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Trimming the Least Dangerous Branch: The Anti-Federalists and the Implementation of Article III

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TRIMMING THE LEAST DANGEROUS BRANCH: THE ANTI-FEDERALISTS AND THE IMPLEMENTATION OF ARTICLE III

Tyler S. Moore*

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The traditional narrative of events following the ratification debates has connected the Bill of Rights with the Anti-Federalists and the Judiciary and Process Acts of 1789 with the Federalists. Although the scholarly consensus has turned against the Bill of Rights part of this story, most scholars continue to portray the first Congress' implementation of Article III as a victory for the Federalists. In this article, I trace the development of the Anti-Federalists' theory of federal/state power and its application to the judiciary in an effort to show why the second part of the above narrative also has it wrong.

Here is the short version. Having adopted the same conception of federalism as an underappreciated faction of delegates at the Constitutional Convention, Anti-Federalist writers like "Brutus" argued that some mechanism was needed to prevent the states from being swallowed up by federal judicial overreach. Despite Alexander Hamilton's attempts in Federalist Nos. 78–83 to downplay this danger and emphasize the necessity of a robust system of federal inferior courts with general "arising under" jurisdiction, it

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was the Anti-Federalists' arguments that continued to resonate in the state ratifying conventions and beyond. Oliver Ellsworth, the Connecticut Federalist who was the primary draftsman of the Judiciary and Process Acts, had shown his sympathy with Brutus all along. And the bare bones, state-dependent inferior court structure he helped create is testimony to this sympathy. Like the Bill of Rights, then, the Anti-Federalists' influence on the original federal judiciary was a vicarious one. But unlike the Bill of Rights, this victory tracked their theory of federalism and gave them a meaningful structural change that might protect the states against a national consolidation.

INTRODUCTION

Not long ago, if the Anti-Federalists were remembered for any enduring contribution to the American system of government, it was for the Bill of Rights. The Anti-Federalists' efforts to prevent the states from adopting the proposed Constitution failed, so the traditional narrative went. But because of the numerous objections they raised at state ratifying conventions—especially in the colonial power-centers of Massachusetts, New York, and Virginia—the Anti-Federalists' consolation prize was congressional approval of what would eventually become the first ten amendments to the Constitution.

In recent years, however, scholars have thrown cold water on this account.¹ It was not Anti-Federalists like Melancton Smith, Patrick Henry, or Richard Henry Lee who drafted the Bill of Rights and shepherded it through Congress; it was James Madison, the Federalist-of-Federalists himself. And although the Bill of Rights did respond to some of the Anti-Federalists' objections, Madison and others who contributed to these amendments declined to address the Anti-Federalists' most fundamental, structural concerns.²

But if the Anti-Federalists' influence on the Bill of Rights has too often been exaggerated, scholars have regularly *underappreciated* their impact on another of the first Congress' most significant and contested priorities—the establishment of the original federal judiciary in the Judiciary and Process Acts of 1789. Consider Matthew Brogdon's recent remark that the creation of inferior courts under the Judiciary Act “was a substantial victory . . . for the Federalist vision of a self-sufficient national government.”³ Or take Felix Frankfurter's more grandiose claim—repeated in Hart and Wechsler's celebrated federal courts textbook⁴—that the “transcendent achievement of the First Judiciary Act [was] the establishment for this country of the tradition of a system of inferior federal courts.”⁵ Even Julius Goebel, whose classic work on the

1. See, e.g., ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997).

2. As Goldwin summarizes, “[t]hat there is a bill of rights in the Constitution we owe in considerable part to the Anti-Federalists and their energetic agitation for amendments; but that we have the Bill of Rights we have, rather than a number of quite different amendments, we owe in larger part . . . to James Madison.” *Id.* at 57.

3. Matthew Brogdon, *Constitutional Text and Institutional Development: Contesting the Madisonian Compromise in the First Congress*, 5 AM. J. POL. THOUGHT 219, 236 (2016).

4. See RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 21 (Robert C. Clark et al. eds., 7th ed. 2015).

5. FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE

Judiciary and Process Acts is more balanced in its treatment of the Anti-Federalists, misses the theoretical point, claiming that “[t]he leading spirits . . . charged with drafting th[ese] measure[s] were federally minded” and so inclined to take a “bold view of the legislative authority conveyed by Article III.”⁶

These portrayals fail to see the forest for the trees. The key takeaway is not that the Judiciary Act established some inferior courts—a point which important Anti-Federalists conceded during the ratification debates⁷ and which may even have been required by Article III⁸—but that it granted *state courts* the primary responsibility for interpreting and applying federal law. The Federalists’ inability to secure general “arising under” jurisdiction for the national judiciary severely undercut their vision for a separate and self-sustaining national government that would act directly on individuals. And the first Process Act and the measures in the Bill of Rights that address the courts represent additional concessions to the Anti-Federalists’ judicial vision. In short, instead of being remembered as a victory for the Federalists, the first Congress’ implementation of Article III is best characterized as an effort to address the Anti-Federalists’ concerns that the federal judiciary might destroy state governments and oppress individual rights.

Why have scholars regularly undersold the Anti-Federalists’ influence on the initial shape of the American judiciary? There are several good reasons. For one, as alluded to above, the Judiciary and Process Acts were written almost exclusively by Federalists. Oliver Ellsworth, a prominent Connecticut Federalist and future Chief Justice of the Supreme Court of the United States, was the primary draftsman of both measures.⁹ Moreover, with the exception of a few Anti-Federalist mainstays, such as Richard Henry Lee and William Grayson (both from Virginia), the Federalists dominated the first Senate and indeed the first Congress as a whole. Of course, not all Federalists shared the same reasons for voting for the new Constitution, nor did they share an identical vision for its operation going forward.¹⁰ Nor, further, should it be forgotten that the first Congress’ deliberations took place against the background of the “ratify now,

FEDERAL JUDICIAL SYSTEM 4 (1928).

6. See, e.g., JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANCEDEMENTS AND BEGINNINGS TO 1801, at 457 (1971). To be sure, Goebel does eventually nod in the direction of the Federalists’ sensitivity to the Anti-Federalists’ criticisms. *Id.* But he misfires from the outset in suggesting that the Federalists who drafted the Judiciary Act were antagonistic to the Anti-Federalists’ theory of federal/state power.

7. See, e.g., *Federal Farmer XV*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 130–31 (Michael P. Zuckert & Derek Webb eds., 2009) (opining that Congress would adopt either the New York or Massachusetts plan for inferior federal courts).

8. I take no position in this article on the meaning of Article III and, specifically, whether it required the creation of some federal inferior courts. But if the scholars who make this claim (or something close to it) are right, it would only add further support for my argument that the Judiciary and Process Acts were a victory for the Anti-Federalists. See William Treanor, *Framer’s Intent: Gouverneur Morris, the Committee of Style, and the Creation of the Federalist Constitution* 99–101 (Georgetown University Law Center, Working Paper, 2019) (arguing that Gouverneur Morris selected language that would require the creation of lower federal courts); see generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995) (arguing that the mainstream view during the founding era was that, because state courts could not constitutionally hear some categories of claims, Congress would need to create inferior federal courts if it wanted these claims to be enforced).

9. See, e.g., GOEBEL, *supra* note 6, at 459–60.

10. I develop and support this claim throughout the rest of the article, but my most direct treatment of this point appears in the context of the discussion of Hamilton in Part III below.

amend later” compromises reached at various state ratifying conventions a year earlier. Notwithstanding all of this, however, the fact remains that the Anti-Federalists’ influence on the federal judiciary is one that must largely be traced through the hands of their political opponents.

Another possible explanation for the Anti-Federalists’ lack of recognition owes to the dearth of records from the first session of the Senate. Until 1794, the Senate met in secret. Thus, the substance of the first Senate’s debates about the judiciary can only be inferred from such sources as the personal correspondence of Senators, scattered (and often one-sided) notes of the proceedings like those taken by William Maclay, and the debates about the Judiciary and Process Acts that took place in the House of Representatives. As previously noted, all accounts suggest that Senate Federalists—including especially Ellsworth, William Paterson, and Caleb Strong—were almost exclusively responsible for drafting these acts, and we also know that many Anti-Federalists in the Senate voted against the Judiciary Act in its final form.¹¹ So it is possible that the Senate records would fail to reveal evidence of Anti-Federalist influence even if they did exist. On the other hand, Richard Henry Lee was a member of the committee that prepared the first draft of the Judiciary Act and was even tasked with reading the committee’s draft bill to the Senate.¹²

One final factor that has clouded the Anti-Federalists’ role is that many (though not all) of the judicially-focused provisions enacted by the first Congress—whether contained in the Bill of Rights, Judiciary Act, or Process Act—are often taken for granted. Should an appellate court be able to reach a different conclusion about the facts of a case than the jury did below? This question sounds so strange because the Seventh Amendment settled this issue after its ratification in 1791. Similarly, such questions as whether the United States should have chancery courts, whether there is a jury trial right applicable in civil cases, and whether litigants need to fear being hauled into court in Washington, D.C. for run-of-the-mill matters rarely (if ever) arise today.

So what basis is there for questioning the Federalist-centered narrative surrounding the original federal judiciary? My claim is that, despite their Federalist authorship, the Judiciary and Process Acts incorporated the Anti-Federalists’ political theory, and specifically their brand of federalism. To develop this argument, I identify a particular theory of federalism at the Constitutional Convention, trace how that theory was embraced by the Anti-Federalists and applied to the topic of the federal judiciary by “Brutus,”¹³ contrast this theory with Alexander Hamilton’s treatment of the judiciary in

11. See GOEBEL, *supra* note 6, at 459–60, 503, 507; WILLIAM J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 213–14 n.10 (1990) (noting that bill’s manuscript was in the handwriting of Ellsworth, Paterson, and Strong). On the topic of why several Anti-Federalists might have voted against a bill that accommodated many of their concerns, see *infra* pp. 27–28, 35–36 and accompanying notes.

12. *Senate Legislative Journal* (Apr. 7, 1789), in 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 11 (Charlene Bangs Bickford et al. eds., 1972); *Senate Legislative Journal* (June 12, 1789), in 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 67 (Charlene Bangs Bickford et al. eds., 1972); GOEBEL, *supra* note 6, at 466–67 (noting the strange fact that Lee, likely the most prominent Anti-Federalist in the Senate, was chosen to report the original bill).

13. Brutus was most likely Melancton Smith or one of his close associates. See THE ANTI-FEDERALIST

the Federalist Papers, show how it was incorporated into the “ratify now, amend later” compromises at state ratifying conventions, and then finally demonstrate how the theory made its way into the Judiciary and Process Acts of 1789. Ultimately, I contend that the Anti-Federalists’ unlikely victory owes to two factors: (1) the significant political pressure that the state ratifying conventions placed on those who drafted and voted on the Judiciary and Process Acts, and (2) the fact that, despite Oliver Ellsworth’s Federalist affiliation, his sympathy with the Anti-Federalists’ brand of federalism put him closer to Brutus than Hamilton. Like the Bill of Rights, then, the Anti-Federalists’ influence on the judiciary was a vicarious one. Yet, unlike the Bill of Rights, the Judiciary and Process Acts actually incorporated the Anti-Federalists’ theory of federal/state power, and, along the way, accomplished some of the structural changes the Anti-Federalists really wanted.

There is one important qualification to this portrayal, however. Namely, with the exception of the judicially-related provisions of the Bill of Rights that made it into the Constitution itself, the Anti-Federalists’ triumph did not have staying power. A detailed account of the growth of the federal judiciary is well beyond the scope of this article, but it is worth noting that, although the structure established by the Judiciary Act went largely unchanged until the Reconstruction era, the Anti-Federalists’ failure to cement the guiding principles of the Act in the Constitution allowed the national judiciary to eventually become something closer to what the Federalists would have wanted.¹⁴ In this way, the Judiciary and Process Acts might simultaneously be portrayed as a temporary Anti-Federalist victory in that the national judiciary was originally weak and state-dependent, and a long-term victory for the Federalists in that the limitations on the judiciary provided by these acts were reversible.

These insights also have contemporary relevance. Beyond at least partially rehabilitating a group that some have called “the first identifiable class of losers in American political history,”¹⁵ some scholars have already demonstrated how the typical Federalist-centered narrative surrounding these Acts has confused such issues as the federal government’s ability to commandeer state officers¹⁶ and whether federal courts should create federal common law.¹⁷ Another context in which this article’s thesis

WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at xi–xxxii, 397–419.

14. See FALLON ET AL., *supra* note 4, at 28–29 (discussing the changes to the federal judiciary accomplished in Reconstruction era). See also William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary*, in CAMBRIDGE COMPANION TO THE FEDERALIST 503–05 (Jack Rakove & Colleen Sheehan eds., 2020) (arguing that Hamilton’s theory has been adopted by contemporary scholars and practitioners). To be sure, while the Federalists wanted a stronger federal judiciary relative to the Anti-Federalists, this does not therefore establish that all Federalists would embrace the degree to which the judiciary has expanded in the modern system.

