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"TO ESTABLISH JUSTICE": POLITICS, THE JUDICIARY ACT OF 1789, AND THE INVENTION OF THE FEDERAL COURTS

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This essay is dedicated to my female colleagues who have demonstrated time and again that in our macho culture, it is often more friendly and pleasant, efficient, and satisfying to work with and to rely upon women than men. One is rarely beset with the competitiveness, the status-jockeying, the impersonality, and the dishonesty that one often finds in so-called professional relationships with men. I would never have been able to finish this work had I been forced to rely solely upon the collegiality of males. Although I know the list is incomplete, I have particularly cherished the help, criticism, and support given me by Marie Ashe, Charlene Bickford, Sandra Van Burkleo, Vivien Clair, Claudia Johnson, Christine Jordan, Martha Morgan, Jennifer Nedelsky, Kathryn Preyer, and Mary K. Tachau.

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I. WHY DO WE HAVE THE NATIONAL JUDICIARY WE HAVE?

A. *Unnoticed National Judiciary Puzzles*

If one pauses for a moment of thoughtful critique, the origins of our national court system and its jurisdiction seem to be a great puzzle with many unanswered questions, indeed an enigma. Why did the national government need its own separate system of courts, when in the 1780s

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The original spelling, punctuation, capitalization, and grammar of letters or documents have been reproduced in the quotes therefrom used in this essay to the extent possible. Sometimes it has proved impossible to reproduce precisely the various diacritical marks, punctuation, and abbreviation practices then in common usage.

there were thirteen completely unctioning state court systems? The Articles of Confederation—the first Constitution of the United States—provided for no national courts. What was so deficient about the state courts that the Framers felt a need to list the *establishment* of justice as the second item in the preamble to the new Constitution? The goal was not to augment justice or to perfect justice, but rather "to *establish* justice"—as though justice could not be found in the state courts. Why are the provisions for that court system in article III of the new fundamental law embodied in the Constitution so maddeningly terse, vague, and open-ended? Why do they include the puzzling category of jurisdiction over suits involving citizens or subjects of foreign nations (hereinafter called "alienage jurisdiction")? Why did the opponents of the Constitution level their heavy guns at this vague new judiciary, claiming that it would be the very engine of the subversion of the states and of the kind of democracy the Revolution had been fought to obtain? Why did the Judiciary Act of 1789 establish such a highly-articulated, three-tiered, hierarchical judicial system, while perversely placing alienage jurisdiction and suits involving citizens of two or more states ("diversity jurisdiction") within federal trial jurisdiction but leaving cases arising under the Constitution, treaties or federal laws ("federal question jurisdiction") to those supposedly untrustworthy state courts? And why were the opponents of the Constitution much more pleased with the Judiciary Act of 1789—hailed in later years as one of the more remarkable and enduring achievements of the First Congress—than were the supporters of the Constitution, who overwhelmingly populated that First Congress?

Strangely enough, most historians have not noticed these questions.[1] Despite two centuries of almost constant and often harsh struggle over the power and place of our national courts—centuries during which other questions about such courts have been endlessly debated—it has seemed axiomatic to these historians that the nature and function of courts are timeless and thus courts are all alike, that all governments must have court systems, that our national court system was and is merely a clone of other court systems, and that the Judiciary Act of 1789 followed in a more or less logical and expected way from these premises.

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1. There are exceptions. John Frank in 1948 posed some extremely good questions for further inquiry:

> If it had not been for the necessity of settling international admiralty disputes, would either the Convention or the Congress of 1789 have created a federal lower court system? . . . Why—a mystery truly dark—why did the Congress of 1789 provide that appellate jurisdiction should be sufficient in federal question cases while there should be trial court jurisdiction in diversity cases? Why diversity at all? . . . [T]here is sufficient mystery left in the origins of the federal judiciary to keep a good many researchers busy for a long time.

Frank, *Historical Bases of the Federal Judicial System,* 13 LAW & CONTEMP. PROBS. 3, 28 (1948). This essay seeks to answer all three questions.

Apparently unaware that they were looking with narrow and highly politicized hindsight, these whiggish historians[2] have confidently divorced law from politics in order to lavish praise upon "the growth of" a supposedly neutral, apolitical, legalistic federal judiciary, and a judicial system that supposedly has developed progressively into just the court structure that our nation needs.[3] As a result, there has never been a good critical history of the federal courts.

Such a history would tell the chronology of the origin of the federal courts within a socioeconomic context. This essay is an attempt to begin that history. The results turn out to be surprising and instructive.

B. *A Solution to Political Problems*

A major puzzle at the very beginning is the astonishing lack of comment upon the need for a national court system in the period immediately before the Constitutional Convention. As Judge Friendly accurately told us, "A search of the letters and papers of the men who were to frame the Constitution does not reveal that they had given any large amount of thought to the construction of a federal judiciary."[4] There was some talk about the need for national courts of admiralty during the Confederation period.[5] Among the elements a Grand Committee of Congress proposed to add to the Articles of Confederation in August 1786 was a "federal Judicial Court" to try national officers for crimes

2. For purposes of this essay, "whig" history assumes relatively uncritically that "now" is both good and inevitable; it then sees the past as a relatively straight-line progression from a dark, uncivilized, simple, disorganized "then" to a happy, genteel, sophisticated, efficient "now."

3. Although each is researched thoroughly and each contains its own excellences, prime examples of the whiggish history of our national courts are the classics: F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927); J. GOEBEL, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1928). This is true even of such recent ingenious contributions as Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U.L. REV. 205 (1985); Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III,* 132 U. PA. L. REV. 741 (1984). Still whiggish and positivistic, but better in terms of critique and a better historian is Casto, *The First Congress's Understanding of its Authority over the Federal Courts' Jurisdiction,* 26 B.C.L. REV. 1101 (1985). Closer still to the criterion of critique, with many insights but still full of error and often stubbornly wrongheaded, is W. CROSSKEY & W. JEFFREY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953 & 1980). Other modern writers have a much greater sense of critique than the whiggish norm. *See, e.g.,* Jay, *Origins of Federal Common Law* (pts. 1-2), 133 U. PA. L. REV. 1003, 1231 (1985); Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985). A genuinely critical history is W. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE (1990).

4. Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483, 484 (1927).

5. *See infra* text accompanying notes 13-15.

and "misbehaviour in their Offices" and to sit upon appeals from "the Judicial Courts of the several States" in cases dealing with national treaties, the law of nations, the powers of taxation, and the regulation of commerce which the Committee proposed also to give to Congress, or "questions of importance [where] the United States shall be a party."[6] This proposal died after desultory debate, without submission to the states, and little else seems to have been said.

