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NOTES

DIVERSITY JURISDICTION AS APPLIED TO CITIZENS OF THE DISTRICT OF COLUMBIA AND THE TERRITORIES

In 1940, the Congress amended Section 24 (1) (b) of the Judicial Code¹ in an effort to extend the diversity jurisdiction of the Federal District Courts to include suits between citizens of the District of Columbia and citizens of any state. Early in its history, the Supreme Court of the United States in *Hepburn and Dundas v. Ellzey*² had held that the District of Columbia is not included in the term "States" appearing in that section of Article III of the Constitution which provides that the judicial power of the United States shall extend to controversies between citizens of different states.³ In subsequent cases the courts have uniformly, although not always willingly, upheld that decision.⁴

¹54 Stat. 143 (1940), 28 U. S. C. § 41 (1) (b) (Supp. 1947). The statute as amended provides: "The District courts shall have original jurisdiction as follows: (1) . . . Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000, and . . . (b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and [citizens of] any state or Territory . . ." The words in brackets have been consistently interpolated into the statute by the courts. See *McGarry v. City of Bethlehem*, 45 F. Supp. 385, 386 (E. D. Pa. 1942).

²Cranch 445, 452-453, 2 L. ed. 332, 335, (1805). Chief Justice Marshall declared: "... the members of the American confederacy only are the states contemplated in the constitution When the same term [state] which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."

³U. S. Const. Art. III, § 2 provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, . . . to Controversies . . . between Citizens of different States . . ."

⁴*O'Donoghue v. United States*, 289 U. S. 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933) (citizen of District of Columbia); *Hooe v. Jamieson*, 166 U. S. 395, 17 S. Ct. 596, 41 L. ed. 1049 (1897); *Barney v. Baltimore City*, 6 Wall. 280, 18 L. ed. 825 (1867); *Duehay v. Acacia Mutual Life Ins. Co.*, 70 App. D. C. 245, 105 F. (2d) 768 (1939); *Anderson v. United States Fidelity & Guaranty Co.*, 8 F. (2d) 428 (S. D. Fla. 1925); *Merrill v. Atwood*, 297 Fed. 630 (D. C. R. I. 1924); *Mutual Life Ins. Co. v. Lott*, 275 Fed. 365 (S. D. Cal. 1921); *Pannill v. Roanoke Times Co.*, 252 Fed. 910 (W. D. Va. 1918); *American National Bank v. Tappan*, 174 Fed. 431 (C. C. D. Mass. 1909), aff'd 217 U. S. 600, 30 S. Ct. 697, 54 L. ed. 897 (1910); *Corporation of New Orleans v. Winter*, 1 Wheat. 91, 4 L. ed. 44 (1816) (citizen of a territory).

See *Watson v. Brooks*, 13 Fed. 540, 543 (C. C. D. Ore. 1882), where the court said: "... these rulings were followed without question upon the principle of stare decisis. But it is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown But so long as this ruling remains in force, the judgment of this court must be governed by it."

Undoubtedly entertaining grave misgivings as to the utility of the Judiciary Article of the Constitution as a source of power, the proponents of the 1940 amendment chose to base its validity upon the complementary powers of the Congress under Article I "to exercise exclusive legislation in all Cases whatsoever over such District" and "To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers."⁵ They believed that an enactment granting diversity jurisdiction to tribunals outside the District was necessary and proper to the securing by the Congress of a better administration of justice to citizens of the District.

In the more than seven years since its enactment, the constitutionality of the measure has been considered in eleven district courts and two circuit courts of appeal.⁶ While only three district courts have decided in favor of its validity, the opinions of both the circuit courts of appeals were accompanied by strong dissents from senior judges, and the problem has assumed peculiar importance because of the disposition of all the courts to recognize the desirability of extending the diversity jurisdiction to include District of Columbia residents.

The first of these cases to reach a circuit court of appeals was *Central States Co-ops v. Watson Bros. Transp. Co.*⁷ The plaintiff, a citizen

⁵H. R. Rep. No. 1756, 76th Cong., 3d Sess. (1940) 3.