15. Paul Finkelman, *Turning Losers into Winners: What Can We Learn, if Anything, from the Antifederalists?*, 79 TEX. L. REV. 849, 892 (2001).

16. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1004, 1108–12 (2013) (arguing that, contrary to *Printz v. United States*, the Anti-Federalists’ support for “commandeering” suggests that the “commandeering of state executive and judicial officers should not be categorically unconstitutional”).

17. See generally Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015) (arguing that the Process Acts of 1789 and 1792, which required federal courts to use state forms of proceeding when hearing common law cases, reveal the *Sosa v. Alvarez-Machain* Court’s mistake in assuming that federal courts originally

matters is the longstanding debate over congressional power to limit the jurisdiction of the federal courts.¹⁸ It would require more time and care to explore the implications of my thesis for that debate. But, in general, to the extent that Article III's initial implementation is relevant to its interpretation, a more Anti-Federalist-friendly understanding of the Judiciary and Process Acts would seem to militate in favor of permitting Congress greater flexibility in transferring power from federal to state courts. Lastly, recognition of the Anti-Federalists' influence on the Judiciary and Process Acts stands to breathe new life into conversations about the Anti-Federalists' relevance to theories of constitutional and/or statutory interpretation. Some have argued that because Anti-Federalist writers like Brutus or Federal Farmer were the "losers," they are irrelevant to interpretations of founding era laws, or that they are relevant only to the same degree as other public texts that reveal the meanings people at the time would have ascribed to certain words.¹⁹ Placing the Anti-Federalists at least partially in the winner's column should cause further reflection about the degree to which their contributions form part of the canon for constitutional and/or statutory interpretation in the founding era.

This article proceeds in the following manner. In Part I, I set the stage for the ratification debates by examining the increasing importance of the judiciary throughout the Constitutional Convention as well as the diverse theories of federalism articulated by the delegates. In Part II, I examine the Anti-Federalists' arguments about federal judicial overreach in the months following the Convention with a special focus on Brutus. In Part III, I discuss the Federalists'—and especially Alexander Hamilton's—response to Brutus, as well as the debates over Article III at the state ratifying conventions. And, finally, in Part IV, I connect Brutus' arguments with key provisions in the Bill of Rights and the Judiciary and Process Acts of 1789.

I. ARTICLE III AND COMPETING STRATEGIES FOR NEGOTIATING FEDERAL/STATE CONFLICT AT THE CONVENTION

There is near-universal agreement among scholars that the delegates to the Constitutional Convention in 1787 did not view Article III as a high priority, at least not initially. Convention scholar Richard Beeman remarks, for example, that "the national judiciary . . . [took] a backseat to other issues throughout most of the Convention."²⁰ Legal historian Julius Goebel claims, similarly, that "the judiciary was subjected to much less critical working over than the other departments of government."²¹ Hart and Wechsler go even further, asserting that "[a]lmost without exception, decisions regarding

consulted "ambient" or "general" law).

18. See FALLON ET AL., *supra* note 4, at 307 (where Hart and Wechsler distinguish between (1) "the power of Congress to limit the jurisdiction of the lower federal courts"; (2) "the power of Congress to limit the appellate jurisdiction of the Supreme Court over cases that continue to be within the jurisdiction of the lower federal courts"; and (3) "the power of Congress to withdraw certain matters from the jurisdiction of all federal courts (with state courts continuing to exercise jurisdiction over those matters)."

19. See generally Nils Gilbertson, *Return of the Sceptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence*, 16 GEO. J.L. & PUB. POL'Y 255 (2018) (summarizing various positions on the Anti-Federalists' relevance to Constitutional interpretation).

20. RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 236 (2010).

21. See GOEBEL, *supra* note 6, at 205.

the judiciary [at the Convention] were ancillary, and reflected settlements and divisions concerning more deeply controversial issues.”²²

While this last characterization may go a bit too far, these claims invite an important question: Why did the delegates arrive at the Convention with such little concern for the judiciary? Bearing in mind the diverse size and population of the states as well as the critical importance of delimiting the powers of the “purse” and the “sword,” the most obvious explanation might be that the structure of the legislative and executive branches were more pressing concerns. Also, considering, first, that the Continental Congress’ authorization for the Convention was, at least technically, limited to “revising the Articles of Confederation,”²³ and, second, that the Articles had established only a very limited national court system, many delegates were likely less focused on the judiciary because of this point of departure.²⁴

One further reason for the judiciary’s initially inferior priority—and one that is especially relevant to the present inquiry—might be that it was several months before the delegates shifted their attention toward the judiciary as the means for addressing the classic problem for governments with a federal structure: How should the system negotiate conflicts between national and state governments?

Many delegates at the convention, and especially James Madison, were originally occupied with a potential *legislative* solution to this problem.²⁵ Madison’s proposed “federal negative” would have given Congress the ability to veto *any* state enactment before it became effective.²⁶ And the Virginia Plan, which Madison helped craft, recommended providing Congress with a similar power, but first would have required that it find the state law in question to have “contraven[ed] . . . the articles of the Union.”²⁷ Convention records suggest that Madison was very committed to these

22. See FALLON ET AL., *supra* note 4, at 4.

23. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 74 (Roscoe R. Hill ed., 1936) (emphasis added); *but see* GOEBEL, *supra* note 6, at 201–02 (arguing that the Continental Congress did not give this authority to the Convention because they knew they could not add anything to the states’ own respective decisions to send delegates to the Convention).

24. Even the New Jersey Plan, however, would have established a federal court system with power to review state court decisions. Thus, it is probable that most delegates began the Convention assuming that the new proposal would include a federal judiciary of some kind. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 611–16 (Max Farrand ed., 1911) [hereinafter 3 FARRAND].

25. See, e.g., ALLISON LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 147–58 (Harvard University Press 2010); Michael Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, 34 REV. POL. 166–210 (1986).

26. Letter from James Madison to George Washington (Apr. 16, 1787) (“[A] negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions.”).

27. 3 FARRAND, *supra* note 24, at 593–94. Some characterize this portion in the Virginia Plan (which Madison helped craft) as a different “federal negative,” thus presenting Madison as having proposed two distinct negatives. See Michael Zuckert, *Judicial Review and the Incomplete Constitution: A Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism*, in *THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM* 61–64 (Steven Kautz et al. eds., 2009). This portrayal can be helpful because, as explored further below, it helps highlight how Madison sought for this provision to solve two different problems. The Virginia Plan’s congressional veto of state enactments contravening the articles of the union was specifically designed to ensure that states did not impinge on national interests. And Madison’s unqualified congressional veto power over state laws was a key part of solving the problem of large republics discussed in Federalist No. 10 because—as compared to the state legislatures—Madison thought Congress would represent a broader diversity of constituencies and interests, making congressional majorities less factious than those

provisions. Not only did he repeatedly attempt to convince the other delegates of the necessity of some type of Congressional veto power over state laws, he also famously complained in a letter to Thomas Jefferson afterward about how “the want of some such provision seems to have been mortal to the antient [sic] Confederacies, and to be the disease of the modern.”²⁸ Indeed, if the length of Madison’s treatment of this topic in his letter to Jefferson is any indication, the absence of a congressional veto power from the plan was his deepest regret.²⁹

To better understand the development of the delegates’ treatment of Article III during the Convention—and to appreciate why Madison felt so strongly about his “federal negative”—it is helpful to contrast Madison’s position with other strategies presented at the Convention for balancing state and federal power. Coming fresh off of a disillusioning experience with the Articles of Confederation, almost every delegate agreed that some adjustment in favor of a stronger national government was necessary to preserve the Union. This, of course, led those on the one extreme—like Alexander Hamilton—to suggest a truly unified national government in which the states would give up all of their sovereignty.³⁰ But even the most pro-state-power plan advanced during the summer of 1787—William Paterson’s New Jersey Plan—granted the national government *some* additional powers targeted especially at better regulating commerce, taxes, and foreign affairs.³¹ The New Jersey Plan thus represents the lightest-touch approach toward reforming the Articles of Confederation, all along seeking to preserve the Articles’ fundamental commitment to act upon states only at the state (rather than individual) level.³²

Madison was the person who perhaps best saw the difficulty inherent in the New Jersey Plan’s attempt to fix the Articles’ problems without departing from their theoretical foundation. Yet, before turning to Madison, it is worth first noting how the architects of the New Jersey Plan themselves attempted to address the problem of state-level defiance of national law that had so plagued the Articles of Confederation. Paterson’s proposed solution was an extraordinary one: he would have granted the Executive the power to compel, by use of all necessary military force, the obedience of noncomplying States.³³ And while this power appears on its face to be in significant tension with state sovereignty, the intent of the New Jersey Plan’s devotees was apparently to make incursions on the states a rare (and desperate) measure.³⁴ Only in cases where enforcement was worth risking armed conflict would the national

found in the states. *Id.* at 62–63. Congress thus needed this strong veto power to be able to adequately protect the rights of citizens. *Id.*

28. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787).

29. LACROIX, *supra* note 25, at 136–39, 158–59; Zuckert, *supra* note 25, at 187.

30. Zuckert, *supra* note 25, at 198 (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 283–86 (Max Farrand ed., 1911) [hereinafter 1 FARRAND]).

31. 1 FARRAND, *supra* note 30, at 242–45.

32. Zuckert, *supra* note 25, at 169–70.

33. 1 FARRAND, *supra* note 30, at 245 (“[I]f any State, or any body of men in any State shall oppose or prevent [the] carrying into execution [of] such acts or treaties, the federal Executive shall be authorized to call forth [the] power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts.”).

34. Zuckert, *supra* note 25, at 170–71.

government act against the will of member states.

Three other conceptions of federalism represented at the Convention—those embraced by the Virginia Plan, James Madison, and John Dickinson respectively—focused their efforts at negotiating the conflict between national and state governments in a more peaceful manner.³⁵ And the similar strategy they adopted for solving this problem is what generated much of the Constitution’s eventual design.³⁶

The Virginia Plan deserves credit for the Constitution’s key theoretical insight. Contrary to the Articles of Confederation, the Virginia Plan began with the premise that *both* national and state governments should operate at the individual level with power over different objects, so that they would essentially act on separate planes with the points of contact between the two being as limited as possible.³⁷ In this way, the two generally independent and self-sustaining levels of government could minimize the avenues through which government-on-government conflict would arise. Thus, under the Virginia Plan, the national and state governments each possessed their own robust executive, legislative, and judicial branches; Congress was given limited powers to accomplish national objects; and the national government was otherwise to stay out of state government affairs.³⁸

For Madison, however, this type of separation by itself was insufficient. Having recently reflected, in anticipation of the Convention, upon the failures of ancient confederacies, Madison was especially concerned with *state encroachment* on the national government.³⁹ Unless some mechanism existed through which the national government could exercise a degree of agency in state government proceedings, confrontation between the two spheres would ultimately be unavoidable. Much like his analysis in Federalist No. 51 concerning the need for each branch of government to have some mechanism to protect itself from the other branches to preserve the separation of powers,⁴⁰ here, Madison held that the integrity of federal and state governments would be short-lived unless the national government had an effective way of protecting its own turf.⁴¹

Of course, the Virginia Plan’s own federal negative (which, again, permitted

35. Note, on this point, that the Virginia Plan included a similar provision permitting the “National Legislature” to compel state compliance by force if necessary. 1 FARRAND, *supra* note 30, at 21 (“[T]he National Legislature ought to be empowered [sic] . . . to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof”). But Madison makes clear in a number of places his belief that the primary method of securing state compliance—and the only one that could actually be successful—was the construction of a self-sufficient national government armed with something like the federal negative. *See, e.g.*, James Madison Letter to Thomas Jefferson (Mar. 19, 1787); *see generally* Zuckert, *supra* note 25.

36. *See generally* FEDERALIST NOS. 15, 16.

37. *See id.*; Zuckert, *supra* note 25, at 181–82.

38. 1 FARRAND, *supra* note 30, at 20–23.

39. *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 2 THE WRITINGS OF JAMES MADISON 361–69 (Gaillard Hunt ed., 1901); James Madison, *On Ancient and Modern Confederacies* (1786), in 2 THE WRITINGS OF JAMES MADISON 369–90 (Gaillard Hunt ed., 1901).

40. FEDERALIST NO. 51, at 267–72 (James Madison).

41. *See* Letter from James Madison to Thomas Jefferson (Mar. 19, 1787) (“Without this defensive power [i.e. the federal negative] experience and reflection have satisfied me that however ample the federal powers may be made, or however [c]learly their boundaries may be delineated, on paper, they will be easily and continually baffled by the Legislative sovereignties of the States”).

Congress to veto only *unconstitutional* state laws) constituted one notable exception to the Plan's otherwise inviolable commitment to minimizing state and federal contacts. But even this was too weak in Madison's view. The danger of state encroachment was such that the national government needed to actually insert itself into the routine procedure by which states made law so that federal oversight was not the exception but the rule.