However, it would not be accurate to conclude from such a sparse record, as Friendly concluded about diversity jurisdiction, that federal courts were "not a product of difficulties that had been acutely felt under the Confederation" or that "fears of local hostilities . . . had only a speculative existence in 1789."[7] As we shall see, debtors suffered "acutely" during the Confederation period, thereby creating "difficulties" for creditors that the Constitution was designed to solve.[8] Debtors then by and large opposed the Constitution. As one of the most sensitive and astute political analysts among the creditor element reported, "the articles [of the Constitution] relating to Treaties—to paper money, and to contracts, created more enemies than all the errors in the System positive and negative put together."[9]

The federal court system was established to attempt to deal with what the Framers considered to be problems of the first order of social difficulty, problems intrinsic to the economic history of the 1780s. During this period, creditors and proto-capitalistic elements were confronted

6. 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 497 (J. Fitzpatrick ed. 1934) [hereinafter JOURNALS]. The restricted jurisdiction proposed for the court probably reflects the politics of the committee members. Three of the thirteen later became ardent Anti-Federalists (Nathan Dane of Massachusetts, Melancton Smith of New York, and Timothy Bloodworth of North Carolina), another became a Jeffersonian (Charles Pinckney of South Carolina), and a fifth was to oppose the Judiciary Act of 1789 as a member of Congress (Samuel Livermore of New Hampshire). This probably also accounts for the proposal's exclusion of Members of Congress and other national officials from being judges, and for its provision "that the trial of the fact by Jury shall ever be held sacred, and also the benefits of the writ of *Habeas Corpus.*" *Id.* at 497-98. For a discussion of the proposal, see M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789, at 418-20 (1950).

7. Friendly, *supra* note 4, at 484, 510. To do Friendly justice, he recognized that local animosity was tremendously important in the establishment of alienage jurisdiction, and that "a general feeling in favor of centralizing the administration of maritime law" also existed. *Id.* at 484 n.6.

Friendly's views have become orthodoxy through their acceptance by Felix Frankfurter. *See* Frankfurter, *Distribution of Judicial Power Between United States and State Courts,* 13 CORNELL L.Q. 499, 520 (1928); Frank, *supra* note 1, at 22-28. Friendly has been challenged, however, in a perceptive but short treatment that prefigures the sorts of findings and discussion of the origins of federal jurisdiction forming the heart of this essay. *See* Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction,* 79 U. PA. L. REV. 869, 873-76 (1931).

8. *See infra* text accompanying notes 59-96, 106-26.

9. Letter of James Madison to Thomas Jefferson, Oct. 17, 1788, *reprinted in* 11 PAPERS OF JAMES MADISON 297 (R. Rutland & C. Hobson eds. 1977) [hereinafter MADISON PAPERS].

with state legislatures and courts that responded in a more or less democratic fashion to the needs and desires of an essentially debtor-oriented, pre-capitalist majority of the citizenry. The creditor element—many merchants, some planters, lawyers, most of those involved in speculation in commercial paper and land, all those (mostly in the cities of the seaboard) caught up in the ethos of competitive individualism that is part and parcel of the world of capitalism, then coming to power—viewed such activity as dangerous, contemptibly immoral, and the product of irrational, localistic bias.

The founding of our national judiciary thus is an episode in the rise to dominance of capitalistic social relations in the United States.[10] This rise was not inevitable, however, nor did capitalism have to take the shape it did in nineteenth century America; rather, the story is one of intense struggle, with the strength of the opponents of capitalism particularly great in the 1780s and 1790s, and remaining powerful until the slaveocracy was crushed in the Civil War. That strength led to the immediate addition of a Bill of Rights to the Constitution and, more importantly, to a host of serious compromises when the judiciary was established by the Judiciary Act of 1789.[11] The next section of this essay will detail the reasons for a national judiciary that some Americans saw, reasons that can be understood only from within the context of the socio-economic history of the new United States during the Confederation period.

The third and fourth sections tell the story of the invention of that national judiciary. The third deals with the Constitutional Convention and the struggle for ratification that ensued. The fourth section elucidates the compromises resulting from this struggle that became the heart of the Judiciary Act of 1789 and shows that many parts of the Act reflected the battles between debtors and creditors in the new Republic. Whereas today our lives and world are so imbued with the creditor morality, language, and worldview that we find it difficult to imagine the position their opponents took, and while we whiggishly think that this

10. One recent study in the American legal history of this period, which roughly parallels this essay in its approach and findings, shows how the disappearance of indentured servitude, the emergence of free labor, and the differentiation of slavery from other forms of unfree labor common theretofore (all *legal* categories) were all part of the rise to dominance of capitalistic social relations. R. Steinfeld, The Invention of Free Labor in the United States (unpublished manuscript [in my possession] 1989); *see also* Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (arguing that the exclusion of paupers from suffrage was integral to the history of American democracy in the nineteenth century).

A short discussion of the utility of my loose categories of debtors and creditors, and of the relevance of the organizing principles of "capitalism" and class to the subject of this essay is found at *infra* note 28. A longer discussion of class is provided in Appendix 2.

11. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

triumph was not only inevitable but also must have occurred in Congress in 1789,[12] the greatest surprise to be derived from the history of the invention of the national judiciary is that the compromises written into the Judiciary Act of 1789 in large part favored debtors.

II. THE SOCIOECONOMIC BACKGROUND OF THE JUDICIARY

A. *Local Bias and Admiralty*

Prizes of war and other ships captured by American privateers during the Revolution occasioned the earliest grumblings about local bias and its Siamese twin (but more neutral-sounding) argument, the lack of uniformity in commercial law. Whether a vessel or its cargo was in law a prize of war and who would receive the proceeds once a prize was declared, were questions within the jurisdiction of admiralty courts and admiralty law. As early as November 1775, Congress recommended to the states that they establish separate admiralty courts to deal with captured ships, although Congress purported to retain full authority to adjudicate appeals.[13] Apparently in reaction to autocratic practices of British Vice-Admiralty courts, Congress also recommended that facts be determined by juries, an ancient English method of asserting popular control over judges that was theretofore foreign to admiralty practice. Ten of the thirteen states established such courts and all used juries, while at least

12. For example, in Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A. J. 379, 380 (1960), William Marbury confidently asserts:

> It is generally agreed that the institutions of the Federal Government reflected to a marked degree the need of the commercial community for a stabilizing agency in the chaotic situation which was paralyzing commerce in the states supposedly united under the Articles of Confederation, and subjecting the infant nation to economic suffocation. The thrust of the forces which we associate with [Alexander] Hamilton's name was all in the direction of re-establishing confidence in those entrepreneurs on whose willingness to take risks the building of the nation depended. . . . Hamilton . . . insisted that judicial institutions of known stability be created to which the citizens of every state might look for protection if they ventured beyond the communities where they were on familiar ground.