⁶The statute was held constitutional in: *Duze v. Woolley*, 72 F. Supp. 422 (D. C. Hawaii 1947); *Glaeser v. Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Cal. 1944); *Winkler v. Daniels*, 43 F. Supp. 265 (E. D. Va. 1942). It was held unconstitutional in: *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 165 F. (2d) 531 (C. C. A. 4th, 1947); *Central States Co-ops v. Watson Bros. Transp. Co.*, 165 F. (2d) 392 (C. C. A. 7th, 1947); *Willis v. Dennis*, 72 F. Supp. 853 (W. D. Va. 1947); *Feely v. Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. C. Md. 1947); *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. C. 1947); *Ostrow v. Samuel Brilliant Co.*, 66 F. Supp. 593 (D. C. Mass. 1946); *Behlert v. James Foundation of New York*, 60 F. Supp. 706 (S. D. N. Y. 1945); *McGarry v. City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa. 1942). See *Federal Deposit Ins. Co. v. George-Howard*, 55 F. Supp. 706 (S. D. N. Y. 1945).

The constitutionality of the statute was not considered in *Central States Co-ops v. Watson Bros. Transp. Co.*, 165 F. (2d) 392 (C. C. A. 7th, 1947) until the case was on appeal to the Circuit Court of Appeals.

Cf. *Van Knorr v. Miles*, 60 F. Supp. 962, 966 (D. C. Mass. 1945) where in an obiter dictum the court apparently without considering the 1940 amendment concluded that it could not entertain the suit brought by a citizen of the District of Columbia: "If, on the other hand Major General Miles has retained citizenship in the District of Columbia, then he is not a citizen of any 'state,' and the case for that reason is not within the scope of the diversity jurisdiction clause of Jud. Code § 24 (1) (b), 28 U. S. C. A. § 41 (1) (b). *Hepburn v. Ellzey*, 2 Cranch 445, 2 L. ed. 332; *Hooe v. Jamieson*, 166 U. S. 395, 397, 17 S. Ct. 598, 41 L. ed. 1049."

It is worthy of note that six of these cases were decided during 1947.

⁷165 F. (2d) 392 (C. C. A. 7th, 1947).

of the District of Columbia, obtained a judgment in a district court in Illinois against a citizen of Nebraska. On appeal the defendant corporation attacked the jurisdiction of the district court under the 1940 amendment. It contended that the *sole* power of the Congress over the inferior federal courts in the United States other than those in the District of Columbia is derived from Article III, and that the rule is well-settled that a citizen of the District of Columbia is not a citizen of a state within the meaning of this Article. The plaintiff conceded that the Congress is devoid of power for the purpose of the amendment under Article III, but argued that if Article I is construed with Article III, the requisite power is found in Article I to confer upon federal courts jurisdiction in addition to the instances of limited jurisdiction enumerated in Article III.⁸

The court, speaking through Judge Major, held the amendment unconstitutional. It was reasoned that the Congress plainly could not rely upon Article III as a source of power in this instance. And the court further rejected the argument that *O'Donoghue v. United States*⁹ was authority for the proposition that the Congress might use its power of legislation over the District under Article I, as a means of conferring jurisdiction in addition to that enumerated under Article III, upon courts established under Article III.

Prior to the *O'Donoghue* case the courts had thought that all federal courts fell into two categories—those established under Article III and those established as a means of giving effect to powers granted the Congress elsewhere in the Constitution. It was believed that the jurisdiction of these courts was mutually exclusive. The Supreme Court rejected this line of reasoning, however, by holding that the Congress exercises dual powers over the courts of the District of Columbia. Thus, the Congress vests in these courts, established under Article III, jurisdiction authorized by Article I, Section 8 (17) as well.

Relying upon a dictum in the *O'Donoghue* case, Judge Major interpreted that decision as limiting the Congress to the exercise within the District of Columbia of power under the "District clause."¹⁰ In

⁸Plaintiff's argument is predicated largely on the opinion of the court in *Winkler v. Daniels*, 43 F. Supp. 265, 266 (E. D. Va. 1942) wherein is quoted an excerpt from H. R. Rep. No. 1756, 76th Cong., 3d Sess. (1940) 3: "This article [III], however, must be construed in connection with other provisions of the Constitution. For example . . . article 1, section 8 . . ."

⁹289 U. S. 516, 546, 53 S. Ct. 740, 749, 77 L. ed. 1356, 1368 (1933). The Court said: "The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District . . ."

