Resources for Public Speaking

The Federal Judiciary During the Gilded Age

Senator William Evarts

Federal Judicial Center
2026

During the Gilded Age (*ca*. 1865–1893), the federal courts underwent significant changes to their structure and jurisdiction. These changes sometimes reflected broader transformations in American society, including post-war reconstruction, the so-called "redemption" of the South by white supremacists, and the explosive growth of industrial capitalism. This resource provides suggested talking points, in outline form, for those wishing to speak about the evolution of the federal courts during this period of American history. This outline adopts as its bookends the end of the U.S. Civil War in 1865 and the Panic of 1893, a national economic crisis that lasted until 1897. The federal judiciary underwent several important structural changes during this period, including the expansion of federal jurisdiction, the creation of circuit judgeships, and the establishment of the U.S. courts of appeal. In addition to the outline, the feature contains Topic at a Glance, a brief summary in PDF format; a gallery of downloadable images for use in a PowerPoint presentation; links to related resources on the FJC's History of the Federal Judiciary website; a further reading list; and excerpts of historical documents that could be handed out to audience members or incorporated into a presentation.

Topic at a Glance

Introduction. During the Gilded Age (*ca*. 1865–1893), the federal courts underwent significant changes to their structure and jurisdiction. These changes sometimes reflected broader transformations in American society, including post-war reconstruction, the so-called "redemption" of the South by white supremacists, and the explosive growth of industrial capitalism.

Congress Enhances Access to Federal Trial Courts (1865–1875). Congress passed several pieces of landmark legislation in the decade following the end of the Civil War, many of which opened the federal courts to new or broader classes of cases. Some of this legislation was designed to enable freedpeople to avoid discriminatory state venues. Other new laws were designed to empower federal courts to hear the increasing number of cases generated by the growth of industry, particularly the railroads. Among the most important of these laws, successive civil rights acts made federal courts the venue of choice for civil rights plaintiffs and criminal defendants seeking removal, most of whom were previously restricted to state courts. Likewise, the Habeas Corpus Act of 1867 for the first time permitted federal habeas petitions from those held in state custody. More broadly, the Fourteenth Amendment (ratified in 1868) created a host of new federal rights against discriminatory or oppressive state actions. The Jurisdiction and Removal Act of 1875 ensured that many of the challenges to state power were brought in federal courts, as it extended full federal question jurisdiction to federal trial courts for the first time since a brief period in 1801–1802 and expanded the availability of removal in civil cases.

Circuit Judges. In 1869, Congress for the first time since 1802 (aside from courts located in the District of Columbia (1801–1863) and California (1855–1863)), authorized bespoke judgeships for U.S. circuit courts, which had previously been staffed by a combination of district judges and Supreme Court justices riding circuit. Though circuit riding remained in place, this change reduced the need for justices to travel.

The Evarts Act. In the late nineteenth century, the expansion of federal jurisdiction and broad-based growth in litigation created a caseload crisis that threatened to overwhelm the federal judiciary. The Evarts Act of 1891 aimed to ease this crisis by authorizing the creation of a new court of appeals in each of the nine existing circuits as well as an additional judgeship for each circuit (leaving the Second Circuit with three judgeships and all other circuits with two). Court of appeals

judges held concurrent commissions to serve on U.S. circuit courts. The act stripped the U.S. circuit courts of their appellate jurisdiction over district court matters but left them to operate as trial courts concurrently with the district courts. Congress granted the new courts of appeals appellate jurisdiction over most cases from the district and circuit courts, while some cases, such as those involving constitutional issues, could be appealed directly from a trial court to the Supreme Court. In diversity cases and in some other categories of suits, no appeal as of right from a court of appeals to the Supreme Court was available, but the Supreme Court could hear cases on a discretionary basis by issuing a writ of certiorari. Some aspects of the Evarts Act system required further refinement—most notably, Congress eventually disbanded the circuit courts in 1911—but the Act, coupled with ambient changes to the courts' jurisdiction and structure during the Gilded Age, arguably laid the template for the modern federal judicial system.