Id. No critique of the entrepreneurial position, not the faintest concern for debtors (who must also have been in chaos), no hint that any other future besides capitalistic commercialized growth might have been useful and good, not the slightest thought that all the key words in his language assume the correctness of a pro-creditor position (especially including the supposedly neutral ones such as "confidence," "stability," or—one he did not use but could have—"uniformity"), ruffled the calm whiggishness of Mr. Marbury's prose.

13. H. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787, at 44-48, 57-75 (1977). Bourguignon provides an expanded discussion of the material in this section. *Id.* at 57-75, 101-34, 243-51, 297-343. Although deficient in some respects, particularly in its failure to indicate the degree and promptness of enforcement by state courts of most decrees of the federal admiralty appeals courts, Bourguignon's study clearly supersedes all previous treatments of the national judicial experience in admiralty law during the Confederation. *See also* J. GOEBEL, *supra* note 3, at 147-82.

For the Congressional resolves of 1775, see 3 JOURNALS, *supra* note 6, at 371-75.

one of the three states that apparently relied on their colonial admiralty establishments also permitted trial by jury.[14]

The jurisdiction given to the new admiralty courts, however, varied widely from state to state, and several states decided to restrict the right of appeal to Congress. Massachusetts and New Hampshire, for example, passed quite restrictive statutes, at first allowing an appeal to Congress only when made by owners of ships commissioned and fitted out by Congress, later adding appeals by foreigners with whom the United States was not at war. Contrarily, Virginia at first allowed appeals only by enemies with whom the United States was at war, then later allowed all appeals save those where both parties were Virginia citizens.[15]

In notorious cases, Pennsylvania's court refused to enforce a federal decree overturning its admiralty jury's prior determination of facts, and New Hampshire refused to enforce a federal decree emanating from an appeal taken by an American citizen whose ship had not been fitted out by Congress.[16] Although much remains to be investigated, it is clear that several other federal decrees failed because of a lack of enforcement (or at least swift enforcement) by state courts,[17] demonstrating in Henry Bourguignon's words that "at the time it must have been clear to all that the states ultimately could determine how far congressional writs could run."[18]

The state courts also showed little respect for the decrees of other states. Aaron Lopez, a wealthy Jewish merchant from Boston who owned extensive property in Jamaica, had his ship *Hope* seized by two Connecticut privateers in 1778. At trial in Hartford County Court, the

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14. H. BOURGUIGNON, *supra* note 13, at 59.

15. *Id.* at 60-61, 64-65, 70-71.

16. The first instance, that of *The Active,* is treated comprehensively by H. BOURGUIGNON, *supra* note 13, at 101-11, 322-23. The litigation lasted intermittently until 1809, culminating in a federal trial of Pennsylvania militia officers who forcibly resisted federal marshals—marshals who in turn were enforcing a decree of the Supreme Court upholding the federal award made in 1778. *See* Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160 (1792); Olmstead v. The Active, 18 F. Cas. 680 (C.C. D. Pa. 1809) (No. 10,503a); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809); United States v. Bright, 24 F. Cas. 1232 (C.C. D. Pa. 1809) (No. 14,647).

The second instance, that of *The Lusanna,* treated comprehensively by H. BOURGUIGNON, *supra* note 13, at 242-51, 307-17, also resulted in an important Supreme Court decision, one that upheld Congress's 1775 arrogation of plenary appellate authority to itself in prize cases. *See* Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 53 (1795) (vessel erroneously called "The Susanna").

17. *E.g., The Sally* (Spencer v. Peters), discussed in H. BOURGUIGNON, *supra* note 13, at 265 & n.61; *Hope* (Lopez v. Brooks), discussed in Friedman, *Aaron Lopez' Long Deferred* Hope, 37 PUBL. AM. JEWISH HIST. SOC'Y 103 (1947) (Connecticut trial court refused to enforce 1779 federal decree, but Connecticut Superior Court reversed and enforced the decree in 1783). I am indebted to William Casto for this last reference. Bourguignon notes the federal decree in *Hope,* but does not deal with Connecticut's intransigence on remand. H. BOURGUIGNON, *supra* note 13, at 226 & n.105, 253 n.31.

18. H. BOURGUIGNON, *supra* note 13, at 318.

privateers offered flimsy evidence that Lopez was a Tory, whereas Lopez produced substantial evidence to the contrary. The judge refused two verdicts from the jury, presumably in Lopez' favor, and impaneled a second jury that obligingly found against the Massachusetts citizen.[19] In 1779, a Massachusetts jury awarded a prize entirely to a capturing Massachusetts privateer despite the latter's clear agreement with a Rhode Island privateer to share all prizes, and the decree was affirmed by the Massachusetts superior court.[20] In that same year two neutral vessels from Spain were captured, and a Massachusetts court awarded one of the ships and both cargoes to the privateers as British property. The Massachusetts superior court denied an appeal to Congress until the Massachusetts admiralty statute was amended to allow appeals by friendly foreigners; the federal court promptly reversed except as to part of the cargo of one of the vessels.[21] Connecticut privateers regularly plundered ships belonging to New York citizens who lived on Long Island, which was under nominal British authority, and their actions were upheld by the Connecticut admiralty courts when they claimed prize, without proof of any actual British ownership or involvement.[22] These examples demonstrate why local bias against nonlocal citizens, both American and foreign, was obvious to many in the prize litigation emanating from the Revolution.

Bourgnignon shows[23] that no fewer than twenty of the fifty-five members of the Constitutional Convention either had practiced before the federal admiralty courts or had served as judges thereof.[24] Only one of these twenty, Luther Martin, ultimately opposed the Constitution. James Wilson had been a judge in ten cases and counsel in six (including *Hope* as counsel for Lopez), whereas Oliver Ellsworth had been involved in nine cases, had presented the report to Congress condemning Pennsylvania's refusal to adhere to the federal decree, and had actively partici-

19. Friedman, *supra* note 17, at 104-10.

20. *Anna Maria* (Bucklin v. White), in H. BOURGUIGNON, *supra* note 13, at 302-05.

21. *Valenciano* (Luca v. Cleveland) and *Santander y los Santos Martires* (Tracy v. de Llano), in *id.* at 305-07.

22. *See British Goods* (Gray v. Scudder, Wells v. Judson, McCluer v. Ston, Gardiner v. Johnson, and Hart v. Foster), in *id.* at 257-63.

23. *Id.* at 328-31 & nn.22-24, 26.