As it turns out, however, Madison would have undoubtedly preferred the Virginia Plan's federal negative to the approach the Convention eventually adopted. As Michael Zuckert notes by way of explaining the defeat of the federal negative:

[I]n part, the failure of [Madison's] negatives must be attributed to [his] success in impressing on his colleagues the new principle that should govern the operation of the new constitution: that one level of government (the general government) should not operate on the other level of government (the states), but rather on individuals. Madison's beloved negative would [have] violate[d] his own principle⁴²

Ultimately, then, one might say that the core tenet of the Madison-inspired Virginia Plan won out over the exception to that tenet embodied in both versions of Madison's federal negative.

If the Virginia Plan generally sought to minimize the points of contact between two separate and self-sustaining levels of government, and Madison's own version of federalism permitted federal agency within state decision-making, this logically leaves room for one final theory of federalism. That theory, which Zuckert calls "Dickinson Federalism" after one of its key champions at the Convention, agreed that it was wise to minimize the points of possible federal/state conflict but, contrary to Madison, sought to grant *state* agency in *federal* decision-making.⁴³ For those subscribing to this view, federal encroachment on state power was just as dangerous as the opposite threat. In this worry, Dickinson Federalists like George Mason anticipated a common Anti-Federalist refrain: namely, that the Virginia Plan's approach would too easily permit the national government to swallow up the states. As Mason stated at the Convention:

[W]hatever power may be necessary [sic] for the Natl. Govt. a certain portion must necessarily be left in the States. . . . The State Legislatures also ought to have some means of defending themselves agst. encroachments of the Natl. Govt. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment.⁴⁴

A second concern for those in this camp, beyond the danger of federal overreach, was that the states would fail to check the federal government in any meaningful way if they were excluded from federal lawmaking procedures. Quoting Dickinson himself:

The preservation of the States in a certain degree of agency is indispensable. It will produce the collision between different authorities which should be wished for in order to check each other. . . . The [Virginia Plan's] reform would only unite the 13 small streams

42. Zuckert, *supra* note 27, at 64.

43. Zuckert, *supra* note 25, at 199.

44. 1 FARRAND, *supra* note 30, at 155.

into one great current pursuing the same course without any opposition whatever.”⁴⁵

For Dickinson Federalists, the primary means for accomplishing this state defense and federal check was to grant each state equal voting power in the Senate and task state legislatures with electing federal senators. This strategy, famously manifested in the Connecticut Compromise, is often attributed to Roger Sherman.⁴⁶ But Sherman was not alone, even in Connecticut, in pushing for this plan. The other two Connecticut delegates, William Samuel Johnson and eventual Judiciary Act architect Oliver Ellsworth also vociferously backed the compromise. And, in fact, throughout the course of the Convention, it was Ellsworth instead of Sherman who eventually assumed the role of the Connecticut Compromise’s “principal spokesperson,”⁴⁷ regularly going toe-to-toe with Madison,⁴⁸ Hamilton,⁴⁹ and Wilson⁵⁰ in floor debates about the plan.

Much could be added here about Ellsworth’s role at the Convention that is relevant to his later work on the Judiciary Act. But, for present purposes, suffice it to say that his conduct evinces not only a commitment to the importance of state agency in the national government, but also a sympathy toward several arguments eventually made by Anti-Federalists. Consider, in this regard, just two of Ellsworth’s core contributions in Philadelphia.

First, as part of the debate surrounding the Connecticut Compromise, in the days prior to the Convention’s July 2nd vote to assign the question to be resolved by a committee of the delegates, Oliver Ellsworth rose multiple times to challenge various presentations of the Virginia Plan’s conception of federalism. In a June 25th speech, for example, Ellsworth responded to James Wilson’s remarks in opposition to the proposal to grant state legislatures the power to elect federal senators. Specifically, Wilson had claimed that the delegates needed to “abstract[] as much as possible from the idea of State Govts.,” and—as support for this approach—continued:

The election of the 2d. branch by the Legislatures, will introduce & cherish local interests & local prejudices. The Genl. Govt. is not an assemblage of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them: the *individuals* therefore not the *States*, ought to be represented in it⁵¹

This was a model presentation of Virginia Plan federalism. In reply, Ellsworth urged, contrary to Wilson, that it was a “necessity [to] maintain[] the existence & agency of the States.”⁵² “Without their co-operation it would be impossible to support a Republican Govt. over so great an extent of Country.”⁵³ “The only chance of supporting

45. *Id.* at 152–53.

46. *See* BEEMAN, *supra* note 20, at 150–51.

47. *See* MICHAEL C. TOTH, *FOUNDING FEDERALIST: THE LIFE OF OLIVER ELLSWORTH* 57–58 (2011). Toth suggests that Sherman and Ellsworth formed a special partnership in the effort towards the compromise, with “Sherman planting the seeds of a possible middle way, and Ellsworth, the seasoned litigator, taking on the role of persuader in chief.” *Id.*

48. *See, e.g.*, 1 FARRAND, *supra* note 30, at 463–65, 468–69, 471–72, 474–77, 485–86, 490–92.

49. *Id.* at 465–67, 468–69, 472–75, 477.

50. *Id.* at 405–07, 413–15, 416–17.

51. *Id.* at 406 (emphasis in original).

52. *Id.*

53. 1 FARRAND, *supra* note 30, at 406.

a Genl. Govt.,” Ellsworth concluded, “[a]y in engrafting it on that of the individual States.”⁵⁴ A June 29 speech, responding to Madison and others, further illustrates Ellsworth’s support for some state-level role in the national government:

[P]roportional representation in the first branch [of Congress] was conformable to the national principle & would secure the large States agst. the small. An equality of voices [in the Senate] was conformable to the federal⁵⁵ principle and was necessary to secure the Small States agst. the large . . . [L]arge States . . . would notwithstanding the equality of votes, have an influence that would maintain their superiority The power of self-defense was essential to the small States. Nature had given it to the smallest insect of the creation.⁵⁶

On this latter occasion, Ellsworth’s defense of state agency is grounded most directly in protecting small states from large state (as opposed to national) encroachments. But, regardless of his specific motivation here, Ellsworth’s remarks plainly give state governments a priority not found in the Virginia Plan or Madison’s conception of federalism.

A second contribution that underscores Ellsworth’s state government sympathies concerns his support for other mechanisms tethering Congress to the states. One example of this is what biographer Michael Toth calls Ellsworth’s “electoral federalism”—or his consistent endorsement of measures allowing the states themselves to determine the qualifications for candidates and voters.⁵⁷ As Toth summarizes:

While other framers favored setting strict national standards for matters such as the eligibility for voting in congressional elections, Ellsworth supported giving local constituents wide discretion over the rules that would determine who would participate in the nation’s political life. In the face of pressure by nationalist delegates for the creation of a centrally regulated political marketplace, Ellsworth advanced a locally regulated one.⁵⁸

Another brief but telling manifestation of Ellsworth’s preference for connecting Congress with the states was his endorsement, along with his Connecticut colleague Roger Sherman, of a *one-year* term for members of the House of Representatives. Following Ellsworth’s motion for the change (and Madison’s speech in opposition), Sherman remarked—in language anticipating one of the most quintessentially Anti-Federalist arguments advanced during the ratification debates⁵⁹—that

54. *Id.* at 407.

55. Ellsworth’s use of “federal” here is of course meant in contrast to the use of “national” in the previous sentence, thus highlighting how his plan for equal representation in the Senate would respect state sovereignty.

56. 1 FARRAND, *supra* note 30, at 468–69.

57. TOTH, *supra* note 47, at 69–82.

58. *Id.* at 71.

59. See, e.g., *Federal Farmer VII*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 70 (cautioning that there is a tendency in every society to “confer on one part [of society] the height of power and happiness, and to reduce the others to the extreme form of weakness and misery”); *Brutus IV*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 191 (“The great art, therefore, in forming a good constitution, appears to be this, so to frame it, as that those to whom the power is committed shall be subject to the same feelings, and aim at the same objects as the people do, who transfer to them their authority”); HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 17 (1981) (noting that the Anti-Federalists generally wanted representatives to be “directly answerable to and dependent on their constituents” by way of “short terms of office, frequent rotation, and a numerous representation”).

[He] preferred annual elections . . . [because] representatives ought to return home and mix with the people. By remaining at the seat of Govt. they would acquire the habits of the place which might differ from those of their Constituents.⁶⁰

One final notable, but more complex, example of this state government sympathy was Ellsworth's proposal that all members of Congress actually be paid by the states rather than by the national treasury.⁶¹ In defense of this proposal as applied to the House of Representatives, on June 22, Ellsworth pointed to the different norms and standards of living in different states as a reason for letting each state decide its own salary for its national representatives.⁶² And on June 26, in the Senate context, Ellsworth argued that having the states pay the national senators' salaries would ensure that the national government "ha[d] the confidence of the States."⁶³ By the time this measure was reintroduced much later, Madison's notes indicate that Ellsworth had changed his mind, admitting that this "mode of payment" would result in "too much dependence on the states."⁶⁴ But Ellsworth's initial support for this approach further demonstrates his localist leanings.

To return to the thread with which this section began, by the end of July, not only had the Convention rejected Madison's multiple proposals for granting Congress agency into state decision-making, in fact, through the Connecticut Compromise and related developments, the national legislative branch had become the home for *state* agency in *federal* decision-making. This reversal of fortunes goes a long way towards explaining Madison's frustrations noted above. But it also brings us to an important point in the evolution of the Convention's conception of the judiciary.

Despite the ultimate failure of Madison's federal negative, his arguments appear to have convinced the delegates that it was necessary to have *some* device to protect against state abuses. Having closed the door on legislative solutions for protecting the federal government against state encroachment, the delegates turned to the judiciary.⁶⁵ Critically, the delegates decided that using the judiciary to prevent state overreach would strike the right balance between the two layers of government and would be most palatable to the states. Thus, on the same day the delegates discarded Madison's negative for the final time, discussion turned to what would eventually become the Supremacy Clause.⁶⁶ And within four days of finalizing the language of the Supremacy Clause, the Convention revised the language of Article III, adding—among other things—the ability of federal courts to hear claims arising "under this Constitution."⁶⁷ If something like

60. 1 FARRAND, *supra* note 30, at 362; *see also id.* at 365 (Yates' notes of Sherman's speech).

61. *Id.* at 371–72, 74 (with regard to the House of Representatives), 427 (with regard to the Senate).

62. *Id.* at 371. Here, in response to (especially Hamilton's) criticism of this proposal, Ellsworth also makes the more pragmatic point that this arrangement would increase the chances of the Constitution's ratification by the states. *Id.* at 374, 379 ("If I return to my state and tell them, we made such and such regulations for a general government, because we dared not trust you with any extensive powers, will they . . . adopt your government?").

63. *Id.* at 427.

64. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 290 (Max Farrand ed., 1911) [hereinafter 2 FARRAND].

65. LACROIX, *supra* note 25, at 161; *see also* Zuckert, *supra* note 27, at 57, 64–69.

66. *See* LACROIX, *supra* note 25, at 161–62.

67. *Id.* at 163–64.

Dickinson Federalism won out in the legislative branch, Madison's conception of federalism had found a new, albeit unexpected, home in the federal judiciary.

Yet there is one key caveat to this characterization. Despite establishing (even if unwittingly) the power of judicial review, the "Madisonian Compromise" concerning the creation of inferior federal courts famously left a blank space where most of the details of the judiciary might have been included. Thus, considering that the judiciary now wielded the key (and controversial) ingredient of Madison's federalism, it is no wonder that this issue was fated to become a flashpoint in the upcoming ratification debates. In short, even if Hart and Wechsler were correct to suggest that the federal judiciary was initially a "secondary or even tertiary concern," this sentiment would soon change.

II. THE ANTI-FEDERALISTS' CRITICISMS OF ARTICLE III

Richard Henry Lee, a sitting Continental Congressman from Virginia who had previously served as President of the Continental Congress, was among the prominent figures that were notably absent from the Convention. Despite his absence, Lee freely offered his advice to Virginia delegates such as George Mason before the Convention, and, to the extent possible, followed the Convention's proceedings from afar.⁶⁸

Lee took special note of the fact that the order originally authorizing the Convention to revise the Articles of Confederation required that any proposal obtain congressional approval before being forwarded on to the states.⁶⁹ Thus, after the Convention's proposed Constitution was released, Lee spent several days poring over the draft, and when the measure finally came before Congress, he surprised many by offering a number of amendments.⁷⁰

For this effort, Lee was politically pilloried. His motion to consider amendments—including, most notably, a Bill of Rights—was rejected without debate.⁷¹ Matters further deteriorated after Lee, along with future Anti-Federalist apologist Melancton Smith, asked the body to express its disapproval of the proposed Constitution's requirement that only *nine* states ratify the document instead of the unanimity required under the Articles of Confederation.⁷² This move was also swiftly rejected.

Following this episode, and before returning from New York to Virginia, Lee met with Melancton Smith and John Lamb.⁷³ This meeting, where these men likely discussed their strategy for securing amendments to the proposed Constitution, portended a growing movement of Americans who were skeptical of the plan. Later, in December 1787, Lee would publish a lengthy letter outlining his opposition to the Constitution,⁷⁴ only to receive further public (and personal) criticism from Federalists like Oliver

68. J. KENT MCGAUGHY, RICHARD HENRY LEE OF VIRGINIA: A PORTRAIT OF AN AMERICAN REVOLUTIONARY 147–58 (2004).

69. *Id.* at 191.