Outline

I. The Federal Courts at the start of the Gilded Age
   A. By the end of the Civil War, there were four kinds of federal court: the Supreme Court of the United States, U.S. circuit courts (which were the primary trial courts and had some appellate jurisdiction over district courts); the U.S. district courts (which had a more limited jurisdiction than today and primarily heard minor criminal matters as well as admiralty and maritime cases); and the Court of Claims, which heard monetary claims against the federal government.
   B. Circuit courts did not have dedicated judges of their own but were instead presided over by a combination of district judges and Supreme Court justices riding circuit.
   C. Federal trial courts did not exercise federal question jurisdiction and could not issue writs of habeas corpus for state prisoners.
   D. State courts heard most cases arising under federal law; removal to federal court was highly restricted.
   E. Each of these aspects of the judiciary's structure would change by 1891.

II. The Judicial Circuits Act of 1866
   A. During the Civil War, Congress had made several changes to the circuit court system designed both to rationalize a system that had become disorganized in the decades leading up to the war and to restrict the power of Southern states in the system.
   B. In 1866, Congress made the final major modification to the circuit system in this period by abolishing the Tenth Circuit and reorganizing several of the existing circuits. It also reduced the Supreme Court from ten to seven seats, by stipulating that three positions could not be filled as they became vacant.
   C. This statute broke with the longstanding practice of allocating one justice to each of the circuits (with presidents conventionally nominating justices from states within their circuits).

III. The Civil Rights Act of 1866
   A. The Civil Rights Act of 1866 was a landmark law designed to give several Important forms of legal equality to previously enslaved people.
   B. The Act declared that everyone born in the United States "and not subject to any foreign power, excluding Indians not taxed[,]" was a U.S. citizen. The Act also protected key legal rights to make contracts, to own property, to sue in court, and to enjoy the full protection of the law.
   C. The Act gave the U.S. district courts exclusive jurisdiction over criminal cases related to violations of the Act and concurrent jurisdiction, along with the U.S. circuit courts, of all civil and criminal cases affecting those who were unable to enforce in state court the rights guaranteed by the Act.
   D. The Civil Rights Act was passed under Congress's power to enforce the Thirteenth Amendment, which abolished slavery. Some critics argued that many of the Act's rights-bearing provisions exceeded this remit, while proponents claimed that meaningful equality under law was a necessary corollary to freedom from slavery.

E. The Civil Rights Act began a gradual transformation of the federal judiciary into the primary forum for individuals to enforce their constitutional and statutory rights.
F. Historians debate the efficacy of these acts in the 1860s and 1870s. Most agree, however, that these laws were seldom enforced or respected in the decades that followed. But many Reconstruction-era laws provided important legal vehicles for civil rights advocates in the mid-twentieth century.

IV. Removal in Diversity Cases

A. During Reconstruction, Republicans passed several statutes designed to protect freedpeople and Union officials from bias in state courts, particularly as Southern governments returned to local civilian control.
B. One of the main mechanisms lawmakers employed was to permit removal from state to federal court in a much broader set of cases than previously.
C. The Separable Controversy Act of 1866 allowed defendants to remove portions of cases specific to them if those elements of the case could be resolved without the presence of the other defendants.
D. In doing so, the statute provided a means to defeat joinder, whereby plaintiffs added local defendants to suits to frustrate diversity of citizenship.
E. The Local Prejudice Act of 1867 amended the earlier statute by providing that any out-of-state party, whether plaintiff or defendant, could petition to remove a case in which they feared prejudice in the state court.

V. The Habeas Corpus Act of 1867

A. This Act made habeas corpus available to any person "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."
B. In doing so, the Act extended the federal writ to state prisoners claiming that their detention violated federal law. Petitions of this kind had previously been barred by an 1807 Supreme Court decision interpreting an earlier habeas statute.
C. This statute effectively made habeas corpus a post-conviction remedy, as it empowered federal courts to free individuals who had been tried and convicted by state tribunals, as well as those who had been detained by federal authorities without trial.
D. In 1868, Congress revoked the Supreme Court's appellate jurisdiction over habeas petitions seeking release from federal custody under the 1867 Act.
E. This repeal was intended to head off habeas litigation then before the Court seeking to challenge the validity of important military reconstruction policies in the South.
F. The Court upheld this repeal in *Ex parte McCardle* (1868).
G. However, shortly after the *McCardle* decision, the Court determined in *Ex parte Yerger* (1868) that the repeal did nothing to affect the Court's preexisting appellate jurisdiction over habeas cases under other statutes.