24. Before 1780, various committees of Congress had served as the court of appeal from the state admiralty courts, so there was a large number of federal appellate "judges" of admiralty. After the establishment of an actual appellate court in 1780, only four men served: Cyrus Griffin of Virginia, William Paca of Maryland, John Lowell of Massachusetts, and George Read of Delaware. Titus Hosmer of Connecticut accepted an appointment but died before ever sitting as judge. Washington later appointed Griffin, Lowell, and Paca (despite the latter's opposition to the Constitution) to federal district court judgeships in 1789, as well as Francis Hopkinson, who had served Pennsylvania as admiralty judge, and Richard Law, who had served Connecticut similarly. *See id.* at 79-100, 116-21, 330-31.

pated in drafting the 1789 legislation establishing the federal courts.[25] Of the thirteen federal district judges appointed by Washington after passage of the Judiciary Act of 1789, three had served as counsel before the federal admiralty court, three had been judges of it, and two had served as admiralty judges in their states. These men presumably understood the problems of localism that the national experience with admiralty had presented during the Confederation and shared the general attitude of 1789 that admiralty jurisdiction should be an exclusively national matter.[26]

B. *British Credit Produces "British Debts"*

1. *Debt Accrues Before the Revolution: Virginia.* Petty if persistent local favoritism in fights between merchants (domestic or foreign) and other merchants or shipping magnates or privateers—maritime entrepreneurs whose predatory activity would have been piracy if it had not been sanctioned by the chaotic and survivalistic necessities of war—was one thing. After all, admiralty law was a branch of the law of nations. The notion of national admiralty courts neither caused nor reflected deep-seated and fundamental social conflict.

Quite another matter was presented by disputes between urban merchants, speculators in land and currency, and other relentless creditors (many of them British subjects) motivated primarily by profit rather than civic responsibility and enmeshed in an endless web of debt and financial obligation which made them "panting for their pound of flesh,"[27] on the one hand, and southern slaveholding planters and the overwhelmingly agricultural yeomen and peasants comprising the bulk of the citizenry of the United States in the 1780s, on the other.[28] The

25. *See id.* at 329-339.

26. John Frank comments that:

> The experience of the Confederation convinced virtually every conscientious patriot of the 1780's that the admiralty jurisdiction ought to be totally, effectively, and completely in the hands of the national government, and an extended search has not revealed a criticism from any contemporary source of the constitution granting federal admiralty jurisdiction.

Frank, *supra* note 1, at 9.

27. R. MORRIS, JOHN JAY, THE NATION AND THE COURT 80 (1967). Ironically Morris, while an assiduous researcher, was one of our more creditor-oriented historians.

28. Most historians dismiss class analysis as not being pertinent to United States history because, as Richard Morris said about the turbulent and crucial period 1775-1805, "too many members of the different classes are found on both sides." Morris, *Class Struggle and the American Revolution,* 19 WM. & MARY Q. (3d Ser.) 3, 20 (1962). Criticism of the same stripe has been leveled at this essay, over what the critics perceive to be my imprecise definitions of the debtor and creditor elements, as well as over my having lumped southern planters together with yeoman and peasants in the debtor class. An atomizing corollary of this critique is that ideas and sensibilities of individuals and small groups—the very stuff of history, in this view—get trampled into the dust by the onrush of material forces.

latter group had fought or endured eight years of devastating and grind-

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I believe that such critics have not undertaken to pursue the fundamental assumptions of educated life, that they "know themselves," for such a self-investigation would demonstrate their own belief systems to be founded upon positivistic assumptions which greatly overprivilege the individual over the group as a unit of social study and contemplation. No possessive individualist or positivist, Marx himself used the term "class" at different levels of abstraction and specificity, depending upon his purpose. See Ollman, *Marx's Use of "Class,"* in B. OLLMAN, SOCIAL AND SEXUAL REVOLUTION: ESSAYS ON MARX AND REICH 33-48 (1979); B. OLLMAN, ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY 3-69 (2d. ed. 1976).

There are three fundamental and interlocking problems with those who hold the class-dismissive viewpoint. First, they ignore or misconstrue deepseated power relationships of oppression based upon economic, gender, ethnic, religious, or other factors of existence which transform the dynamic interaction which is life into struggle. The moral pivot of this essay is the reality of socioeconomic struggle. Second, they imagine groups to be only collections of individuals. Their analysis begins and ends with individuals, so they are unable to understand socioeconomically defined groups engaging in struggle. Their very method of definition by separation and disjunction is narrowing; they are thus unable to see human history broadly, as a matter of connections and junctures. Third, it is actually they (not scholars who use class analysis) who delete humans from history. They are too mechanistic and deterministic, leaving little or no room for the progress, possibility, education, and change that are the most important universal features of human existence.

These deficiencies render it impossible for Morris, and for those who think as Morris did, to see the fundamental class conflict burgeoning in the new United States, a conflict between those groups who benefitted from and championed a new way of life built around "free labor" and the organization of economic institutions to produce profits, and those groups who benefited from and championed an older way of life built around unfree labor and the organization of "economic" institutions to produce status and prestige. The rise of capitalist classes to power had been long underway in Great Britain by 1775, and many of the social and ideological tentacles of capitalism had been increasingly percolating through and enshrining themselves in the colonies, especially in the cities. The old social and ideological patterns, centered around the older economic organization, still predominated in the colonial countryside and in most colonists' ways of thinking. Essentially simultaneously, a major anticapitistic form of socioeconomic organization, slavery, began to grow in the very bosom of the development of capitalistic growth in the colonies. It retained and adapted most of the older mores and ways of thinking, since (though it was fundamentally commercial) its ultimate socioeconomic organization and object or goal was production for status and prestige, not for profits.

Socioeconomic revolutions do not take place overnight, and indeed are never "complete" but continue as a matter of struggle: the moment of the passing of predominance from one class and one mode of production to another becomes relatively stark and shattering only in historical hindsight. Moreover, the class interactions which take place during them are quite complicated in actual fact. *See, e.g.*, K. MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE (1963). American protocapitalistic developers, merchants, speculators, and entrepreneurs allied themselves with European credit at the close of the Revolution, to fund what they saw to be the neeessary industrial growth of the United States. They were opposed by debtors, both rural and poor, and rich planters, who shared an older, more mutual language and who captured a certain amount of control of many institutions of power in various of the states. Vigorous social struggle ensued in the 1780s and early 1790s.

This is the socioeconomic context against and within which the national court system of the United States was invented. Strictly speaking, debtors and creditors do not form coherent classes, since they do not relate in precisely opposite ways to ownership of the means of production. But during this brillant and poignant actual historical moment, they did represent major opposing social polarities, and their clash produced the essential features of the court system, both in the Constitution and in the Judiciary Act of 1789. My purpose is to tell that story, and for my purpose I need no more specificity in my terminology than to indicate the opposition of a debtor element to a creditor

ing warfare against a British enemy that they believed (as widely depicted in American war propaganda) a haughty colonialistic oppressor attempting to reduce or eliminate the fundamental freedom of a self-governing nation. They were also people for whom the ethics and mores of capitalist life were mostly alien, disquieting, inhumane, and threatening. Here was a clash between two incompatible economic ways of life—between two moral visions of the good—and the conflict was bound to be harsh and bitter.