70. See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337–39 (John P. Kaminski et al. eds., 1978) [hereinafter 1 DHRC].

71. MCGAUGHY, *supra* note 68, at 191.

72. *Id.*

73. *Id.*

74. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 61–64, 208 (John P. Kaminski et al. eds., 1978) [hereinafter 8 DHRC].

Ellsworth. Melancton Smith would also soon take up the Anti-Federalist cause in New York, helping author at least one (and perhaps both) of what were arguably the most sophisticated Anti-Federalist tracts written during the ratification period: Brutus and Federal Farmer.⁷⁵

The Anti-Federalists' arguments against the Constitution were many, but one quintessential and foundational Anti-Federalist objection is worth underscoring at the outset. As presaged by George Mason's statement quoted above, the Anti-Federalists especially feared that the Constitution was calculated to absorb the states into a single national government. As *Federal Farmer I*—published October 8, 1787—told the tale: the men who had originally pressed for the Constitutional Convention knew that “[t]he idea of destroying . . . the state government[s], and forming one consolidated system, could not [be openly] admitted.”⁷⁶ Thus, these men had attempted to fool the states into “passing the Rubicon” toward a single unified government by taking only “the first important step” in this direction.⁷⁷ The ultimate goal and the proposed system's unavoidable tendency, however, was “to change, in time, our condition . . . [from] being thirteen republics, under a federal head . . . [to] one consolidated government.”⁷⁸ Brutus' opening letter put the point similarly, saying that “although the government reported by the convention does not go to a perfect and entire consolidation . . . it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.”⁷⁹ Numerous other Anti-Federalists raised similar concerns.⁸⁰

Preventing “consolidation,” then, became a slogan of sorts for the Anti-Federalists that carried well into the state ratifying conventions and beyond. In this way, the Anti-Federalists plainly shared some common ground with the so-called Dickinson Federalists at the Constitutional Convention like Mason and Ellsworth.

On that note, it should not surprise the reader to learn that Ellsworth's own contributions to the ratification debates include multiple statements demonstrating his desire to protect the states' sphere of influence, including: (1) his assurance in a public report (jointly authored by Sherman) that, under the new plan, the “states [would] retain their Sovereignty in all [local] matters”;⁸¹ (2) his suggestion in the pseudonymously

75. See THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at xi–xxxii (discussing the authorship of Brutus and Federal Farmer).

76. *Federal Farmer I*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 23.

77. *Id.* at 19, 23.

78. *Id.* at 22.

79. *Brutus I*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 169.

80. See, e.g., *Cato III* (Sept. 26, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 109–13 (Herbert J. Storing & Murray Dry eds., 1981) (arguing that a consolidated government would run afoul of Montesquieu's admonition against large republics); *Centinel II* (Oct. 24, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 147 (Herbert J. Storing & Murray Dry eds., 1981) (predicting that Congress would “before long swallow up the Legislative, the Executive, and the Judicial powers of the several States”); *The Address and Reasons of the Dissent of the Minority of the Convention of Pennsylvania To Their Constituents* (Dec. 18, 1787), in 3 THE COMPLETE ANTI-FEDERALIST 155 (Herbert J. Storing & Murray Dry eds., 1981) (noting that “two co-ordinate sovereignties would be a solecism in politics” and that the inevitable conflict between state and national governments will result in the “absolute destruction of state governments . . . [because they] are divested of every means of defence”).

81. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 352 (John P. Kaminski et al. eds., 1978) [hereinafter 3 DHRC].

published *Landholder IV* that there was no need to fear consolidation—or really any change to the situation of the states—because their power to choose Senators “indissolubly linked” the federal and state governments;⁸² and (3) his passing suggestion in *Landholder VI* that, except where the United States Supreme Court had original jurisdiction, matters might “in the first instance be [heard] in the state courts and those trials be final except in cases of great magnitude.”⁸³ Because the immediate question facing the nation had become whether to ratify the Constitution as proposed, however, Ellsworth also frequently took up the mantle of defending a robust and unified national government.⁸⁴ Thus, despite the affinities between Anti-Federalists and pro-state power Federalists, this natural alliance would sit largely unrealized for the time being.

Turning to the specific criticisms of Article III put forward by Anti-Federalists, many publications in the latter months of 1787 contained some analysis of the judiciary. Richard Henry Lee’s proposed amendments to the Constitution, for example, sought the guarantee of a jury trial in civil cases, a provision to ensure that juries in criminal cases would be formed from citizens living in the “vicinage” where the action arose or where the defendant was domiciled, and certain limitations on diversity and alienage jurisdiction so as to prevent defendants from being hauled into a court hundreds of miles away from home.⁸⁵ Other Anti-Federalists struck similar chords. *Cincinnatus II*, for example, on November 8, 1787, defended the necessity of the trial by jury in civil cases and expressed concern that federal appellate jurisdiction over questions of both law and fact would subvert jury trials completely.⁸⁶ In George Mason’s *Objections to the Constitution*, published in various places in November 1787, he suggested that the federal judiciary might be responsible for bringing about the feared consolidation, which would in turn encourage the oppression of the poor:

The judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states; thereby rendering laws 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.⁸⁷

Also, there were numerous other Anti-Federalist publications in this time period containing partially developed criticisms of Article III, including *Centinel II* (published October 24, 1787),⁸⁸ *The Dissent of the Minority of the Convention of Pennsylvania* (published December 16, 1787),⁸⁹ and *Federal Farmer XV* (published January 16,

82. *Id.* at 479–80 (claiming that “no alteration in the state governments is even proposed, but they are to remain identically the same as they now are”).

83. *Id.* at 490.

84. See, e.g., *Landholder II*, in 3 DHRC, *supra* note 81, at 463 (noting that “[a] government capable of controlling the whole . . . is one of the prerequisites for national liberty”); Ellsworth speech at Connecticut Convention (Jan. 7, 1788), in 3 DHRC, *supra* note 81, at 548–54 (emphasizing the necessity of judicial review to keep “the states [from] go[ing] beyond their limits”).

85. 1 DHRC, *supra* note 70, at 337–39.

86. *Cincinnatus II* (Nov. 8, 1787), in 6 THE COMPLETE ANTI-FEDERALIST 11–12 (Herbert J. Storing & Murray Dry eds., 1981).

87. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 9–13 (John P. Kaminski et al. eds., 1978) [hereinafter 2 DHRC].

88. *Id.* at 147–49.

89. 3 DHRC, *supra* note 81, at 159–61.

1788).⁹⁰

Beginning in late-January 1788, however, the upward trajectory of Anti-Federalist commentary about the federal judiciary reached its zenith in a series of essays penned by Brutus. Instead of devoting only a few scattered comments to the topic as did most other Anti-Federalist authors, Brutus set aside five consecutive letters presenting a comprehensive and forceful critique of the proposed Constitution's national judiciary. From the outset, Brutus was not shy about his unique ambition in these letters, suggesting that, up to that point, no writer on either side "ha[d] [yet] discussed the judicial powers with any degree of accuracy."⁹¹

The overarching theme of Brutus' analysis of Article III is that the proposed Constitution grants the federal judiciary far too long a leash, and that the Supreme Court's unique degree of influence will be used to bring about the destruction (or "consolidation") of state governments. *Brutus XI*, the first letter examining the judiciary, provides a concise opening formulation of this claim, stating that—through these letters—Brutus will show how Article III "will operate to a total subversion of the state judiciaries, if not to the legislative authority of the states."⁹² In this opening letter, Brutus also provides a roadmap of his argument. First, he plans to convince his readers of the truly unprecedented "nature and extent of the judicial powers" granted under the proposed Constitution.⁹³ And, second, Brutus hopes to show how this power will be inevitably abused at the expense of the states.⁹⁴

As to the first point, Brutus' presentation of federal judicial power begins by emphasizing the national judicial branch's remarkable independence. Federal judges, Brutus stresses, are "totally independent, both of the people and the legislature, both with respect to their offices and salaries."⁹⁵ What is more, beyond their tenure and salary protections, Brutus notes how these judges might resist any external oversight through their power to flexibly interpret the Constitution. In one striking passage, Brutus states that the courts "will give the sense of every article of the constitution, that may from time to time come before them," and that they "will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."⁹⁶ Later, Brutus claims that the word "equity" in Article III, section 2 will permit judges to consider the preamble in the process of "giv[ing] such a meaning to the various parts [of the Constitution], as will . . . most effectually promote the ends the constitution had in view . . ."⁹⁷ Still later, Brutus argues that other parts of

90. 2 DHRC, *supra* note 87, at 315–23.

91. See *Brutus XI*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 233.

92. *Id.* at 235.

93. *Id.* at 234.

94. *Id.* at 234, 237–39.

95. *Id.* at 234.

96. *Brutus XI*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 236.

97. *Id.* at 238. Brutus earlier places this "ends-based" method of equitable interpretation in the context of a broader theory of constitutional interpretation. "[C]ourts are to give such meaning to the constitution as comports best with the common, and generally received acceptation of the words in which it is expressed, regarding their ordinary and popular use, rather than their grammatical propriety," Brutus states. He continues:

the Constitution invite this open-ended approach because they are phrased in “general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning.”⁹⁸

All of this is especially problematic, Brutus continues, because the Supreme Court will have the final say as to the meaning of the Constitution. Anticipating Chief Justice Marshall’s argument in *Marbury v. Madison*,⁹⁹ Brutus contends that, because Article III, section 2 explicitly extends the judicial power to cases “arising under this constitution” and to those arising “under the laws of the United States,” this plainly suggests that the Supreme Court has the “power to resolve all questions that may arise on any case on the construction of the constitution”¹⁰⁰ Moreover, because “there is no power provided in the constitution, that can correct [the Supreme Court’s] errors, or controul their adjudications,” their opinions, “whatever they may be, will have the force of law”¹⁰¹ Nor can Congress be permitted to disagree with the federal judiciary, Brutus claims: “The legislature must be controuled by the constitution, and not the constitution by them.”¹⁰²

Expanding on this point in *Brutus XV*, the final letter on the judiciary, Brutus notes how even the *people themselves* are unable to check the Supreme Court under the proposed Constitution:

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find in the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right [B]ut when this power is lodged in the hands of men independent of the people . . . no way is left to controul them but *with a high hand and an outstretched arm*.¹⁰³

Here, Brutus implies that a significant flaw exists in the mixed brand of federalism adopted by the Constitutional Convention. Unlike Madison’s Congressional negative, the Convention’s judicial solution for protecting the federal government from state encroachment insulates care over the nation’s fundamental contract from the people themselves! Thus, the very motivating principle of the Virginia Plan—that military conflicts between state and federal governments must be avoided at all costs—is again put at risk. If the people cannot realistically expect to hold their governors accountable

“[w]here words are dubious, they will be explained by context . . . [and] [t]he end of the clause will be attended to, and the words will be understood as to bear no meaning or a very absurd one.” *Id.* at 235–36.

98. *Id.* at 237.

99. There, Chief Justice Marshall states:

The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

Marbury v. Madison, 5 U.S. 137, 178–79 (1803).

100. *Brutus XI*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 235.

101. *Id.* at 236

102. *Id.* at 236–37.

103. *Id.* at 262. Brutus’ use of the phrase “a high hand and an outstretched arm” is a reference to the Old Testament God’s characterization of his deliverance of the Israelites from Egypt. *See, e.g.*, Deuteronomy 4:34, 5:15, 7:19, 11:2.

for what the people judge to be flawed interpretations of the Constitution, they will have no choice but to turn back to military solutions to address their grievances. This line of thought is also likely behind an earlier passage in *Brutus XV*, which echoes the Lockean characterization of revolution as an “appeal to heaven”.¹⁰⁴

There is no power above [the judiciary], to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.¹⁰⁵

This brings us to the second point on Brutus’ initial outline. Having established the unique power and position of the federal courts, Brutus turns again to the theme of consolidation, offering numerous reasons in *Brutus XI* and *XII* why the Supreme Court’s expansive power spells doom for the states. Several of Brutus’ arguments seize on specific clauses of the Constitution—such as the Necessary and Proper Clause, the preamble’s admonitions toward forming “a more perfect Union” and “establish[ing] Justice,” and Article IV’s Privileges and Immunities Clause—by way of contending that all of these will eventually be marshaled against the states.¹⁰⁶ But the core of Brutus’ argument on this point concerns his analysis of the human desire for power.

It is axiomatic that men holding political office are “tenacious of power,” Brutus claims.¹⁰⁷ Accordingly, unless they are somehow checked, such men will only expand their own influence. This “maxim” of political power is especially pronounced in the judicial context, Brutus suggests, because “the dignity and importance of [federal] judges, will be in proportion to the extent and magnitude of the powers they exercise.”¹⁰⁸ Federal judges will thus be incentivized to “give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority,” at the expense of the states.¹⁰⁹ As a result, even if this development is gradual, bit-by-bit the federal courts will erode state power “until [the states] become so trifling and unimportant, as not to be worth having.”¹¹⁰

After Brutus’ treatment of ‘consolidation’ in letters *XI* and *XII* and before he returns to the topic of judicial power in *Brutus XV*, in letters *XIII* and *XIV* Brutus focuses on two other important aspects of Article III: state sovereign immunity and the right to trial by jury. Concerning the first, Brutus argues that permitting suits “between a state and citizens of another state [is] improper,” and that this “will, in its exercise, prove most pernicious and destructive.”¹¹¹ For one, such suits are “humiliating and degrading to a

104. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 379–80 (Peter Laslett ed., 1960).

