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The Federal Key to the Judiciary Act of 1789

Henry J. Bourguignon*

I. INTRODUCTION

James Wilson, one of the most influential drafters of the Constitution in 1787, during the ratification debate coined a label for the type of government created by the new Constitution. He called it a federal republic.¹ During this debate James Winthrop, a strong opponent of the new Constitution, writing under the name Agrippa also called the ideal government a federal republic.² For Winthrop, however, this ideal government already existed under the Articles of Confederation. When President Thomas Jefferson spoke at his inauguration in 1801, he proclaimed, “We are all republicans—we are all federalists.”³

Jefferson’s blithe assertion strikes us today as the prototype of a political platitude, a call for national unity after a bitterly partisan campaign. Jefferson, however, seems naively to have believed that all his countrymen, even those federalists who had fought with such personal enmity against his election, would soon realize that they too were republicans.⁴ The language of Wilson and Winthrop suggests Jefferson’s words would have rung true at the time of the debate over the ratification and founding of the new constitutional government. In 1788 and 1789, his words accurately reflected the views of the vast majority of politically involved individuals. Virtually all political leaders believed in federalism, even though vast gulfs of interpretation separated their individual positions; they also thought of themselves as republicans, which also had different meanings for different individuals.

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1. [Mercy O. Warren], *Observations On the New Constitution and on the Federal and State Conventions by a Columbian Patriot* in 4 THE COMPLETE ANTI-FEDERALIST 275 (Herbert J. Storing, ed., 1981).

2. Letter from James Winthrop to the Massachusetts Convention (Jan. 14, 1988), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 94.

3. Quoted in STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM, 753 (1993).

4. *Id.* at 753-54.

Thus, this broad and embracing umbrella concept of a federal republic covered widely divergent views and opinions.

These two concepts, federalism and republicanism, did not identify two philosophies or ideologies, and in 1789 they certainly did not refer to political parties as the terms slowly came to mean after 1793 or 1794. Rather, these terms constituted an intellectual frame of reference for viewing and questioning political developments, a widespread consensus for interpreting basic issues of government, and a widely shared and generally accepted vocabulary for political discourse. Thus, federalism and republicanism could embrace the divergent attitudes and conclusions of different political spokesmen, such as Wilson and Winthrop. Because their contours remained vague and ill-defined, the two terms provided a possibility of common discourse, compromise, and consensus.

Virtually all educated leaders of the founding generation considered themselves true republicans. According to the American view of republicanism, only active and selfless participation in the political process could preserve the liberty of the people. The people must be represented in government by individuals who sought the good of the republic rather than their own personal gain. The common good was viewed as the good of all the people who made up the republic. Although republics could be destroyed from within, the surest protection for a republic was the virtue of its citizens. Republics, like nature, were subject to the inherent laws of growth, ripeness and decline, or corruption. For republics to survive, civic virtue must prevail. Most of the citizens believed that the surest sign of a republic's corruption and enfeeblement was the luxury of the ruling few. The people's liberty could only be preserved by disinterested, virtuous leaders who sacrificed all while they sought only the common good of the people. Republicans believed that "Frugality, industry, temperance, and simplicity—the rustic traits of the yeoman—were the stuff that made a society strong."⁵ But when they sought leaders for their new republic, they looked to men like George Washington, the embodiment of selfless civic virtue. "[U]ltimately the most enlightened of that enlightened age believed that the secret of good government and the

5. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, 52 (1969). See also *id.* 46-82. For other standard sources on republicanism, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); CAROLINE ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCE OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL THE WAR WITH THE THIRTEEN COLONIES* (1959); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q., 49 (1972). For a recent historiographic essay, see Daniel T. Rodgers, *Republicanism: the Career of a Concept*, 79 J. AM. HIST. 11 (1992).

protection of popular liberty lay in ensuring that good men—men of character and disinterestedness—wielded power.”⁶

Just as republicanism was all-pervasive in the political idiom of the day, so also practically everyone at least paid lip service to the reality if not the word, federalism. By the time the Constitution was formulated at the Philadelphia Convention of 1787, political leaders generally took for granted the native-grown vision of shared governmental power in a federal union. Almost all the delegates in Philadelphia believed that the states would continue somehow as viable governmental entities, but at the same time they would be united into a new powerful and efficient government.⁷ One author suggests five different shades of positions on the federalism spectrum at the Philadelphia Convention.⁸ Federalism here is used to embrace those who, at the one extreme, thought that confederation under the existing Articles of Confederation supplied sufficient unity and that a more centralized government would ultimately swallow the independent states. At the other extreme were those who were more likely to argue for a national government sufficient to curb the abuses of the states. But, with few exceptions, even those most inclined to a more nationalist solution realized that political realities called for the preservation of the states.

After the Revolutionary War ended, great disillusionment set in as leaders throughout the states saw the abuses committed by the very state legislatures they had regarded as protectors against British tyranny. Many of the founding fathers like Madison, as they came to Philadelphia in 1787, were aware of the democratic excesses of the state legislatures.⁹ Some viewed state legislative assemblies as little more than mob rule. The states had, for instance, passed laws for the confiscation of property and for the printing of paper money with the fiat that it was to be accepted by creditors as legal tender. British creditors, despite the protection afforded them in the Treaty of Peace of 1783, found state courts an obstacle to effective debt collection. The state legislatures even attempted to gain control of all judicial and executive powers. Thus these state legislatures, empowered by the constitutions drafted during the heat

6. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*, 109 (1991).

7. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM*, 65-66 (1988).

8. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 213-215 (1985). On the wide disparity of views among those loosely labeled anti-federalists, See Saul Cornell, *Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, the Bill of Rights, and the Promise of Post-Modern Historiography*, 12 *LAW AND HIST. REV.* 1 (1994).

9. See Peter S. Onuf, *James Madison's Extended Republic*, 21 *TEX. TECH. L. REV.* 2375, 2376 (1990).

of the revolution, had themselves become the source of tyranny.¹⁰ “The people, it seemed, were as capable of despotism as any prince.”¹¹

Most leaders at the Constitutional Convention, therefore, agreed on some form of federalism, although disagreements remained sharp on the precise boundaries between state and federal authority.¹² In general, some delegates to the Constitutional Convention, made wise by the need for compromise, conceived of the national government and the state governments as operating in different spheres. The states would control the objects of government within their own boundaries and the national government would have power on all objects which extended beyond the reach of individual states. The national government, therefore, would not have full and total legislative power, but only certain enumerated powers, while the states would retain sovereignty over other objects. Some framers thought the secret to the success of this unprecedented form of government was the national government’s power to act directly and coercively on the individual, who remained a citizen of a state.¹³

Not surprisingly, therefore, the framers of the Constitution had the greatest difficulty in agreeing on proper legislative representation in their federal republic. The crucial and most extended debate during the summer of 1787 centered on the issue of representation in the new national legislature. Only with the acceptance of the great compromise were the extreme and discordant views of federalism sufficiently reconciled to complete the Constitution. Under the great compromise, popular representation would exist in the lower house of the legislature, while the states would be equally represented in the upper house. Bills for taxation or spending could originate only in the lower house.¹⁴ In effect, federalism was preserved by allowing the states themselves to take their equally weighted seats in one house of the national legislature. To assure, however, that the new national government would not become as ineffective as that under the Articles of Confederation, the founding fathers determined that the federal Constitution and laws, as well as treaties, would be the supreme law of the land.¹⁵

Federalism, therefore, became the key to the great compromise that made possible most of the other compromises in the Constitution. Federalism, as

10. WOOD, *supra* note 5, at 393-413.

11. *Id.* at 410.

12. A few delegates to the Philadelphia Convention seem to have thought of the possibility of abolishing the states. See Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES, 85, 87 (Lawrence M. Friedman & Harry N. Scheiber, ed., 1978); McDONALD, *supra* note 8, at 214.

13. Scheiber, *supra* note 12, at 88.

14. McDONALD, *supra* note 8, at 236.

15. See *id.* at 255-56, 275-76.

we shall see, is likewise the key for understanding the formation of the judiciary in the Constitution and especially in the Judiciary Act of 1789. This federal compromise in forming the judiciary of the new government will be the main focus of the discussion that follows.

The founding generation derived its diverse understandings of republicanism from its wide reading of classical texts and the British and continental authors who wrote from that point of view. They derived their firm convictions on federalism from their experience with the political realities around them and their innate sense of loyalty to their own state. Additionally, the common law was another source of influence that helped to shape the judiciary. Lawyers wrote Article III of the Constitution, the judiciary article, and they also drafted the Judiciary Act of 1789. Their understanding of the processes and procedures as well as the substance of the common law, as practiced in their respective states, constituted a third basis on which they built the new federal judiciary.

Those who formed the new federal judiciary were men of wide and diverse learning who could readily quote from the classical texts and from ancient or modern history.¹⁶ Although some of these sources are difficult to trace, they undoubtedly colored the thinking and arguments of the founders.¹⁷

II. FORMATION OF THE JUDICIARY IN THE CONSTITUTION

A historian searches in vain for long and thoughtful debates over the formation of the third branch of government, the judiciary, during the 1787 Constitutional Convention. When one quickly surveys the debates at the

16. Knud Haakonssen, *From Natural Law to the Rights of Man: European Perspective on American Debates*, in *A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW—1791-1991*, 19-61 (Michael J. Lacey & Knud Haakonssen, eds., (1991)). For a discussion of the religious values of the founding generation, see John M. Murrin, *Fundamental Values, the Founding Fathers, and the Constitution*, in *TO FORM A MORE PERFECT UNION: THE CRITICAL IDEAS OF THE CONSTITUTION 1* (Herman Belz et al., eds. 1992).

17. There is also the question of an economic explanation of the creation of the federal judiciary. This issue has been well discussed in an insightful article on the formation of the federal judiciary by Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L. J. 1421. Holt's thesis focuses on the pro-creditor, pro-commercial biases implicit in debates and compromises that led to the creation of the federal judiciary in 1789. Holt also supplies a detailed background of the economic factors influencing the debates.

It is true that many of the founding fathers opposed state paper money schemes and pro-debtor legislation. This, it appears, was not to further their own short or long range interests as creditors. Rather, they opposed these inflationary schemes because, as true republicans, they were firmly convinced that these schemes undermined the moral fabric of society and corrupted the common good. See Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69, 103-109 (Richard Beeman et al., eds. 1987).

Constitutional Convention, one might get the impression that Article III of the Constitution was practically an afterthought for the delegates. They had perhaps exhausted their debating energy on the legislative compromises, or maybe Madison, the principal note taker, failed to include a full summary of the debates as he did elsewhere in his notes. Gouverneur Morris' recollection of his role in drafting the final version of Article III, expressed a quarter century after the event, does not at first appear totally implausible. In 1814 he wrote to a friend informing him that he had served on the Committee on Style that prepared the final draft of the Constitution. Morris claimed that for the judiciary article he had deliberately blurred over the various conflicting opinions with his own careful selection of phrases in order to get Article III accepted in its final form.¹⁸ Morris's claim, however, vastly overstates his contribution.

Since the major concern of this Paper is with the Judiciary Act of 1789, it is unnecessary to trace each step of the evolution of the judiciary during the debates over the Constitution.¹⁹ Although little remains of the precise rumblings during the debates, a careful reading reveals the federal fault line along which an earthquake could occur at any time.

During the decade before the Constitutional Convention, most Americans had little experience with any courts which had jurisdiction beyond the boundaries of their own states.²⁰ Since some participants in the Philadelphia

18. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419-20 (Max Farrand ed., 1937), Morris wrote:

That instrument [the final draft of the Constitution] was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self-love, and to the best of my recollection, this was the only part which passed without cavil.

Morris' earlier comments on the formation of the Constitution in general and on the true intent of Article III were part of the Senate debate in 1802 on the repeal of the Judiciary Act of 1801. *Id.* at 390-91. His comments, however, shed no light on the actual drafting of Article III.

19. An old and somewhat dated step-by-step analysis of the debates over the judiciary during the Constitutional Convention can be found in JULIUS GOEBEL, JR., 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, 204-50 (1971). See also Ralph A. Rossum, *The Courts and the Judicial Power*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 222-41 (Leonard W. Levy & Dennis J. Mahoney eds., 1987). Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); *supra* note 18.

20. The Continental Congress had tried to avoid costly, possibly bloody, interstate disputes over rival land claims by creating an ad hoc body of commissioners for such disputes. They heard only one case. See PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787 6 (1983). The Continental Congress also created several successive adjudicative bodies to determine appeals in cases of capture of enemy

Convention had experience with the appellate prize tribunals set up by the Continental Congress, they knew first hand that admiralty jurisdiction had international ramifications. A few had learned that uncontrolled state admiralty courts hearing prize disputes could give rise to interstate and international resentment.²¹

Despite this limited experience with a continental court, the delegates to the Convention all saw the need for some judicial dimension to the new government. There apparently was no disagreement on the need to establish one supreme national court.²² For believers in the principle of separation of powers, the new national government could not be complete without its own judicial authority to interpret and apply federal law.

Unanimity also prevailed in the Convention in assuring the independence of the judges to be selected for the Supreme Court and any other federal court.²³ Judicial independence was to be assured by two constitutionally secured techniques. The judges would hold their offices during good behavior instead of for a term of years or at the pleasure of some political official. Secondly, the legislature and the executive would not have the power to influence the judges by decreasing their salaries.²⁴

This conviction that the new federal government must have independent judges grew out of the experiences with colonial judges, appointed at the pleasure of the Crown, who remained subject to interference from the colonial governors.²⁵ The drafters of the Constitution also drew on their experience after the Revolution with the legislative assemblies' meddling in legal disputes as the colonial governors had before the Revolution. During the 1780s, many thoughtful leaders became disillusioned with the omnipotent and arbitrary state legislatures. They came to appreciate the crucial importance of judicial

vessels during the Revolutionary War. *See* HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775-1787* (1977). A significant number of the founding fathers, but not the general population, had experienced the limited effectiveness of these appellate prize bodies. *Id.* at 328-29.

21. *See generally* BOURGUIGNON, *supra* note 20, at 238-318.

22. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 37.

23. 1 *id.* at 121.

24. At first the founding fathers sought to guarantee that the judges would receive "a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time." *Id.* Eventually the drafters were convinced that the prohibition of salary increases should be omitted because of the likelihood that the value of money would fluctuate. The judges could maintain sufficient independence even from a legislature able to increase their salaries. But Article III of the Constitution does prohibit any decrease in judicial salaries. 2 *id.* at 44-45. The final language in the Constitution stated that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. ART. III, § 1.

25. *See* WOOD, *supra* note 5, 159-61.

independence in order to assure true separation of powers.²⁶ Only independent judges could assert the power, barely hinted at during the 1780s, of reviewing the acts of the legislature and challenging them as against common right and natural equity.²⁷ The founding fathers' insistence on an independent judiciary was one of their most lasting and significant contributions to the federal judiciary.

More controversial than judicial independence was the question of judicial appointment. At first the choice of judges for the Supreme Court and any other federal courts was left with the Congress, or the National Legislature as it was called during the Convention.²⁸ Since James Wilson believed that intrigue and partisanship would necessarily follow if a large legislative body made judicial appointments, he suggested appointment by the president. John Rutledge opposed appointment of judges by the president as mimicking too closely a monarchy. James Madison wavered between these two positions; he was fearful of appointment by a large legislative body, but he was unsure of the wisdom of allowing appointment by the chief executive. He suggested the appointment by the smaller upper house of the legislature, but then proposed delaying the decision for a later day.²⁹ The Convention accepted Madison's suggestion that the Senate should have the power of appointing judges because it was a smaller, more select body, that could better assess the qualifications of candidates.³⁰ When the issues were again reopened, Nathaniel Gorham argued that appointment should be by the President with the advice and consent of the Senate necessary for confirmation. This led at that time to a strenuous debate on the issue of the proper mode of appointment, with prior positions repeated. At this point in the Convention, Gorham's position was rejected.³¹ Ultimately, after the Convention had settled the most divisive issue of representation in the two houses of Congress, it had little difficulty

26. As Madison said at the Convention, "If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 34.

27. See WOOD, *supra* note 5, at 453-63.

28. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 21.

