AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

United States v. Callender, 25 F. Cas. 239 (C.C.D. Va., 1800)

James Callender was charged with violating the Sedition Act for making such claims as "[t]he reign of Mr. Adams has been one continued tempest of malignant passions." During the course of the trial, his counsel asserted that the Sedition Act was unconstitutional and that juries had the right to determine the constitutionality of federal laws. Justice Samuel Chase immediately interrupted. He ruled that juries were not empowered to decide the constitutionality of legislation. That was a matter for judicial determination. Justice Chase in Callender *and other cases maintained that the Sedition Act was constitutional. These decisions and other pro-Federalist rulings from justices on the federal bench led many Jeffersonians to question their previous commitment to either judicial supremacy or judicial review.*

Justice Chase would later be impeached in part for his conduct during United States v. Callender. *He frequently interrupted defense counsel, delivered several partisan speeches from the bench, and generally seemed biased toward conviction. While many Jeffersonians who sought to impeach Chase were intent on weakening the Marshall Court, they did not criticize judicial review during the impeachment hearings. Chase's eventual acquittal is generally considered to have played a vital role in establishing judicial independence in the United States. James Callender went on to become the source for the rumor that Thomas Jefferson had an affair with Sally Hemmings, a black slave.*

Mr. HAY [counsel for the defendant] --

[H]e had long ago formed a determination to appear in behalf of the first man who should be indicted in this state for a libel under the sedition law. He had formed this resolution because he was convinced, after the most mature deliberation, preceded by a calm and temperate investigation of the subject with gentlemen who differed from him in political sentiment, but were of the first characters for talents, that the second section of the sedition law was unconstitutional.

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Mr. WIRT [counsel for the defendant] -- Gentlemen of the jury. . . . You will find that a material part of your inquiry will relate to the powers of a jury over the subject committed to them, whether they have the right to determine the law, as well as the fact. . . . By the common law of England, juries possess the power of considering and deciding the law as well as the fact, in every case which may come before them. . . . If, then, a jury in a court of the state would have a right to decide the law and the fact, so have you. The federal constitution is the supreme law of the land; and a right to consider the law, is a right to consider the constitution: if the law of congress under which we are indicted, be an infraction of the constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oaths.

Here CHASE, Circuit Justice -- Take your seat, sir, if you please. If I understand you rightly, you offer an argument to the petit jury, to convince them that the statute of congress, entitled, "An act, &c.," commonly called the "Sedition Law," is contrary to the constitution of the United States and, therefore, void. Now I tell you that this is irregular and inadmissible; it is not competent to the jury to decide on this point; but if you address yourselves, gentlemen, to the court, they will with pleasure hear any reasons you may offer, to show that the jury have the right contended for. Since I came into the commonwealth, I understood that this question would be stirred, and that the power of a jury to determine the validity or

nullity of a law would be urged. I have, therefore, deliberately considered the subject, and I am ready to explain my reasons for concluding that the petit jury have not a right to decide on the constitutionality of a law, and that such a power would be extremely dangerous. -- Hear my words: I wish the world to know them, -- my opinion is the result of mature reflection.

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Mr. NICHOLAS [counsel for the defendant] --

First, that a law contrary to the constitution is void; and, secondly, that the jury have a right to consider the law and the fact. First, it seems to be admitted on all hands, that, when the legislature exercise a power not given them by the constitution, the judiciary will disregard their acts. The second point, that the jury have a right to decide the law and the fact, appears to me equally clear. In the exercise of the power of determining law and fact, a jury cannot be controlled by the court. . . .

. . . . From this right of the jury to consider law and fact in a general verdict, it seems to follow, that counsel ought to be permitted to address a jury on the constitutionality of the law in question; -- this leads me back to my first position, that if an act of congress contravene the constitution of the United States, a jury have a right to say that it is null, and that they will not give the efficacy of a law to an act which is void in itself; believing it to be contrary to the constitution, they will not convict any man of a violation of it; if this jury believed that the sedition act is not a law of the land, they cannot find the defendant guilty. The constitution secures to every man a fair and impartial trial by jury, in the district where the fact shall have been committed: and to preserve this sacred right unimpaired, it should never be interfered with. If ever a precedent is established, that the court can control the jury so as to prevent them from finding a general verdict, their important right, without which every other right is of no value, will be impaired, if not absolutely destroyed. Juries are to decide according to the dictates of conscience and the laws of the country, and to control them would endanger the right of this most invaluable mode of trial.