105. *Brutus XI*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 258.

106. *Id.* at 241–45.

107. *Id.* at 238.

108. *Id.*

109. *Id.* Brutus also argues that if the Constitution is to be interpreted in accordance with its ends and spirit, “its spirit is to subvert and abolish all the powers of the state government, and to embrace every object to which any government extends.” *Id.* at 243.

110. *Brutus XI*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 245.

111. *Id.* at 247.

government.”¹¹² Also, given that many states owed money to individuals after the Revolutionary War, in Brutus’ mind, this provision could permit such widespread litigation against states that the solvency of state budgets would be jeopardized.¹¹³

Concerning the right to trial by jury, in letter *XIV* Brutus sounds a common Anti-Federalist refrain underscoring the importance of the right to a jury from one’s vicinage in *all cases*—both criminal and *civil*. Yet, unlike most Anti-Federalists touching on the issue, Brutus’ comments do not arise in the context of arguing for a bill of rights, but under Article III, section 2, clause 2, which gives the Supreme Court “appellate jurisdiction, *both as to law and fact*, with such exceptions, and under such regulations as the Congress shall make.”¹¹⁴

Here, Brutus’ basic claim is that appellate jurisdiction over questions of *fact* would undermine the entire institution of the jury. If an appellate judge can reject a lower court jury’s factual findings out of hand, Brutus emphasizes, the right to a jury is practically hollow. Alternatively, if Congress were to require that appellate courts call a *second* jury when reviewing lower court findings of fact, this would significantly incentivize appeals—thus making “the inferior courts . . . almost entirely useless.”¹¹⁵ Under such a system, litigants would have to pay an attorney throughout the duration of yet another trial and, as Brutus aptly notes, “the costs accruing in courts generally advance with the grade of the court.”¹¹⁶ Litigants would have to meet new evidence if introduced and would be held under the shadow of litigation for a longer period of time.¹¹⁷ Finally, Brutus observes that appellate courts will almost always be located further away from the homes of the witnesses and parties involved than trial courts.¹¹⁸ And this will inevitably still be the case (although to a lesser degree), even if Congress requires appellate judges to ride circuit.¹¹⁹ Thus, because fewer witnesses will be able to make the trip to the appellate court, the second jury runs the risk of being deprived of the benefits of live testimony and cross-examination. He states:

It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to

112. *Id.*

113. *Id.* at 247–49.

114. U.S. CONST. art. III, § 2, cl. 2 (emphasis mine).

115. See THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 253. It is worth noting here, however, that many state judicial systems at the time would have permitted something like a second trial upon appeal. See GOEBEL, *supra* note 6, at 27–29 (discussing how some of the American colonies, and especially those in New England, essentially permitted a new trial on appeal throughout much of the 18th Century); RITZ, *supra* note 11, at 6, 27 (discussing how appeals involving a new trial and jury were not unusual in post-revolutionary state judicial systems).

116. THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 254 (opining that “the costs in the supreme general court will exceed [every] court[]; the officers . . . will be more dignified . . . , the lawyers of the most ability will practice in them, and the trouble and expense of attending them will be greater.”).

117. *Id.* at 251.

118. *Id.* at 253.

119. *Id.*

writing¹²⁰

Adding all of this together, Brutus argues this will cause the “administration of justice under the powers of the judicial” to be fundamentally oppressive.¹²¹ The fact that the courts “will be attended with such a heavy expense,” according to Brutus, “amount[s] to little short of a denial of justice to the poor and midling class of people who in every government stand most in need of the protection of the law.”¹²² “No man of midling fortune, can sustain the expence of such a law suit,” Brutus exclaims, “and therefore the poorer and midling class of citizens will be under necessity of submitting to the demands of the rich and the lordly, in cases that will come under the cognizance of this court.”¹²³

What solution does Brutus offer for these problems? His answer here is particularly important, for it helps clarify the Dickinson-like brand of federalism he supports. Beyond arguing that federal appellate courts should be permitted to review only questions of law, Brutus suggests that “the courts of the respective states might . . . have been securely trusted” with deciding all cases initially.¹²⁴ By allowing state courts to try all cases “in the first instance,” Brutus claims, “[t]his method would preserve the good old way of administering justice, would bring justice to every man’s door, and preserve the inestimable right of trial by jury.”¹²⁵ Further, this approach would avoid, as much as possible, the consolidating tendency that follows from giving federal judges authority to interpret both federal and state law.¹²⁶ Note, however, that Brutus does not assert that state courts should decide all questions with finality, only that they should get the first crack. “The state courts would be under sufficient controul,” Brutus suggests, “if writs of error were allowed from the state courts to the supreme court of the union . . . on all cases in which the laws of the union are concerned, and perhaps to all cases in which a foreigner is a party.”¹²⁷ Under Brutus’ proposed system, then, there would be no federal inferior courts, but the United States Supreme Court would have ample authority to review any questions of federal law that arose in cases at the state level.

Almost in the same breath that he proposes this solution, however, Brutus seems to grant that the ship of federal inferior courts may have already set sail. “[A]s the system now stands,” Brutus concedes, “there is to be as many inferior courts as Congress may seem fit to appoint”¹²⁸ And if Congress has the power to create inferior courts, it is safe to assume that this power will be exercised. In this way, Brutus’ final position on inferior courts is not that far from that of other Anti-Federalists—like Federal Farmer—who took it as a given that the proposed national government would include inferior

120. *Id.* at 254.

121. THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 254.

122. *Id.*

123. *Id.* at 253.

124. *Id.* at 256.

125. *Id.*

126. THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 245 (“It is obvious that these courts will have authority to decide upon the validity of the laws of any of the states, in all cases that come before them [Thus,] it is easy to see that in proportion as the general government acquires power and jurisdiction [the states will] lose [their] rights”).

127. *Id.* at 256

128. *Id.*

courts but presumably hoped to limit those courts' power and jurisdiction.¹²⁹

So forceful was Brutus' treatment of Article III that it caught the attention of New York Federalists such as Alexander Hamilton, who responded (as "Publius") in *Federalist Nos. 78–83*. In that regard, it is worth highlighting that *Brutus XI* through *Brutus XV* were published between January 31, 1788 and March 20, 1788.¹³⁰ *Federalist Nos. 74–83*, on the other hand, appeared in book form more than two months later on May 28, 1788.¹³¹ Also, this collection was issued almost two months after *Federalist No. 73* (published April 2, 1788), a break that was by far the longest between any two editions of the *Federalist Papers*.¹³² And this all occurred against the backdrop of New York's ratification election, which took place in late April 1788, and the state ratifying convention which began in June 1788. This suggests, at the very least, that the Federalists believed Brutus' arguments deserved a careful response.

III. THE FEDERALISTS' REJOINER AND THE STATE RATIFYING CONVENTIONS

Federalist No. 78 arguably occupies a position behind only *Federalist Nos. 10* and *51* among the most widely read of the *Federalist Papers*. Yet despite its theoretical power and historical importance, this letter, and the related installments that follow, are rarely considered in relation to Brutus.¹³³ This is unfortunate because an appreciation of Hamilton's primary interlocutor as well as the broader Anti-Federalist-dominated political climate in New York sheds helpful light on a number of Hamilton's statements, not least of which is his particularly sunny portrayal of the unlikelihood of judicial overreach.

Consider, in that regard, how Hamilton's¹³⁴ arguments track Brutus' central claims that the federal judges under the proposed system are too independent, judicial review places the Supreme Court above Congress and the people, that this will result in the states' destruction, and the appellate review of facts will subvert the right to trial by jury. In *Federalist No. 78*, Hamilton famously responds that, in fact, the judiciary is "the least dangerous" branch,¹³⁵ that judicial independence is necessary to *protect* the states from Congressional overreach,¹³⁶ and that the proposed Constitution does not make the judiciary supreme but merely establishes "an intermediate body between the people and

129. *Federal Farmer XV*, in THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 130–31.

130. THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 422.

131. *Id.* at 423.

132. *Id.* at 420–23.

133. *But see, e.g.,* Treanor, *supra* note 14; Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7–31 (2006).

134. As I develop below, it seems to me that *Federalist Nos. 78–83* reveal especially Hamilton's position as to the judiciary, not necessarily Madison's (or Jay's for that matter). For this reason, I refer to Hamilton instead of "Publius" throughout this section, although I otherwise remain agnostic about whether it is productive to treat Publius as expressing a consistent position throughout the *Federalist Papers*. For extended treatments of the "split-personality" thesis, compare George W. Carey, *Publius—A Split Personality?*, 46 REV. POL. 5–22 (1984), with Thomas Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625–43, and GOTTFRIED DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* (1960), and Douglass Adair, *The Authorship of the Disputed Federalist Papers*, 1 WM. & MARY Q. 97–122 (1944).

135. THE FEDERALIST NO. 78, at 402–03 (Alexander Hamilton).

136. *Id.* at 403.

the legislature” to enforce *the people’s* supremacy.¹³⁷ Later, in *Federalist Nos. 80* and *81*, Hamilton champions judicial review as a natural extension from “the general theory of a limited constitution,”¹³⁸ and as decidedly better than the British model of legislative supremacy, which Brutus cites,¹³⁹ because it respects the separation of powers.¹⁴⁰ Finally, in *Federalist Nos. 81* and *83*, Hamilton defends the Supreme Court’s appellate jurisdiction “over law and fact” and the proposed Constitution’s overall treatment of the right to trial by jury.¹⁴¹

To fully appreciate how Hamilton’s conception of the judiciary contrasts with that of the Anti-Federalists, however, one must start not only with Brutus, but—as Hamilton himself counsels at the very beginning of his discussion of the courts¹⁴²—also with *Federalist Nos. 15–22*, the earlier installments of the *Federalist Papers* dealing with “the insufficiency of the present confederation” (of which numbers 15, 16, 17, 21, and 22 were authored by Hamilton).¹⁴³ As referenced in the discussion in Part I of the various conceptions of federalism presented at the Constitutional Convention,¹⁴⁴ *Federalist Nos. 15* and *16* provide the classic statement of the Virginia Plan’s core strategy: to minimize conflicts between the two completely-formed, parallel levels of government—national and state—by allowing the federal government to operate directly on individual citizens.¹⁴⁵ But what is easily missed in the course of this discussion are Hamilton’s comments about the *judiciary’s* role in this plan. For what arm of government actually applies the law to individuals but the judiciary? As Hamilton himself states:

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. . . . This penalty, whatever it may be, can only be inflicted in two ways; by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms.¹⁴⁶

Accordingly, while the judiciary may be the “least dangerous” branch, for Hamilton it is also one of the most important—and this is so for at least two reasons. First, as discussed previously, the judiciary now filled the critical role of preventing state overreach, functioning as the lynchpin of the whole system, which Madison had

137. *Id.* at 404.

138. *Id.* at 418.

139. *Brutus XV*, in *THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE*, *supra* note 7, at 257–61.

140. *THE FEDERALIST NO. 81*, at 418–19 (Alexander Hamilton).

141. *Id.* at 423–25, 430–42.

142. *THE FEDERALIST NO. 78*, at 401 (Alexander Hamilton) (stating that “the utility and necessity of a federal judicature have been clearly pointed out” in the earlier letters that “unfold[ed] the defects of the existing confederation”).

143. For the initial roadmap of the argument of the *Federalist Papers*, see *Federalist 1*, in *THE FEDERALIST 4* (noting that after discussing “[t]he utility of the UNION” Publius will discuss “[t]he insufficiency of the present confederation to preserve that Union”). For confirmation that *Federalist Nos. 15–22* constitute this section, see also *Federalist 15*, in *THE FEDERALIST 68*; *Federalist 23*, in *THE FEDERALIST 112*.

144. See *supra* notes 36–55 and accompanying text.

145. *THE FEDERALIST NOS. 15–16*, at 72–75, 77–80 (Alexander Hamilton) (insisting that “we must extend the authority of the union to the persons of the citizens” in order to avoid applying “the COERCION of arms” to the states).