29. 1 *id.* at 119-120.

30. 1 *id.* 232-33. Madison made some telling points in his argument:

Many of them [members of the legislature] were incompetent Judges of the requisite qualifications. They were too much influenced by their partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations but possessed of every necessary accomplishment.

Id.

31. 2 *id.* at 41-44.

accepting Gorham's position. Thus, federal judges would be appointed by the president with the advice and consent of the Senate.³²

The Constitution surprisingly does say not a word about these judges' qualifications. Lay judges were common during the colonial period. At a time when formal law school education was just beginning and apprenticeship programs were uneven,³³ a statement of qualifications for federal judges would have appeared unwarranted and impossible to articulate. The founding fathers, however, apparently thought that by establishing an appropriate machinery for selection of judges, they would assure qualified judges.³⁴

The most divisive issue before the Convention in its debates over the judiciary was the creation of lower federal courts because it touched too closely the sensitive nerve of federalism. The drafters of the Constitution ultimately found this issue too difficult and merely handed it to the first Congress.

The debate over lower courts began with the simple proposal that the new judiciary should include "inferior tribunals to be chosen by the National Legislature."³⁵ On June 4, 1787, this proposition was approved,³⁶ but on the next day, John Rutledge reopened the question. He insisted that state courts could and should decide all cases at the trial level. Appeal to the Supreme Court would suffice to assure protection of federal rights and to assure uniform interpretation of federal law. He also argued creating lower federal courts would only burden the Constitution with unnecessary obstacles in its path to adoption by the states.³⁷ James Madison replied that lower federal courts "dispersed throughout the republic" could give final judgment in many cases and obviate the need for most appeals. Furthermore, he argued, appeals to the Supreme Court could not effectively solve the problem of "improper Verdicts in State tribunals obtained under the biased [*sic*] directions of a dependent Judge."³⁸ A remand for a new trial before the same biased judge and jury would be futile, and a new trial before the Supreme Court would require the expense of bringing witnesses all the way to the seat of government. Madison concluded that "An effective Judiciary establishment commensurate to the legislative authority, was essential. A government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move."³⁹

32. 2 *id.* at 538-39. See also U.S.CONST. art. II, § 2, cl. 2.

33. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3-4 (1983).

34. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 80-83.

35. 1 *id.* at 21.

36. 1 *id.* at 105.

37. 1 *id.* at 124.

38. 1 *id.*

39. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 124.

James Wilson quickly took up Madison's argument and insisted that at least admiralty jurisdiction belonged wholly within federal jurisdiction, since it concerned cases beyond the jurisdiction of any state. State courts, Wilson implied, should not be able to meddle with foreign disputes.⁴⁰ But Roger Sherman reminded the Convention of the expense of creating a full array of lower federal courts.⁴¹ When it came to a vote, a bare majority decided to omit mention of inferior federal courts.⁴²

Wilson and Madison immediately moved to adopt a compromise suggested by John Dickinson "that the National Legislature be empowered to institute inferior tribunals."⁴³ Pierce Butler, rightly anticipating the reception this proposal would receive from opponents of the Constitution, stated, "The people will not bear such innovations. The States will revolt at such encroachments."⁴⁴ Although the Convention approved the proposal of Wilson and Madison,⁴⁵ the issue was vigorously opposed.

After the great compromise on legislative representation, the Convention reconsidered the Wilson and Madison proposal to empower Congress to create lower federal courts. Butler again insisted that lower federal courts served no purpose since state courts could handle federal business.⁴⁶ Luther Martin objected that lower federal courts would create jealousy and hostility by interfering with the state courts.⁴⁷ Gorham apparently told the members of the Convention that something akin to lower federal courts already existed within the states to hear cases of piracies and maritime crimes. State courts, he claimed, had not objected. "Inferior tribunals are essential," Gorham insisted, "to render the authority of the Natl. Legislature effectual."⁴⁸ Edmund Randolph reminded the Convention that state courts could not be trusted to apply and interpret federal law leading to conflicting national and state policy.⁴⁹ Gouverneur Morris supported the proposal, and Roger

40. 1 *id.*

41. 1 *id.* at 125.

42. 1 *id.*

43. 1 *id.*

44. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 125.

45. 1 *id.*

46. 2 *id.* at 45.

47. 2 *id.* at 45-46. On an earlier occasion in the debates, Martin had insisted "that a national Judiciary extended into the States would be ineffectual, and would be viewed with a jealousy inconsistent with its usefulness." 1 *id.* at 341.

48. 2 *id.* at 46. Gorham's statement, if correctly reported, seems quite inaccurate. At the insistence of the Continental Congress, the states had created courts to hear cases of maritime captures of enemy vessels made during the Revolution. Appeals were allowed to a tribunal created by the Continental Congress. The Continental Congress, however, did not create any trial courts that functioned within the States with maritime jurisdiction. *See* BOURGUIGNON *supra* note 20, 41-138.

49. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 46.

Sherman likewise reluctantly supported it. Sherman hoped that state courts would be employed at least to the extent they could be used without impairing the national interest.⁵⁰ George Mason concluded the debate by observing that situations might arise in the future, unforeseeable by the Convention, that might make lower federal courts utterly essential.⁵¹ After this debate, the Convention adopted the Wilson-Madison proposal.

As a result of this debate, Article III of the Constitution in its final form reads, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁵² This debate over the creation of lower federal courts served merely as a rehearsal for a much fuller debate during the ratification debates and two years later in the First Congress. None of the objections disappeared; all the same arguments and more were raised. Establishing federal trial courts within each state constituted one of the greatest innovations of the new form of government, but also one of the greatest threats to the principle of federalism.

Defining the jurisdiction of the federal courts was a process of moving from the general to the specific. At the outset of the Convention the jurisdiction of the proposed national judiciary fell under five broadly worded categories: (1) maritime cases beyond the jurisdiction of any state,⁵³ (2) cases brought by foreigners or citizens of other states,⁵⁴ (3) cases for the collection of national revenue, (4) cases of the impeachment of national officials, and (5) "questions which may involve the national peace and harmony."⁵⁵ The final category could hardly have been stated more openendedly.

When this was first debated, for some reason, the Convention eliminated the categories of maritime cases and cases brought by foreigners or citizens of other states.⁵⁶ Perhaps these two specific categories were viewed as embraced in the broad language of "national peace and harmony." Edmund Randolph told the Convention that it was too difficult to determine the jurisdictional limits of the national judiciary. He indicated the general

50. 2 *id.*

51. 2 *id.* By the end of the Convention, Mason was opposed to the Constitution in general and to the creation of lower federal courts in particular. He objected, "The judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States: thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor." 2 *id.* at 638.

52. U.S. CONST. art. III, § 1.

53. "[A]ll piracies & felonies on the high seas, captures from an enemy." 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 22.

54. "[C]ases in which foreigners or citizens of other States applying to such jurisdictions may be interested." 1 *id.*

55. 1 *id.*

56. 1 *id.* at 231-32.

consensus, as he understood it, that the jurisdiction should embrace the principle of protecting “the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof.”⁵⁷ Randolph also thought a committee of detail could work out a statement. William Paterson proposed the more specific categories, but omitted mention of federal trial courts as well as the final, global grant of jurisdiction over cases touching the national peace and harmony. He mentioned cases of impeachment of federal officials, cases involving ambassadors, cases of capture of enemy vessels and piracies, cases in which foreigners have an interest under treaty provisions, and cases involving national statutes regulating trade or collecting revenue.⁵⁸

But when the Convention addressed the question again, it reverted to two broad categories of federal jurisdiction: “cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony.”⁵⁹ This general statement of jurisdiction was turned over to the Committee of Detail.⁶⁰ One has to be cautious when deciphering the notes of the Committee of Detail because they do not include any of the debates or arguments for changing the wording of the various drafts. The Committee reported to the Convention a specific list of areas for federal jurisdiction that were drawn from all the suggestions that had been made during the debates and a few that apparently the Committee itself added. The broad, general language of national peace and harmony had been replaced by a more precisely drafted list of jurisdictional categories.⁶¹ The Convention made a few alterations in the jurisdictional statement⁶² and then gave it to the Committee of Style for a final reworking.

57. 1 *id.* at 238.

58. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 244.

59. 2 *id.* at 39, 46.

60. 2 *id.* at 132-33.

61. 2 *id.* at 186. The Committee report gave the following boundaries to the jurisdiction.

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all other cases before mentioned, it shall be appellate, with such exceptions and under such regulation as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.

62. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 18, at 430-32, 437.

It is possibly this jurisdictional section of which Gouverneur Morris was thinking in 1814 when he said that, in working on the final draft of the Constitution, he had blurred over differences and used his own choice of phrases to express the judicial power in a manner acceptable to the full Convention.⁶³ The final statement of jurisdiction contains clarity where Morris and the committee had received ambiguity, and it provides a more elegant expression than the earlier draft.⁶⁴

This summary suggests the chief issues concerning the judiciary that the Convention debated. The publication of the Constitution on September 17, 1787, only set the stage for a broader and fuller discussion of the judiciary during the ratification debates and in the first Congress during the debates on the Judiciary Act of 1789.

III. DEBATE OVER THE JUDICIARY DURING RATIFICATION

At Jefferson's inauguration in 1801, he somewhat implausibly proclaimed, "We are all republicans—we are all federalists." If Jefferson's statement ever was true, it was in 1787 and 1788 during the extensive debates on the ratification of the Constitution. The participants often drew their artillery from the same arsenal. At times many of them employed the rhetoric of federalism as well as the rhetoric of republicanism.

The labels that were attached to the participants in the debate, federalists and antifederalists, highlight the importance of federalism. The so-called antifederalists thought of themselves as the true federalists whose name had been stolen by their opponents. The opponents of the new Constitution believed in some form of a federal league similar to the loose union of states under the Articles of Confederation. The antifederalists understood federalism to mean that the states, as equal and independent sovereignties, had entered into a limited compact. But the states remained the primary focal point of political power. The antifederalists opposed the Constitution largely because they feared the newly created national government would swallow the

63. *See supra* text accompanying note 18.

64. The final version of the Constitution reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III § 2, cl. 1.

states.⁶⁵ The antifederalists, however, often undermined their own position by acknowledging the need for more of a union than that under the Articles of Confederation. Some effective, national or central government was necessary, but they insisted that the sovereignty of the states must remain inviolate. The tasks of government might be divided between a national government and the state governments, but the states must retain supremacy.⁶⁶ The antifederalists, therefore, could with candor claim to be federalists.

The proponents of the Constitution, the federalists, did not regard themselves as illegitimate children parading under someone else's banner. Before the drafting of the Constitution, those who had tried to make the feeble Articles of Confederation more effective were called federal men. Thus, prior to the Constitution, federal and antifederal had already begun to mean either a willingness or unwillingness to strengthen the ties under the Articles of Confederation binding the states into some union.⁶⁷

During the ratification debates, the federalists agreed with the antifederalists that the powers of government must be divided. Only specified powers, some federalists claimed, would be entrusted to the new national government with the remaining powers entrusted to the states. Within the national government's limited sphere, the federalist viewed it as complete, but they argued the states could act as independent entities within their particular spheres.⁶⁸ James Madison attempted to show the new Constitution remained faithful to republicanism because the constitution derived its powers from the people. He conceded that certain features of the new government made it national, but in most aspects, it was federal. Ultimately he concluded that the new government was a composition of national and federal features.⁶⁹ The federalists usually implied the national government must be the primary authority.

The antifederalists retorted that sovereignty could not be divided; either the national or the state governments must be sovereign. Divided sovereignty made no sense. The federalists' rejoinder, most clearly formulated by James

65. See 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 10.

66. See *id.* at 32-33. See SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 237-43 (1993).

67. 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 9.

68. *Id.* at 32.

69. 1 THE FEDERALIST No. 39, 250-57 (James Madison) (Jacob E. Cooke ed. 1961). Madison summarized this essay by stating,

The proposed Constitution, therefore, is, in strictness neither a national nor a federal Constitution; but a composition of both . . . [i]n the sources from which the ordinary powers of the Government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

Id. at 257.

Wilson, deftly sidestepped the dilemma posed by the antifederalists. The supreme power did not rest with either the states or the new national government. Sovereignty resided in the people.⁷⁰ Thus, the people could grant specified, limited power to the national government and give the remaining powers to the states.⁷¹ Thus the federalists, by cautiously avoiding the issue of divided sovereignty, could continue to defend their vision of a federal government with powers divided between the state and national governments.

While opponents and proponents of the Constitution hurled their barbs at each others' views of federalism, they also fought over the true meaning of republicanism. For antifederalists, republics had to be small with a homogeneous population. A small republic made up of like-minded individuals with similar status and values would best assure the liberty of the people, because opposing factions would not arise and representatives could truly express the interests of the voters. It was absurd, the antifederalists contended, to expect similar standards of morals, habits, and laws for the vastly different states stretching from Georgia to Massachusetts.⁷²

The federalists' initial reply was that such societal homogeneity did not exist even within the existing states. For example, even in tiny Rhode Island distinctions among the citizens existed. In any state, there would always be divergent interests of the rich and the poor, of creditors and debtors, of those with land and those with business investments.⁷³

James Madison carried the federalist reply much further. He turned the traditional republican argument inside out in his essay in Federalist No. 10. He showed that small republics are dangerous precisely because the majority can become a faction and damage the interests of minorities. Madison obviously had before his mind the excesses he had observed in the legislative majorities of the state governments created after the Revolution. Homogeneity, so basic to the usual republican vision, became in Madison's argument a dangerous phantom. Some minority interests could be threatened by the majority faction precisely to the degree the faction faithfully represented the views and values of most members of society. The answer, Madison insisted, lay in an extended republic like that created in the new federal union. By assuring a greater variety of interests and political views, the new Constitution guaranteed no faction could easily become a majority able to invade the rights of minorities. Representatives of the people, the very essence of republican government in Madison's view, could stand above the various differences and

70. WOOD, *supra* note 5, at 530.

71. *Id.* at 530-31. See also 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 34.

72. 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 15-23, WOOD, *supra* note 5, at 499-500. See also, THE ANTIFEDERALISTS, Cecelia M. Kenyon, ed. xxxix-xli (Indianapolis, 1966).

73. WOOD, *supra* note 5, at 502.

factions of the people who elected them and seek the true common good of the republic. For Madison, the extended republic became possible because of the joining together of republicanism and the federal principle.⁷⁴

When the antifederalists focused their attention on the judicial power, they saved some of their most vehement objections for aspects of the judicial power that had hardly merited debate at the Philadelphia Convention. The sacred right of trial by jury, which had barely been discussed at the Convention, became a major rallying point for the antifederalists. For them the popular control of the judicial process at the local level must be fully guaranteed in any republican government. Juries drawn from the body of the people must have the power to render general verdicts in civil or criminal cases, and their factual determinations must not be disturbed by distant judges sitting on appeal. By sitting on the local juries, fellow citizens could effectively protect the rights of others against abusive governmental powers.⁷⁵ The right of trial by jury, one antifederalist wrote, “‘preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens.’”⁷⁶ Another

74. THE FEDERALIST, No. 10, *supra* note 69, at 56-65. A far more adequate and nuanced discussion of Madison's essay can be found in Peter S. Onuf, *James Madison's Extended Republic*, 21 TEX. TECH. L. REV. 2375 (1990). See also BEER, *supra* note 66, at 255-64.

For the influence of Locke on Madison's Federalist essay No. 10, see Isaac Kramnick, *The Discourse of Politics in 1787: The Constitution and Its Critics on Individualism, Community, and the State*, in TO FORM A MORE PERFECT UNION, *supra* note 16, at 166, 178-83.