VI. Fourteenth Amendment (1868)

A. The Fourteenth Amendment did not directly transform the federal courts as an institution, but it eventually became one of the primary fonts of constitutional cases brought before the courts.

B. Among other things, the Amendment established that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It also dictated that states could not deny any citizen the privileges and immunities of citizenship or of equal protection under law or deprive any person of life, liberty, or property without due process.
C. In doing so, the Amendment shored up the constitutionality of existing civil rights legislation. Section 5 meanwhile empowered Congress to pass further legislation to enforce the Amendment. Congress would use this power several times during the late 1860s and early to middle 1870s, often relying on the federal courts to interpret and protect newly created rights.
D. Most historians agree that the courts generally interpreted the rights granted by the Fourteenth Amendment narrowly during the Gilded Age.
    1. In *The Slaughterhouse Cases* (1873), the Supreme Court adopted a strict interpretation of the Privileges or Immunities Clause, holding that the provision only applied to rights directly related to federal citizenship, such as the right to use interstate waterways.
    2. In *United States v. Cruikshank* (1875), the Court held that the Fourteenth Amendment did not incorporate the protections of the Bill of Rights against the states. This approach was gradually superseded beginning with *Chicago, Burlington & Quincy Railroad Co. v. Chicago* (1897), which applied the takings clause of the Fifth Amendment against the states through the Fourteenth Amendment's Due Process Clause.
    3. In *Minor v. Happersett* (1875), the Court rejected challenges to electoral laws discriminating against women. While the Court acknowledged that women were citizens, it reasoned that this status conveyed "the idea of membership of a nation, and nothing more." Though some states began to liberalize their voter laws in the decades that followed, discrimination at the polls on the basis of sex remained widespread until the ratification of the Nineteenth Amendment in 1920.
    4. In *Plessy v. Ferguson* (1896), the Court rejected claims that racial segregation in railway accommodations violated the Fourteenth or Thirteenth Amendments, reasoning that separate accommodations were not inherently unequal or "badges" of slavery. This line of reasoning was gradually rejected by the Supreme Court in a series of landmark cases beginning in the 1940s and culminating in *Brown v. Board of Education* (1954).

VII. Circuit Judges Act of 1869

A. During Reconstruction, Congress established separate judgeships for each of the nation's circuit courts for the first time since the short-lived Judiciary Act of 1801 authorized similar judgeships.
B. The Act also eased the burden of circuit riding, which had previously required the justices to undertake arduous and sometimes dangerous travel on a semi-regular basis. Under the new system, justices were only required to attend the courts in their circuit once every two years.

C. The provision of new judges for the U.S. circuit courts also allowed the Supreme Court and the U.S. district courts to better manage their expanding caseloads.
D. The 1869 Act countermanded the Judicial Circuits Act's reduction of the Supreme Court to seven seats, establishing nine seats to match the number of circuits established by the 1866 reorganization (this is the last time to date that Congress has modified the Supreme Court's size).
E. The Act also created the first provision allowing federal judges to retire while continuing to receive their salaries.

VIII. The Ku Klux Klan Act of 1871

A. This Act, also known as the Civil Rights Act of 1871 or the Third Enforcement Act, was designed to enforce the rights-bearing provisions of the Fourteenth Amendment (ratified in 1868) and to combat vigilante violence against African Americans in Southern and border states.
B. The Act enabled those deprived of a constitutional right by anyone acting under color of law to seek relief in a federal district or circuit court.
C. This part of the legislation was recodified as 42 U.S.C. §1983 and served as the basis for many federal court lawsuits against state and local officials in the twentieth and twenty-first centuries.

