John Marshall Speech: Virginia Convention 20 June 1788

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

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

dragged to the centre of the Union. But I did not conceive, that the power of increasing the number of Courts could be objected to by any Gentleman, as it would remove the inconvenience of being dragged to the centre of the United States. I own that the power of creating a number of Courts, is, in my estimation, so far from being a defect, that it seems necessary to the perfection of this system. After having objected to the number and mode, he objected to the subject matter of their cognizance.—(Here Mr. *Marshall* read the 2d section.)—These, Sir, are the points of Federal jurisdiction to which he objects, with a few exceptions. Let us examine each of them with a supposition, that the same impartiality will be observed there, as in other Courts, and then see if any mischief will result from them.—With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he says, that the laws of the United States being paramount to the laws of particular States, there is no case but what this will extend to. Has the Government of the United States power to make laws on every subject?—Does he understand it so?—Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void. It will annihilate the State Courts, says the Honorable Gentleman. Does not every Gentleman here know, that the causes in our Courts are more numerous than they can decide, according to their present construction? Look at the dockets.—You will find them crouded with suits, which the life of man will not see determined. If some of these suits be carried to other Courts, will it be wrong? They will still have business enough. Then there is no danger, that particular subjects, small in proportion, being taken out of the jurisdiction of the State Judiciaries, will render them useless and of no effect. Does the Gentleman think that the State Courts will have no cognizance of cases not mentioned here? Are there any words in this Constitution which excludes the Courts of the States from those cases which they now possess? Does the Gentleman imagine this to be the case? Will any Gentleman believe it? Are not controversies respecting lands claimed under the grants of different States, the only controversies between citizens of the same State, which the Federal Judiciary can take cognizance of? The case is so clear, that to prove it would be an useless waste of time. The State Courts will not lose the jurisdiction of the causes they now decide. They have a concurrence of jurisdiction with the Federal Courts in those cases, in which the latter have cognizance.

How disgraceful is it that the State Courts cannot be trusted, says the Honorable Gentleman! What is the language of the Constitution? Does it take away their jurisdiction? Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution, and the laws of the United States? What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection. But the Honorable Member [George Mason] objects to it, because, he says, that the officers of the Government will be scre[e]ned from merited punishment by the Federal Judiciary. The Federal Sheriff, says he, will go into a poor man's house, and beat him, or abuse his family, and the Federal Court will protect him. Does any Gentleman believe this? Is it necessary that the

officers will commit a trespass on the property or persons of those with whom they are to transact business? Will such great insults on the people of this country be allowable? Were a law made to authorise them, it would be void. The injured man would trust to a tribunal in his neighbourhood. To such a tribunal he would apply for redress, and get it. There is no reason to fear that he would not meet that justice there, which his country will be ever willing to maintain. But on appeal, says the Honorable Gentleman, what chance is there to obtain justice? This is founded on an idea, that they will not be impartial. There is no clause in the Constitution which bars the individual member injured, from applying to the State Courts to give him redress. He says that there is no instance of appeals as to fact in common law cases. The contrary is well known to you, Mr. Chairman, to be the case in this Commonwealth. With respect to mills, roads, and other cases, appeals lye from the Inferior to the Superior Court, as to fact as well as law.[1] Is it a clear case, that there can be no case in common law, in which an appeal as to fact might be proper and necessary? Can you not conceive a case where it would be productive of advantages to the people at large, to submit to that tribunal the final determination, involving facts as well as law? Suppose it should be deemed for the convenience of the citizens, that those things which concerned foreign Ministers, should be tried in the Inferior Courts—If justice would be done, the decision would satisfy all. But if an appeal in matters of fact could not be carried to the Superior Court, then it would result, that such cases could not be tried before the Inferior Courts, for fear of injurious and partial decisions.

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

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

The Honorable Member objects to suits being instituted in the Federal Courts by the citizens of one State, against the citizens of another State. Were I to contend, that this was necessary in

all cases, and that the Government without it would be defective, I should not use my own judgment. But are not the objections to it carried too far? Though it may not in general be absolutely necessary, a case may happen, as has been observed, in which a citizen of one State ought to be able to recur to this tribunal, to recover a claim from the citizen of another State. What is the evil which this can produce?—Will he get more than justice there?—The independence of the Judges forbids it. What has he to get?—Justice. Shall we object to this, because a citizen of another State can obtain justice without applying to our State Courts? It may be necessary with respect to the laws and regulations of commerce, which Congress may make. It may be necessary in cases of debt, and some other controversies. In claims for land it is not necessary, but it is not dangerous. In the Court of which State will it be instituted, said the Honorable Gentleman? It will be instituted in the Court of the State where the defendant resides,—where the law can come at him, and no where else. By the laws of which State will it be determined, said he? By the laws of the State where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty?—No—it is a principle in the jurisprudence of this Commonwealth. If a man contracted a debt in the East-Indies, and it was sued for here, the decision must be consonant to the laws of that country.—Suppose a contract made in Maryland, where the annual interest is at six per centum; and a suit instituted for it in Virginia—What interest would be given now, without any Federal aid?—The interest of Maryland most certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given without doubt.—It is now to be governed by the laws of that State where the contract was made. The laws which governed the contract at its formation, govern it in its decision. To preserve the peace of the Union only, its jurisdiction in this case ought to be recurred to.—Let us consider that when citizens of one State carry on trade in another State, much must be due to the one from the other, as is the case between North-Carolina and Virginia. Would not the refusal of justice to our citizens, from the Courts of North-Carolina, produce disputes between the States? Would the Federal Judiciary swerve from their duty in order to give partial and unjust decisions?