75. 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 1 at 18-19; THE ANTIFEDERALISTS, *supra* note 72, at lxx-lxxiii. Luther Martin's objections were typical:

And in all those cases where the general government has jurisdiction in civil questions, the proposed constitution not only makes no provision for the trial by jury in the first instance, but by its appellate jurisdiction absolutely takes away that inestimable privilege, since it expressly declares the supreme court shall have appellate jurisdiction both as to law and fact. Should therefore, a jury be adopted in the inferior court, it would only be a needless expense, since on an appeal the determination of that jury, even on questions of fact, however honest and upright, is to be of no possible effect—the supreme court is to take up all questions of fact—to examine the evidence relative thereto—to decide upon them in the same manner as if they had never been tried by a jury—nor is trial by jury secured in criminal cases; it is true, that in the first instance, in the inferior court the trial is to be by jury, in this and in this only, is the difference between criminal and civil cases; but, Sir, the appellate jurisdiction extends, as I have observed, to cases criminal as well as to civil, and on the appeal the court is to decide not only on the law but on the fact, if, therefore, even in criminal cases the general government is not satisfied with the verdict of the jury, its officer may remove the prosecution to the supreme court, and there the verdict of the jury is to be of no effect, but the judges of this court are to decide upon the fact as well as the law, the same as in civil cases.

LUTHER MARTIN, MR. MARTIN'S INFORMATION TO THE GENERAL ASSEMBLY OF THE STATE OF MARYLAND (1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 27, 70 (emphasis omitted.)

76. LETTERS OF CENTINEL, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 143, 149

antifederalist referred to juries as “the democratic branch of the judiciary power”⁷⁷ Thus, the antifederalists saw republican values in the preservation of jury trials.

The federalists ultimately could not withstand these arguments and pledged that jury trials and their factual determinations would be fully protected in a Bill of Rights to be prepared by the first Congress and submitted to the states for ratification.⁷⁸ (The complex issues of the drafting of the Bill of Rights, though clearly intertwined with the Judiciary Act, are beyond the scope of this Article. Since several of the first eight amendments deal with judicial processes, there obviously was an interrelationship between the drafting of the Judiciary Act of 1789 and the more or less simultaneous drafting of the Bill of Rights.)⁷⁹

During the ratification debates little mention was made of the Constitution’s guarantee of judicial independence for federal judges.⁸⁰ The antifeder-

(quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND III 379-80). Another antifederalist expressed these Republican views:

[T]he jury trial brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings. This, and the democratic branch in the legislature, as was formerly observed, are the means by which the people are let into the knowledge of public affairs—are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them.

THE FEDERAL FARMER, LETTERS FROM THE FEDERAL FARMER, XV (1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 315, 320.

77. JOHN F. MERCER, ESSAYS BY A FARMER, IV (1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 36, 38 (emphasis omitted).

78. Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 19, at 305, 306-07. See also, Michael A. Gillespie, *Massachusetts: Creating Consensus*, in RATIFYING THE CONSTITUTION, 138, 152 (Michael A. Gillespie & Michael Lienesch eds., 1989); Jean Yarbrough, *New Hampshire Puritanism and the Moral Foundations of America*, in *id.* at 235, 250-55; Lance Banning, *Virginia: Sectionalism and the General Good*, in *id.* 261, 283-87; Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, in *id.* at 300, 325-28.

79. The records we have of contemporary commentary do not connect the drafting of the Judiciary Act, primarily in the Senate, with the roughly simultaneous drafting of the Bill of Rights, primarily in the House. The drafters of both houses must have been aware of what was happening with the other. Maeva Marcus and Natalie Wesler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?* in ORIGINS OF THE FEDERAL JUDICIARY—ESSAYS ON THE JUDICIARY ACT OF 1789 13, 27 (Maeva Marcus ed. 1992). See also Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1181-99 (1991); GOEBEL, *supra* note 19, at 413-508 (treating the Bill of Rights and the Judiciary Act sequentially, without any clear suggestions of their interrelationship).

80. One antifederalist objected to the constitutional guarantee of no diminution in the salary of federal judges as “quite a novelty in the affairs of government.” THE FEDERAL FARMER, LETTERS FROM THE FEDERAL FARMER XV (1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 315, 319. He foresaw times of inflation, when judicial salaries would properly be increased, followed by times of falling prices, when judicial salaries “with equal reason and

alist who most profoundly and perceptively commented on the proposed federal judiciary, who signed himself Brutus, expressed the fear that the judges were made too independent, not only independent of the people and of the legislature, but “[m]en placed in this situation will generally soon feel themselves independent of heaven itself.”⁸¹ Thus, he objected to placing federal judges beyond all control. Under the Constitution, he sensed the danger of judicial supremacy even over the legislature. “[T]here is no power above them that can control their decisions, or correct their errors.”⁸²

The Brutus essays had been published in New York and could hardly have been ignored by Alexander Hamilton who, along with John Jay and James Madison, was also in New York writing as the federalist Publius. Hamilton perhaps was replying to Brutus in asserting that the judiciary would “always be the least dangerous to the political rights of the Constitution”⁸³ Hamilton insisted the judiciary could never successfully attack the legislative or executive branches, and “all possible care is requisite to enable it to defend itself against their attacks.”⁸⁴ Constitutionally secure judicial independence was therefore appropriate.

The antifederalists objected to the expense of the judicial establishment from two different points of view. Some saw the judiciary as an excessive additional cost of the new government. Judicial salaries “must add a very considerable sum to the expense of government.”⁸⁵ More frequently antifederalists objected to the expense to litigants from cases argued in distant federal courts. They feared “the intolerable delay, the enormous expenses and

propriety [should] be decreased” 2 *Id.*

81. BRUTUS, ESSAYS OF BRUTUS (1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, 358, 438.

82. 2 *id.* at 439.

83. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 69, at 522.

84. *Id.*

85. CORNELIUS, ESSAY BY CORNELIUS (1787), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 139, 144. See also LUTHER MARTIN, *supra* note 75, at 57. Hamilton replied that the expense of maintaining all three branches of the new government was far less than the expense of national defense. See THE FEDERALIST No. 34 (Alexander Hamilton), *supra* note 69, at 212-13.

infinite vexation to which the people of this country will be exposed”⁸⁶ by cases brought in federal courts.

The antifederalists repeatedly and forcefully pointed to the dangers of allowing lower federal courts to sit within the states. George Mason, who participated in the Constitutional Convention but refused to sign its final product, objected that the federal judiciary would “absorb and destroy the Judiciaries of the several States; thereby rendering Law . . . tedious[,] intricate and expensive, and Justice . . . unattainable”⁸⁷ Another antifederalist found federal courts “a very invidious jurisdiction, implying an improper distrust of the impartiality and justice of the tribunals of the states.”⁸⁸ A third antifederalist viewed the Supreme Court as an “imperial jurisdiction, clad in a dread array, and spreading its wide domain into all parts of the continent.”⁸⁹ He anticipated that the federal judiciary would “swallow up all other courts of judicature.”⁹⁰

The author Brutus, with his usual penetrating analysis, predicted that:

86. SAMUEL BRYAN, THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS (1787), in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 146, 160. Another critic observed:

The tradesman, mechanic, and farmer, would by this [judicial] establishment, be exposed to every imposition from the wealthy; as the former could not spare the time, and defray the expense of prosecuting their legal claims, distant from home. This mode also gives every advantage to British and other foreign creditors to embarrass the American merchant by appeals to this Court.

CANDIDUS, ESSAYS BY CANDIDUS I (1787), in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 125, 129.

87. GEORGE MASON, OBJECTIONS TO THE CONSTITUTION OF GOVERNMENT FORMED BY THE CONVENTION (1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 11, 12.

88. LETTERS OF CENTINEL, *supra* note 76, at 148. Centinel also observed,

The objects of [federal] jurisdiction recited above, are so numerous, and the shades of distinction between civil causes are oftentimes so slight, that it is more than probable that the state judicatories would be wholly superseded; for in contests about jurisdiction, the federal court, as the most powerful, would ever prevail.

2 *id.* at 140.

89. THE IMPARTIAL EXAMINER, ESSAYS BY THE IMPARTIAL EXAMINER (1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 173, 182.

90. 5 *id.* The dissenting delegates to the Pennsylvania Convention who supported this view stated that:

The judicial powers vested in Congress are also so various and extensive, that by legal ingenuity they may be extended to every case, and thus absorb the state judiciaries, and when we consider the decisive influence that a general judiciary would have over the civil polity of the several states, we do not hesitate to pronounce that this power, unaided by the legislative, would effect a consolidation of the states under one government.

SAMUEL BRYAN, *supra* note 86, at 156-57.

One inferior court must be established, I presume, in each state, at least, with the necessary executive officers appendant thereto. It is easy to see, that in the common course of things, these courts will eclipse the dignity, and take away from the respectability, of the state courts. These courts will be, in themselves, totally independent of the states, deriving their authority from the United States, and receiving from them fixed salaries; and in the course of human events it is to be expected, that they will swallow up all the powers of the courts in the respective states.⁹¹

Brutus also most forcefully expressed the antifederalist apprehension that federal courts, with their equitable power, would interpret the already ambiguous text of the Constitution according to its spirit and purpose as stated in the preamble. These courts, he feared, would determine the validity of state laws and destroy states' rights. The states would thereby become utterly insignificant and not worth continuing.⁹²

Brutus insisted nothing was wrong with state courts. "State courts always administer[ed] justice with promptitude and impartiality according to the laws of the land."⁹³ Although Brutus admitted some states had created paper money and authorized debtors to discharge their debts with the depreciated currency, he insisted these evils were not caused by any flaw in the state courts. Brutus, however, argued the state courts had generally given a narrow interpretation to these legal tender laws.⁹⁴ State courts, therefore, should be trusted to bring justice to every person's door and to decide fairly all civil cases, even those involving citizens from other states or foreign nations.⁹⁵

Brutus clearly expressed the underlying fear of the antifederalists, that the new government was "calculated to abolish entirely the state governments, and to melt down the states into one entire government . . ."⁹⁶ Furthermore, Brutus believed the new federal judiciary would be the chief instrument of the states' destruction. "Nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."⁹⁷

Despite the cogent objections of Brutus and other antifederalists, the state conventions ultimately ratified the Constitution. We often forget today how plausible the argument was for using state courts as the only trial courts, with only appeals to a Supreme Court to assure uniform application of federal law.

91. BRUTUS, *supra* note 81, at 366-67.

92. 2 *id.* at 420-28.

93. 2 *id.* at 435.

94. 2 *id.* at 435-46.

95. 2 *id.* at 436-37.

96. BRUTUS, *supra* note 81, at 441.

97. 2 *id.*

Lower federal courts were, in the eyes of many, problematical, and a nation could have been created without them.

When the president was selected and Congress was elected, it became apparent that the Constitution itself provided for the creation of the executive and legislative powers, with the full scope of authority vested in these two branches by Articles I and II of the Constitution. The judiciary, however, could not be born without the congressional midwife. Without action by Congress, the judicial power would remain mere empty words in Article III. The cogent and politically popular arguments of many antifederalists could hardly be forgotten as the Senate considered the drafting of the Judiciary Act.

IV. THE JUDICIARY ACT OF 1789

Previous studies of the Judiciary Act of 1789 have provided valuable, original insights from a limited range of documents.⁹⁸ Thanks to the splendid editorial work of Maeva Marcus and her staff, we now have access to a vastly broader array of documents, correspondence, and newspaper articles on the debates over the drafting of the Judiciary Act of 1789.⁹⁹ This treasure trove of information will provide whatever meat there is in what follows.

On Tuesday, April 7, 1789, the day after the first Senate had a quorum to organize itself, it "ORDERED, That Mr. Ellsworth, Mr. Paterson, Mr. Maclay, Mr. Strong, Mr. Lee, Mr. Basset, Mr. Few, and Mr. Wingate comprise a Committee, to bring in a bill for organizing the JUDICIARY of the United States."¹⁰⁰ One senator was appointed from each of the ten states that had at that time ratified the Constitution.¹⁰¹ Oliver Ellsworth, William Paterson, and Caleb Strong provided the leadership on the committee, presumably because of their extensive legal experience. These three, plus Richard Bassett and William Few, had participated in the debates at the Philadelphia Convention.¹⁰² Ellsworth soon stood out as the leading architect of the judiciary.¹⁰³ By the end of May a subcommittee, consisting of

98. See, e.g., WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Wythe Holt & L.H. LaRue eds., (1990); William R. Casto, *The First Congress's Understanding of its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101 (1985); Holt, *supra* note 17; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

99. 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES, (Maeva Marcus, et al eds., (1992) [hereinafter DOCUMENTARY HISTORY].

100. SENATE LEGISLATIVE JOURNAL 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1791, 11 (1972). On April 13, Mr. Carroll and Mr. Izard were added to the committee. 1 *id.* at 14.

101. 4 DOCUMENTARY HISTORY, *supra* note 99, at 22.

102. 4 *id.* at 22 n.5.

103. A committee member wrote, "Ellsworth seems to be the leading projector, who is a very

Ellsworth, Paterson and Strong and perhaps others had formulated a fairly detailed draft of the proposed legislation. However, debate in the full committee and in the Senate was delayed by the press of other business until June 12, 1789.¹⁰⁴ Unfortunately, the Senate journal gives little insight into these debates.

When the draft bill was printed, many members of both houses of Congress sent copies or summaries to friends, mostly lawyers, for comments. The dozens of letters received in reply, like a modern committee hearing, raised numerous objections to and questions about many aspects of the bill. This correspondence, together with the various drafts of each section of the bill and some other forms of commentary, provide the illuminating material assembled by Maeva Marcus and her staff.

A. The Anatomy of the Judiciary Act

The basic skeletal outline of the final Act remained the same from the initial draft. An early sketch shows the committee from the beginning sought to create a stripped-down federal judicial system that was politically acceptable rather than one enjoying the full scope of power contained in Article III. The antifederalists' harsh criticism still rang clearly in the committee's ears. Federalism would remain the basic underlying explanation of the most important aspects of the Senate bill. Article III provided a ceiling rather than a floor. It reminded the committee of the outer limits of judicial power but did not, in their minds, compel them to grant the judiciary all the authority potentially contained in the constitutional judicial power.¹⁰⁵

Before the bill came before the full committee, Ellsworth wrote to a fellow member of the Connecticut bar and described the basic elements that,

sensible man & will do very well if he is not too much attached to the forms of law he has long been [in] the habits of." Letter from Paine Wingate to Timothy Pickering (April 29, 1789), *in* 4 DOCUMENTARY HISTORY, *supra* note 99, at 382. Another committee member took a more negative view of Ellsworth's leading role. He wrote "[T]his Vile Bill is a child of [Ellsworth's], and he defends it with the Care of a parent. [Ev]en with wrath and anger. [H]e kindled as he always does When it was meddled with" William Maclay Diary Entry (June 29, 1789), *in id.* at 427.

104. 4 DOCUMENTARY HISTORY, *supra* note 99, at 23.

105. This important conclusion will emerge from the discussion below. See also, Marcus & Wexler, *supra* note 79, at 13-16.

Akhil Amar has provided appealing and logically coherent arguments concerning the relationship between the precise language of Article III and the various key sections of the Judiciary Act. Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). From my reading of the contemporary sources, however, I have the impression that the participants in the debate over the Judiciary Act were far more concerned with finding an acceptable compromise to the tensions of federalism than with implementing the exact language of Article III.

with some modifications, would ultimately be in the Judiciary Act.¹⁰⁶ Ellsworth wrote that the bill allowed for one Supreme Court with six members. The Court would hold two sessions each year near the seat of government. The bill also allowed for a federal district court with one judge in each state. The district court's jurisdiction included admiralty cases, lesser criminal offenses, and a few other types of cases to be discussed below. The judiciary would also sit in circuit courts that would hear cases in the three circuits into which the country would be divided. This circuit court, the most original creation of the committee, in part expressed the unwillingness of the committee even to propose a strong district court with broad jurisdiction in each state. The Circuit Court would consist of two Supreme Court judges, literally riding the circuit, and the district judge of the district where they were sitting. This circuit court would have some appellate jurisdiction over the district courts, making it a traveling miniature Supreme Court. The circuit court would also have original jurisdiction over all federal crimes, over cases between foreign parties and citizens, or between citizens of different states. Thus the circuit court, with greater prestige than the district courts, would bring the federal judicial power into all of the states. The Senate plan included a \$500 jurisdictional minimum for the circuit court's diversity jurisdiction, thus leaving most cases in state courts.¹⁰⁷ Appeals from the circuit courts to the Supreme Court could be granted on legal issues only, with a jurisdictional amount of at least \$2000. The Circuit Court would thus be effectively a traveling mini-Supreme Court, the court of last resort for most cases within its jurisdiction.