IX. The Civil Rights Act of 1875

A. This Act guaranteed access to inns, public transportation, theaters, and "other places of amusement" regardless of race. As such, it arguably went further than previous Reconstruction efforts by attempting to ensure racial equality in social as well as political and civil spheres.
B. Congress granted the U.S. district and circuit courts exclusive jurisdiction over cases regarding alleged violations of the Act.
C. In *The Civil Rights Cases* (1883), the Supreme Court ruled that the Act was unconstitutional because the Fourteenth Amendment applied only to state and not to private action. Though the result of the case was often assailed in subsequent years, the state action doctrine it established has survived into the modern day.

X. The Jurisdiction and Removal Act of 1875

A. This Act gave circuit courts jurisdiction to hear cases arising under the Constitution and the laws of the United States, as well as diversity suits, if the amount in dispute was more than $500.
B. In doing so, the Act granted federal trial courts full federal question jurisdiction for the first time since a brief period in 1801–1802.
C. The Act also permitted parties to remove state-court cases arising under federal law to federal courts.
D. This expansion of federal jurisdiction was aimed primarily at protecting interstate business interests that some lawmakers claimed were often treated unfavorably in state courts, but the law's reach was significantly broader than that issue and contributed to a significant growth in federal caseloads in the late nineteenth century.

XI. The Tucker Act (1887)

A. The Tucker Act expanded the jurisdiction of the U.S. Court of Claims.
B. Prior to the Act, the court was authorized to hear cases based on acts of Congress, executive branch regulations, or contracts with the United States government.
C. The Act authorized suits based on the Constitution as well as suits seeking damages in contract cases. In addition, Congress gave the U.S. district courts and U.S. circuit courts concurrent jurisdiction with the Court of Claims for cases concerning less than $1,000 and cases between $1,000 and $10,000, respectively.

XII. The Evarts Act (1891)

A. In response to growing caseloads that threatened to overwhelm the federal judiciary, Congress in 1891 created a separate tier of appellate courts known as the U.S. circuit courts of appeals.
B. The Evarts Act, named after Senator William Evarts of New York, authorized the creation of a court of appeals in each of the nine existing circuits, as well as an additional judgeship for each circuit (leaving the Second Circuit with three judgeships and all other circuits with two).
C. Court of appeals judges held concurrent commissions to serve on U.S. circuit courts.
D. The Act stripped the U.S. circuit courts of their appellate jurisdiction but left them to operate as trial courts concurrently with the district courts.
E. The distinction between the district and circuit courts' jurisdiction under this scheme caused some confusion among practitioners. The Judicial Code of 1911 ultimately remedied this by abolishing the circuit courts, effective January 1, 1912.
F. Congress granted the new courts of appeals appellate jurisdiction over most cases from the district and circuit courts, while some cases, such as those involving constitutional issues, could be appealed directly from a trial court to the Supreme Court.
G. In diversity cases and in some other categories of suits, no appeal as of right from a court of appeals to the Supreme Court was available, but the Supreme Court could hear cases on a discretionary basis by issuing a writ of certiorari.

XIII. Conclusion

A. The federal courts transformed at a rapid pace in the decades between the Civil War and the Crash of 1893.
B. Many of these changes were driven by Congress's desire to have federal judges hear a broader set of legal matters to shield both freedpeople and large corporations from state courts that many lawmakers deemed hostile forums for these parties.
C. The workload of the federal courts was also transformed by several constitutional amendments and federal civil rights statutes that made federal public-law claims far more common than they had been before the Civil War.
D. In part to deal with the courts' increased caseloads, Congress in 1891 created the U.S. courts of appeals, setting in motion the process that would lead to the three-tier judicial hierarchy with which many modern Americans are familiar.

Related FJC Resources

Spotlight on Judicial History: The South Carolina Ku Klux Klan Trials of 1871–1872

Further Reading

Cashman, Sean Dennis. America in the Gilded Age: From the Death of Lincoln to The Rise of Theodore Roosevelt. New York: New York University Press, 1984.

Crowe, Justin. Building the Judiciary: Law, Courts and the Politics of Institutional Development. Princeton, NJ: Princeton University Press, 2012.