146. *THE FEDERALIST NO. 15*, at 72 (Alexander Hamilton).

originally hoped to assign to Congress. But, second, as a rather Hobbesian-sounding Hamilton emphasizes in these earlier letters, there is a close connection between the power to punish citizens and the creation of a government worthy of respect. In *Federalist 17*, Hamilton suggests that “the ordinary administration of criminal and civil justice,” is the “most powerful, most universal, and most attractive source of popular obedience and attachment.”¹⁴⁷ Later, while summarizing his critique of the Articles of Confederation, Hamilton states:

The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns, and preserving the general tranquility . . . [t]he majesty of the national authority must be manifested through the medium of the courts of justice. The government of the union, like that of each state, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support, those passions, which have the strongest influence on the human heart.¹⁴⁸

Note here Hamilton’s special emphasis on the connection between “the majesty of the national authority,” “the courts,” and “those passions, which have the strongest influence on the human heart.” In light of these comments, it should come as no surprise that, shortly after this, in a seldom referenced portion of *Federalist No. 22*, Hamilton goes so far as to call the lack of a judiciary “a circumstance which crowns the defects of the confederation.”¹⁴⁹

With this background in mind, we are now prepared to turn to Hamilton’s treatment of federal inferior courts in *Federalist Nos. 81 and 82*, a discussion which takes on added importance in light of Brutus’ proposal to substitute state courts in the federal inferior courts’ place. Following from the comments above as well as what has been previously noted about the Federalists’ goal of minimizing state agency in the federal government, one would expect Hamilton to return immediately to the claim that a well-developed system of federal inferior courts is necessary for the federal government to gain the support of the people.

But Hamilton is more creative and politically savvy than that. After conceding that “the fitness and competency of state courts should be granted in the utmost latitude,” and that Congress could (at least arguably) assign such a role to state courts under the Constitution, Hamilton goes on to tactfully mention several reasons why state courts, in fact, might not be trusted to apply federal law after all.¹⁵⁰ These reasons include state courts’ tendency toward “a local spirit,” their lack of independence, and the inconvenience of a system in which appeals are the norm—an inconvenience which would be all the more necessary for accomplishing uniformity if there were no inferior federal courts.¹⁵¹ Only then does Hamilton assert that it is “necessary that the power of constituting inferior courts should exist in the full extent in which it is seen in the

147. *Id.* at 82.

148. *Id.* at 78.

149. *Id.* at 110.

150. THE FEDERALIST NO. 81, at 421 (Alexander Hamilton).

151. *Id.* (stating that “if there was a necessity for confiding to [state courts] the original cognizance of causes arising under [federal] law[], there would be a correspondent necessity for leaving the door of appeal *as wide as possible*”) (emphasis mine).

proposed constitution,” and describe a plan for instituting a modest number of federal district courts possessing original jurisdiction over cases arising under federal law.¹⁵²

Hamilton’s treatment of the relationship between state and federal courts takes another unexpected turn in *Federalist No. 82*, where he goes so far as to *recommend* that state courts be allowed to exercise concurrent jurisdiction over all federal claims as long as Congress has not explicitly directed to the contrary.¹⁵³ In other words, like Brutus, Hamilton here expresses a willingness to allow state courts to hear (at least initially) a great number of cases involving federal law. At first blush, this seems to stand in blatant opposition to the common Federalist goal of excluding state agency in the federal government, as well as the Virginia Plan’s aspiration to maintain a strict separation between the two parallel governmental systems. Granted, as Hamilton subsequently suggests, many Federalists likely assumed that the states would have concurrent jurisdiction over at least some federal causes of action considering that the prevailing law-of-nations paradigm permitted the courts of one nation to apply the laws of another on some occasions.¹⁵⁴ But this puzzling aspect of *Federalist No. 82* is only further problematized by Hamilton’s answer to the final question he sets for himself in the letter: “[C]ould an appeal be made to lie from the state courts, to the subordinate federal judicatories?”¹⁵⁵ Hamilton responds in the affirmative, declaring that “many advantages attending [this arrangement] . . . may be imagined.”¹⁵⁶ Hamilton continues:

[Allowing federal inferior courts to hear appeals from state courts] would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the supreme court, may be made to lie from the state courts, to district courts of the union.¹⁵⁷

So, here, we have the allegedly nationalist Hamilton championing a solution that would minimize the necessity of setting up federal courts and give state courts a broader role in interpreting federal law. Had Hamilton somehow been converted to the cause of encouraging state agency in the federal government in order to protect the states? Or, is

152. *Id.* at 421–23.

153. THE FEDERALIST NO. 82, at 427 (Alexander Hamilton) (“I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.”).

154. For a comprehensive treatment of this aspect of the law of nations framework, see generally Anthony J. Bellia, Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949 (2006). In this regard, as Hamilton goes on to explain, if Congress were to disallow state courts from hearing all claims arising under federal law, this would have given foreign courts more power than state courts. In Hamilton’s own words:

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.

THE FEDERALIST NO. 82, at 427–28 (Alexander Hamilton). A key difference between a court of Japan applying federal law and a court of New York, however, was obviously that one of these courts sits within the territorial boundaries of the United States and the other does not.

155. *Id.* at 429.

156. *Id.*

157. *Id.*

this an example of Hamilton's prioritizing the political goal of getting the Constitution ratified in Anti-Federalist New York over a pure articulation of the Constitution's basic principles?

While political calculations no doubt had some influence on Hamilton's rhetoric here,¹⁵⁸ I think the "Hamilton as born-again Anti-Federalist" thesis can be dismissed on other grounds. A hint toward a key difference between Hamilton's and Brutus' hopes for the judiciary appears at the beginning of *Federalist No. 82*, where Hamilton states that "[t]ime only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE."¹⁵⁹ Hamilton later continues this theme, asserting that the state courts' concurrent jurisdiction follows from the fact that "the state governments and the national governments . . . [are] parts of ONE WHOLE."¹⁶⁰ Hamilton repeats this language a final time in the following paragraph, again recommending that "the national and state systems are to be regarded as ONE WHOLE."¹⁶¹ Here, however, Hamilton is more suggestive about the consequences of this characterization, stating that it follows that state courts "will . . . be natural auxiliaries to the execution of the laws of the union" and will be controlled by the Supreme Court, a body "destined to unite and assimilate the principles of national justice and the rules of national decision."¹⁶²

The nationalist Hamilton returns! Indeed, once one moves beyond Hamilton's state-friendly flourishes to reflect upon the actual system he proposes, it becomes clear that, in permitting appeals from state courts to lower federal courts, Hamilton reduces state courts to a station *below*, not beside, inferior federal courts. The following chart illustrates this difference between Brutus and Hamilton:¹⁶³

158. See Campbell, *supra* note 16, at 1118–19, 1129 (arguing that, in the similar context of commandeering state officers for collecting federal taxes, Hamilton adopted a more state agency-friendly rhetorical strategy in *Federalist 36* than he had in earlier debates about the "1783 Compromise").

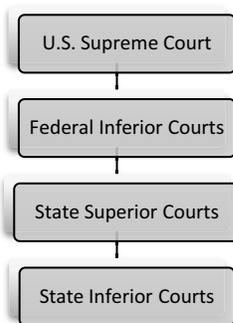
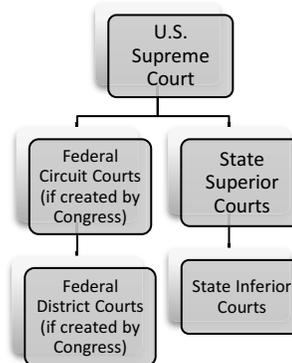
159. THE FEDERALIST NO. 82, at 426 (Alexander Hamilton).

160. *Id.* at 428.

161. *Id.*

162. *Id.*

163. I use the terms "superior" and "inferior" in the chart below (as opposed to district, appellate, or supreme) because most state judiciaries in 1789 operated in a different manner than modern systems. See RITZ, *supra* note 11, at 27–52; but see GOEBEL, *supra* note 6, at 468 (remarking that "no belief was more ingrained in this country than that courts were properly to be ordered in terms of inferior and superior jurisdiction"). With the exception of Virginia, no state at the time had yet instituted intermediate appellate courts, nor were judicial opinions published in reports. RITZ, *supra* note 11, at 48. Also, as was previously noted, state superior courts sometimes conducted new trials on appeal. *Id.* at 38–41. Moreover, despite the fact that multiple levels of courts were common in state systems at the time, a shared "corps of judges" would generally staff the courts in such a way that a given judge could sit at any level on the hierarchy. *Id.* at 6.

Hamilton's Judiciary*Brutus' Judiciary*

Instead of granting states a degree of agency in the federal government in order to defend their existence (like Brutus), Hamilton's system simply folds them into the federal judiciary's own hierarchy. To be sure, the fact that Hamilton's state courts could regularly interpret federal law is not an unimportant concession. But notice that, under Hamilton's approach, litigants presumably have two entry points into the system—either at the state or *federal* trial court level—and therefore have some disincentive toward starting at the lowest rung. Combine this with Hamilton's mention of words like “assimilate,” his comments about the defects of state courts, and his earlier admonition about the importance of a federal judiciary that can directly inspire fear and respect, and one could easily forgive an Anti-Federalist left unconvinced of Hamilton's states-rights bona fides.

Due to its importance to some Anti-Federalists' later political strategy, it is worth noting that this aspect of Hamilton's response may very well have been responsible for convincing especially Anti-Federalists in Virginia that perhaps granting state courts a role in the federal judicial hierarchy was not such a good idea after all. For example, Patrick Henry, who took this stance during the Virginia ratification convention in late-June of 1788, argued that vesting the authority to interpret federal law in state courts would compromise state judicial independence by making state judges subject to “two masters.”¹⁶⁴ Given Henry's political standing and legendary rhetorical skill, other Virginia Anti-Federalists like future Senator William Grayson also fell in line with this view.¹⁶⁵ That Henry's approach was likely at least partially obstructionist, however, is indicated by the Virginia Anti-Federalists' further demand that Congress also be prohibited from creating federal inferior courts—thus leaving the U.S. Supreme Court as the only body that would hear cases arising under federal law.¹⁶⁶

164. 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1419 (John P. Kaminski et al. eds., 1978) [hereinafter 10 DHRC].

165. *Id.* at 1445 (suggesting that it would be “extremely disgraceful” for “[t]he independent Judges of Virginia . . . to be subordinate[d] to the Federal Judiciary”).

166. *See id.* at 1762 (noting Henry's subsequently expressed commitment to “‘oppose every measure’ for putting the Constitution into motion unless [Congress] called for a second [constitutional] convention”); *see*

But, to return to Hamilton, if his conception of the judiciary fits poorly with Dickinson Federalism, neither does it accord with the course charted by Madison or the Virginia Plan, as it flatly violates the principle of keeping federal and state governments separate from one another. To be sure, each of the Convention's conceptions of federalism required *some* point of contact between the national and state governments, and the delegates' own strategy was to locate this junction in the judicial branch. But rather than minimizing the overlap between state and federal judiciaries, Hamilton here maximizes it. To use today's judiciary as an illustration, clearly, it would be no small difference if 108 different federal courts (district, circuit, and supreme), all with a large number of judges, were empowered to hear appeals from the state level instead of a single court of nine justices with an appellate caseload limited by the certiorari process.¹⁶⁷ In that regard, if one were tasked with selecting the version of federalism from the Convention with which Hamilton's strategy most closely tracks, the answer would seem to be Hamilton's own approach: to consolidate the states into a unified national system.¹⁶⁸

That Hamilton's preferred implementation of Article III would have resulted in a robust federal judiciary at the states' expense is further supported by remarks he made in a different series of pseudonymously published articles appearing more than ten years later. Specifically, after Jefferson's controversial election to the Presidency in 1800 and just prior to the Anti-Federalists' repeal of the Federalist-inspired Judiciary Act of 1801 (which would have created twenty-three additional inferior federal judicial posts¹⁶⁹), Hamilton had the opportunity to comment on the framework adopted by the Judiciary Act of 1789 in a series of articles titled the "Examination."¹⁷⁰ There, in the sixth installment of the series, Hamilton flatly states that the original Judiciary Act was "inadequate to its object, and incapable of being carried into execution."¹⁷¹ And while this claim is made most directly in connection with the Act's circuit-riding requirement, Hamilton subsequently raises a number of "insuperable objections" to having state courts hear federal claims in the first instance, subject only to Supreme Court appellate review.¹⁷² Hamilton's complaints on this occasion—that state courts will have local bias, that a system in which appeals are the norm encourages unnecessary expense and delay,

also id. at 1555 (listing, among the proposed amendments that Virginia attached to its ratification, that the judiciary consist only of "one Supreme Court" and "such Courts of Admiralty as Congress may from time to time ordain and establish").

167. See FALLON ET AL., *supra* note 4, at 41, 43 (noting that, as of September 30, 2013, there were ninety-four district courts with 677 authorized district judgeships and 346 senior district judges, and thirteen circuit courts with 179 authorized judgeships and eighty-nine senior circuit court judges).

168. As additional support for this portrayal of Hamilton, consider his discussion in *Federalist 17* comparing the conflict between state and federal governments to the historical conflicts in European feudal systems. THE FEDERALIST NO. 17, at 82–84 (Alexander Hamilton). There, if one follows the analogy, Hamilton's suggestion is that, just as either the monarch or the aristocracy eventually supplanted the other in their conflicts over the affections of the people, either the federal or state governments would ultimately come to dominate the other under the American Constitution. *Id.*

169. ALEXANDER HAMILTON, 8 THE WORKS OF ALEXANDER HAMILTON 278 (Henry Cabot Lodge ed., 1904).

170. The long title for the series is "The Examination of Jefferson's Message to Congress of December, 7 1801." *Id.* at 246.

