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A STUDY IN THE SIGNIFICANCE OF CONSTITUTIONAL WORD-OMISSION EX INDUSTRIA

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The Constitution of the United States enumerates, in their order, nine distinct and separate classes of national judicial jurisdiction,[1] which are as follows

1. "all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority;"
2. "all cases affecting ambassadors, other public ministers and consuls,"
3. "all cases of admiralty and maritime jurisdiction,"
4. "controversies to which the United States shall be a party,"
5. "controversies between two or more states,"
6. (controversies) "between a state and citizens of another state,"
7. (controversies) "between citizens of different states,"
8. (controversies) "between citizens of the same state, claiming lands under the grants of different states,"
9. (controversies) "between a state or the citizens thereof, and foreign states, citizens, or subjects."

Mr. Justice Story contended in 1816 in *Martin* v. *Hunter's Lessee*[2] that because the word "all" was omitted after the first three the Constitution had conferred all of the first three on the national judiciary but had designated the Congress as the arbiter as to whether any, all, or just how much of the latter six should be conferred on the national judiciary He buttressed his reasoning with the observation that if the word "all" preceded no. 4 the argument might be advanced that the United States could properly be made a party defendant without her consent in her own courts. I submit that the reason Mr. Justice Story claimed

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[1] U.S. Const., Art. III, sec. 2, clause I.

1 Wheat. 304, 4 L.Ed. 97 (1816)

that all of the first three have to be exercised was no doubt because only no. 2 of the first three constitutes original jurisdiction of the Supreme Court, therefore, if two grounds of appellate jurisdiction of the Supreme Court *have* to be exercised, there has to be an inferior national court (or courts) to which the original jurisdiction of the two grounds may attach—thus, the establishment of inferior national courts is justifiably embedded in logic.

One hundred six years later Mr. Justice Sutherland asserted in *Kline* v *Burke Construction Company*[3] that only the original jurisdiction of the Supreme Court is fixed and immutable, completely independent of the Congress. Therefore, following his premise, all of no. 2 has to be exercised by the Supreme Court as it alone among the first three constitutes original jurisdiction of the Supreme Court and part or all of nos. 5, 6, and 9 have to be exercised by the Supreme Court as these comprise the remainder of the original jurisdiction of the Supreme Court. Reasoning thusly, no appellate jurisdiction has to be exercised by the Supreme Court, and accordingly, no inferior national courts *have* to be created due to the phrase *"with such exceptions,* and under such regulations, *as the Congress shall make"* following the sentence "In all the other cases before mentioned (nos. 2, 3, 4, 7, and 8) the Supreme Court shall have appellate jurisdiction, both as to law and fact."[4]

Eleven years later Mr. Justice Sutherland was confronted again with this problem in *Williams* v *United States.*[5] This time he apparently modified his prior view and concurred with the conclusion drawn by Mr. Justice Story one hundred seventeen years earlier, even advancing the same observation which Mr. Justice Story had employed regarding the omission of the word "all" before no. 4 as indication that the United States could not properly be made a party defendant without her consent in her own courts. Mr. Justice Sutherland offered the additional observation that the word "all" was omitted before no. 6 as indication that a State could not properly be made a party defendant without her consent by a citizen of another State.

[3] 260 U.S. 226, 67 L.Ed. 226, 43 Sup. Ct. 79, 24 A.L.R. 1077 (1922).
[4] U.S. Const., Art. III, sec. 2, clause 2.
[5] 289 U.S. 553, 77 L.Ed. 1372, 53 Sup. Ct. 751 (1932).

Ten years later, however, the problem posed itself again—for the fourth and last time—in *Lockerty* v. *Phillips*.[6] In this case Mr. Chief Justice Stone reverted to the earlier ruling of Mr. Justice Sutherland and adopted the holding of *Kline* v. *Burke Construction Company*[7] to the effect that no inferior national courts *have* to be created. This conception of the matter is the law of the land today, but is precedent of only five years dignity

That the Supreme Court in its seriatim opinion by Mr. Chief Justice Jay, Mr. Justice Blair, Mr. Justice Wilson, Mr. Justice Cushing, and Mr. Justice Iredell, the latter dissenting, did not take the view in *Chisholm* v. *Georgia*[8] that a State could not properly be made a party defendant without her consent by a citizen of another State can only be attributed to the fact that Mr. Justice Story's opinion in *Martin* v *Hunter's Lessee*[9] was not handed down until twenty-three years later, and Mr. Justice Story was apparently the first jurist to attach importance to the omission of the word "all" after the first three classes of national judicial jurisdiction. Since Mr. Justice Iredell alone took such view in *Chisholm* v. *Georgia*[10] he, accordingly, might be expected to have preceded Mr. Justice Story in attaching significance to such word-omission.

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[6] 319 U.S. 182, 87 L.Ed. 1339, 63 Sup. Ct. 1019 (1942).
[7] *Supra*, note 3.
[8] 2 Dall. 419, 1 L.Ed. 440 (1793).
[9] *Supra*, note 2.
[10] *Supra*, note 8.