Currie, David P. "The Reconstruction Congress." University of Chicago Law Review, vol. 75 (2008): 383.

Edwards, Laura F. A Legal History of the Civil War and Reconstruction: A Nation of Rights. New York: University of Cambridge Press, 2015.

Foner, Eric. Reconstruction: America's Unfinished Revolution, 1863–1877, Perennial Classics edition. New York: Harper Collins, 2002.

Hamilton, Daniel W. "A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court." Journal of Supreme Court History 29 (2004): 254.

Kutler, Stanley I. Judicial Power and Reconstruction Politics. Chicago: University of Chicago Press, 1968.

Horwitz, Morton J. The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy. New York: Oxford University Press, 1992.

Kaczorowski, Robert J. The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876.New York: Fordham University Press, 2005.

Sager, Lawrence G. "Klein's First Principle: A Proposed Solution." Georgetown Law Journal 86 (1998): 2525.

Van Alstyne, William W. "A Critical Guide to Ex Parte McCardle." Arizona Law Review 15 (1973): 229.

Wiecek, William. "The Reconstruction of Federal Judicial Power, 1863–1875," American Journal of Legal History 13 (1969): 333–59.

_____. "The Great Writ and Reconstruction: The Habeas Corpus Act of 1867." The Journal of Southern History 36, no. 4 (1970): 530.

Historical Documents

Supreme Court of the United States, *Ex Parte McCardle*, April 12, 1869.

Chief Justice Salmon Chase wrote for a unanimous Supreme Court that the Repeal Act of 1869 had successfully eliminated the Court's jurisdiction over habeas corpus petitions from federal prisoners. Importantly, Chase did not discuss whether the Constitution placed any limitations on Congress's power to repeal the Court's jurisdiction.

. . . The motion to dismiss the appeal has been thoroughly argued, and we are now to dispose of it.

The ground assigned for the motion is want of jurisdiction, in this court, of appeals from the judgments of inferior courts in cases of habeas corpus.

Whether this objection is sound or otherwise depends upon the construction of the act of 1867. . . .

It was insisted on argument that appeals to this court are given by the act only from the judgments of the Circuit Court rendered upon appeals to that court from decisions of a single judge, or of a District Court.

The words of the act are these: "From the final decision of any judge, justice, or court inferior to the Circuit Court, an appeal may be taken to the Circuit Courts of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States."

These words, considered without reference to the other provisions of the act, are not unsusceptible of the construction put upon them at the bar; but that construction can hardly be reconciled with other parts of the act.

The first section gives to the several courts of the United States, and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

And it is to this jurisdiction that the system of appeals is applied. From decisions of a judge or of a District Court appeals lie to the Circuit Court, and from the judgment of the Circuit Court to this court. But each Circuit Court, as well as each District Court, and each judge, may exercise the original jurisdiction; and no satisfactory reason can be assigned for giving appeals to this court from the judgments of the Circuit Court rendered on appeal, and not giving like appeals from judgments of Circuit Courts rendered in the exercise of original jurisdiction. If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the Circuit Court by appeal rather than to cases originating there. In the former description of cases the petitioner for the writ,

without appeal to this court, would have the advantage of at least two hearings, while in the latter, upon the hypothesis of no appeal, the petitioner could have but one.

These considerations seem to require the construction that the right of appeal attaches equally to all judgments of the Circuit Court, unless there be something in the clause defining the appellate jurisdiction which demands the restricted interpretation. The mere words of that clause may admit either, but the spirit and purpose of the law can only be satisfied by the former.

We entertain no doubt, therefore, that an appeal lies to this court from the judgment of the Circuit Court in the case before us.

Another objection to the jurisdiction of this court on appeal was drawn from the clause of the first section, which declares that the jurisdiction defined by it is "in addition to the authority already conferred by law."

This objection seems to be an objection to the jurisdiction of the Circuit Court over the cause rather than to the jurisdiction of this court on appeal.