The three-tiered structure of Supreme Court, circuit courts and district courts remained intact throughout the debates of the coming months.

Before the House debate over the Judiciary Act was completed, Ellsworth, its principal architect, expressed in another letter his rationale for adopting various compromises in the bill. Because of Ellsworth's influence on the drafting of the bill, his letter merits a lengthy quotation. Ellsworth wrote:

To annex to State Courts jurisdictions which they had not before, as of admiralty cases, & perhaps of offenses against the United States, would be constituting the Judges of them, *protanto* [to that extent], federal Judges, & of course they would continue such during good behavior & on fixed salaries, which in many cases, would illy comport with their present tenures of office. Besides if the State Courts as such could take cognizance of those offenses, it might not be safe for the generall government to put the trial & punishment of them entirely out of its own hands. One federal Judge at least, resident in each State, appears unavoidable. And

106. Letter from Oliver Ellsworth to Richard Law, April 30, 1789, DOCUMENTARY HISTORY, *supra* 100, at 382.

107. See Holt, *supra* note 17, at 1488 n.234.

without creating any more, or much enhancing the expense, there may be circuit courts, which would give system to the department, uniformity to the proceedings, settle many cases in the States that would otherwise go to the Supreme Court, & provide for the higher grade of offenses. Without this arrangement there must be many appeals or writs of error from the supreme courts of the States, which by placing them in a Subordinate situation [sic], & Subjecting their decisions to frequent reversals, would probably more hurt their feelings & their influence, than to divide the ground with them at first & leave it optional with the parties entitled to federal Jurisdiction, where the causes are of considerable magnitude to take their remedy in which line of courts they pleased.¹⁰⁸

In this letter, Ellsworth explained that state courts should not sit as federal trial courts because the state courts lack the judicial independence required by Article III, have not had experience trying admiralty cases, and should not be entrusted with the exclusive power of trying federal criminal cases. Thus, he concluded with apparent reluctance that one federal judge must sit in each state to constitute the federal district court. He viewed circuit courts as the final federal court for most cases within federal jurisdiction. The circuit courts allowed litigants to have certain types of cases tried in a federal court without the possibility of an appeal to the distant Supreme Court. Ellsworth believed too many appeals to the Supreme Court from state courts would be undesirable and offensive to state sensitivities.

The message of federalism, the need to maintain the proper federal balance between state and federal courts, echoes throughout Ellsworth's second letter to Law. Neither letter mentions a word about the Article III grant of federal judicial power over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"¹⁰⁹ What happened to this important federal question jurisdiction will be one of the principal issues discussed below.

B. The Physiology of the Federal Judiciary

The drafters of the Judiciary Act knew they had to breathe life into the bare bones of the new judiciary; they had to spell out the processes and procedures, the powers and remedies, and the personnel and sessions. It should be obvious that here, more than on any other issue, the lawyers on the committee would supply the leadership for the Senate as it tried to make the federal judiciary a functioning entity. On these issues the lawyers gained little

108. Letter from Oliver Ellsworth to Richard Law (August 4, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 495.

109. U.S.CONST. art. I, § 2 cl. 1.

guidance from the rhetoric of republicanism and they obviously felt constrained on many issues by the different states' judicial practices. Thus, federalism played a key role. But here the intellectual frame of reference for the lawyers on the committee was often the common law as they had come to know it and practice it. By common law, I mean primarily the procedural rules that enabled the courts to receive and hear the cases that came before them.

One member of the committee, William Maclay, recorded in his diary how the lawyers dominated the committee. The judiciary bill, Maclay wrote, "was fabricated by a knot of Lawyers who Join hue and cry to run down any Person, who will venture to say one Word about it."¹¹⁰ A newspaper article written after the Act's completion was also critical of the lawyers' role in drafting the Act. "The adoption of this Judiciary system, therefore, plainly proves, that the *present Members* have fully provided for their *own profession*; and established an inexhaustible source of business for themselves, and posterity."¹¹¹

A moderate antifederalist on the committee, Richard Henry Lee, perhaps was more willing to accept the basic terms of the bill after receiving a letter from a judge friend who generally supported the draft bill. The judge found the bill "as little exceptionable as possible" and concluded that a system of procedural rules for the federal courts was appropriate.¹¹²

With the leadership of the lawyers on the committee, the drafters wrote into the bill the dates and places for the circuit courts to hold their sessions.¹¹³ Some towns hoping to benefit by being selected as the place where

110. William Maclay Diary Entry (July 2, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 439. Two days later he added, "The Gentlemen of the bar are so numerous in . . . our house that Wh[en they] unite, they are irresistible[.]" Letter from William Maclay (July 4, 1789), in *id.*, at 449. A few days later, however, he was mollified when some prominent lawyers expressed their approval of the bill. "I own The approbation of so many Men of Character for abilities has lessened my dislike of it . . ." William Maclay Diary Entry (July 7-8, 1789), in *id.*, at 454.

111. INDEPENDENT CHRONICLE FEDERAL GOVERNMENT, (Sept. 16, 1790), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 538.

112. Letter from Richard Parker to Richard Henry Lee (July 6, 1789) in *id.*, at 452. Parker concluded the letter with the observation, "Perhaps upon comparing the Laws of the several States respecting the practice of the Courts a judicious System of Rules may be selected and I really think Rules are necessary and ought to be in the Law establishing each Court." 4 *id.* at 453.

On Lee's earlier role as an anti-federalist, see Letter from Richard Henry Lee to Governor Edmund Randolph, (Oct. 16, 1787), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 1, at 112-18. Lee, during the period when the Judiciary Act was being debated, wrote to Patrick Henry generally approving the terms of the bill. Letter from Oliver Ellsworth to Oliver Wolcott, Sr. (May 30, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 399-400, n.1.

113. Judiciary Act of 1789 § 5, in 4 DOCUMENTARY HISTORY, *supra* note 99, at 46 (originally enacted at 1 Stat. 73, 75).

a circuit court would sit lobbied for selection.¹¹⁴ Small, practical details did not escape the committee's notice. It established the rules for adjourning the Supreme Court or the circuit courts when the courts lacked a quorum of judges.¹¹⁵ The committee also provided the essential personnel, clerks, and marshals for the new courts.¹¹⁶ The final Act responded to strong local demands by determining that the future states of Maine and Kentucky would have special arrangements for their circuit courts.¹¹⁷

Of course, the most important decisions concerning the federal judiciary involved the jurisdictional boundaries of the Supreme Court, the circuit courts, and the district courts. This will be discussed more fully below. Precise rules and a jurisdictional amount in controversy were stated for the removal of a diversity case from a state court to a circuit court.¹¹⁸

The common-law experience of the lawyers on the committee is apparent in the grant to federal courts of the power to issue all writs that were "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."¹¹⁹ The bill included an essential element for discovery by allowing federal courts to require the parties to produce books or records for trial.¹²⁰ But the committee departed from the traditional British practice of using depositions and interrogatories in admiralty and chancery courts by requiring the witnesses to testify orally in open court.¹²¹ The committee also altered traditional admiralty and equity practice by requiring that the facts of the case be stated as part of the record.¹²² Because admiralty and equity cases were strange to the practice of many common-law lawyers throughout the country, the Judiciary Act allowed these cases within the federal jurisdiction only after they took on some of the familiar appearances of common law cases.

The committee had to overcome considerable opposition to assure that federal circuit courts could sit as courts of chancery, a jurisdiction unknown in many of the states. Ultimately the bill merely stated that federal courts

114. Letter from George Phillips to Benjamin Huntington, Jonathan Sturges, and Jonathan Trumbull (July 25, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 477-79. See also *id.* at 46.

115. Judiciary Act of 1789 § 6, *supra* note 113, at 48.

116. Judiciary Act of 1789 §§ 7, 27, *supra* note 113, at 50, 88.

117. Judiciary Act of 1789 § 10, *supra* note 113, at 57-58.

118. Judiciary Act of 1789 § 12, *supra* note 113, at 63-64.

119. Judiciary Act of 1789 § 14, *supra* note 113, at 71. The committee insisted, however, that habeas corpus would not be available in federal courts for prisoners in state custody, an obvious bow to the political realities of federalism. 4 *id.*

120. Judiciary Act of 1789 § 15, *supra* note 113, at 72.

121. Judiciary Act of 1789 § 30, *supra* note 113, at 95-96. Where a witness might be unavailable to give testimony at trial, the committee provided for depositions, after notice to the adverse party who would have the opportunity to cross-examine the witness. 4 *id.*

122. Judiciary Act of 1789 § 19, *supra* note 113, at 76.

could not hear “suits in equity . . . in any case where plain, adequate and complete remedy may be had at law.”¹²³ In his diary, William Maclay recorded the hostility toward chancery. In the debate on this section, he assured the Senate that most Americans abhorred equity jurisdiction. He suggested that chancery existed to purchase delay and to make the outcome of trials turn on the depth of the parties’ purses.¹²⁴ Equity jurisdiction, therefore, was tolerated in the Judiciary Act, but only as a last resort when a common-law suit could not provide a remedy.

The lawyers on the committee showed their awareness of common-law practice throughout the Act. Careful of small details as well as large, they wrote into the bill the power for federal courts to grant new trials, to administer oaths, to punish for contempt, and to establish “all necessary rules for the orderly conducting [of] business”¹²⁵ The circuit courts were empowered to grant stays of judgment for forty-two days to allow the party to petition for a new trial.¹²⁶

The committee also prescribed the jurisdictional amount-in-controversy minimums for different types of cases, and it specified the penalty for a plaintiff who won a judgment that was less than the required amount.¹²⁷ The Act determined that, except for extraordinary cases, the circuit court would be the final appeal within the federal system. To appeal a case to the Supreme Court, one had to meet the large jurisdictional amount of \$2000.¹²⁸ The committee also sought to limit review by either the circuit court or the Supreme Court only to serious legal issues. The Act forbade the use of a writ of error for technical failures (pleas in abatement except to jurisdiction) or for errors of fact.¹²⁹ The Act, borrowing from an English statute, made the survival of a suit possible after the death of a party.¹³⁰

123. Judiciary Act of 1789 § 16, *supra* note 113, at 73.

124. Comparing equity with the common law courts, where juries determined the facts, Maclay concluded that “every thing after the Verdict of a Jury was a mere Trap to catch fees.” William Maclay Diary Entry (July 13, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 463. When equity was discussed, it appears that William Paterson spoke against equity jurisdiction. His notes are quite elliptical and difficult to interpret. William Paterson’s Notes on Judiciary Bill Debate in *id.*, at 429-30 (June 29-30, 1789), and William Maclay Diary Entry (June 29, 1789), in *id.* at 427-28.

125. Section 17, *id.* 74-75.

126. Judiciary Act of 1789 § 18, *supra* note 113, at 75-76.

127. Judiciary Act of 1789, §§ 20-22, *supra* note 113, at 77-80.

128. Judiciary Act of 1789 § 22, *supra* note 113, at 79-80.

129. 4 DOCUMENTARY HISTORY, *supra* note 99, at 80. The final Act also provided federal courts could hear the merits of a case despite technically defective pleadings. The parties were allowed to amend the pleadings. Judiciary Act of 1789 § 32, *supra* note 113, at 100-01.

130. Judiciary Act of 1789 § 31, *supra* note 113, at 99.

Bail in criminal cases became a controversial issue. The Act, after some debate, allowed state and federal judges to issue arrest warrants and to grant bail in non-capital cases.¹³¹

One of the most controversial issues confronting the drafters of the Judiciary Act was the method for selecting juries in criminal cases. In the final version of the Act, jurors for capital cases in federal courts had to be selected from the county where the crime had been committed. The jurors would be selected either by lot or according to the selection process used by the state where the trial was held.¹³² In response to the outcry during the ratification debates, the Senate committee assured critics that common-law civil trials would be by jury, and the federal circuit courts or the Supreme Court would review on appeal only the legal issues of the case.¹³³

The same committee that drafted the Judiciary Act also wrote the Process Act of 1789, a companion bill that was enacted five days after the Judiciary Act. The original plan appears to have been to create a set of uniform rules for bringing suits in federal court. For any judge or lawyer with extensive legal practice, the effort of the committee to spell out some rules of practice for initiating a law suit must have seemed essential. But common law practice rules varied greatly among the states, and ultimately the hope of uniform rules proved unrealistic. It took Congress nearly a century and a half before it established uniform federal rules of civil procedure.¹³⁴ The first Congress, influenced by the procedural differences among the states and the apparent fear of unfamiliar procedures in the new federal courts, finally determined that state rules of process and procedure would have to be followed in any federal court sitting as a court of common law in that state. Process in admiralty and chancery suits would be “according to the course of the civil law,” whatever that might have been intended to mean to common-law lawyers of the day.¹³⁵ At least it meant there would be no jury trials. This procedural balkanization,

131. Judiciary Act of 1789 § 33, *supra* note 113, at 102-03.

132. Judiciary Act of 1789 § 29, *supra* note 113, at 91-92.

133. Judiciary Act of 1789 §§ 9, 12, 22, 25, *supra* note 113, at 53-54, 63-64, 69, 79-80, 85-86.

134. The history of the establishment of uniform federal rules of civil procedure is briefly sketched in CHARLES A. WRIGHT, LAW OF FEDERAL COURTS, 423-28 (5th ed. 1994).

135. The Process Act of 1789, in 4 DOCUMENTARY HISTORY, *supra* note 99, at 108-21 (originally enacted at 1 Stat. 93). The Process Act of 1789 and its 1792 amendments have been most fully discussed in GOEBEL, *supra* note 19, at 509-551.

The lawyers of America in the 1780s had precious little idea how admiralty courts functioned in England and undoubtedly even less understanding of admiralty practice on the Continent. English admiralty reports were not published until the late 1790s, and therefore, American lawyers had few means of grasping “the course of the civil law.” One prominent lawyer of the day, who had served as an admiralty judge during the Revolutionary War and would soon be appointed as a federal district judge, Francis Hopkinson, pointed out in 1785 that American lawyers did not even know the difference between prize and instance practice in English admiralty courts. *Dean et al. v. John Angus*, *Bee Reports*, 369, 372 (1785).

created by the first Congress, continued in modified forms until 1938. Perhaps this utter abdication of the effort to establish fully an autonomous federal court system with uniform rules of process represented federalism triumphant, or the failure perhaps merely highlighted the fear of many lawyers that they might have to learn a new system of procedure.

Congress also failed to adopt or incorporate a uniform body of common law as the substantive law to be applied in federal court. There apparently was little support for adopting English common law as the federal substantive rule to be applied. One judge, however, stood out as the singular voice for making the English common law and statutes the rules of decision in federal courts.¹³⁶ Far more typical was the objection of a lawyer who found it demeaning for the United States to adopt English common law. One opponent to the adoption of the English common law said that "the dignity of America requires that [the common law] be ascertained, and that where we refer to laws they should be laws of our own country."¹³⁷ Since it was meaningless at the time to talk of the common law of the United States, the committee determined that "the laws of the several States except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply."¹³⁸ Thus, the new federal courts would have to look to state courts for the substantive and procedural law to be applied unless a federal statute enacted some clear rule.

Americans in all states, from Connecticut to Georgia, generally spoke English. But the dialects and idioms changed from state to state and from

136. Letter from Edward Shippen to Robert Morris (July 13, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 464-67. Although no other lawyers agreed, Judge Shippen's words are worth quoting:

It is of the utmost Consequence that the Judiciary Law should establish in express terms by what Law we are to be governed--There are some loose Expressions in the Bill concerning the Common Law, but it is no where said the Judges should decide according to it--The American States have generally adopted it, either in their Constitutions or by Act of Assembly. The United States should likewise adopt it; and it should not be left to the Judges to make the Law, but only to declare it--Perhaps the Common Law alone would not be sufficient--there are many Statutes made in England before our Revolution which amend and improve the Common Law; some of these have been long practiced under in America, and are incorporated with the Common Law, which would be imperfect without them--I own it is a difficult and delicate Point to fix by any Rule the Extension of the Statutes; and perhaps here there may be a necessity to leave some latitude to the Judges--Such Statutes as do not suit our Circumstances, or which have never been at all admitted here, should certainly not be introduced[.]