¹⁰165 F. (2d) 392, 396 (C. C. A. 7th, 1947). "The court there was considering the

emphasizing that point, the court pointed out that if the amendment were upheld, the Congress would be conferring the benefits and imposing the burdens of suit upon citizens of the several states as well as upon citizens of the District.

Judge Evans, in his dissent, chose to approach the case from the standpoint of the result which the framers of the Constitution wished to attain, rather than as a matter of strict constitutional construction. The construction of the majority he pointed out, would run counter to the entire scheme of equality which permeates the Constitution, and should be avoided if at all possible.¹¹ In order to avoid being driven to this result by stare decisis, the holding of the *Ellzey* case could be distinguished from the present case on the ground that the Court there was interpreting an Act of Congress granting jurisdiction of suits between citizens of different states (not between a citizen of a state and a citizen of the District of Columbia).¹² It is not altogether clear whether the basis of the distinction made by Judge Evans is the belief that the *Ellzey* case was confined to the construction of the statute actually before the Court, or the belief that the holding was made so broad as to include a gratuitous dictum that Congress was powerless to include citizens of the District within the diversity jurisdiction of Article III. The first proposition rests on the idea that the Court intended to go no farther than to interpret the intent of the Congress in providing for jurisdiction of suits between citizens of different states, and did not intend to restrict the possibility under Article III of a future specific grant of jurisdiction to include citizens of the District of Columbia. The second proposition would concede that the Court meant to interpret the Judiciary Article, but would avoid giving that interpretation effect as precedent in that instance because such an interpretation

power of Congress with reference to the courts of the District of Columbia and held that its power in that respect [Art. I, § 8 (17)] was greater than its powers over the courts of the country generally."

¹¹165 F. (2d) 392, 398 (C. C. A. 7th, 1947): "... it is so contrary to the practice of the forefathers to deal differently with one group of citizens than with another Is such a conclusion necessary from the language used in Section 2, Article III? Perhaps I should state the question—Is such a conclusion unavoidable from said language? I believe the Supreme Court must so construe it before we inferior Federal Courts should so hold."

¹²165 F. (2d) 392, 398 (C. C. A. 7th, 1947): "The construction of the majority must be accepted, if at all, solely on the ground of oversight by the framers of Article III Let us first turn to the judicial precedent In that case of *Hepburn v. Ellzey* . . . we are met by a holding which it seems to me is distinguishable. There the Supreme Court was passing upon an Act of Congress which gave 'jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state.'"

of the Constitution was not necessary to a decision under the statute then before the Court. The latter approach seems to have been intended by Judge Evans, since in the latter pages of his dissent it is apparent that he would urge the Supreme Court to overrule the *Ellzey* case to the extent necessary to interpret the word "State" in Article III, Section 2 to mean a geographical subdivision rather than a constituent member of the American Union.¹³ Although he pointed out the possibility of construing Articles I and III together so as to make the power of the Congress under Article I an independent ground upon which to uphold the amendment, he chose not to discuss that point.¹⁴

Shortly after the *Central States* decision, the Circuit Court of Appeals for the Fourth Circuit had occasion to consider the same problem in *National Mut. Ins. Co. v. Tidewater Transfer Co.*¹⁵ The Court held that the District Court in Maryland lacked jurisdiction of a suit between a citizen of the District of Columbia and a citizen of Virginia. In the opinion, Judge Dobie maintained that the Congress must have proceeded under Article III, but concluded that whether it invoked Article III or Article I, the amendment was nevertheless unconstitutional. He pointed out a dictum in *O'Donoghue v. United States*¹⁶ to the effect that although within the District of Columbia the Congress might rely on both Articles I and III, yet the Congress had no power under Article I with respect to courts outside the District. Therefore,

¹³165 F. (2d) 392, 404, 405 (C. C. A. 7th, 1947): "This impossible construction can be avoided if we ascribe to the word 'state' a meaning of citizens in a geographical subdivision, such as a territory or the District of Columbia . . . Few of us would care to repeat the upsetting effect of *Erie R. Co. v. Tompkins* . . . I would not declare an Act unconstitutional in so important a statute, where there was serious doubt, but would leave to the Supreme Court that decision."