171. *Id.* at 278.

172. *Id.* at 278, 280.

and that the federal government should have its own courts to enforce its own laws—are familiar, with the exception that Hamilton seems to have changed his mind about whether states can constitutionally be made to perform the role of interpreting federal law.¹⁷³ But the key point is that Hamilton’s remarks further confirm that, in his mind, the broad use of state courts to interpret federal law was never ideal.

Though Hamilton was the most prominent Federalist to provide a lengthy defense of Article III, other Federalists also addressed the topic. One particularly relevant, albeit brief, contribution was already mentioned—that of Oliver Ellsworth. Recall that Ellsworth held the Federalist party-line in noting the importance of establishing federal inferior courts to interpret federal law,¹⁷⁴ but also suggested that state courts might hear federal claims in the “first instance.”¹⁷⁵ Because Connecticut was one of the first states to ratify the Constitution, however, Ellsworth’s minimally-developed comments came long before Brutus and Hamilton’s contributions, and in a state in which ratification was never in doubt.¹⁷⁶

Madison’s own approach to Article III is at least partly spelled out in records of a speech he gave at the Virginia ratifying convention on June 20, 1788. There, in defending federal court jurisdiction over claims arising under federal law, Madison claimed that “it [was] so necessary and expedient that the [federal] Judicial power should correspond with the [federal] Legislative” as to not deserve any objection.¹⁷⁷ Later, Madison provides a more thoroughgoing statement in support of federal judicial power (albeit in the immediate context of the interpretation of treaties), remarking that “[c]ontroversies affecting the interest of the United States, ought to be determined by their own Judiciary, and not to be left to partial local tribunals.”¹⁷⁸ Madison does subsequently temper this position somewhat, granting that “[i]t will be also in the power of Congress to vest [judicial] power in the State Courts . . . when they find the tribunals of the States established on good footing.”¹⁷⁹ But later statements in the diversity jurisdiction context again make it seem like state courts will be limited to hearing controversies between citizens of the same state involving only state law.¹⁸⁰ Similar to Hamilton, then, Madison never provides theoretical resources for why one would want to give state courts federal judicial power—and, in fact, the reader is left with the impression that the opposite strategy would be more advisable. Unlike Hamilton, however, Madison also never gives any indication that inferior federal courts might hear appeals from the states. So this snapshot of Madison’s conception of the judiciary appears to chart a course between Hamilton and Brutus.

Other Federalist presentations at the Virginia ratifying convention sounded similar

173. *Id.* at 280–82 (“[I]t is not to be forgotten that the right to employ the agency of the State Courts, for executing the laws of the Union, is liable to question, and has, in fact, been seriously questioned”).

174. 3 DHRC, *supra* note 71, at 484 (noting that “[a] legislative power without a judicial and executive under their own control is in the nature of things a nullity”).

175. *Id.* at 490 (suggesting that “all the cases, except the few in which [the Supreme Court] has original and not appellate jurisdiction, may in the first instance be had in state courts . . .”).

176. *See* GOEBEL, *supra* note 6, at 299–300, 337–39.

177. 1 DHRC, *supra* note 70, at 1413.

178. *Id.* at 1414.

179. *Id.* at 1417.

180. *Id.* at 1418.

notes. Like Madison, John Marshall expressed incredulity over the Virginia Anti-Federalists' arguments that Congress should not create inferior federal courts or that "arising under" jurisdiction should be excluded from such courts. Concerning the creation of inferior courts, Marshall stated that "so far from being a defect of the system [that it allows Congress to establish inferior courts] . . . it seems necessary to the perfection of this system."¹⁸¹ And, on the "arising under" jurisdiction point, Marshall remarked:

Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution, and the laws of the United States? What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?¹⁸²

Edmund Pendleton had a similar take, clearly supporting both the creation of inferior federal courts, and their possession of "arising under" jurisdiction.¹⁸³ Edmund Randolph, who eventually sided with the Federalists, also threw his weight behind these points.¹⁸⁴

Ultimately, then, an important consensus emerges from the Federalist side concerning Article III's implementation. The Federalists all held that it was necessary for Congress to create inferior federal courts with jurisdiction over cases involving federal law. To be sure, inner-party disagreements existed on matters like the extent to which states might possess concurrent jurisdiction over federal claims, whether this type of state court involvement was to be anything more than a short-term strategy to help secure the Constitution's ratification and broader acceptance, and whether federal inferior courts would be able to hear appeals from state courts. But the general principle whose origin can be traced back to the Virginia Plan—that the federal government should possess its own fully-developed judiciary—was a core doctrine.

Notwithstanding the Federalists' narrow victory in the summer of 1788, however, it would be wrong to equate this success with any consensus concerning the judiciary. Six of the states that ratified the Constitution simultaneously advanced amendments to the document and, of those six, all but one sought some alteration of Article III.¹⁸⁵ Virginia's ratification amendments, for example, enumerated a whole host of changes to Article III—including the specification that Congress could only create inferior "admiralty courts" and that "the Supreme Court sh[ould] have appellate jurisdiction, *as to matters of law only*, except in cases of equity, and of admiralty, and maritime jurisdiction . . ."¹⁸⁶ North Carolina's proposed amendments also aimed to abolish federal appellate review of fact questions in most cases.¹⁸⁷ And, among other things, New York's ratifying amendments would have eliminated Congress' ability to create

181. *Id.* at 1431.

182. 10 DHRC, *supra* note 164, at 1432.

183. *Id.* at 1426–27.

184. *Id.* at 1450–52.

185. *See* FALLON ET AL., *supra* note 4, at 19.

186. 2 DHRC, *supra* note 87, at 145–46, 160, 377–85.

187. *Id.* at 266–76, 290.

inferior federal courts, sought to restrict federal courts from hearing “any Suit by any Person against a State,” and would have required that jurors in criminal cases be selected from “the County where the Crime was committed.”¹⁸⁸ In this way, despite the Federalists’ victory, the political winds were decidedly against their conception of the judiciary.

IV. THE JUDICIARY IN THE FIRST CONGRESS

The stage is now set to return to the question posed at the beginning of the article: If the Federalists dominated the first Congress and Connecticut Federalist Oliver Ellsworth was primarily responsible for drafting the Judiciary and Process Acts of 1789, why connect the initial implementation of Article III with the Anti-Federalists? Up to this point, I have tried to show a fundamental theoretical difference between most Anti-Federalists and Federalists on how to balance federal and state power. Where the Federalists saw the need for a federal supervisory power to prevent state overreach, Brutus and other Anti-Federalists wanted the states to have agency in the federal government to protect against the opposite danger. The Constitution employed the federal judiciary to negotiate conflicts between these parallel levels of government so—for the Federalists’ strategy to work—the federal judiciary needed to be robust and independent. The Anti-Federalists, on the other hand, thought they could go a long way to preventing a national consolidation if state courts interpreted federal law in the first instance.

This is why it was remarkable that the original federal judiciary was *not* robust and independent. Instead, it was small, lacked general “arising under” jurisdiction, and granted state courts the primary responsibility for interpreting and applying federal law. The ratify-now, amend-later compromises struck during ratification had underscored the need to mollify the Anti-Federalists, especially on the subject of the federal judiciary. And Oliver Ellsworth’s Dickenson Federalist roots provided a theoretical foundation for the new system.

Turning to the details of the first Congress’ plan, there were three key pieces of legislation that related to the judiciary. The first two, the Bill of Rights and the Judiciary Act, were among the session’s most important priorities—the Bill of Rights owing most directly to Madison’s work in the House of Representatives, and the Judiciary Act to the efforts of Ellsworth in the Senate.¹⁸⁹ The Process Act, on the other hand, was supplemental to the Judiciary Act (specifically to §14) and, mostly because of the late date on which it was reported and the unexpected degree of controversy it created, its final stripped-down form was hastily settled upon.¹⁹⁰

Beginning with the Bill of Rights, despite the fact that it arose in a different house of Congress than the Judiciary and Process Acts, many scholars have suspected a

188. *Id.* at 190–203.

189. Of course, both the House and the Senate were involved in all of these enactments, but citations could be multiplied supporting Oliver Ellsworth’s dominant influence on the Judiciary and Process Acts. Consider, for example, James Madison’s suggestion (although written later in life) that “[i]t may be taken for certain, that the bill organizing the judicial department originated in [Ellsworth’s] draft, and that it was not materially changed in its passage into law.” Letter from Madison to Joseph Wood (Feb. 27, 1836).

190. See GOEBEL, *supra* note 6, at 509–10, 535–40.

probable connection between these measures.¹⁹¹ For one, the timing of their enactments alone is suggestive of some association. The Senate put its stamp of approval on the Bill of Rights on September 24, 1789, a mere three days after the House agreed to the final Senate version of the Judiciary Act.¹⁹² Further, as Maeva Marcus and Natalie Wexler summarize, although “no documentary evidence exists linking [these bills explicitly] . . . [i]t is clear from surviving correspondence that those concerned with procuring greater protection for individual rights divided their efforts between the Bill of Rights being discussed in the House and the judiciary bill being debated in the Senate.”¹⁹³ One final indicia of this connection is the measures’ overlapping subject matter. Gerhard Casper has noted that, “of the eight amendments [in the Bill of Rights] that deal with specifics—that is not counting the Ninth and Tenth Amendments—five regard matters mostly concerning the courts.”¹⁹⁴ And, if one follows the drafting history of the Bill of Rights, one sees that, in addition to the provisions that were eventually adopted, Madison had earlier proposed several direct amendments to Article III—many of which were presumably dropped because their concerns were addressed in the Judiciary Act itself.¹⁹⁵

In any event, what is especially relevant for the present inquiry is the degree to which several provisions in the Bill of Rights respond to key Anti-Federalists concerns about Article III. To recall Casper’s comment above, half of the first ten amendments to the Constitution involve the courts in some manner. The Fourth Amendment addresses searches and seizures and the issuance of warrants, the Fifth Amendment safeguards certain key rights of criminal and civil defendants, and the Eighth Amendment addresses bail and other punishments.¹⁹⁶

The two amendments that most squarely address Brutus’ particular concerns, however, are the Sixth and Seventh Amendments. Recall again Brutus’ fear that holding trials in federal courts would force defendants to travel long distances, thereby jeopardizing the local character of juries and the ability of key witnesses to appear in person. The Sixth Amendment requires juries in criminal cases to be drawn from the district where the crime at issue was committed,¹⁹⁷ while the Seventh Amendment generally preserves the right to jury trials in civil cases, and prohibits federal courts from reviewing questions of fact.¹⁹⁸

191. See, e.g., Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 281 (Maeva Marcus ed., 2002); RITZ, *supra* note 11, at 19–21.

192. See Casper, *supra* note 191, at 281.

193. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 27 (Maeva Marcus ed., 2002).

194. See Casper, *supra* note 191, at 281.

195. See GOEBEL, *supra* note 6, at 430–32 (noting that Madison proposed, among other things, to place an amount in controversy requirement on the Supreme Court’s appellate jurisdiction as well as some further clarification regarding whether federal court appellate jurisdiction extended to questions of fact); RITZ, *supra* note 11, at 21 (providing a similar account, but also noting the Sixth Amendment’s connection to an amendment Richard Henry Lee had first proposed to the Judicial Bill).

196. U.S. CONST. amends. IV, V, VIII.

197. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .”).

198. U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty

Turning to the Judiciary Act itself, most of these same concerns are also taken up there. In response to the protestations of numerous Anti-Federalists, section 25 of the Judiciary Act also limits appellate review of questions of fact.¹⁹⁹ Section 29 of the Judiciary Act addresses the right to a jury drawn from one's vicinage, narrowing the boundary line even further than the Sixth Amendment. It required that jurors in cases involving an offense punishable by death be selected from the *county* where the offense was committed.²⁰⁰ Additionally, this section also ties jury selection in all other cases to state law, which in many cases included other vicinage provisions.²⁰¹

This brings us to the key question that Oliver Ellsworth and others had to answer following the ratification debates: Should Congress set up inferior federal courts with the power to hear cases arising under federal law (among other categories of jurisdiction), rely on state courts to fill this role, or select some kind of mixed strategy by giving both state courts and federal inferior courts concurrent jurisdiction over such claims? As discussed above, either the first or third options would have been palatable to the Federalists.²⁰² As for the Anti-Federalists, despite the Virginia contingent's political posturing to the contrary,²⁰³ Brutus' proposal to grant state courts original jurisdiction over claims that would otherwise be placed in federal inferior courts was the best realistically-possible result.

Ultimately, although the first Congress voted to establish federal inferior courts, the courts' narrowly circumscribed jurisdiction demonstrates the way in which it was primarily the second option above—that of relying on the states—that Ellsworth selected.

As support for this claim, consider the three levels of courts established by the Act. Thirteen federal district courts were created, each with its own judge, and each corresponding to state lines in a way that was apparently meant to nod to the importance of the states as independent governmental entities.²⁰⁴ The district courts' jurisdiction was entirely original, so the key feature of Hamilton's framework was rejected. The types of cases which these courts could hear was limited to such categories as admiralty and maritime disputes, a narrow class of federal crimes with minimal penalties, and suits at common law where the United States was the plaintiff.²⁰⁵ Importantly, the Act did not provide for diversity or federal question jurisdiction—a severe curtailment of the permissible boundaries for federal courts under Article III.²⁰⁶

dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”).