4 *id.* at 466-67.

137. Letter from Gunning Bedford, Jr. to George Read (June 24, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 418.

138. Judiciary Act of 1789 § 34, *supra* note 113, at 105.

region to region. Similarly the common law, procedural and substantive, had evolved differently in each state. Some of the court systems in the original states had been functioning for more than a century and a half before Congress drafted the Judiciary Act of 1789. It is not surprising that Congress ultimately instructed federal courts to borrow the familiar substantive and procedural law of the different states. The members of the committee, as well as most of the members of Congress, must have shared an uneasiness about the federal judicial system they were creating and inserting into the states. The compromise the Senate committee came up with effectively meant that all practitioners should speak in court in the dialect and idiom of that state. There seems to have been little fight over the quickly aborted attempt to formulate in a statute new uniform federal rules of judicial process. Throughout the Act great sensitivity for the diversity of the states marked the work of Congress.

C. Cost of the Federal Courts

Many who discussed, debated, and opposed the creation of federal district courts argued about their excessive and unnecessary cost. Although many avenues led individuals to this conclusion, anyone reviewing the statements can often detect the rhetoric of republicanism.¹³⁹ Opponents of the judiciary bill frequently raised the cry of luxurious salaries. One member of the House of Representatives challenged the excessive salaries the Senate had allowed for the vice president, for the Senate and especially for the federal judges. The American people, he warned, would not submit to taxation “for the purpose of feasting a few favorites in luxury and profusion.”¹⁴⁰ A writer in a newspaper most clearly incorporated republican rhetoric in his vehement criticism of the Judiciary Act. In opposing the excessive salaries of federal judges, he wrote:

But the most dangerous principles of these liberal advocates, are that the money is given to support the splendor of the offices, and to buy the

139. At times one can note the language of republicanism in the writings of those who favored an effective federal judiciary. In a newspaper article favorable to the establishment of a federal judiciary, the author, *Americanus*, adopts some of the platitudes of republican writers.

Private virtue, and the public happiness, are inseparably connected; and while the comprehensive eye of the statesman takes a view of the happy effect of this principle, his able hand will be extended by all possible means to preserve the morals of the community, in giving every encouragement to virtue, industry, and good conduct, on the one hand, and by the rigid punishment of vice, in all its haggard forms, on the other.

AMERICANUS, A SKETCH OF THE POLITICAL STATE OF AMERICA, (June 10, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 402-03.

140. Letter from Benjamin Goodhue to Samuel Phillips, Jr. (Sept. 13, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 508.

men in office, into integrity. Where the magistrates possess a splendor far above their fellow citizens, it may, and no doubt will, have a tendency to awe the people into slavery; but where they can pity the people from feelings they possess in common with them, there is less danger of tyranny and oppression. When the judges are raised far above the level of the rest of the community, they become quite unfit to judge among the people.¹⁴¹

People already were complaining that the salary proposed for federal judges was greater than the income that all but the wealthiest few earned from their estates in this country.¹⁴²

A member of the Senate committee who drafted the bill, William Maclay, committed his personal views to his diary,

I opposed this bill from the beginning. It certainly is a Vile law System, calculated for Expense. and with a design to draw by degrees all law business into the federal Courts. The Constitution is meant to swallow up all the State Constitutions by degrees and this to Swallow by degrees all the State Judiciaries.¹⁴³

One observer pointed out that the judiciary would “cost more than it [was] worth[,]” since at the cost of \$50,000 to \$60,000 a year the judiciary would only have jurisdiction to hear “a tenth part of the causes which *might* by the constitution come into the federal court.”¹⁴⁴ It was particularly galling to grant such high salaries to federal judges who would have “next to nothing” to do.¹⁴⁵ Another critic insisted this money could be saved “by throwing the business into the hands of the State Courts”¹⁴⁶ For a nation already

141. CINCINNATUS, published in *HERALD OF FREEDOM*, (Oct. 2, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 522.

142. Letter from James Sullivan to Elbridge Gerry (Oct. 11, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 523.

143. William Maclay Diary Entry (July 17, 1789) in 4 DOCUMENTARY HISTORY, *supra* note 99, at 473.

144. Letter from Paine Wingate to Nathaniel P. Sargeant (July 18, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 474. Wingate added, “The Gentlemen of the law in the Senate are mostly in favor of the bill & when it passed six only voted against it. Mr. Elsworth is the father of it & Mr. Strong nursed it.” 4 *id.*

145. A FREEMAN, published in *CONNECTICUT COURANT*, March 22, 1790 in DOCUMENTARY HISTORY, *supra* note 99, at 530.

146. Letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789), in 4 Documentory History, *supra* note 99, at 475. James Madison, then a leader in the House of Representatives, had difficulty accepting the Senate bill. “[I]t seems scarcely practicable to carry federal justice home to the people on this plan without a number of offices & a degree of expense which are very serious objections to it.” Letter from James Madison to Samuel Johnston (July 31, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 491.

deeply in debt, the added expense of the federal judiciary seemed to some a strong argument for rejecting it.¹⁴⁷

No doubt some form of federal judiciary was necessary “to organize the government.”¹⁴⁸ Many, however, agreed with “Rusticus” who found the “whole judicial system . . . a giddy profusion, and quite unnecessary.”¹⁴⁹ Many therefore concluded that all the business of the federal courts could have been performed by state courts with appeals to a Supreme Court to correct errors.

D. The Federal Compromise

Other reasons besides the cost of the new federal judiciary led many to oppose or at least to hesitate in endorsing the judiciary bill. From a careful reading of the numerous letters, newspaper articles, and other contemporary commentary, I believe the debate in general did not pit nationalists against states’ rights antifederalists. Rather these writings reveal a broad spectrum of federalists, most of them appreciating the need for a new effective national government with an appropriate judicial system, but all of them more or less apprehensive about introducing the federal judicial power into the states. Possibly there were some nationalists trimming their sails to the wind, but there is little in the preserved record to prove this.

The major debate over the judiciary centered on the need for and the powers of the federal district courts. The arguments reiterated the points made during the Philadelphia Convention and during the ratification process. The familiar arguments came back with a different intensity but with the same essential message: The state courts, widely different from each other but familiar to all the participants in the debate, could hear the federal cases as well as federal courts and at less expense. As a result, most participants agreed that the Constitution did not require the creation of lower federal courts, but merely gave Congress the power to create them. The hot potato of whether to create lower federal courts had been consciously passed to the first Congress, and none of the heat had gone out of it in the intervening two years.

It appears that the first Congress spontaneously gravitated toward a major consensus, comparable in its constitutional importance to the great compromise of the Philadelphia Convention concerning representation in the two houses of Congress. The judicial compromise in the Judiciary Act was that federal

147. See Letter from John Sullivan to John Langdon (Aug. 18, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 500.

148. Letter from Elbridge Gerry to John Wendell (July 4, 1790), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 535.

149. Rusticus, (August 26, 1790, published in INDEPENDENT CHRONICLE), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 536.

district courts would be created, but only for a few, relatively noncontroversial areas of jurisdiction. These limitations severely restricted the federal district courts' jurisdiction to areas where the state courts had never had jurisdiction or could not appropriately take jurisdiction. State courts, on the other hand, would have jurisdiction over many areas of potential federal jurisdiction, including most cases arising under the Constitution, federal laws and treaties. The Supreme Court would travel, in the form of circuit courts, into the states to bring federal justice close to the people. And the Supreme Court would assure some measure of uniformity of decisions by reviewing erroneous decisions of the state courts when they had denied the federal rights asserted. All of this will be more fully developed, with greater accuracy of detail, in what follows.

It is important to note at the outset, however, that no one at the time spoke of such a compromise. Because the extreme positions were seldom taken, it was easy for the members of the Senate committee to veer toward a consensus position that was politically acceptable to most members of Congress and to most of the lawyers, judges, and other commentators who had reflected on the new judiciary.

1. The State Courts

The Senate committee apparently expected Richard Henry Lee to be the most difficult member to satisfy. He had been a moderate antifederalist during the ratification debates.¹⁵⁰ As the committee was finishing its draft of the judiciary bill, however, Ellsworth felt quite comfortable working with Lee. In writing to a colleague from Connecticut, he said that

“Our affairs, I think, are going favorably, tho’, as might be expected, slowly. I am satisfied with the Senate. . . . We have no schism, nor much locality. Mr. Lee as yet goes with us.”¹⁵¹

Lee, for his part, seemed equally at ease working with the rest of the committee. He wrote to Patrick Henry, also an antifederalist, that “[s]o far as this has gone, I am satisfied to see a spirit prevailing that promises to send this system out free from those vexations and abuses that might have been warranted by the terms of the constitution.”¹⁵²

150. 5 COMPLETE ANTI-FEDERALIST, *supra* note 1, at 111.

151. Letter from Oliver Ellsworth to Oliver Wolcott, Sr. (May 30, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 399. I presume that by “locality” Ellsworth meant what a generation later would call states’ rights.

152. Letter from Richard Henry Lee to Patrick Henry (n.d.), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 400 n.1 (quoting 2 THE LETTERS OF RICHARD HENRY LEE 487 (James C. Ballagh ed., On Capo Press 1970) (1911-1914)). Lee also wrote to Samuel Adams to inform him

Lee believed the Senate committee had little desire to give the new federal judiciary all of Article III's power. He was not diametrically opposed to the plan outlined in the draft bill. Lee proposed limiting the jurisdiction of the lower federal courts to admiralty and maritime cases.¹⁵³ Thus, the federal judicial power could not intrude into the states except in the one area of admiralty jurisdiction. Lee argued state judges, bound by their oath to uphold the Constitution, could administer all the other areas of federal jurisdiction.¹⁵⁴ Lee's proposal to limit the lower federal courts to admiralty jurisdiction was the strongest antifederalist position presented in the Senate debates. Although Lee's position on the merits of the circuit court is unclear, he went along with a federal district court that had a few other restricted areas of jurisdiction.

In the House of Representatives, a small group of congressmen wanted to go further than Lee in restricting the federal judicial power. Led by Samuel Livermore, they wanted to eliminate federal district courts entirely from the judiciary bill. Livermore argued that Congress could establish state courts with admiralty jurisdiction.¹⁵⁵ These congressmen argued that state courts could act with impartiality in dealing with all federal issues,¹⁵⁶ the Union had survived (under the Continental Congress) for more than a decade without such courts,¹⁵⁷ and the Constitution did not absolutely require the creation of inferior federal courts.¹⁵⁸ James Jackson relied on the long familiarity of the people with state courts. "[T]he harmony of the people," he contended, "their liberties and properties, would be more secure under the legal paths of

that

A bill for constructing the Judiciary system, of the U. States is preparing in the Senate, and I trust it will come forth in a spirit of moderation that will quiet the apprehensions of many, whilst federal justice may be effectually administered thereby. But we must not forget, 'that the liberties of the people are not so well secured by the *gracious manner*, as by the *limitations* of power.[']

Letter from Richard Henry Lee to Samuel Adams (May 10, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 390.

153. The Virginia ratifying convention in 1788 had proposed that the inferior courts of Article III of the Constitution be limited to "such courts of admiralty as Congress may from time to time ordain and establish in any of the different states." William Maclay Diary Entry (June 22,, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 409 n.2. Lee, from Virginia, apparently felt bound by this restriction. See 4 *id.* (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, AS THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 660, 661 (Jonathan Elliot ed., 2d ed. 1876)).

154. William Maclay Diary Entry (June 23, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 413. Since the debates in the Senate were not recorded, we have to rely on the elusive diary entries of William Maclay.

155. 1 ANNALS OF THE CONGRESS, 784, 796 (Joseph Gales ed., 1789) [hereinafter ANNALS].

156. 1 *id.* at 784.

157. 1 *id.* at 797.

158. 1 *id.* at 802.

their ancestors; under their modes of trial, and known methods of decision.”¹⁵⁹ Michael Stone argued for a narrow construction of the Constitution. The new federal government “originated in *necessity* and it ought not be carried further than *necessity* will justify.”¹⁶⁰ Stone argued that federal district courts were not essential. Federal courts within the states would harass the people, insisted Aedanus Burke.¹⁶¹ James Jackson further proclaimed to his fellow congressmen, “My heart, sir, is federal; and I would do as much as any member on this floor, on any, and on every occasion, to promote the interests and welfare of the Union.” But Jackson concluded that he opposed the federal district courts because “I conceive the liberties of my fellow-citizens too deeply involved” to gamble on the creation of these new federal courts in the states merely for greater efficiency.¹⁶² Even while arguing for the most severe restriction on federal judicial power, Jackson felt it necessary to assure his fellow congressmen that he was a federal man.

After extensive debate in the House, only eleven members out of forty-two voted to eliminate the federal district courts from the judiciary bill. Thus, the basic structure of the Senate bill remained intact.

Many outside of Congress who commented on the judiciary bill also opposed the creation of federal district courts. State courts, they insisted, should be trusted to hear most of the federal cases. For instance, Pierce Butler wrote in his notes that federal courts would “Cut up at the Root . . . the State Judiciaries . . . [and] Anhialate [sic] their whole system of Jurisprudence”¹⁶³ Butler thought federal courts should have appellate jurisdiction in all federal cases and original jurisdiction only for admiralty and federal revenue cases.¹⁶⁴ A prominent former judge and current governor of Connecticut advised Ellsworth to work for a judiciary bill that would create “a Spirit of . . . Candour & Harmony & Mutual Support, upon which the Constitution Seems to be founded.”¹⁶⁵ He cautioned against anything in the bill that “appears like engrossing or absorbing the Government of the Several States”¹⁶⁶ For Huntington, as for most others, the proper federal balance remained of the utmost importance. Another lawyer opposed the vexations to ordinary citizens who would have to travel great distances to defend their interests in a federal court.¹⁶⁷ A newspaper published the

159. 1 *id.*

160. 1 ANNALS, *supra* note 155, at 809.

161. 1 *id.* at 811.

162. 1 *id.* at 829.

163. Pierce Butler’s Notes for Remarks on Judiciary Bill (July 17, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 471.

164. 4 *id.* at 472.

165. Letter from Samuel Huntington to William S. Johnson and Oliver Ellsworth (April 30, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 383.

166. 4 *id.*

167. Letter from Robert T. Paine to Caleb Strong (May 18, 1789) in 4 DOCUMENTARY

observations of one commentator who opposed the judiciary bill. He wrote that “[t]he judicial powers vested in Congress are also so various and extensive, that by legal ingenuity they may be extended to every case, and thus absorb the state judiciaries.”¹⁶⁸

Another newspaper contributor contended that the entire federal judicial system was based on “this indecent supposition, that the courts of the several states have not spirit and integrity to do justice.”¹⁶⁹ After all, a prominent state judge observed, “Have we any Security that Judges of federal appointment, will possess Superior ability or Integrity, to those called into that duty by the States?”¹⁷⁰ State judges took the same oath and looked to the same law, but had the advantage of being close to the people.¹⁷¹ A member of the Senate committee, writing to a prominent lawyer, raised the question that was implicit in numerous comments, “[W]hy not make [state courts] the inferior federal Courts at once?”¹⁷²

The Judiciary Act reflected agreement with or sensitivity to the widespread fear of the unknown that was directed at the powerful federal district courts. The Judiciary Act left vast areas of federal jurisdiction to be administered by state courts with appellate review by the Supreme Court. The Senate committee showed considerable care in defining the jurisdiction of federal district courts. The important point is that the grant of jurisdiction was precisely limited, and even within these limits, the federal courts did not always have exclusive jurisdiction. Federal district court jurisdiction, therefore, consisted of precisely charted islands in the vast sea of state court jurisdiction. The Senate committee was determined to assure the district court boundaries intruded as little as possible into the domain of the state courts.