It is interesting to note that this particular argument closely parallels that of the counsel for the unsuccessful plaintiffs in *Hepburn and Dundas v. Ellzey*, 2 Cranch 445, 446-9, 2 L. ed. 332 (1805). This argument is also substantiated by language in: *Dykes and Keeffe*, *The 1940 Amendment to the Diversity of Citizenship Clause* (1946) 21 *Tulane L. Rev.* 171; *Note* (1942) 11 *Geo. Wash. L. Rev.* 258.

¹⁴165 F. (2d) 392, 402, 405 (C. C. A. 7th, 1947). "The specific constitutional provision here involved gives Congress all inclusive power of legislation over the District of Columbia. Art. 1, Sec. 8, Clause 17 . . . A broad construction of the judiciary provisions of the Constitution weakens if it does not destroy any asserted inconsistencies between the two provisions . . . I will not discuss the added reason for my conclusion, namely the specific grant of power to Congress, found in Art. I, Sec. 8."

¹⁵165 F. (2d) 531 (C. C. A. 4th, 1947).

¹⁶289 U. S. 516, 551, 53 S. Ct. 740, 750, 77 L. ed. 1356, 1369 (1933). The Court stated: "... what was said . . . in respect to the dual power of Congress . . . is not in conflict with the view that Congress derives from the District clause distinct powers in respect of the constitutional courts of the District which Congress does not possess in respect of such courts outside the District."

he reasoned, in cold logic that Congress must have relied on Article III. In this case, also, the point was emphasized that the Congress is powerless to act under Article III for this purpose,¹⁷ and that even if the Congress should invoke Article I, it would meet with no greater success for the reason that "... to a very great extent at least, these powers are territorial . . ."—i.e., the power of the Congress under Article I, Section 8 (17) when exercised independently, although national in character, is nevertheless in its general operation confined within the geographical limits of the District. The court also spoke in terms of construing the two articles together, but insisted that the result of this construction would be a limitation upon Article I by Article III so that Article I is still operative only within the District.

Judge Parker, in a very strong dissent, early conceded that Article III was of no avail for the present purpose,¹⁹ but was quick to contest the alleged impotency of the Congress under Article I. He declared that the general operation of the power of the Congress under Article I, Section 8 (17) is not necessarily confined by the Constitution to the geographical limits of the District of Columbia.²⁰ Once this is assumed, under the principle of the O'Donoghue case there can be no objection to superimposing upon federal courts created under Article III the judicial power which Congress may confer under Article I, Section 8 (17). He pointed out that the practical reasons which justify this result are legion.

A review of the decisions of the various district courts, as well as the two cases now under consideration, emphasizes two major points of conflict: Did the *Ellzey* case completely deprive the Congress of power under Article III, Section 2 for the purposes of the 1940 amendment? May the Congress validly extend the exercise of its powers under Article I, Section 8 (17) beyond the geographical limits of the District for this purpose?

So far, no court which has passed upon the issue can be found to

¹⁷165 F. (2d) 531, 534 (C. C. A. 4th, 1947).

¹⁸165 F. (2d) 531, 535 (C. C. A. 4th, 1947).

¹⁹165 F. (2d) 531, 537 (C. C. A. 4th, 1947): "... if the power of Congress to vest jurisdiction in the federal courts were limited to that which may be exercised under Art. III, I would think the legislation here involved to be beyond its power."

²⁰165 F. (2d) 531, 538 (C. C. A. 4th, 1947): "... there is nothing in the Constitution from which any such limitation can be spelled out. It should be noted that the power of Congress is not merely to exercise exclusive legislation over the District, but also to make all laws necessary and proper to that end, which certainly would seem to authorize legislation necessary to secure a proper administration of justice for its citizens."

express the idea that the *Ellzey* case did not conclusively close the federal courts outside the District to citizens of the District insofar as such jurisdiction is dependent on the diversity clause of Article III, Section 2.²¹ Judge Evans, however, in his dissent in the *Central States* case has placed great faith in the argument that the language used in that Article does not justify such a conclusion, and that the present cases may be distinguished from the *Ellzey* case. Several writers have also concurred in this view.²² It is difficult to see how the *Ellzey* case may be validly distinguished either under the view that the Supreme Court meant to interpret *only* the Act of Congress which referred merely to "citizens of states," or under the view that the Court went farther than necessary to deny citizens of the District jurisdiction under the diversity clause of the Constitution. The following language seems to indicate that Chief Justice Marshall did find it necessary to make a binding interpretation of the Judiciary Article, and the cases following substantiate this view:

"But as the act of Congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument When the same term which has been used

²¹There is, however, at least an intimation by a writer that such a holding has been attributed to *Winkler v. Daniels*, 43 F. Supp. 265 (E. D. Va. 1942). In Note (1943) 5 La. L. Rev. 478, 480, appears this observation: "The Virginia court's decision here has the effect of saying that a grant of jurisdiction to the federal courts need not be expressly found in the judiciary article, but may be impliedly found in any other article of the Constitution. Assuming this reasoning to be correct, for the sake of argument, it is nevertheless hard to visualize how declaring a citizen of the District of Columbia a citizen of a state for purposes of suing in the federal court has any connection whatsoever with the right to legislate." It is believed that the approach of the court was not to employ the legislative power under Article I as a means of declaring a citizen of the District a "citizen of a state," in which case jurisdiction is nevertheless dependent on Article III. That court attempted to justify its source of power under Article I, § 8 (17) independently of Article III. Congress did not declare that citizens of the District of Columbia are "citizens of a state" and therefore may sue in federal courts under Article III. Rather Congress declared that, under its power to legislate for the District of Columbia, it granted citizens of the District a right to sue in federal courts.

²²Dykes and Keefee, *The 1940 Amendment to the Diversity of Citizenship Clause* (1946) 21 Tulane L. Rev. 171, 174-5: "It should however be noted that no specific reference was made by the Chief Justice to Article 3 and that he was speaking generally of the meaning of the word 'state' as used throughout the Constitution. The necessity of deciding the extent of the phrase 'between citizens of different states' as used in Article 3 was not before the Court The Supreme Court could meet the problem of constitutionality by holding that within the meaning of Article 3, citizens of the territories and the District of Columbia are in fact 'citizens of states'." See also, McKenna, *Diversity of Citizenship Clause Extended* (1940) 29 Ga. L. Rev. 193.

plainly in this limited sense in the articles respecting the legislative and executive department, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."²³

If this conclusion is correct, it follows that the desired authority cannot be attained under the intermediate view that Congress might by virtue of its legislative power under Article I vest the citizens of the District with the character of citizens of a state which is requisite for diversity jurisdiction under Article III.²⁴

Furthermore, in its recent revision of Title 28 of the United States Code, effective on September 1, 1948, the Congress may have made it even more difficult for the courts to uphold the constitutionality of this extension of diversity jurisdiction through reliance on Article I, Section 8 (17). Section 1332 of revised Title 28, after providing for diversity jurisdiction in civil actions between *citizens of different States*, now reads:

"The word 'States,' as used in this section, includes the Territories and the District of Columbia."

Inasmuch as the word "State" used in Article III, Section 2 of the Constitution has been interpreted by Chief Justice Marshall not to include the District of Columbia, it would appear that the Congress has chosen to challenge that decision directly by relying on Article III rather than Article I as a source of power. On the other hand, the Congress may be considered as having used the word "State" merely for convenience in identifying those governmental units whose citizens may, under *any applicable section* of the Constitution, be empowered to sue or be sued in the district courts.

In recent years, a considerable number of the courts²⁵ as well as a few writers,²⁶ have discussed to a limited extent the availability of Article I, Section 8 (17) as a source of power to the Congress beyond the territorial limits of the District. Those courts which would restrict its operation within these limits have apparently done so in this connection

²³2 Cranch 445, 452-453, 2 L. ed. 332, 335 (1805).

²⁴Feely v. Sidney S. Schupper Interstate Hauling System, 72 F. Supp. 663, 667 (D. C. Md. 1947). But see Note (1946) 46 Col. L. Rev. 125, 126.

²⁵National Mut. Ins. Co. v. Tidewater Transfer Co., 165 F. (2d) 531 (C. C. A. 4th, 1947); Central States Co-ops v. Watson Bros. Transp. Co., 165 F. (2d) 392 (C. C. A. 7th, 1947); Willis v. Dennis, 72 F. Supp. 853 (W. D. Va. 1947); Feely v. Sidney S. Schupper Interstate Hauling System, 72 F. Supp. 663 (D. C. Md. 1947); Wilson v. Guggenheim, 70 F. Supp. 417 (E. D. S. C. 1947); Winkler v. Daniels, 43 F. Supp. 265 (E. D. Va. 1942).

