

- sitting in judicial judgment of the president. The framers “knew that in the very nature of things, in common justice, a man could not be a judge in his own case. They knew that the provisions of the common law prohibited a man from being a judge in his own case. They probably remembered what has been said by one great commentator, (Blackstone,) that the omnipotence of Parliament was limited in this respect, and that body could not make a man a judge in his own case.” *Trial of Andrew Johnson*, 3:397. For other senatorial statements explicitly arguing that the Constitution gave the chief justice the presidential-impeachment gavel for *nemo iudex* reasons, and that the spirit of this *nemo iudex* clause applied to Wade as well, see *ibid.*, 360, 365 (Sen. Hendricks), 362–363 (Sen. Reverdy Johnson—no relation to Andrew), 363–364 (Sen. Davis), 373–374 (Sen. Bayard), 385 (Sen. Buckalew). For the text of the impeachment oath, see *Senate Journal*, 40–2:809 App. (March 5, 1868). For general background, see Michael Les Benedict, *The Impeachment of Andrew Johnson* (1973), 118.
- 24 In 1862 Congress imposed a special 3 percent salary tax on a wide range of federal officials, including judges. In response, Chief Justice Roger Taney limited himself to penning and publishing a letter of protest to Treasury Secretary Chase: “I should not have troubled you with this letter, if there were any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it.” Taney to Chase, Feb. 16, 1863, in 157 U.S. 701, 702 (1895) (challenging Act of July 1, 1862, ch. 119, sec. 86, 12 Stat. 432, 472). For more recent case law, see, e.g., *United States v. Will*, 449 U.S. 200, 213–217 (1980). Cf. *Evans v. Gore*, 253 U.S. 245, 247–248 (1920); *O’Malley v. Woodrough*, 307 U.S. 277 (1939). See generally John T. Noonan Jr., “Making the Case One’s Own,” *Hofstra LR* 32 (2004): 1139. For defenses of Wade invoking the two-senator-per-state rule, see, e.g., *Trial of Andrew Johnson*, 3:360, 371–372 (Sen. Sherman), 361 (Sen. Howard), 379 (Sen. Howe), 382 (Sen. Thayer). Note that no necessity problem arises in any situation when the vice president must recuse himself as the Senate’s presiding officer; Article I, section 3, expressly provides that the Senate may designate a substitute presiding officer in the vice president’s absence.
- 25 Act of Jan. 19, 1886, ch. 4, sec. 1, 24 Stat. 1; Act of July 18, 1947, Public Law (Pub. L. hereafter) No. 80-199, sec. (a)(1), (b), 61 Stat. 380, 380 (codified at 3 U.S.C. sec. 19[a][1], [b]). For more on this deeply flawed 1947 statute, see Chapter 10, text accompanying n. 11.
- 26 Cf. Hadley Arkes, *Beyond the Constitution* (1990) and *Constitutional Illusions and Anchoring Truths* (2010).
- 27 Professor Sanford Levinson has provocatively identified a nineteenth-century pattern in which Justice Brockholst Livingston participated “in circuit court litigation involving the New York steamboat monopoly even though his brother Robert Livingston was the holder of the monopoly in question”; Justice Levi Woodbury “once heard on circuit an important case in which a lawyer for one of the litigants was his son, Charles Woodbury”; Chief Justice Taney declined to recuse himself when his brother-in-law Francis Scott Key argued before his Court; and “David Dudley Field...argued three