A useful place to begin the story is with the revolution that took place in credit relations between British merchants and Virginian planters and yeoman farmers in the 1740s and 1750s.[29] Hard money was scarce in Virginia's extractive economy, so large-crop tobacco planters financed by credit, with the planters pledging their future crops for the building materials and goods that fed their increasingly ostentatious and opulent lifestyles. Equally wealthy consignment merchants (essentially bankers) in London and Bristol extended the credit and the planter

element during the first two decades of the existence of the United States. A more complicated discussion of these matters of class, with a partial bibliography, is provided in Appendix 2.

29. Excellent primary research in economic, political, and legal history has developed the basis for the Virginia portion (that is, the major portion) of the story of debt crisis, debtor resistance, and oppression of Loyalists told in this section. Although I have supplemented this research with my own primary research for the period after 1783, nevertheless I have been dependent on the research of others for the period before that time and have found it extremely helpful. The best contributions, listed chronologically in their order of publication, are: Price, *The Rise of Glasgow in the Chesapeake Tobacco Trade, 1707-1775,* 11 WM. & MARY Q. (3d ser.) 179 (1954) [hereinafter Price, *Rise of Glasgow*]; Soltow, *Scottish Traders in Virginia, 1750-1775,* 12 ECON. HIST. REV. (2d ser.) 83 (1959); Sheridan, *The British Credit Crisis of 1772 and the American Colonies,* 20 J. ECON. HIST. 161 (1960); Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia,* 19 WM. & MARY Q. (3d ser.) 511 (1962) [hereinafter Evans, *Prerevolutionary Indebtedness*]; Evans, *Private Indebtedness and the Revolution in Virginia, 1776 to 1796,* 28 WM. & MARY Q. (3d ser.) 349 (1971) [hereinafter Evans, *Indebtedness During Confederation*]; Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797,* 92 VA. MAG. HIST. & BIOGRAPHY 176 (1984). Although dated and somewhat sophomoric and adventuresome, I. HARRELL, LOYALISM IN VIRGINIA (1926), is still quite useful. And helpful insights and facts are found in Main, *Sections and Politics in Virginia, 1781-1787,* 12 WM. & MARY Q. (3d ser.) 96 (1955); Gipson, *Virginia Planter Debts Before the American Revolution,* 69 VA. MAG. HIST. & BIOGRAPHY 259 (1961); Tate, *The Coming of the Revolution in Virginia: Britain's Challenge to Virginia's Ruling Class, 1763-1776,* 19 WM. & MARY Q. (3d ser.) 323 (1962). Less comprehensive, but still quite useful, treatments of similar problems, trends, and events in the other states are cited below. Indispensable for a background understanding of monetary and credit policy for the period before the Revolution is J. ERNST, MONEY AND POLITICS IN AMERICA 1755-1775: A STUDY IN THE CURRENCY ACT OF 1764 AND THE POLITICAL ECONOMY OF REVOLUTION (1973). Only Hobson and Gipson, however, seem to glimpse how successful the resistance of the Virginia debtors was. The profound if largely unspoken and unconscious creditor/capitalist orientation of modern American culture makes it almost impossible to assess matters from the debtors' perspective, even when one tries to do so.

shipped the crops on consignment, also making all the transatlantic shipping arrangements.[30] Spurred both by a desire for a greater share of the lucrative Virginia tobacco market and a large and rapidly growing French demand for tobacco, which the French obtained through an increasingly centralized purchasing process, Glasgow merchants borrowed heavily and organized their businesses inventively to get into the trade.[31] This inventiveness meant pooling the bankers' capital with the merchants' salesmanship and the shipowners' vessels.

The Glaswegians enjoyed the advantage of a quicker passage to the Chesapeake (by two to three weeks) compared to bankers located further south who had to get around Ireland. Agents in Virginia were hired to purchase tobacco there, so that the merchants had to assume the risks of passage but were able to put together a shipload of tobacco before the arrival of a ship, thereby lessening the turn-around expenses of insurance, dockage, and crew salaries while ships lay idle at an American dock waiting their lading—the highest costs of the business. They established great chains of stores upriver in the newly-opening tobacco areas of the Piedmont where the conservative and agentless consignment merchants were reluctant to go, in order to tap the supplies of the yeoman and peasant farmers who raised small crops.[32] These small farmers incurred small debts (and purchased necessities rather than luxuries at the Scottish stores), but there were a great many of them. The largest of these concerns, William Cuninghame's three interlocking Glaswegian firms, had fourteen stores in Virginia and seven more in Maryland while owning six oceangoing ships. At the commencement of the war they claimed that they were owed more than £135,000 on thousands of small accounts, the vast majority of them for sums under £25, few over £100. "For the mid-eighteenth century, it [£135,000] was a fantastic sum."[33]

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30. Evans, *Prerevolutionary Indebtedness, supra* note 29, at 517-19; Soltow, *supra* note 29, at 84. "By the 1750's and 1760's few commentators failed to mention the extravagant, luxurious, and even ostentatious tastes and habits of the large Virginia planters." Evans, *supra,* at 518-19; *accord,* Gipson, *supra* note 29, at 260.

31. Kulikoff, *The Economic Growth of the Eighteenth-Century Chesapeake Colonies,* 39 J. ECON. HIST. 275, 287 (1979); Price, *The Economic Growth of the Chesapeake and the European Market, 1697-1775,* 24 J. ECON. HIST. 496, 508-09 (1964) [hereinafter Price, *Economic Growth*]. The decline after 1758 of Amsterdam as a European tobacco entrepot rivaling London and Glasgow increased the Scottish advantages. Price, *Rise of Glasgow, supra* note 29, at 190-91.

32. Price, *Economic Growth, supra* note 31, at 509; Price, *Rise of Glasgow, supra* note 29, at 187-95; Soltow, *supra* note 29, at 84, 87-89.

33. Evans, *Prerevolutionary Indebtedness, supra* note 29, at 518; Price, *Rise of Glasgow, supra* note 29, at 195, 197 (source of quote); Soltow, *supra* note 29, at 85. One-half the total debt from Virginia to Great Britain in 1776 was for sums under £100, and almost all of those were less than £25. Kulikoff, *supra* note 31, at 288.