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

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

The exclusion of trial by jury in this case, he urged to prostrate our rights. Does the word Court only mean the Judges? Does not the determination of a jury, necessarily lead to the judgment of the Court? Is there any thing here which gives the Judges exclusive jurisdiction of

matters of fact? What is the object of a jury trial? To inform the Court of the facts. When a Court has cognizance of facts, does it not follow, that they can make enquiry by a jury? It is impossible to be otherwise. I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury. But, says the Honorable Gentleman [George Mason], the juries in the ten miles square will be mere tools of parties, with which he would not trust his person or property; which, he says, he would rather leave to the Court. Because the Government may have a district ten miles square, will no man stay there but the tools and officers of the Government?—Will no body else be found there?—Is it so in any other part of the world, where a Government has Legislative power?—Are there none but officers and tools of the Government of Virginia in Richmond?—Will there not be independent merchants, and respectable Gentlemen of fortune, within the ten miles square?—Will there not be worthy farmers and mechanics? Will not a good jury be found there as well as any where else?—Will the officers of the Government become improper to be on a jury?—What is it to the Government, whether this man or that man succeeds?—It is all one thing. Does the Constitution say, that juries shall consist of officers, or that the Supreme Court shall be held in the ten miles square? It was acknowledged by the Honorable Member [Patrick Henry], that it was secure in England. What makes it secure there?—Is it their Constitution?—What part of their Constitution is there, that the Parliament cannot change?—As the preservation of this right is in the hands of Parliament, and it has ever been held sacred by them, will the Government of America be less honest than that of Great-Britain? Here a restriction is to be found. The jury is not to be brought out of the State. There is no such restriction in that Government; for the laws of Parliament decide every thing respecting it. Yet Gentlemen tell us, that there is safety there, and nothing here but danger. It seems to me, that the laws of the United States will generally secure trials by a jury of the vicinage, or in such manner as will be most safe and convenient for the people.

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

The Honorable Gentleman [George Mason] said much about the quitrents in the Northern Neck. I will refer it to the Honorable Gentleman himself. Has he not acknowledged, that there was no complete title? Was he not satisfied, that the right of the legal representative of the proprietor did not exist at the time he mentioned? If so, it cannot exist now. I will leave it to those Gentlemen who come from that quarter. I trust they will not be intimidated on this account, in voting on this question. A law passed in 1782, which secures this. He says that many poor men may be harrassed and injured by the representative of Lord Fairfax. If he has no right, this cannot be done. If he has this right and comes to Virginia, what laws will his claims be determined by? By those of this State. By what tribunals will they be determined? By our State Courts. Would not the poor man, who was oppressed by an unjust prosecution, be abundantly protected and satisfied by the temper of his neighbours, and would he not find ample justice? What reason has the Honorable Member to apprehend partiality or injustice? He supposes, that if the Judges be Judges of both the Federal and State Courts, they will incline in favour of one Government. If

such contests should arise, who could more properly decide them, than those who are to swear to do justice? If we can expect a fair decision any where, may we not expect justice to be done by the Judges of both the Federal and State Governments? But, says the Honorable Member [Patrick Henry], laws may be executed tyrannically. Where is the independency of your Judges? If a law be executed tyrannically in Virginia, to what can you trust? To your Judiciary. What security have you for justice? Their independence. Will it not be so in the Federal Court?

Gentlemen ask what is meant by law cases, and if they be not distinct from facts. Is there no law arising on cases in equity and admiralty? Look at the acts of Assembly.—Have you not many cases, where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and fact? The Honorable Gentleman says, that no law of Congress can make any exception to the Federal appellate jurisdiction of fact as well as law. He has frequently spoken of technical terms, and the meaning of them. What is the meaning of the term *exception*? Does it not mean an alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court.—These exceptions certainly go as far as the Legislature may think proper, for the interest and liberty of the people.—Who can understand this word, *exception*, to extend to one case as well as the other? I am persuaded, that a reconsideration of this case will convince the Gentleman, that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied, that this power will not be so much abused as they have said.

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

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

He states a case, that a man may be carried from a federal to an antifederal corner, (and *vice versa*) where men are ready to destroy him. Is this probable? Is it presumeable that they will make a law to punish men who are of different opinions in politics from themselves? Is it presumeable, that they will do it in one single case, unless it be such a case as must satisfy the people at large? The good opinion of the people at large must be consulted by their Representatives; otherwise mischiefs would be produced, which would shake the Government to its foundation. As it is late, I shall not mention all the Gentleman's argument: But some parts of it are so glaring, that I cannot pass them over in silence. He says that the establishment of these tribunals, and more particularly in their jurisdiction of controversies between citizens of these States, and foreign citizens and subjects, is like a retrospective law. Is there no difference between a tribunal which

shall give justice and effect to an existing right, and creating a right that did not exist before? The debt or claim is created by the individual. He has bound himself to comply with it. Does the creation of a new Court amount to a retrospective law?

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

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

1. The act establishing the General Court, passed in January 1778, provided for the appeal of the "judgment or sentence of any county court or court of Hustings" in cases concerning mills, roads, land titles, probate, debts or damages over £10, and "certificates for administration."

CITE AS: John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, Vol. X: Virginia [3] (Madison, Wis.: Wisconsin Historical Society Press, 1993), 1430–39.