²⁶Note (1946) 46 Col. L. Rev. 125, 127, n. 12; Note (1942) 21 Tex. L. Rev. 83, 84.

largely through deductive reasoning. They premise their conclusion on the orthodox construction that District of Columbia courts vested with power under Article III can be vested with no other power except within the District.

In no instance, however, has authority been cited to show that because of the Congress' power of exclusive legislation over the District, the general operation of its laws under Article I, Section 8 (17) is necessarily confined to the District.²⁷ To the contrary, Chief Justice Marshall as early as 1821 said of this power of Congress in *Cohens v. Virginia*:

"... that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised throughout the Union, because the principal power is given to that body as the legislature of the Union."²⁸

Thus it would seem that the Congress in its national character, or by virtue of the "necessary and proper" clause in Article I could effectuate its goal of securing the administration of justice to the citizens of the District, outside the territorial limits of the District.²⁹

Even if this analysis is correct, the theory that the Congress might superimpose upon a district court sitting outside the District judicial power derived from a source other than Article III will directly conflict with the dictum in the *O'Donoghue* case. It is believed that there is ample precedent, however, upon which this theory may be sustained, and by which the dictum is greatly weakened. It is significant that the decisions by the Supreme Court in *O'Donoghue v. United States*³⁰ and *Williams v. United States*³¹ are contemporaneous. In the latter case,

²⁷In *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 165 F. (2d) 531, 537 (C. C. A. 4th, 1947), Judge Parker, dissenting, said: "It seems equally clear that Congress could authorize such courts to sit and their process to run anywhere in the country." Indeed, Judge Dobie, writing the majority opinion, is not unequivocal in his statement that: "Even so, we conclude that to a very great extent at least, these powers are territorial." 165 F. (2d) 531, 535.

²⁸6 Wheat 264, 427, 5 L. ed. 257, 296-297 (1821). Accord: *Lyons v. Bank of Discount of City of New York*, 154 Fed. 391 (C. C. S. D. N. Y. 1907); *Rogge v. Michael Del Balso*, 15 F. Supp. 499 (S. D. N. Y. 1936).

²⁹An interesting fact is that rarely have the courts which have denied constitutionality of the amendment set out the "necessary and proper clause" of Article I in conjunction with the "District clause" as a source of Congressional power to effectuate the latter provision. None of these courts has discussed its implications.

³⁰289 U. S. 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933).

³¹289 U. S. 553, 53 S. Ct. 751, 77 L. ed. 1372 (1933).

the Court expressly held that the judicial power exercised by the Court of Claims was not "vested in virtue of" Article III,³² but rather under the power of Congress to pay the debts of the United States.³³ Yet in its opinion the Court referred to the Tucker Act of 1887 by which *concurrent jurisdiction was conferred on the federal district courts* in all matters to which the Court of Claims had jurisdiction, and where the amount involved did not exceed \$10,000.³⁴ It would seem, therefore, that the power exercised as a result of the jurisdiction conferred under the Tucker Act concurrently on the district courts is likewise not vested in virtue of Article III.

The Court subsequently, in *Bates Mfg. Co. v. United States*,³⁵ has stated that the purpose of the Congress, when in the Tucker Act it expanded the jurisdiction of the Court of Claims, was to relieve congestion in that court by an integrated jurisdictional plan whereby both the district courts and the Court of Claims might provide to litigants equal opportunity. As late as 1941 it was held in *United States v. Sherwood*³⁶ that the district courts have "no greater jurisdiction" in respect of such suits than the Court of Claims, and that the Tucker Act simply authorized the district courts to *sit as a Court of Claims*. In subsequent cases the lower federal courts have described the district courts in such instances as "sitting as a Court of Claims," or as "sitting as a special tribunal."³⁷

³²289 U. S. 553, 568, 53 S. Ct. 751, 755, 77 L. ed. 1372, 1377 (1933).

³³289 U. S. 553, 569, 53 S. Ct. 751, 756, 77 L. ed. 1372, 1378 (1933). "This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States."