The district and circuit courts’ jurisdiction over all federal crimes was exclusive of the state courts. District courts could hear only the lesser federal criminal cases while circuit courts had comprehensive jurisdiction over federal crimes. But Congress hemmed in the grant of admiralty and maritime jurisdiction and authority over seizures under the federal navigation laws. The seizure jurisdiction was divided between significant seizures and smaller ones.

HISTORY, *supra* note 99, at 393.

168. SAMUEL BRYAN, (CENTINEL REVIVED, No. 26), (Aug. 27, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 503. In the same contribution, Centinel added “[A]fter this sweeping jurisdiction, added to its auxiliaries, what will remain for the state courts?--Nothing that can prevent their being reduced to cyphers.” 4 *id.* at 504.

169. A CITIZEN, (Nov. 19, 1791, published in DUNLAP’S AMERICAN DAILY ADVERTISER), in DOCUMENTARY HISTORY, *supra* note 99, at 565, 566.

170. Letter from Edmund Pendleton to James Madison (July 3, 1789), in DOCUMENTARY HISTORY, *supra* note 99, at 444.

171. *See* 4 *id.*

172. Letter from William Maclay to Jared Ingersoll (July 4, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 449-50.

The Act limited significant seizures to those made "on waters which are navigable from the Sea by Vessels of ten or more tons burthen."¹⁷³ The admiralty, maritime, and seizure jurisdiction of federal district courts, however, was subject to an inscrutable exception protecting familiar state court jurisdiction: "Saving to Suitors, in all cases, the right of a common law remedy where the common law is competent to give it."¹⁷⁴ Thus, even in the area where the widest consensus on jurisdiction for federal district courts existed, the Senate committee carved out some space for state courts to continue to operate as they had in the past. The committee could not speak of concurrent jurisdiction, since states did not have admiralty courts. Instead of simply granting the federal courts exclusive jurisdiction, the committee left open the possibility of suit in state courts of common law.

The judiciary bill also granted district courts exclusive jurisdiction over "all seizures [under federal law] on land, or other waters" than those navigable from the sea by vessels of ten tons.¹⁷⁵ Presumably these would be lesser seizures. The Senate did not make these lesser revenue seizures subject to the "Saving to Suitors" clause.

The Senate bill gave district courts jurisdiction over cases "where an Alien sues for a tort only in violation of the law of Nations or a Treaty of the United States."¹⁷⁶ When this clause is situated in its historical context, it seems the bill intended to allow suits by any alien (not just the ambassadors or consuls covered by Supreme Court original jurisdiction) who had been injured and sought recovery under international law or treaty obligations. It clearly seems to exclude contract suits by aliens, such as British creditors.¹⁷⁷ Whatever the committee intended this grant of jurisdiction to mean, and virtually no contemporary commentary exists on it in or out of the Congress, federal courts did not have exclusive jurisdiction.

Federal district courts also received concurrent jurisdiction over suits at common law brought by the United States. Not only did state courts have concurrent jurisdiction over these sensitive suits where the United States was plaintiff, but federal district courts only had jurisdiction over these cases if the jurisdictional amount of at least \$100 was satisfied. Thus, the district courts had no jurisdiction to hear actions brought by the United States seeking equitable relief or for smaller common-law claims of less than \$100. The Senate committee did not want the United States to bring numerous civil suits

173. Judiciary Act of 1789, ch.20, § 9, *supra* note 113, at 53, 54.

174. 4 *id.* at 54.

175. 4 *id.*

176. 4 *id.*

177. The most thorough historical analysis is by William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-510 (1986). See also, KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM*, 34-38 (1990).

in federal courts. The drafters did not give the district courts general jurisdiction over any other common-law suits.

Finally, the federal district courts were given exclusive jurisdiction “of all suits against Consuls or vice Consuls” unless the suit involved criminal offenses of a more serious nature.¹⁷⁸ Under the Constitution, the Supreme Court has original jurisdiction over “cases affecting Ambassadors, other public Ministers and Consuls.”¹⁷⁹ The Senate committee felt justified in moving the less important cases brought against consuls from the Supreme Court’s original jurisdiction to the district courts.

To respond to the many objections raised during the ratification debates, the Senate committee assured jury trials for all civil and criminal cases in the federal district courts, excepting only the admiralty and maritime cases.¹⁸⁰

The Senate committee in crafting in Section 11 its most original creation, the circuit courts, measured out with precise care the jurisdiction granted to them. The circuit courts received broader trial court jurisdiction than the district courts. But their jurisdiction was not exclusive. State courts had concurrent jurisdiction with the circuit court over civil common-law or equity suits with at least \$500 as the amount in controversy.¹⁸¹ Smaller suits could be brought exclusively in state courts. The state courts also had concurrent jurisdiction with the circuit courts over diversity suits where an alien, such as a British creditor, was a party or where one of the parties was a citizen of another state.¹⁸² The circuit courts had jurisdiction over all federal crimes.¹⁸³

The state courts, therefore, retained significant jurisdiction over cases that fit within the judicial power as defined in Article III. Jurisdictional grants to lower federal courts came with narrow and exact metes and bounds. Despite the Senate committee’s careful definitions of the district courts’ and circuit courts’ jurisdictional boundaries, the committee failed to mention one area of original jurisdiction in Sections 9 or 11. The Senate committee did not grant original jurisdiction to any lower federal courts over all cases arising under the Constitution, federal laws, or treaties. Of course, many such federal question cases were within the jurisdiction of federal trial courts, such as cases arising under revenue laws or federal criminal laws. Subsequent federal statutes, such as patent and copyright laws, did grant jurisdiction to federal courts for cases which arose under those laws.¹⁸⁴ But the fact remains that the Judiciary Act

178. Judiciary Act of 1789, ch. 20, § 9, *supra* note 113, 53, 54. Apparently this was offered by Ellsworth as an amendment to the original Senate bill. 4 *id.* at 55.

179. U.S. CONST. art. 3, § 2, cl. 1.

180. Judiciary Act of 1789, ch. 20, § 9, *supra* note 113, at 54.

181. Judiciary Act of 1789, ch. 20, § 11, *supra* note 113, at 59.

182. 4 DOCUMENTARY HISTORY, *supra* note 99, at 59.

183. 4 *id.*

184. See David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14

maintained silence about general federal question jurisdiction. In many cases suits arising under federal laws, treaties or the Constitution could be brought only in a state trial court, with appeals possible to the Supreme Court.

2. *The Federal District Courts*

In reading the records of the debates over the Judiciary Act of 1789, one keeps a cocked ear to pick up the argument we, from our distant vantage point, would have expected. But we search in vain. Few participants pointed out that the judiciary, like the executive and the legislative branches, should come into being fully clothed with the powers set out in the Constitution.¹⁸⁵ As a matter of fact, only occasionally in the entire debate did the participants look seriously at the precise wording of Article III at all.¹⁸⁶ During the congressional debate, Edmund Randolph wrote to James Madison with comments on the judiciary bill. He objected that “[t]he jurisdiction is inartificially, untechnically and confusedly worded. Would it not have been sufficient to have left this point upon the constitution itself?”¹⁸⁷ Another correspondent pointed out that the federal judiciary would cost more than it was worth. Even for a cost of \$50,000 or so, “it will not extend to a tenth part of the causes which *might* by the constitution come into the federal court.”¹⁸⁸ The dictates of federalism, it seems, far more than the precise requirements of Article III, guided the drafters of the Judiciary Act.

One congressman did rely on Article III of the Constitution in opposing the group of representatives who sought to delete federal district courts from the judiciary bill completely. William Smith of South Carolina insisted that the language of Article III, “such inferior courts as Congress shall, from time to time, establish,” required Congress to establish some lower federal courts.

OKLA. CITY U. L. REV. 521, 532-33 (1989).

185. Samuel Osgood, it seems, was a rare exception. Early in the process of preparing the judiciary bill, Osgood wrote to an unknown correspondent questioning whether Congress should be able determine the scope of the federal judicial power. Instead, he claimed for the judiciary full constitutional authority, “[H]ere are certain Powers vested by the Constitution itself—& however inconvenient & oppressive they may be found to be; yet the Legislature cannot modify or alter them.” Letter by Samuel Osgood (Feb. 20, 1789), in DOCUMENTARY HISTORY, *supra* note 99, at 364.

186. A Virginia judge, Richard Parker expressed in a letter, apparently to Richard Henry Lee, his general satisfaction with the judiciary bill. He added, “The framers of the Bill appear to have taken great pains to make it as little exceptionable as possible and to have guarded against the Mischiefs which many people dreaded from the Words of the Constitution.” Letter from Richard Parker to Richard Henry Lee (July 6, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 452.

187. Letter from Edmund Randolph to James Madison (June 30, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 432.

188. Paine Wingate, *supra* note 144 and accompanying text.

He claimed that Congress had the power to determine how many and what kinds of lower courts, but that it lacked the option of not creating any inferior federal courts.¹⁸⁹ This position certainly represented a minority view. Nearly all the participants in the debate over the judiciary bill believed Congress could choose whether to create lower federal courts, and they believed Congress could give them a little, a lot, or all the powers enumerated in Article III. The political process and the realities of federalism, therefore, rather than the words of Article III of the Constitution, determined the size and shape of lower federal courts.

As we have already seen, the core of the debate centered on whether state courts should be used instead of creating federal trial courts. Some commentators looked to the constitutionally prescribed characteristics of federal judges—tenure during good behavior and no decrease in salary—as a bar to employing state judges to hear federal cases.¹⁹⁰ This argument, as we have seen, influenced Oliver Ellsworth in drafting the judiciary bill. After the Senate had completed its initial action on the bill, Ellsworth explained to a Connecticut judge that state judges lacked the judicial independence required of federal judges and thus could not sit as federal judges.¹⁹¹

Beyond the constitutional argument, however, lay a more immediate obstacle to using state judges entirely instead of federal judges. At least one state, Virginia, had prohibited its judges from “executing federal functions.”¹⁹² This problem made it impossible for the Senate committee to

189. Smith’s words, referring to the language of Article III, were clear:

[I]t is a latitude of expression empowering Congress to institute such a number of inferior courts, of such particular construction, and at such particular places, as shall be found expedient; in short, in the words of the Constitution, Congress may establish such inferior courts as may appear requisite. But that Congress must establish some inferior courts is beyond a doubt.

1 ANNALS, *supra* note 155, at 818.

190. See Robert T. Paine, *supra* note 167, at 392. Paine stated that

I find there is a difficulty in the minds of many in Constituting the State Supreme Jud Courts for that purpose; it is Said the regulation must be general & that the S.J. Court of every State do not hold *quam diu*: it certainly would Save much expense of time & money if Such a regulation could take place.

4 *id.* at 393. See also, Letter from Caleb Strong to Nathaniel P. Sargeant (May 7, 1789) in 4 DOCUMENTARY HISTORY, *supra* note 99, at 387.

191. See letter from Oliver Ellsworth to Richard Law (August 4, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 495.

192. Letter from James Madison to Edmund Pendleton (April 19, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 395. A member of the Senate committee, who opposed such a resolution of the issue, expressed a basic reason for not turning over to the state courts the federal judicial powers:

There is another [inconvenience]. . . [t]he State of Virginia by a Law passed since their Adoption of the Constitution, have prohibited their Officers from holding Offices under the United States, and their Courts from having Jurisdiction of Causes arising

follow the advice of a few and simply turn over to state judges all the judicial powers under the Constitution, with only the Supreme Court to assure some uniformity of interpretation.

Federal district courts, therefore, were necessary because of the constitutional argument and because of the practical difficulty of Virginia's refusal to allow its judges sit as federal judges. Underlying these arguments, however, was the deep suspicion some had of state courts. James Madison, in the House debate on the judiciary bill, argued, as he had two years earlier at the Philadelphia Convention, that the judicial power of the new government must be commensurate with the executive and legislative departments.¹⁹³ He insisted that in many states the courts could not be trusted to enforce federal law. Some state courts, he told the Congress, "are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation"¹⁹⁴ under the Articles of Confederation. One lawyer expressed more graphically the same distrust. He stated that it would be "little better than madness . . . to adopt the state courts[.] It is delivering the Govt. bound hand and foot to its' enemies to be buffeted[.]"¹⁹⁵ Another lawyer, Abiel Foster, placed no confidence in state courts, which were utterly dependent on the state governments, to enforce federal law.¹⁹⁶ Foster argued the new government

under the Laws of the Union; by such Laws every State would be able to defeat the Provisions of Congress if the Judiciary powers of the Genl. Government were directed to be exercised by the State Courts[.]

Letter from Caleb Strong to Robert T. Paine (May 24, 1789) in 4 DOCUMENTARY HISTORY, *supra* note 99, at 395-96.

193. 1 ANNALS, *supra* note 155, at 812.

194. 1 *id.* at 813. One writer in a newspaper captured the essence of the argument Madison would later use:

The simple self evident proposition, that the means ought ever to be commensurate with the end designed, points out the need of a national judiciary; the inconveniences and incompatibilities which must have necessarily resulted from the interpretation of the national laws by the State judicial courts, the partial determinations to be feared from juries so impanelled . . . the strong bias of separate interests and views, are so many sarcasms upon the idea [of allowing state courts act as lower federal courts.]

AMERICANUS, A SKETCH OF THE POLITICAL STATE OF AMERICA (June 10, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 401-02.

195. Letter from Fisher Ames to John Lowell (July 28, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 480, 482. Ames, in the same letter also stated that:

The idea of submitting to a foreign and hostile jurisdiction—as some of the state courts will be, and, in time, perhaps, all of them—the important office of enforcing and interpreting the Laws seems, a priori, awkward and improper . . . The principal difficulty the new Govt will have to experience is the opposition of the state powers.

4 *id.* at 481.

196. See Letter from Abiel Foster to Oliver Peabody (Sept. 23, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 515-16.

must have a judicial system coextensive with the legislative power, and equally as strong.¹⁹⁷ “[F]or of what avail are the wisest & most salutary Laws, without a firm & unbiased judicial, to carry those Laws into effect?”¹⁹⁸ Another lawyer simply brushed off most state courts as “a burlesque on Justice[.]”¹⁹⁹ Distrust of some of the state judiciaries, therefore, rather than any intense belief in the desirability of powerful federal courts, influenced Congress to create some carefully delineated federal trial courts. Federalism, for the participants in this debate, remained a tension between two opposing poles: enough authority in the central government to make it effective without, at the same time, dismantling the state governmental powers.

Although cogent arguments were made for establishing “inferior federal courts,” the precise design and scope of these federal trial courts remained to be settled. It appears that the narrow jurisdiction finally accorded the federal district courts came about by Congress starting with a zero base and justifying each additional grant of power. Few regarded Article III’s description of the judicial power as the relevant starting point. The political realities of a federal union seem to have played a larger role.

Even those opposed to federal district courts in general conceded the need for district courts with admiralty jurisdiction.²⁰⁰ The important concession of the need for federal trial courts to hear at least admiralty cases opened the door for somewhat broader jurisdiction, since it effectively surrendered the argument over the expense of federal district courts. Another correspondent wrote, “State-Courts, where they are well established might be adopted as the inferior Federal Courts, except as to Maritime business.”²⁰¹

Probably many who were willing to concede the need for federal admiralty courts were thinking primarily of courts, like those established during the Revolutionary War, to determine the lawfulness of captures of enemy vessels.²⁰² These prize cases often involved the rights of neutral

197. See 4 *id.*

198. 4 *id.*

199. John Lowell to Fisher Ames (Jan. 14, 1791), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 549. Fisher Ames had earlier written to John Lowell opposing the use of state courts as lower federal courts.

200. Pierce Butler, *supra* note 165, at 472. Butler insisted his objections would not destroy the federal judiciary. “I wou[ld] give them Appellate Jurisdiction in all Cases, and Original in Admiralty or Maritime Cases and on whatever related to the Collection of the Revenue of the General Government.” 4 *id.* On Butler’s hostility to the federal judiciary, see William Maclay Diary Entry (June 12, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 404.