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JUSTICE CHASE delivered the opinion of the Court.

I will assign my reasons why I will not permit the counsel for the traverser to offer arguments to the jury, to urge them to do what the constitution and law of this country will not permit; and which, if I should allow, 1 should, in my judgment, violate my duty, disregard the constitution and law, and surrender up the judicial power of the United States, that is, the power intrusted by the constitution to the federal courts, to a petit jury, in direct breach of my oath of office. . . .

. . . . The petit jury, to discharge their duty, must first inquire, whether the traverser committed all or any of the facts alleged in the indictment to have been done by him, sometime before the indictment. If they find that he did commit all or any of the said facts, their next inquiry is, whether the doing such facts have been made criminal and punishable by the statute of the United States, on which the traverser is indicted. . . . By this provision, I understand that a right is given to the jury to determine what the law is in the case before them; and not to decide whether a statute of the United States produced to them, is a law or not, or whether it is void, under an opinion that it is unconstitutional, that is, contrary to the constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law; and whether they amount to the offence described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law. . . .

. . . . By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. To determine the validity of the statute, the constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the constitution, is prohibited by it expressly, or by necessary implication. Was it ever intended, by the framers of the constitution, or by the people of

America, that it should ever be submitted to the examination of a jury, to decide what restrictions are expressly or impliedly imposed by it on the national legislature? I cannot possibly believe that congress intended, by the statute, to grant a right to a petit jury to declare a statute void. The man who maintains this position must have a most contemptible opinion of the understanding of that body; but I believe the defect lies with himself. If anyone can be so weak in intellect as to entertain this opinion of congress, he must give up the exercise of the power, when he is informed that congress had no authority to vest it in anybody whatsoever; because, by the constitution, (as I will hereafter show,) this right is expressly granted to the judicial power of the United States, and is recognized by congress by a perpetual statute. If the statute should be held void by a jury, it would seem that they could not claim a right to such decision under an act that they themselves consider as mere waste paper. Their right must, therefore, be derived from some other source.

It appears to me that all the rights, powers, and duties of the petit jury, sworn in this cause, can only be derived from the constitution, or statutes of the United States made agreeably to it; or from some statute of this commonwealth not contrary to the federal constitution or statutes of congress; or from the common law, which was adopted by the federal constitution in the case of trials by jury in criminal cases. It never was pretended, as I ever heard, before this time, that a petit jury in England (from whence our common law is derived,) or in any part of the United States ever exercised such power. If a petit jury can rightfully exercise this power over one statute of congress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed on the exercise of such power; it must rest in discretion only. If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control. The power to abrogate or to make laws nugatory, is equal to the authority of making them. The evident consequences of this right in juries will be, that a law of congress will be in operation in one state and not in another. A law to impose taxes will be obeyed in one state, and not in another, unless force be employed to compel submission. The doing certain acts will be held criminal, and punished in one state, and similar acts may be held innocent, and even approved and applauded in another. The effects of the exercise of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to dissolve the union of the United States, on which, under Divine Providence, our political safety, happiness, and prosperity depend.

No citizen of knowledge and information, unless under the influence of passion or prejudice, will believe, without very strong and indubitable proof, that congress will, intentionally, make any law in violation of the federal constitution, and their sacred trust. I admit that the constitution contemplates that congress may, from inattention or error in judgment, pass a law prohibited by the constitution; and, therefore, it has provided a peaceable, safe, and adequate remedy. If such a case should happen, the mode of redress is pointed out in the constitution, and no other mode can be adopted without a manifest infraction of it. Every man must admit that the power of deciding the constitutionality of any law of the United States, or of any particular state, is one of the greatest and most important powers the people could grant. Such power is restrictive of the legislative power of the Union, and also of the several states; not absolute and unlimited, but confined to such cases only where the law in question shall clearly appear to have been prohibited by the federal constitution, and not in any doubtful case. . . .