The latter jurisdiction, as has just been shown, is coextensive with the former. Every question of substance which the Circuit Court could decide upon the return of the habeas corpus, including the question of its own jurisdiction, may be revised here on appeal from its final judgment.

But an inquiry on this motion into the jurisdiction of the Circuit Court would be premature. It would extend to the merits of the cause in that court; while the question before us upon this motion to dismiss must be necessarily limited to our jurisdiction on appeal.

The same observations apply to the argument of counsel that the acts of McCardle constituted a military offence, for which he might be tried under the Reconstruction Acts by military commission. This argument, if intended to convince us that the Circuit Court had no jurisdiction of the cause, applies to the main question which might arise upon the hearing of the appeal. If intended to convince us that this court has no appellate jurisdiction of the cause, it is only necessary to refer to the considerations already adduced on this point.

We are satisfied, as we have already said, that we have such jurisdiction under the act of 1867, and the motion to dismiss must therefore be

DENIED.

[Document Source: *Ex Parte McCardle*, 73 U.S. 318, 324, 325–27 (1868).]

Senator William Stewart of Nevada, U.S. Senate, Speech of February 23, 1869.

As the Senate debated the bill to establish circuit judgeships and to restore a ninth seat on the Supreme Court bench, Stewart urged his colleagues to dispense with any fine-tuning of a bill that he thought needed to be enacted swiftly if the federal courts were to meet the new demands placed upon them. Stewart

summarized how the impact of the Civil War and the demands of Reconstruction compounded and accelerated the already brisk growth in federal judicial business.

. . . At present it is impossible to have the judicial business of the country performed. We have constant applications for the creation of new judicial districts, growing out of the accumulation of business, and there are a great many new questions growing out of reconstruction which are necessary to be attended to at this time. The country in this particular, in the accumulation of business in the United States courts growing out of the war, has grown more rapidly than in almost any other. It is possible that but for the war we might have gone on for years under the old system; but this country is growing so rapidly that we should soon be compelled to increase the force in any event. But now we have applications from all parts of the country, I believe if we give to the South a judiciary who can perform the duties devolving upon them it will do more to settle that country, do more to establish law, order, and peace, than anything else. If you could have a judiciary of that character there that the people would have confidence in, and they could have sufficient confidence to do all the duties that we have devolved on those courts, it would be the best reconstruction measure that could be adopted. It is a pressing necessity. Senators who have not paid special attention to it would be surprised at the want of proper judicial force in the South to discharge the duties. . . .

[Document Source: *Congressional Globe*, 40th Cong., 3d sess., 1486.]

Senator William Evarts, *The Case for the Circuit Court of Appeals Bill*, U.S. Senate, Speech of September 19, 1890.

In a speech before Congress, Evarts emphasized the extent to which his proposal for a raft of judicial reforms including the creation of a new set of intermediate appellate courts preserved the existing structure of the federal court system while improving judicial efficiency. Evarts criticized the Rogers bill for allowing cases that must ultimately be decided by the Supreme Court—cases of national law—to pass through the inferior circuit courts of appeals. Allowing direct appeals to the Supreme Court, he argued, was the only way of ensuring speed, uniformity, and predictability of the law. Evarts also believed these measures improved administration of justice while preserving the prestige and authority of the Supreme Court.

Mr. President, there are no real faults, as it seems to me, of great magnitude in the present system of the administration of justice by the courts of the United States in the first instance and then by direct appeal to the Supreme Court of the United States, except the inability of the Supreme Court to discharge its duty of hearing and determining. Therefore, the great point for us to meet is to provide intermediate courts that shall answer the purpose of our obligations under the Constitution, that shall leave entirely uncurtailed the authority of the Supreme Court in the great functions of its politico-legal relation to affairs; I mean the establishment of the supervision of laws in the sense of constitutionality and other questions of a public nature, and that there should be provided an intermediate court of dignity and character and furnished with a sufficient number of judges to dispose of the appellate jurisdiction thus created. . . .