³⁴289 U. S. 553, 564, 53 S. Ct. 751, 754, 77 L. ed. 1372, 1376 (1933). "By that [Tucker] act the Court of Claims was given jurisdiction to hear and determine, all claims . . . 'in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.' By § 2 of the act, as amended and supplemented by § 24 (20) of the Judicial Code, concurrent jurisdiction was conferred upon the federal district courts in all matters as to which the Court of Claims had jurisdiction, where the amount involved did not exceed \$10,000."

³⁵303 U. S. 567, 571, 58 S. Ct. 694, 696, 82 L. ed. 1020, 1023 (1938). Mr. Justice Black, speaking for the Court, said: "In response to the needs disclosed by this report Congress passed the Tucker Act, manifestly intending to provide adequate opportunity for expeditious and orderly determination of claims against the Government. This Act not only expanded the jurisdiction of the Court of Claims, but, for the first time, gave District Courts general authority to hear and determine claims against the Government. Relief of existing claim congestion and prevention of future congestion obviously demanded an integrated jurisdictional plan by which the Court of Claims and District Courts could afford equal opportunities for expeditious and fair trials of like claims within the jurisdictional amount of the District Courts."

³⁶312 U. S. 584, 61 S. Ct. 767, 85 L. ed. 1058 (1941).

³⁷In *United States v. Dismuke*, 76 F. (2d) 715, 716 (C. C. A. 5th, 1935) the court

Although as yet the Supreme Court has not been called upon to settle this particular point, the inference, at least, is inescapable that this provision of the Tucker Act represents an application of the principle of the *O'Donoghue* case, that the Congress has in reality conferred upon the district courts judicial power derived from its power under Article I to pay the debts of the United States.³⁸

Upon this principle it is submitted that it would be possible for the Supreme Court to uphold the power of the Congress to superimpose upon the federal district courts judicial power derived from Article I, Section 8 (17). In such manner the Court could uphold the constitutionality of the 1940 amendment to the Judicial Code without the upsetting effect of over-ruling *Hepburn and Dundas v. Ellzey*.³⁹

Every practical reason exists, as most of the courts have willingly conceded, in favor of allowing residents of the District the same privileges of suit based upon diversity of citizenship that the Congress has extended under Article III, Section 2 to citizens of the several states. The difficulties arising from such discrimination are not ameliorated by the explanation that they result from the "anomalous situation" of the District itself.⁴⁰ Nor are they answered by the fact that *Erie Ry. v. Tompkins*⁴¹ requires the district courts to apply the laws of the par-

said: "The District Court of the United States as to claims under the Tucker Act sits as a special tribunal exercising jurisdiction concurrent with the Court of Claims."

In *United States v. Biggs*, 46 F. Supp. 8, 10 (E. D. Ill. 1942) the court said: "Under that [Tucker] Act, the District Court is not limited to its ordinary jurisdictional boundaries, but has concurrent jurisdiction with the Court of Claims . . . under it, the District Court sits as a Court of Claims and not as a District Court . . ."

³⁸This theory was early forecast by the writers. Katz, *Federal Legislative Courts* (1930) 43 Harv. L. Rev. 894, 907: "Such jurisdiction was granted to the district courts by the Tucker Act of 1887, and has been referred to by the Supreme Court as 'the special jurisdiction of the District Court sitting as a Court of Claims.' The theoretical difficulties involved in these instances of the exercise of jurisdiction by legislative and constitutional courts over the same cases will be considered later . . ."

Note (1933) 43 Yale L. J. 316, 319: "The Tucker Act of 1887 confers upon the federal district courts jurisdiction concurrent with the Court of Claims . . . It was early declared, however, that the district courts can accept only cases within 'the judicial power of the United States.' Thus, the above theory leads to the anomalous result that whether or not a particular case is one included within the provisions of Article III depends upon which court hears it."

³⁹2 Cranch 445, 1 L. ed. 332 (1805).

⁴⁰*Feely v. Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663, 667 (D. C. Md. 1947): "It has been suggested that an anomalous result is reached in denying jurisdiction over citizens of the District of Columbia on the basis of lack of requisite diversity of citizenship . . . It is submitted, however, that this result is only one aspect of what, by its very nature, is an anomalous situation."

⁴¹304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938).

Feely v. Sidney S. Schupper Interstate Hauling System, 72 F. Supp. 663, 668