From these considerations I draw this conclusion, that the judicial power of the United States is the only proper and competent authority to decide whether any statute made by congress (or any of the state legislatures) is contrary to, or in violation of, the federal constitution. That this was the opinion of the senate and house of representatives, and of General Washington, then president of the United States, fully appears by the statute, entitled "An act to establish the judicial courts of the United States," made at the first session of the first congress (on 24th September, 1789, chapter 20, sec. 8 [1 Stat. 76]), which enacts, "that the justices of the supreme courts, and the district judges, shall take an oath or affirmation in the following words, to wit: 'I, A.B., do solemnly swear or affirm, 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 and perform 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.'" No position can be more clear than that all the federal judges are bound by the solemn obligation of religion, to regulate their decisions agreeably to the constitution of the United States, and that it is the standard of their

determination in all cases that come before them. I believe that it has been the general and prevailing opinion in all the Union, that the power now wished to be exercised by a jury, properly belonged to the federal courts. It was alleged that the tax on carriages was considered by the people of this commonwealth to be unconstitutional, and a case was made to submit the question to the supreme court of the United States, and they decided that the statute was not unconstitutional, and their decision was acquiesced in. I have seen a report of a case (*Kamper v. Hawkins*), decided in 1793, in the general court of this commonwealth, respecting the constitutionality of a law which gave the district courts a power of granting injunctions in certain cases, in which case the judges of the general court (four to one) determined that the law was unconstitutional and void. On yesterday I saw the record of another case, in the court of appeals of this commonwealth (in 1788), on which it appears that the general assembly passed "An act to establish district courts," and the judges (ten being present), adjudged "that the constitution and the said act were in opposition, and could not exist together, and that the court ought not to do anything officially in the execution of an act, which appeared to be contrary to the spirit of the constitution." I also observed, that the then governor, Mr. Edmund Randolph, immediately on this decision, called the general assembly by proclamation; and I have been informed that they altered the law according to the opinion of the court. From these two decisions, in the two highest courts of justice in this state, I may fairly conclude, that, at that period, it was thought that the courts of justice were the proper judicature to determine the constitutionality of the laws of this commonwealth. It is now contended, that the constitutionality of the laws of congress should be submitted to the decision of a petit jury. May I ask, whence this change of opinion? I declare that the doctrine is entirely novel to me, and that I never heard of it before my arrival in this city. It appears to me to be not only new, but very absurd and dangerous, in direct opposition to, and a breach of the constitution. And I wish those who maintain this doctrine, and have sworn to support the constitution, conscientiously to reconsider their opinions with a calm and deliberate temper, and with minds disposed to find the truth, and to alter their opinion if convinced of their error. It must be evident, that decisions in the district or circuit courts of the United States will be uniform, or they will become so by the revision and correction of the supreme court; and thereby the same principles will pervade all the Union; but the opinions of petit juries will very probably be different in different states.

The decision of courts of justice will not be influenced by political and local principles, and prejudices. If inferior courts commit error, it may be rectified; but if juries make mistakes, there can be no revision or control over their verdicts, and therefore, there can be no mode to obtain uniformity in their decisions. Besides, petit juries are under no obligation by the terms of their oath, to decide the constitutionality of any law; their determination, therefore, will be extra judicial. I should also imagine, that no jury would wish to have a right to determine such great, important, difficult questions; and I hope no jury can be found, who will exercise the power desired over the statutes of congress, against the opinion of the federal courts.

I have consulted with my brother, Judge GRIFFIN, and I now deliver the opinion of the court, "That the petit jury have no right to decide on the constitutionality of the statute on which the traverser is indicted; and that, if the jury should exercise that power, they would thereby usurp the authority entrusted by the constitution of the United States to this court." Governed by this opinion, the court will not allow the counsel for the traverser to argue before the petit jury, that they have a right to decide on the constitutionality of the statute, on which the traverser stands indicted. If the counsel for the traverser had offered sufficient arguments to the court, to show that the petit jury had this right, the court, on being convinced that the opinion delivered was erroneous, would have changed it; for they hold it a much greater reproach for a judge to continue in his error, than to retract. The gentlemen of the profession know, that questions have sometimes occurred in the state courts, whether acts of assembly had expired, or had been repealed; but no one will say that such questions were ever submitted to a jury. If the constitution of the United States had not given to the judiciary a right to decide on the constitutionality of federal laws -- yet, if such power could be exercised, it could not be by a juror, from this consideration -- it is a maxim of law in all the states, that the courts have the exclusive right to decide every question, as to the admissibility of evidence in every case, civil or criminal, whether the evidence be by act of assembly, or by deed, or other writing, or by witnesses.