The key innovation of the Scottish factors, however, was in the field of credit: they essentially invented the credit account with a floating upper limit (much like today's credit cards), allowing the remainder of one year's unpaid debt to be rolled over to the next if it were not unbearably large. Only British creditors took such risks, and they did so largely because of increasingly heavy competitive pressures.[34] In the generation before the Revolution, the amount of debt owed to British mercantile firms rose astoundingly, especially in the last ten years of that period. The actual totals will never be accurately known, but one knowledgeable historian claimed: "At the outbreak of the American Revolution colonial [mercantile] indebtedness to Great Britain exceeded five million pounds. The southern colonies were most heavily encumbered; among them Virginia stood first with a debt of over two million pounds."[35]

Just as the inexorable logic of profit-driven competition both drove frugal, ingenious, and well-organized Scottish merchants to extend credit beyond reason and entrapped specie-poor "third-world" yeomen and peasants by their desires for what by fashion and usage had become necessary household items, so the logic of a pre-capitalist world found the rural planters, yeomen, and peasants alike "hopelessly in debt."[36] The nuances and mores of the possessive-individualistic ethos which characterized an increasingly virulent and virile capitalism in Great Britain had only penetrated so far into a Virginia society colonial in both senses of that word.[37] Planters selling crops as commodities knew about markets

34. Price, *Rise of Glasgow, supra* note 29, at 195-98; Soltow, *supra* note 29, at 86, 89-91. A Scottish historian noted in 1777 that "the trade, after the period of of 1750, being exceedingly increased, and factors established in every corner of the [American] country, the interests of these gentlemen began to interfere with one another; ambition for who should be possessed of the largest share of the trade took possession of them; they lent to the planters large sums of money, in order to secure them for customers, they gave them unlimited credit; and rendered the commerce with the people of America, rather a speculative, than a solid branch of business." J. GIBSON, THE HISTORY OF GLASGOW, FROM THE EARLIEST ACCOUNTS TO THE PRESENT TIME 212 (1777), *quoted in* Price, *Rise of Glasgow, supra* note 29, at 195. "All surviving correspondence between Scottish (or English) merchants and their American employees is but a variation on the theme of the near-bankrupt employer beseeching his extravagant representative to be less easy with credit in the future." Price, *Rise of Glasgow, supra* note 29, at 196. The competition is evidenced by the fact that many Virginia planters and some yeomen were in debt to more than one firm in 1775. One planter, for example, owed four firms in London, four in Glasgow, and one in Bristol. A study of the lists of debtors of six consignment firms (five in London, one in Bristol) and two Glasgow factor firms found a number of individuals owing debts to two or more of them. Sheridan, *supra* note 29, at 183, 180-81.

35. Evans, *Prerevolutionary Indebtedness, supra* note 29, at 511. *See also id.* at 517-18, 524-25; Price, *Rise of Glasgow, supra* note 29, at 196-98.

36. Gipson, *supra* note 29, at 260. Planters "did not let their indebtedness deter them from ordering large amounts of British goods." For example, John Syme (Patrick Henry's half-brother) owed £8000 at the outbreak of the Revolution. Evans, *Prerevolutionary Indebtedness, supra* note 29, at 519-23.

37. For possessive individualism, see C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962). For the rise of commercial market ways in Vir-

and dealt in market ways, but did not fully understand them and certainly did not accept them as dominant forces in their lives. Yeoman farmers were even further removed from market ways.

Still living in essentially a barter economy, most failed fully to appreciate or grasp "the impersonal action of the organized market which determined prices, paid for tobacco, and charged for goods without reference to their needs or their deserts, without prejudice or favor."[38] They continued to accept the credit offered them and shopped around for more; it was credit that freed what funds they had for other projects[39] and gave at least the planters the ability to flaunt their wealth and gain prestige and power in a world still centered around status and human sentiment, still wary about profits and the invisible, impersonal hand.[40] The clash between older and newer ways produced a certain moral ambivalence and ambiguity.

Maryland, North Carolina, and South Carolina followed the Virginia pattern of indebtedness to British merchants. And indebtedness also existed in the colonies north of the Mason-Dixon Line, but to a much smaller degree. Virginians held about forty-five percent of the debt, depending upon which set of calculations one uses, and five of the top six debtor colonies were southern. Among the northern colonies, only Massachusetts had a large debt at the time the Revolution commenced.[41]

2. *The Revolution Produces "Legal Impediments."* The beginning of the Revolution is usually dated for debt purposes in 1775—for Virginia, in May 1774[42]—because long before the Declaration of Independence the courts in many colonies closed as a result of the turmoil attendant upon the collapse of British authority. This meant that their debt collection agency of last resort was unavailable to British creditors. And the courts stayed shut during the lengthy hostilities, insofar as British creditors were concerned, for the laws of each of the belligerents for-

ginia, see Konig, "Commercial Relations and the Legal System in Prerevolutionary Virginia" (paper delivered at annual American Society for Legal History Conference, Feb. 10, 1990).

38. Soltow, *supra* note 29, at 94, 97.

39. Price, *Rise of Glasgow, supra* note 29, at 197.

40. *Cf.* E. GENOVESE, POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH 16-18, 283 (1965); E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE 165-74, 184-90 (1971).

41. For the claims as advanced by the British creditors, which ranked Virginia first with 46% of the debt and the other four Southern states second through sixth (except Massachuetts, at fifth) with another 38% of the debt, see Duncan Campbell, John Nutt, and William Molleson, "Lists of debts due by the Citizens of the United States of America to the Merchants and Traders of Great Britain . . ." (Chatham Papers) (PRO/Gifts and Deposits/30/8, vol. 343).

42. Tate, *supra* note 29, at 336-37.

bade enemy aliens to sue in the courts of their adversaries. Most British merchants packed their belongings carefully, including their account books, and went home full of bitterness and determined to collect the enormous debt once hostilities ended. They had to collect, since they were heavily in debt themselves. They wanted to collect, because, in the world of commerce and profits, contractual obligations are sacred and payment is the blood flow of life. The merchants *owned* the right to be repaid—with interest, they thought. It was only just.

The war was a long, bloody, expensive, and utterly draining struggle;[43] it was fought almost entirely on American soil, and saw former friends suddenly become murderous enemies. Many people huddled on the bleak margins awaiting the outcome, since they disliked both sides of a war whose soldiers were farmers' lads but whose proponents were local merchants desiring release from the political power of transatlantic merchants.[44] New York, northern New Jersey, Virginia, and the more southern states were constantly crisscrossed and their villages and farms pillaged and destroyed by the contending armies. Norfolk and several New England coastal towns were put to the torch. Savannah (with much of Georgia), Charleston (with some of the surrounding hinterlands), and Philadelphia were occupied by British troops for lengthy periods of time, while New York City (with Westchester, Staten Island, and Long Island) suffered a British occupation for the duration of the conflict—indeed, General Sir Guy Carleton did not evacuate the city until late November 1783, though the treaty had been provisionally ratified the preceding April.