201. Letter from Edward Carrington to James Madison (Aug. 3, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 493.

202. See William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AMER. J. LEGAL HIST. 117, 143-49 (1993). It is clear, however, that some lawyers also thought of the the civil admiralty cases that could come before federal district courts, such as cases of seamen’s wages. See Letter from James Sullivan to

nations and disputes between claimants from different states.²⁰³ Such cases most obviously called for federal courts situated in the principal port cities of each state. During the Revolutionary War, at the behest of the Continental Congress, each state had established a court to determine the legality of the prizes brought into its ports. Appeals were allowed to some judicial body set up by the Continental Congress.²⁰⁴ Perhaps those who remembered the experience with state prize courts had strongly negative recollections. Few indeed in 1789, just a decade after the wartime experience with state prize courts, thought it wise to repeat the mistake.

Federal district courts were granted jurisdiction over lesser federal crimes. William Paterson, a member of the Senate committee, had argued most cogently for this jurisdiction over federal crimes. He began with the broadly stated principle that every community must “retain in its own Hands the Powers of self preservation.”²⁰⁵ Patterson also argued that if state courts had jurisdiction over lesser federal crimes, it would give the states a sword that could destroy the federal government.

Congress also gave federal district courts jurisdiction over federal impost, navigation or trade laws.²⁰⁶ A lawyer expressed the basic reason for retaining jurisdiction in federal courts over these cases that involved federal revenue. “It appears to me,” he wrote, “indispensably necessary to have district Judges who shall have jurisdiction of all Admiralty matters, and whatever may in any way concern the Revenue.”²⁰⁷ Dana feared state courts would become unpopular and have their impartiality questioned, if they dealt with federal revenue cases.²⁰⁸ William Paterson was more blunt; he wrote: “Do not give up the Power of collecting your own Revenue [or] you will collect Nothing—The State Officers will feel it their Interest to consult the Temper of the People of the State in which they live rather than that of the Union.”²⁰⁹

Elbridge Gerry (March 29, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 372.

203. BOURGUIGNON, *supra* note 20, at 238-96.

204. *Id.* at 37-134.

205. William Paterson's Notes on Judiciary Bill Debate and William Paterson's Notes for Remarks on Judiciary Bill (June 22, 1789), in DOCUMENTARY HISTORY, *supra* note 99, at 410, 411.

206. Judiciary Act § 9, *supra* note 113, at 53, 53.

207. Letter from Francis Dana to John Adams (July 31, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 489.

208. 4 *id.* at 490-91.

209. William Paterson, *supra* note 205, at 411.

3. *The Circuit Courts*

Although the district courts were given narrowly stated areas of jurisdiction, the circuit courts, the other federal trial court, received broader and more significant jurisdictional powers.

The most creative idea in the judiciary bill was the cross-breeding of the district courts with the Supreme Court to give birth to three federal circuits. The original districts where the district courts sat followed the boundaries of the eleven states that had ratified the Constitution. Special provisions were made for district courts of Maine and Kentucky, which were not yet states. The original Senate bill divided the districts into three circuits, the eastern, middle, and southern circuits.²¹⁰ Twice a year each district would hold a circuit court composed of two Supreme Court justices and the district judge of the district where the circuit court was sitting.²¹¹

The Senate committee borrowed the idea of itinerant Supreme Court Justices from the British *nisi prius* courts, which for centuries had sent out the judges of the central courts at Westminster to conduct jury trials throughout the country. A number of the states had experimented in various ways with traveling judges carrying the state judiciary to the local communities.²¹²

Because some members of the Senate objected to the possibility of a district judge participating in appeals from his own decisions,²¹³ the senate committee amended Section 4 to eliminate this problem.²¹⁴

The circuit court must have been intended to be a traveling supreme court. The circuit court could review only the more important admiralty cases. The Senate bill imposed a \$300 minimum amount in controversy limitation on admiralty appeals to the circuit court.²¹⁵ A \$50 minimum amount in controversy limit was applied to other civil appeals.²¹⁶ The judiciary bill also permitted out-of-state defendants to remove a case from the

210. Original S.Bill, in 4 DOCUMENTARY HISTORY, *supra* note 99, at 45.

211. Judiciary Act § 4, *supra* note 113, at 44, 44-45.

212. GOEBEL, *supra* note 19, at 472. In the debates a distinction was made between circuit courts, as in the Ellsworth plan, and *nisi prius* courts. See William Maclay Diary (June 24, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 421. See also Holt, *supra* note 17, at 1493 (discussing this distinction more fully).

213. See Letter from James Sullivan to Elbridge Gerry (June 30, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 433-34; William Maclay Diary Entries (July 7-8, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 453-54.

214. The Act was amended to read that "no district Judge shall give a vote in any case of appeal or Error from his own decision, but may assign the reasons of such his decision." Judiciary Act § 4, *supra* note 113, at 44, 45. However, Supreme Court Justices who decided a case on circuit were not prohibited from participating if the case should be appealed to the Supreme Court.

215. Judiciary Act § 21, *supra* note 113, at 78.

216. Judiciary Act § 22, *supra* note 113, at 79.

state court to the circuit court where diversity of citizenship existed and the matter in dispute was more than \$500.²¹⁷ The most important restriction was a \$2000 amount-in-controversy limit for appeals from the circuit court to the Supreme Court.²¹⁸ Thus, for the vast majority cases within the circuit court's jurisdiction, it was the court of last resort.

The essential aim of creating these itinerant supreme courts was to "carry Law to their Homes, to their very Doors."²¹⁹ The Senate committee grasped the widespread sentiment that individuals should not have to travel great distances in order to protect their rights. "[T]he Vexations of carrying a Dft to answer at a distance may amount to a greater Oppression to individuals than any we expect the Resolution to deliver us from."²²⁰ The creation of the federal judiciary required "the lenient touch of Congress[,] To quiet the fears of the Citizens of being drag'd large distances from home, to defend a suit for a small sum."²²¹ Furthermore, riding circuit would be educational for the Supreme Court Justices. "I think the Superiour. Judges can acquire a knowledge of the rights of the people of these States much better by riding the circuit, than by Staying at home and reading. British and other foreign Laws."²²²

The circuit court's civil jurisdiction was made concurrent with the states, allowing plaintiffs to choose their forum. The court, however, had no civil jurisdiction at all unless the amount in controversy exceeded \$500. The circuit court, unlike the district courts, had jurisdiction of suits in equity as well as common law suits. The United States, an alien, or a citizen of another state were the three types of plaintiffs that could bring civil suits in the circuit courts. The judiciary bill made it clear that diversity of citizenship could not be artificially created by assigning the subject matter of the suit to a citizen of a different state.²²³

Not much of the debate over the circuit court's jurisdiction remains in the preserved record. One lawyer strongly suggested to Oliver Ellsworth that the diversity jurisdiction was unnecessary and that the jurisdictional amount should be increased by adding a zero to the sum the committee settled on.²²⁴ Many

217. Judiciary Act § 12, *supra* note 113, at 63. Removal by a citizen in a diversity case had to be brought in the state where the suit was pending.

4 *id.*

218. Judiciary Act § 22, *supra* note 113, at 79-80.

219. William Paterson, *supra* note 205, at 411.

220. Robert T. Paine, *supra* note 168, at 393.

221. Letter from Edmund Pendleton to James Madison (July 3, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 444.

222. Letter from Roger Sherman to Simeon Baldwin (Jan. 21, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 550-51.

223. See Judiciary Act § 11, *supra* note 113, at 59.

224. Letter from Robert R. Livingston to Oliver Ellsworth (June 24, 1789), in 4 DOCUMENTA-

people, however, saw the wisdom of allowing aliens to bring their significant disputes before the circuit courts. “[I]f foreigners Should have injustice done them in the State Courts they will think very hard of having no remedy in the general Government.”²²⁵ Oliver Ellsworth also supported diversity jurisdiction. William Smith, a member of the House of Representatives, discussed the Senate bill with Ellsworth and reported that Ellsworth

[O]bserved that the convention had in view the condition of foreigners when they framed the Judicial of the U. States. The Citizens were already protected by [the State] Judges & Courts, but foreigners were not. The Laws of nations & Treaties were too much disregarded in the several States—Juries were too apt to be biassed ag[ain]st them, in favor of their own citizens & acquaintances: it was therefore necessary to have general Courts for causes in w[h]ich foreigners were parties or citizens of diff[eren]t States.²²⁶

Diversity suits, therefore, whether brought by aliens or by citizens of another state seem to have been accepted by the Senate committee as an appropriate justification for the circuit courts. Clearly the larger suits by British creditors would be within circuit court jurisdiction. These diversity suits had an explicit basis in Article III, Section 2 of the Constitution. The Judiciary Act, however, imposed a minimum \$500 jurisdictional amount on the circuit court’s jurisdiction even for these diversity suits, and thus, the states had exclusive jurisdiction over the numerous suits involving less than \$500 as well as concurrent jurisdiction over the larger suits.

The propriety of federal jurisdiction over federal crimes has already been discussed in the context of the district court’s jurisdiction.²²⁷ If it would violate the principle of self preservation to allow state courts to hear the lesser criminal cases within the district court’s jurisdiction, then most assuredly it would violate the same principle to turn over to the states the more serious federal criminal violations.

The debate over equity jurisdiction of the circuit courts led to diametrically opposed positions. Some suggested that equity jurisdiction should be added to the powers of the district courts. Since the district court jurisdiction would consist largely of cases of admiralty and seizures, one observer commented, it might be difficult to attract “a man of real talents” to sit as a judge.²²⁸ It

RY HISTORY, *supra* note 99, at 420.

225. Letter from James Sullivan to Elbridge Gerry (March 29, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 372.

226. Letter from William L. Smith to Edward Rutledge (Aug. 9-10, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 496, 498-99.

227. *See supra* pp. 689-90.

228. Letter from William Bradford, jr. to Elias Boudinot, (June 30, 1789) in 4 DOCUMENTARY

would be wise therefore to add to the district court's jurisdiction smaller "cases in equity & at law . . . [to] secure a person of consequence to fill this post & ease the Circuit Judges who seem to have an accumulation of Business far beyond a common portion of industry to dispatch."²²⁹ This was a minority opinion. Most commentators opposed uniting admiralty, common law and equitable powers in the same person.²³⁰ Some, however, were hostile to the district courts having any equitable jurisdiction because they believed it "had encroached greatly on the Common Law."²³¹ On the other hand, a few lawyers insisted that common law and equity courts were "indispensably necessary to the due Administration of Justice[.]" but should be in different courts.²³²

The different experiences in the various states, as well as the near worship of the sacred right of jury trials, probably accounted for the divergent attitudes toward equitable jurisdiction. In the end the Judiciary Act, as in so many other issues, revealed a compromise. District courts would have no equitable jurisdiction, and the equity powers of the circuit courts would remain barred "in any case where plain, adequate and complete remedy may be had at law."²³³ Common law proceedings were clearly preferred. Furthermore, when the circuit court acted as a court of equity, it would have "to cause the facts on which they found their Sentence or decree, fully to appear upon the Record"²³⁴ as in a common law court. Finally, the Senate bill answered the objection of those who opposed equity courts because "the proof of facts is by the Examination of Witnesses in *private*."²³⁵ The Judiciary Act made the practice of taking testimony identical in common law, equity, and admiralty cases.²³⁶ Equity jurisdiction did not survive in the district courts, and in the circuit courts it survived only with some of the appendages of common-law practice.

HISTORY, *supra* note 99, at 430.

229. 4 *id.*

230. Letter from Nathaniel Freeman, Jr. to John Quincy Adams (July 1, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 435. *See also* Letter from Samuel Chase to Richard Henry Lee (July 2, 1789), *id.* at 439; Letter from Elbridge Gerry to John Wendell (Sept. 14, 1789), *id.* at 509.

231. Letter from William Maclay Diary Entry (July 13, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 462-63.

232. Letter from Samuel Chase to [Richard Henry Lee] (July 16, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 468-70.

233. Judiciary Act § 16, *supra* note 113, at 73.

234. Judiciary Act § 19, *supra* note 113, at 76.

235. Samuel Chase, *supra* note 232, at 470.

236. Section 30 stated that "the mode of proof by oral testimony and examination of Witnesses in open Court shall be the same in all the Courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law."

The glaring omission in the jurisdiction of the circuit courts was the failure to grant judicial power over all “Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”²³⁷ Some members of the Senate committee did call for adding this jurisdiction to the inferior federal courts. When Richard Henry Lee proposed restricting district courts to admiralty jurisdiction, William Maclay apparently rose to insist that the Constitution extended the judicial power to cases arising under the Constitution, federal laws and treaties. He said, “These [powers] must be executed by the federal Judiciary.”²³⁸ William Paterson made the same point in that debate. “We must have Tribunals of our own pervading every State, operating upon every Object of a national Kind.”²³⁹ Lee apparently replied that “State Judges would be all Sworn to support the Constitution. That they must obey their Oath. and of course execute the Federal laws[.]”²⁴⁰ Lee’s position ultimately prevailed.

Several individuals outside Congress likewise raised the propriety of granting federal question jurisdiction to federal circuit or district courts. One insisted to a member of the Senate committee that “[T]here must be federal Courts to try all matters that are of a federal nature.”²⁴¹ A writer in a newspaper asserted “The perfect propriety of having a national judiciary to interpret the laws made by a national legislature.”²⁴² A lawyer raised the question “[W]hether any Courts but those of the Union or such as may be authorized by a Legislative Act thereof can take cognizance of Cases arising under the laws of the Union[.]”²⁴³

An oversight cannot explain the omission of general federal question jurisdiction from the judicial powers granted to the district courts or the circuit courts. Since the district courts were viewed as little more than admiralty courts and lacked general common law or equity jurisdiction, there was little likelihood that general federal question jurisdiction would be granted to them. The circuit courts, however, would seem to have been the ideal courts to

237. U.S. CONST. art. III, § 2, cl. 1.

238. William Maclay Diary Entry (June 22, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 409.

239. William Paterson, *supra* note 205, at 411. See also William Paterson’s Notes for Remarks on Judiciary Bill (June 23, 1789), *id.* at 414, 416, and [June 24-27, 1789], *id.* 421, 422. Paterson’s notes of his comments for debate are fully analyzed in Casto, *supra* note 99, at 1107-17.

240. William Maclay Diary Entry (June 23, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 413.

241. Robert T. Paine, *supra* note 167, at 392.

242. “AMERICANUS,” A SKETCH OF THE POLITICAL STATE OF AMERICA (June 10, 1789), reprinted in 4 DOCUMENTARY HISTORY, *supra* note 99, 401-02.

243. Letter from George Read, Jr. to George Read (after Sept. 28, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 520.

receive this important area of jurisdiction, but they did not. Revenue cases and federal criminal cases were within the jurisdiction of federal trial courts. But other cases arising under the Constitution, federal laws and treaties could only be brought originally in state courts, unless the parties had different citizenship or the United States was the plaintiff. This enormous concession of federal judicial power to the often distrusted state courts must have been the expression of a compromise or a consensus of those drafting the bill. Most of the circuit courts' civil jurisdiction would be based on the status of the parties (diversity) and not on the subject matter of the dispute (federal question). Citizens of the same state with disputes that arose under the Constitution, federal laws, or treaties could look only to state courts for initial relief. The drafters of the judiciary bill, however, recognized the need for some uniformity of judicial decisions. These state court decisions on cases involving federal questions, therefore, could be appealed in most cases to the Supreme Court. The next Section focuses on this question.

4. *The Supreme Court*

Four sections of the Judiciary Act dealt with the Supreme Court, but the last section calls for the fullest comment since it focused on the power of the Supreme Court to review judgments of the state courts. Because the Constitution explicitly required the Supreme Court as the minimum repository of the federal judicial power, no debate took place on the specifications of its personnel, procedures, and processes.