The next question was how we should divide the appellate recourse so as to operate in reduction of the burden of the docket of the Supreme Court and also maintain as well as might be the necessary conditions of a just uniformity of decision. One of the first objections to an interappellate court took the form that there would be these diverse tribunals in geographical distribution over the great district of country in these political divisions, and that therefore all that we had secured heretofore by a uniformity of conclusions of any court upon great public questions by the appeals centering at once in the highest court here would be endangered. The method of the House [Rogers] bill does not meet this difficulty at all. . . . It is vague and uncertain. . . .

The House bill, as well as all discussions on this subject, has contemplated the necessity of constitutional questions affecting either the laws of the United States or the treaties of the United States or the laws of the States that are deemed to be in conflict with the Federal Constitution and also with certain other subjects of national importance, such as prize cases being brought to the Supreme Court. The House bill carries all these things up through these interappellate courts, and leaves all these subjects therefore exposed to two difficulties: first, that of being first heard in these courts and, secondly, of the necessity of their going to the Supreme Court if the suitors choose to carry them there. But that is not the only mischief of this scheme of the House of Representatives, for it leaves to these tribunals distributed all over the country the opportunity of original determination on all these constitutional and public questions when there are two stages for consideration, and when they must be finally resolved in the Supreme Court of the United States, and when diversities may arise in decisions upon these general and central propositions of the jurisprudence and of the jurisdiction by various determinations in these different circuits.

An attempt has been made in discussion to provide for facility with which these doubting and divided judgments in these interappellate courts might be carried up, but no scheme short of that proposed now by the Judiciary Committee of the Senate will accomplish any great useful purpose.

The first thing that engaged our attention was to discriminate what causes ought, irrespective of amount and from their very nature, to have access to the Supreme Court of the United States, and when we had determined that list the first determination seemed quite natural to us that they should go directly up to the Supreme Court as they now go, and that thus we should avoid all the difficulty even of momentary diversities of judgment on these great questions in the courts of the new establishment in the different circuits. We also felt that it was entirely unnecessary, and therefore it was unnecessarily burdensome, that these questions in the interest of suitors and their advisers should be delayed and weighed down with the expense of an appeal to the intermediate court when almost necessarily these questions would go to the Supreme Court in the interest of suitors and in the interest of unity of jurisprudence and jurisdiction. . . .

Now, what is our provision to guard against diversity of judgment in these different courts—I mean in regard to those litigations that are to receive their final decision in these interappellate courts? Simply that the court itself may, in any case before it that it deems it necessary or useful to be advised by the Supreme Court on any question or proposition of law, send up these questions to the Supreme Court. . . .

Mr. President, another guard against the occurring diversity of judgments or of there being a careless or inadvertent disposition of important litigation by these courts . . . is that the Supreme

Court shall have a right, in any of these cases that are thus made final, by certiorari to take up to itself for final determination this or that case, and in that way the scheme of the committee does firmly and peremptorily make a finalty [sic] on such subjects as we think in their nature admit of finality, and at the same time leaves flexibility, elasticity, and openness for supervision by the Supreme Court. . . .

I have heard it said by persons in great authority that under this scheme, after this accumulation is once worked off, as we hope it may be by some extraordinary effort on the part of the court so as to bring about practically the benefits, a session of five months here might dispose of the docket, and that therefore these justices might be liberated for doing a share of judiciary duty in the courts of the first instance.

I do not know whether all the Senators will agree, but for myself I regard it as a great misfortune that judges in banc are also not brought in contact with the profession and the suitors and the people in the courts of first instance as frequently as possible. Now, I will imagine—for perhaps I can not call it more than imagination—that these circuit judges, who are to compose this tribunal in each of the circuit courts in their appellate function, will, as I think, be able to dispose of the annual litigation in three or four months, at such distribution of terms as they may think fit, and they would be left to take the very important part that they now take, and can not be spared, in my judgment, in the court of first instance in equity cases and in matters that belong to first hearings of all important matters. I do not desire to see a severance between these appellate judges, which the scheme of the House operates between the judges of that court and the jurisdiction in the first instance of the litigation that the circuit judges now discharge.

[Document Source: *Congressional Record*, 51st Cong., 1st sess., 1890, 21, pt. 10:10220–22.]