199. *An Act to Establish the Judicial Courts of the United States* § 25 (discussing the implications of § 25 of 1 Stat. 73 (1789)), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800, at 85–86 (Maeva Marcus et al. eds., 1992) [hereinafter 4 DHSC].

200. *Id.* at 92.

201. *Id.*

202. *See supra* pp. 29–30.

203. *See supra* pp. 27–28 and accompanying notes.

204. *See An Act to Establish the Judicial Courts of the United States* § 2 and § 3, in 4 DHSC, *supra* note 199, at 39–42; *see also* GOEBEL, *supra* note 6, at 471.

205. *See An Act to Establish the Judicial Courts of the United States* § 9, in 4 DHSC, *supra* note 199, at 53–54; GOEBEL, *supra* note 6, at 474 (noting that the District Court's exclusive original jurisdiction over admiralty and maritime cases was “something that antifederalists generally had conceded was properly federal”).

206. *See FALLON ET AL.*, *supra* note 4, at 25.

As to the circuit courts, only three circuits were created, and each was to be staffed by one federal district court judge and two supreme court justices riding circuit so as to minimize costs.²⁰⁷ This plan required supreme court justices to regularly traverse the nation meeting twice annually in two different locations within their respective circuits. As Michael Toth suggests, in this way “the crafters of the judiciary bill answered critics who claimed that a federal court system would force Americans to travel several hundred miles to the seat of government to defend themselves in court.”²⁰⁸ Or as Judiciary Act collaborator (and former Constitutional Convention delegate) William Paterson put it in language echoing Brutus almost word-for-word: the circuit-riding provision would allow the government to carry “Law to [citizens] Homes, Courts to their Doors.”²⁰⁹

Plainly, however, the primary way this arrangement brought justice to every person’s door was not by way of circuit-riding, but courtesy of the fact that most cases were to be heard in state courts. While the jurisdiction given to circuit courts was more expansive than that of the district courts, here again, Ellsworth declined to grant federal question jurisdiction to even *these* courts, leaving the bulk of the work of interpreting federal law and the newly-minted Constitution to the states.²¹⁰ Even the most notable grant of additional power here—the circuit courts’ jurisdiction over diversity and alienage cases—was concurrent with the states and was limited by a (then) sizable amount in controversy requirement of \$500.²¹¹ This limitation served at least two purposes. First, it again responded in part to the Anti-Federalists’ concern that indigent litigants would be forced to travel great distances to access the courts, as this limitation meant that only cases involving large sums of money would require such efforts. Second, the amount in controversy requirement also largely avoided the politically sensitive issue of pushing alien-debtor cases into federal courts because most such cases would fall under the \$500 threshold.²¹²

Section 25 of the Act addressed the Supreme Court’s jurisdiction, requiring that parties appealing a decision of a state or federal court obtain a “writ of error,” meaning that only *legal* questions could be appealed, not questions of fact.²¹³ Next, this section allowed review of state courts decisions only where the state court held a treaty provision

207. See *An Act to Establish the Judicial Courts of the United States* § 4 and § 5, in 4 DHSC, *supra* note 199, at 44; see also Letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789), in 4 DHSC, *supra* note 199, at 495 (noting that, if one assumes that federal district courts would be created, circuit courts could be added without “much enhancing the expence” by staffing them with district judges and justices of the Supreme Court).

208. TOOTH, *supra* note 47, at 159. Marcus et al. make a similar point, stating that the strategy of holding the circuit courts in various locations was meant to respond to critics charging that the effect of the federal judiciary would be “to drag the accused ‘from his house, friends and connexions, to a distant spot, where he is deprived of every advantage of former character, of relations and acquaintance.’” 4 DHSC, *supra* note 204, at 28.

209. 4 DHSC, *supra* note 199, at 28 (citing “William Paterson’s Notes for Remarks on Judiciary Bill, June 23, 1789”). Marcus et al. also quote John Jay’s statement, made in the opening months of his tenure as the first Chief Justice of the Supreme Court, that “the new system of inferior courts [w]as one that would carry “Justice as it were to every Man’s Door.” *Id.*

210. *Id.* at 59–60.

211. *Id.*

212. TOOTH, *supra* note 47, at 152.

213. See *An Act to Establish the Judicial Courts of the United States* § 25, in 4 DHSC, *supra* note 199, at 85–86; TOOTH, *supra* note 47, at 166.

or federal statute invalid, or where the state court upheld the validity of *state* law in the face of a constitutional challenge or claim or federal preemption.²¹⁴ This means that any state court decisions over-applying federal law were completely insulated from Supreme Court review.

Taken together, the parallels between these critical sections of the Judiciary Act and *Brutus XIV* are remarkable. Recall again that, although Brutus believed his concerns about indigent litigants and federal overreach could be (at least partially) addressed by having state courts hear the lion's share of federal cases initially, he freely granted the need for the United States Supreme Court to hear appeals concerning questions of law.²¹⁵ This is exactly the approach that Ellsworth and the rest of Congress adopted. Toth also sees the connection here, saying:

In Section 25, Ellsworth pursued the course of action that Brutus had recommended. The Connecticut Federalist accepted the Anti-Federalist's suggestion that allowing state courts to try cases based on federal statutory or constitutional claims, subject to oversight by the Supreme Court struck the right balance. . . . Ellsworth's crafting of Section 25 disarmed the potential opponents to the Supreme Court's appellate jurisdiction. It encountered no objection in either the Senate or the House.²¹⁶

In short, the first Congress went to great lengths to assuage the concerns about federal judicial overreach that the Anti-Federalists' had raised during the ratification debates.

There is still one objection that needs to be addressed, however. That is, if the first Congress really did respond to most of the Anti-Federalists' concerns relating to the judiciary, then why did several Anti-Federalists in Congress vote against the Judiciary Act in its final form? As I alluded to above, the primary reason owes to Patrick Henry's influential decision at the Virginia state ratifying convention to oppose the creation of federal inferior courts, a position that was folded into his broader political strategy of attempting to undermine the new Constitution.²¹⁷ Add to this the fact that several of the state ratifying conventions had concluded with a call for amendments preventing the creation of such courts,²¹⁸ and it is no surprise that several (though not all²¹⁹) Anti-Federalists adopted this more radical position at the first Congress. There were also other

214. See *An Act to Establish the Judicial Courts of the United States* § 25, in 4 DHSC, *supra* note 199, at 85–86 (permitting review of state court “final judgment[s] or decrees . . . where 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 the 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 their validity . . .”).

215. See generally THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE, *supra* note 7, at 256.

216. See TOOTH, *supra* note 47, at 170.

217. See *supra* pp. 27–28 and accompanying notes; see also GOEBEL, *supra* note 6, at 419, 442, 462, 494, 503, 507 (describing various Anti-Federalist votes against the Judiciary Act as well as Patrick Henry's attempts to bring about “Madison's political downfall”); Campbell, *supra* note 16, at 1148–53 (noting that although the Anti-Federalists in the first Congress generally opposed the creation of inferior federal courts, they did not share Henry's concern with state courts hearing federal claims).

218. See *supra* pp. 29–31.

219. Elbridge Gerry, for example, was a prominent Anti-Federalist who argued in favor of the creation of inferior federal courts. See Brogdon, *supra* note 3, at 225–27 (discussing the debate about inferior federal courts in the House of Representatives).

reasons that Anti-Federalists might have voted against the bill, such as the federal judicial system's novelty, its expense, or because they were unsatisfied that it had done enough to address the new constitution's consolidating tendency.²²⁰ But, viewed in context, the decision Anti-Federalists in the first Congress made to outflank the arguments of Brutus (and Federal Farmer) says more about the realities of political negotiation and how public sentiment had shifted in the Anti-Federalists' favor than it does about the federal judiciary's theoretical heritage.

The final piece of legislation at the first Congress implementing Article III was the Process Act of 1789, which, as mentioned above, was meant to regulate the procedures and forms of action to be used in federal courts.²²¹ The same Senate committee that drafted the Judiciary Act was also responsible for the Process Act.²²² Yet this Act was not destined to share the same smooth path through Congress. In crafting the Process Act, Ellsworth and company had attempted the herculean task of sorting through the diverse state procedural approaches to arrive at a uniform federal system.²²³ This proved overly ambitious for at least two reasons. First, considering the attachment various Congressmen had to their own states and the state bars' oversized representation in Congress, Ellsworth's attempt was bound to collide with the "age-old professional malady of resisting procedural change."²²⁴ Second, even granting Ellsworth's numerous good faith overtures across the political aisle, the Anti-Federalists were relentless in pursuing a "sustained offensive . . . against a 'consolidated government'"—and they saw this as yet another opportunity to resist federal control.²²⁵

Accordingly, when the Senate committee's draft of the Process Act was finally reported near the end of the session, it was met with a wave of opposition that sunk the ship of federal procedural uniformity, at least for the time being. The result, then, was that even in the limited sphere of jurisdiction they had been given, federal courts would have to use state procedures and, for cases raising common law questions, state causes of action.²²⁶ Numerous scholars recognize this as a victory for the Anti-Federalists.²²⁷ As

220. Although a Federalist, consider William Maclay's characteristically provocative summary of his objection to the bill:

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 all the State Constitutions by degrees, and thus to swallow, by degrees, all the State judiciaries.

See, e.g., JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA, 1789–1791, at 114 (Edgar Stanton Maclay ed., 1890).

221. *See An Act to Regulate Processes in the Courts of the United States* (discussing 1 Stat. 93 (1789) (repealed 1792)), in 4 DHSC, *supra* note 199, at 114–15.

222. *See* GOEBEL, *supra* note 6, at 509.

223. *Id.* at 512, 514.

224. *Id.* at 511.

225. *Id.* at 510.

226. *See, e.g.*, Bellia & Clark, *supra* note 17, at 629. Bellia and Clark's article raises yet another reason why the Anti-Federalists might not have been given the credit they are due for the original federal judiciary over the years. Namely, for a long time, scholars have misunderstood the nature of the federal common law, believing that federal courts could themselves make up federal causes of action based on "ambient of general law" as suggested in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). This was not the case. Instead, because of the Process Acts, federal courts were bound to use state law forms of proceeding when hearing cases based on the common law. *Id.* at 611–13.

Anthony Bellia, Jr. and Bradford Clark put the point (in relation to both the 1789 and 1792 Acts):

In important ways, the Process Acts were a victory for anti-Federalists against proponents of centralized federal judicial power. The Acts denied federal courts the power to devise a uniform system of federal causes of action that potentially could have undermined state interests. The Acts also prevented the development of two fundamentally different remedial systems in the same state, thereby sparing litigants and lawyers the need to learn a new system.²²⁸

Accordingly, even on this occasion when Ellsworth thought it necessary to side with federal uniformity, the first Congress landed on the other side.

CONCLUSION

Having now canvassed four key moments in the establishment of the United States judiciary—the Constitutional Convention, the ratification debates, the state ratifying conventions, and the first Congress—the payoff should be clear: it was not primarily the Federalists’ theoretical approach that shaped the original federal judiciary, it was the Anti-Federalists’. Taken together, the Bill of Rights, the Judiciary Act, and the Process Act demonstrate how the first Congress responded to the Anti-Federalists’ criticisms by carefully circumscribing the jurisdiction of the federal courts, using state courts to check the expansion of federal power, increasing the connection between the execution of federal law and local juries, and tying federal forms of action and procedures to the states. As emphasized above, Ellsworth’s decision not to grant federal courts general “arising under” jurisdiction especially undercut the core principle of the Virginia Plan by allowing state courts to execute and interpret the bulk of federal law. And this decision is all the more striking once one recalls that the key component of Madisonian federalism—the federal government’s possession of some means to protect against state intransigency—was now housed in the judicial branch.

The first implementation of Article III thus represents the Anti-Federalists’ most unequivocal political victory. Even if their influence on the federal judiciary was eventually outlasted, their success in establishing this point of departure significantly delayed the federal judiciary’s maturation, and should be remembered as a critical turning point in the evolution of the American political experiment. There is also a certain irony to the Anti-Federalists’ success. By limiting the creation and jurisdiction of the federal courts, they helped bring Hamilton’s prediction into reality. The original federal judiciary was the least dangerous branch—at least for a while.

227. See, e.g., *id.* at 647; 4 DHSC, *supra* note 204, at 108 (“[A]s with the Judiciary Act, those who favored a strong, centralized federal court system had to contend with those who feared a loss of autonomy by the individual states,” and “[a]lthough reports of the congressional debates are sparse, it is apparent that the advocates of state interests carried the day”); GOEBEL, *supra* note 6, at 539–40 (“If there was truth in the antifederalists’ charge that the most ardent federalists were aiming at a ‘consolidated’ government, the Act for Regulating Processes in its final form was a defeat for such ambitions.”).

228. See Bellia & Clark, *supra* note 17, at 647.