Section 1 of the Act merely established the number of Justices on the Supreme Court, five Justices and one Chief Justice, and the number needed for a quorum, four.²⁴⁴ Section 1 also prescribed the time and place where the Court would hold its two annual sessions.²⁴⁵

Section 13 looked to Article III, Section 2 to establish the boundaries of the Supreme Court's original jurisdiction. But the Senate drafters of the bill did not feel constrained by the exact terms of the Constitution. The Constitution stated that "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."²⁴⁶ The Senate committee ignored the "In all Cases" language. The Supreme Court was not given original jurisdiction in suits "between a State and its Citizens."²⁴⁷ The Court was not given exclusive original jurisdiction for suits "between a State and Citizens of other States or Aliens" and "suits brought by Ambassadors, or other public

244. Judiciary Act § 1, *supra* note 113, at 38.

245. 4 *id.*

246. U.S. CONST. art. III, § 2, cl. 2.

247. Judiciary Act § 13, *supra* note 113, at 69.

Ministers, or in which a Consul or Vice-Consul shall be a party.”²⁴⁸ In the other situations covered by the Constitution, the Supreme Court would have exclusive original jurisdiction. Once again we see that the Senate committee did not consider itself bound by the precise terms of the Constitutional grant of power; undoubtedly, the committee was influenced by the statement in Article III that the Supreme Court’s appellate jurisdiction was subject to “such Exceptions, and under such Regulations as the Congress shall make.”²⁴⁹

At least some observers thought Congress lacked the power to convert any of the Supreme Court’s original jurisdiction to appellate jurisdiction.²⁵⁰ The Senate probably imposed these restrictions on the Supreme Court’s original jurisdiction because of the obvious difficulties of travel to the seat of government for a trial before the Supreme Court. Concurrent jurisdiction in the lower federal courts or in the state courts would give the plaintiff the option of bringing the suit closer to home.²⁵¹

Section 22 of the Judiciary Act established the amount-in-controversy limits for appeals. We have already seen that the circuit courts could review district court decrees in civil cases only if the amount in dispute was greater than \$50. Circuit court decrees, however, could be reviewed by the Supreme Court only if “the matter in dispute exceeds the sum . . . of Two thousand Dollars.”²⁵² The Senate bill clearly intended the federal circuit courts to have effective finality in the vast majority of cases within their jurisdiction.

The Senate committee imposed no amount-in-controversy limitation for the Supreme Court’s appellate review of state court decisions. The Supreme Court could review the smallest cases decided by the state courts in the exercise of the state courts’ jurisdiction over cases arising under the Constitution, federal law or treaties. The original draft of Section 25 remained unchanged through the legislative process except for small verbal alterations.²⁵³ For a section of the bill so potentially controversial, this lack of attempts to amend is quite surprising.

248. 4 *id.*

249. U.S. CONST. art. III, § 2, cl. 2.

250. See letter from Arthur Lee to Tench Coxe (April 24, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 380; letter from John Dickinson to George Read (June 24, 1789), *id.* at 419. Edmund Randolph apparently thought that Congress lacked the power to restrict any of the jurisdictional power granted by the Constitution. “Will the courts be bound by any definition of authority, which the constitution does not in their opinion warrant?” Letter from Edmund Randolph to James Madison (June 30, 1789), *id.* at 432.

251. Letter from Edmund Pendleton to James Madison (July 3, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, 444, 447.

252. Judiciary Act § 22, *supra* note 113, 79-80.

253. Original S. Bill, in 4 DOCUMENTARY HISTORY, *supra* note 99, at 86. The draft of § 25, at it was finally enacted, must have been completed early in the legislative process. By April 24 the contents were accurately described in Ralph Izard’s letter to Edward Rutledge. 4 DOCUMENTARY HISTORY, *supra* note 99, at 377.

Some lawyers did comment in general on whether there should be some amount-in-controversy limitations on Supreme Court review of the state courts. Edmund Pendleton went to the heart of the issue. He objected to the lack of any amount-in-controversy limitation since every British creditor could “drag every D[ebtor] for the most trifling sum first thro’ the State Courts & then by Appeal to the seat of Congress.”²⁵⁴ Another lawyer also saw the need for a restriction of appeals of small suits. He agreed a Supreme Court was essential and should not be stationary because of the great distances parties would have to travel to appear before it.²⁵⁵ He felt that one jury trial should suffice unless there was a legal basis for granting a new trial.²⁵⁶ He thought, however, that federal jurisdiction should be “as much Contracted as possible, and no matters of small moment should ever Come before the S[upreme] J[udiciary] unless such as must from their Nature there Originate[.]”²⁵⁷ Another lawyer made the same point: “I think the fed[eral] Sup[reme] Jud[iciary] will be Itinerant & the trial of Appealed Causes So regulated as to prevent as much as may be the expense and burthen of going far from home for Justice.”²⁵⁸ This view prevailed for appeals from the federal circuit courts, but not for appeals from “a final judgment or decree in any suit, in the highest Court of law or equity of a State in which a decision in the suit could be had.”²⁵⁹

Although the point came up on a different issue in the Senate debate, William Paterson’s notes indicate that someone (perhaps Paterson himself) had reminded the Senate that “a small Sum . . . may involve a Question of Law of great Importance.”²⁶⁰ The speaker revived the Senate members’ attention by invoking the famous ship money case involving John Hampden’s refusal in the seventeenth century to pay twenty shillings in tax for support of the king’s war.²⁶¹ Apparently just such an argument prevailed, and the Senate accepted Supreme Court review of state court decisions without any minimum amount in controversy. Shortly after the Senate amended the bill and the House of Representatives approved it, James Madison used this exact point in explaining why the proposed bill of rights amendments could not be changed. He wrote, “It will be impossible I find to prevail on the Senate to concur in the limitation on the *value* of appeals to the Supreme Court, which they say is unnecessary,

254. Edmund Pendleton, *supra* note 251, at 448.

255. Letter from David Sewall to George Thatcher (April 11, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 374.

256. 4 *id.*

257. 4 *id.*

258. Robert T. Paine, *supra* note 167, at 393.

259. Judiciary Act § 25, in 4 DOCUMENTARY HISTORY, *supra* note 113, at 85.

260. William Paterson’s Notes on Judiciary Bill Debate, (June 24-27, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 421-22.

261. 4 *id.*

and might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount."²⁶²

Although Congress imposed no monetary limit on review of state court cases by the Supreme Court, the Judiciary Act did attempt to limit them in another manner. The language of the Act is complex, but basically the Senate bill sought to restrict Supreme Court review of state court judgments to those cases in which the state court had decided against the federal claim or right that had been asserted.²⁶³ A few people objected to this limitation. They thought that the right of appellate review should be reciprocal; that either party should be able to obtain Supreme Court review of a state court decision on a federal issue. Just because the state court upheld the asserted federal claim did not prove that the state court was correct.²⁶⁴ James Jackson, an astute opponent of the Senate bill in the House of Representatives, insisted this clause did not impose any limits on appeals of state court judgments to the Supreme Court. He told his colleagues in the House, "I am convinced experience will prove [that] there will not, neither can there be any suit or action brought in any State courts, but may, under this clause, be reversed or affirmed by being brought within the cognizance of the Supreme Court."²⁶⁵

The clear intent of the Senate bill, however, was to limit the right of access to the Supreme Court. William Smith, a member of the House of Representatives, best captured the reasoning behind this clause. The Senate

262. Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, 517. Madison is clearly replying to the points raised by Pendleton in his letter of July 3, 1789. See *supra* text at note 251.

263. The language of Section 25 provided that the Supreme Court could review state court judgments only,

[W]here is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission. . . .

Judiciary Act § 25, *supra* note 255, at 85.

264. Edmund Pendleton raised this point in his comments on Section 25: "If an improper Judgm[en]t is given in fav[o]r of the Preference to foedral treaty or laws, the party injured should have the same right to App[ea]l as the other, in case of a Contrary Judgm[en]t, otherwise the remedy is Partial." Edmund Pendleton, *supra* note 251, at 448.

265. ANNALS, *supra* note 155, at 815. The astuteness of Jackson's comments appears from considering the debate today over the scope of Article III and of the Judiciary Act of 1789. One commentator has concluded that "in virtually every case in which a state court errs in adjudicating a federal law, appellant can plausibly package her claim of error as one deriving from a violation of her own federal 'right, privilege, or exemption' under the precise language of section 25." Amar, *supra* note 105, at 1530.

did not want the right to appeal to the Supreme Court from state courts to be reciprocal. As Smith expressed it,

The reason on w[hi]ch the Clause is grounded is that a citizen can't complain if his own State Court decides ag[ain]st him; that this Bill does not put him in that respect in a worse plight than he was before: on the other hand the Clause is absolutely necessary for the preservation of The federal governm[en]t.²⁶⁶

Smith's final point, regarding the absolute necessity of Supreme Court review of state court judgments "for the preservation of The federal governm[en]t," was frequently repeated in the observations made on the Senate bill. The need for uniformity of decisions on issues of federal law lay at the heart of the argument for Supreme Court review of the state courts. The federal government could hardly prosper if its Constitution, treaties, and laws had different meanings and applications in various states. As one lawyer suggested to a member of the Senate committee,

A certain uniformity of decisions throughout the united States, Whether in the federal or State Courts, is an object that may be Worthy of Consideration. . . . The Writs of Error should lie from these several Courts to the S[upreme] J[udiciary] of the U.S. in all Causes of a federal kind to a Certain amount, within a limited time[.]²⁶⁷

Uniformity of federal law seemed to take on a mystical meaning for some. William Paterson argued in the Senate debate that "To become one People—We must have one common national Tribunal—hence Uniformity of Decision—hence a bond of Union—we shall approximate to each other gradually—be assimilated in Manners, in Laws, in Customs[.]"²⁶⁸ Oliver Wolcott, a friend and the lieutenant governor of Connecticut, commented favorably to Oliver Ellsworth on the draft of the Senate bill he had reviewed. He thought the bill was well devised to secure impartial and uniform decisions by the federal judiciary.²⁶⁹ A member of the House who argued vigorously against the creation of any federal district courts reminded the other members

266. Letter from William L. Smith to Edward Rutledge, (Aug. 9-10, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 496, 498.

267. Letter from David Sewall to Caleb Strong (March 28, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 369-70. See also letter from Richard Law to Oliver Ellsworth (May 4, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 386.

268. William Paterson's Notes for Remarks on Judiciary Bill, *supra* note 205, at 416. It is not clear whether this passage in his notes refers specifically to the Supreme Court or to the whole federal judicial system.

269. Letter from Oliver Wolcott, Sr. to Oliver Ellsworth (June 27, 1789), in 4 DOCUMENTARY HISTORY, *supra* note 99, at 423.

that the state court decisions would be subject to Supreme Court review to remove the divisiveness of divergent state judgments. He stated that

[i]t has been said in this debate, that the State Judges would be partial, and that there were no means of dragging them to justice. Shall I peremptorily tell the gentlemen who hold this opinion, that there is a Constitutional power in existence to call them to account. Need I add that the Supreme Federal Court will have the right to annul these partial adjudications?²⁷⁰

The participants all agreed uniformity of decisions on questions of federal law and constitutional or treaty interpretation would be essential. Therefore, the Supreme Court must be able to review all judgments of the highest state court acting on the case and deciding against the federal interest. Under the Judiciary Act, the Supreme Court could have been effectively fragmented into three virtually final circuit courts. An effective Supreme Court, however, was needed to hold a fragile Union's legal system together because the often refractory state courts alone could initially determine many cases arising under the Constitution, federal laws, and treaties. Section 25 marks the final element of the federal compromise that made the federal judiciary possible.

V. CONCLUSION

The principles of federalism permeated the Judiciary Act of 1789. Of course, for the leading members of the political community, federalism was a bi-polar tension in society. The leaders who conceived, discussed, and completed the Judiciary Act of 1789 understood the divisions in society. On the one hand was the conviction that there must be an effective union of the states in a new government, with an effective judiciary to complete the tripartite governmental structure. But at the same time there was the conviction that the long familiar states must not be swallowed up and that the local, accessible state courts must continue to be trusted with most judicial proceedings.

Far more important than the external federalism that was reflected in the major debates of the day was the federalism within. Many individuals within themselves felt tugged in two directions, more in one way for some and more the other way for others. Most of the participants in the discussions over the Judiciary Act seem to have shared a similar ambivalence. Although they saw the need for an effective national government because of what many viewed as widespread abuses by the state legislatures, they had at least a little and often much apprehension about powerful federal courts intruding into the states. Although the participants might have had strong suspicions about the

270. ANNALS, *supra* note 155, at 830.

competence and fairness of the courts of many states to execute federal law, they often felt a strong loyalty to the courts of their own states before which they had practiced and which they basically trusted.²⁷¹ The tension of federalism existed within the convictions and loyalties of most of the participants in the debate. To express it another way, the debates over the Judiciary Act do not reveal a pitched battle: firmly convinced nationalists against die-hard states' rightists. Rather, in that brief period before the birth of partisan politics, they were all federalists of varying shades and hues.

This underlying consensus is most clearly brought out by looking to two participants who seemed to express the most extreme positions. William Paterson argued most strenuously for federal courts with the fullest possible judicial power. This, of course, was the same William Paterson who, two years earlier, had sired the great compromise concerning representation in the two houses of the federal legislature. This solution cannot be considered the sign of an extreme nationalist. During the Senate debates, the same William Paterson apparently said, "Must trust a great Deal to State Courts."²⁷²

At the other extreme of federalism was Congressman Jackson, who during the floor debate in the House joined in the fight to kill federal district courts. But even he felt obliged to insist to his fellow congressmen, that "My heart, sir, is federal; and I would do as much as any member on this floor, on any, and on every occasion, to promote the interests and welfare of the Union."²⁷³ These two examples of the extreme positions in the debate seem to reveal individuals with divided hearts. On one hand, they wanted to protect their familiar state institutions, while all too aware of the abuses and inadequacy of the state governments, and on the other hand they wanted a more effective union of the states in the new federal government but feared that a powerful federal authority might completely absorb the states.

This federalism revealed itself throughout the Judiciary Act. State boundaries were followed in establishing districts for the new federal courts. State procedures and state common law were imposed upon the federal courts hearing cases in the states. The restricted jurisdiction of the district and circuit courts reflected a desire not to overwhelm or subdue the state courts. The grant to state courts of maximum concurrent jurisdiction with the federal

271. See, for example, letter from Fisher Ames to John Lowell (July 28, 1789) and the Enclosure, in which Ames complained on the one hand that "The principal difficulty the new Govt will have to experience is the opposition of the state powers." Later he scornfully asked, "Shall we trust *all* the Several state courts?" But in the same discussion he insisted, "I am not willing to make our excellent Court in Mass[achuse]ts subordinate." 4 DOCUMENTARY HISTORY, *supra* note 99, at 480-81.

272. William Paterson's Notes on Judiciary Bill Debate (June 24-27, 1789) in 4 DOCUMENTARY HISTORY, *supra* note 99, at 421-22. It is possible that Paterson recorded these words from the speech of some other participant in the debate.

273. ANNALS, *supra* note 155, at 829.

courts and of exclusive jurisdiction over most cases arising under federal law, treaties and the Constitution reflected a trust, perhaps reluctant for some, of the state courts in dealing with important federal suits of their own citizens.

At every point in the drafting and debate over the Judiciary Act there seems to have been an attempt to fine-tune the delicate balance between state and federal judicial authority. Despite opposition, federal district courts were created, but their jurisdiction was limited to admiralty and a few other relatively insignificant areas that state courts had never exercised or could not appropriately exercise. Circuit courts were necessary primarily in cases where the state courts could not be trusted to be fair to foreign or out-of-state litigants. Even in these sensitive cases, state courts had exclusive jurisdiction of the numerous suits involving less than \$500 and concurrent jurisdiction of the larger cases. In dealing with their own citizens, state courts retained the exclusive power of hearing cases that arose under the federal Constitution, federal law, and federal treaties. But because of the need for uniformity of decisions, the Supreme Court received the power to review all state court judgments adverse to the federal right or interest asserted.

Such was the federal compromise at the heart of the Judiciary Act of 1789. Neither pole of the bi-polar tension of federalism was ignored. Some aspects of the Judiciary Act were also influenced by the widespread acceptance of the world view of republicanism. Because lawyers dominated the debates and drafting of the Act, the common law as they understood it played an important role. But ultimately, the Judiciary Act of 1789 cannot be understood without a clear insight into what federalism meant to the participants.