Americans were by no means gentle with Tories and British prisoners, but British viciousness was unexcelled. Brutality by those British commanders who took no prisoners and devastated the countryside from Virginia to Georgia contrasts favorably to the fetid sweltering British prison hulks in Florida and the Caribbean that "housed" prisoners of war. Economic devastation was as severe. The withdrawal of the British

43. For the horrors of the Revolution recounted in the following paragraph, see R. MORRIS THE FORGING OF THE UNION, 1781-1789, at 1-6, 34-38, 41, 53 (1987); E. COUNTRYMAN, THE AMERICAN REVOLUTION 140, 160-62, 183 (1985); M. JENSEN, *supra* note 6, at 37-43, 234-35, 275, 303-04. For more detail, consult the works cited in Countryman's superb bibliography, *supra,* at 269-70.

44. Ernst's massive study of the colonial political economy in the decades before the revolt shows

> the existence of a direct and fundamental conflict of interest between the British and American commercial classes. In an effort to protect their right to exploit or invest in the riches of the New World, the British political nation was fully prepared to ride roughshod over the colonials. The colonial ruling classes proved no less aggressive or less aware of their interest. They showed a remarkable determination to have a voice in the management of their own economic destinies.

J. ERNST, *supra* note 29, at viii.

manufacturing and mercantile counection drained the rural countryside of commodities and whatever little specie it had; the value of paper money the states and Congress had issued to pay for the war evaporated, soldiers went unpaid in terms of purchasing power (and often in fact), and a staggering public debt mounted. The British encouraged slaves to flee within their lines, and it took little prodding for thousands of blacks to escape bondage. Shiploads of slaves left when Charleston and New York were evacuated.[45]

During the war every state, in indignation and dire need as much as in retaliation, passed laws confiscating (at least some) Loyalist property.[46] Confiscation proved lucrative to governments that were desperately short of money. Maryland, for example, sold a quarter million acres of Loyalist land (including the two largest iron manufactories in the United States); North Carolina's sales brought in six hundred thousand pounds by the end of 1782 and a total of nine hundred thousand pounds by 1790; and New York's sale of confiscated property (mostly accomplished after the peace) raised nearly four million dollars.[47] In ad-

45. Evans, *Indebtedness During Confederation, supra* note 29, at 360-61 ("[T]he refusal by . . . Sir Guy Carleton to return slaves who had been carried away during the war . . . proved crucial in the subsequent development of Virginia attitudes on the debt question."); Jones, *The British Withdrawal from the South,* in THE REVOLUTIONARY WAR IN THE SOUTH: POWER, CONFLICT, AND LEADERSHIP 258, 270-77 (1979); J. NADELHAFT, THE DISORDERS OF WAR: THE REVOLUTION IN SOUTH CAROLINA 91 (1981).

46. The laws penalizing Loyalists are collected in C. VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 318-41 (1902). For contrasting treatments of the situation and problems presented by the Loyalists and the British debts during and after the Revolution, see M. JENSEN, *supra* note 6, at 16-18, 68-69, 265-81, 302-26 (from the debtors' perspective); R. MORRIS, *supra* note 43, at 154-59, 174-75, 196-203 (from the creditors' perspective); R. MORRIS, *supra* note 27, at 73-92 (same); A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789, at 644-56 (1924) (same). Even the best recent synthesis of the history of the period — one with a sophisticated if not very hard-nosed understanding of socioeconomic struggle clearly comprehending that "courts functioned as the agents of the creditor interests demanding the payment of private debts," M. JENSEN, *supra* note 6, at 309, but forgetting this when it discusses the anti-democratic implications of the Constitution—pays little attention to these issues. *See* E. COUNTRYMAN, *supra* note 43, at 152, 156-59, 165-72, 176, 182-84, 200-04, 227-29. They are completely ignored by the massive, creditor-oriented "standard" history of the era. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

Some discussion of the debt controversy may be found in diplomatic history. For the Ameriean point of view, see S. BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY 132-43 (2d ed. 1962); for the British point of view, see C. RITCHESON, AFTERMATH OF REVOLUTION: BRITISH POLICY TOWARD THE UNITED STATES 1783-1795, at 49-69, 77-87, 147-51, 236-50 (1969). Ritcheson must be used with extreme caution on the legal points, as he seems to have misunderstood, misstated, and/or misdated most of the various American "legal impediments."

47. For Maryland, see N. RISJORD, CHESAPEAKE POLITICS 1781-1800, at 106-07 (1978); Stiverson, *Necessity, the Mother of the Union: Maryland and the Constitution, 1785-1789,* in THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 133 (P. Conley & J. Kaminski eds. 1988) [hereinafter THE CONSTITUTION AND THE STATES]. For New York, see Kaminski, *Adjusting to Circumstances:*

dition, New York enacted a Trespass Act, allowing Patriot owners who had fled before the enemy troops to recover damages and accrued rent from those British citizens who had used the property during the long occupation.[48]

Several states also passed statutes specifically impeding or restricting the ability of British creditors to recover their debts. North Carolina, alone among the states, confiscated British debts.[49] Maryland and Virginia allowed debtors to discharge British debts by payment into their treasuries;[50] since paper money was a tender for such purposes and it depreciated rapidly, debtors could acquit themselves by paying much less than the actual value of their loans. Maryland, Virginia, North Carolina, and New Hampshire closed their courts to British creditors,[51] whereas South Carolina simply closed its courts to all plaintiffs.[52] Pennsylvania suspended executions to enforce judgments, and New York suspended executions on British debt judgments until three years after the evacua-

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New York's Relationship with the Federal Government, 1776-1788, in *id.* at 228. For North Carolina, see H. LEFLER & A. NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE 221 (1954). Sales of confiscated land in Virginia were accomplished only sporadically during the war. Sales totaled more than three million pounds, but most of this was paid before May 1782 in depreciated paper money and thus hardly benefited the state. Some escheated property was set aside specifically for education, and Transylvania University and Hampden-Sydney College today sit on such property. The funds from confiscation sales were set aside for redemption of soldiers' pay certificates. See I. HARRELL, *supra* note 29, at 94-103.

48. Act of Mar. 17, 1783, ch. 31, 6th Sess., 1777-1784 N.Y. Laws 552, *extended by* Act of May 4, 1784, ch. 54, 7th Sess., 1777-1784 N.Y. Laws 700.

49. For a complete treatment of the several North Carolina confiscation acts between 1777 and 1782, *see* J. Waldrup, James Iredell and the Practice of Law in Revolutionary Era North Carolina, 286-88 n.6 (1985) (unpublished doctoral dissertation, University of North Carolina at Chapel Hill).

50. *See* An Act for calling out of circulation the quota of this state of the bills of credit issued by Congress, and the bills of credit emitted by acts of assembly under the old government and by the resolves of conventions, Sess. of Oct. 1780, ch. 5, § 12, 1780 Md. Laws [no pagination]; An act for Sequestering British Property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties, Sess. of Oct. 1777, ch. 9, §§ 3, 5, 9 THE STATUTES AT LARGE 379-80 (W. Hening reprint ed. 1969) [hereinafter HENING,] *repealed,* An Act repealing part of the act . . . , Sess. of May 1780, ch. 3, 10 HENING, *supra,* at 227.

51. *See* An Act to prevent suits on certain debts for a limited time, Sess. of Apr. 1782, ch. 55, 1782 Md. Laws [no pagination]; An Act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes, Sess. of Nov. 1781, ch. 22, § 3, 10 HENING, *supra* note 50, at 472 (Va.); An Act to repeal so much of a former act as suspends the issuing of executions upon certain judgments until December, 1783, Sess. of May 1782, ch. 44, 11 HENING, *supra* note 50, at 75 (same); An Act to amend an act entitled [previous act], Sess. of Oct. 1782, ch. 45, §§ 1, 8, 11, HENING, *supra* note 50, at 176, 180 (same); An Act for establishing courts of law, and for regulating the proceedings therein, ch. 2, § 101, Sess. of Nov. 1777, 1 Pub. Acts of Gen. Assy. of North Carolina 226 (2 vols., rev. ed. 1804); *see also* N. RISJORD, *supra* note 47, at 111-13, 117, 119 (Va., Md., and N.C.); L. TURNER, THE NINTH STATE: NEW HAMPSHIRE'S FORMATIVE YEARS 30-32 (1983) (New Hampshire).

52. Act of Feb. 26, 1782, ch. 1150, 4 S.C. Stat. 513 (1838).

tion of New York City.[53] New York also suspended wartime interest.[54] Courts in most states were of a similarly anti-British mind. They allowed juries in British debt cases to deduct some or all interest for the period of the war, sometimes going so far as to deduct it themselves, and many state courts allowed the settlement of decedents' estates, legally discharging debts to all creditors who did not file timely claims, despite the inability of British creditors to receive notification or to file.

3. *The Peace Treaty Condemns "Legal Impediments."* In England, Loyalists and the British merchants were well aware of these legal restraints and considered them not only illegal but immoral and dangerous. They organized into pressure groups and repeatedly urged their government to remember them when the terms of peace were negotiated.[55] Although anger at British hauteur and devastation as well as the knowledge that the Confederation could not force recalcitrant states to obey kept the American commissioners from giving in on the Loyalist property issue, only the aged self-made artisan Benjamin Franklin felt that American restrictions on recovery of their debts by the British merchants were justified on moral grounds. John Jay and John Adams, lawyers from above the Mason-Dixon Line, saw the debt issue from the standpoint of creditors and within the ethos of capitalism. They believed that honesty as well as the burgeoning credit needs of the fledgling undeveloped nation demanded that contracts be honored without reference to the wartime conditions. Using Franklin's fulminations about British depredations to advantage as leverage, the American commissioners went even further than the British commissioners imagined possible by agreeing to language in article 4 (proposed by Adams) that required flatly: "Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full value in Sterling Money of all bona fide debts heretofore contracted."[56] Little hesitation about the power of Congress

53. *See* Act of Mar. 12, 1783, ch. 53, Sec. 3, 1782-1785 Pa. Laws 138; Act of July 12, 1782, ch. 1, 6th Sess., 1777-1784 N.Y. Laws 499.

54. Act of July 12, 1782, ch. 1, § 5, 6th Sess., 1777-1784 N.Y. Laws 500.

55. For their organization and pressure, especially that of the efficient merchants, see C. RITCHESON, *supra* note 46, at 50-59, 64-65. The Glasgow merchants recognized the "Prohibitory Laws" that had "prevented them from recovering payment of their just Debts" in a memorial to the government in May of 1782. The Memorial of the Merchants of Glasgow Interested in the North American Trade Previous to the Year 1776 (May 30, 1782) (Shelburne Papers, vol. 87:49, William L. Clements Library, University of Michigan).

56. The Definitive Treaty of Peace, Sept. 3, 1783. The Treaty is conveniently reprinted in S. Bemis, *supra* note 46, at 442-50. The story of the negotiations, in this and the next paragraph of the text, is taken from R. MORRIS, THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE 341-80 (1965). The debt issue was at an impasse until Adams arrived. At his first session, without having consulted his fellow Commissioners on this point, Adams exclaimed: "I have no notion of cheating anybody." On the side of the British commissioners, "Strachey's face lit up,

to enforce such a predictably unpopular provision impeded the pro-creditor morality of Jay and Adams on this point.

By contrast, article 5 more realistically required Congress to "earnestly recommend" to the states that they restore the confiscated property of "real British Subjects" and Loyalists "who have not borne Arms against" the United States, and that they repeal all of the wartime laws against Loyalists.[57] The wealthy South Carolina merchant Henry Laurens, the only southerner who actually served on the Commission (since Thomas Jefferson never sailed for Europe), arrived on the next-to-last day of the months-long negotiations in time to grouse sufficiently about British theft, murder, and pillaging that the weary British commissioners accepted language in article 7 guaranteeing that the British would evacuate their armies and fleets without "carrying away any Negroes or other Property of the American inhabitants,"[58] a promise regarding slaves that the British did not keep and probably had no intention of keeping.

4. *Peace Increases "Legal Impediments."* Many Americans greeted the news of these provisions with disbelief, derision, uproar, and rejection. Loyalists, British creditors, and their agents already had begun to enter the United States after Lord Cornwallis's surrender at Yorktown in late 1781, and they had been met with outrage and violence.[59] Archibald Maclaine, a North Carolina attorney, was physically attacked in

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and his fellow Scotsman, Richard Oswald, wore a broad smile. . . . Franklin . . . for months had been insisting that both the commissioners and Congress lacked the power to deal with the subject. Now that Adams chose to put it on high moral ground, Franklin saw it was useless to protest." *Id.* at 361. Even then, the original draft of what became article 4 restricted the American agreement to debts incurred before 1775, but on the last day the Americans in a strange fit of generosity suggested the elimination of this language. *Id.* at 380; Letter from Richard Oswald to Lord Townshend (Nov. 30, 1782) (PRO/FO/95/1/511) (demonstrating that the American Commissioners suggested the change).

57. Definitive Treaty of Peace, art. 5.

58. Article 6 did command that there would be "no future Confiscations" or prosecutions against Loyalists, and article 5 required that Loyalists who had taken up arms against the United States be given one year to return "unmolested in their Endeavours to obtain the Restitution of such of their Estates Rights & Properties as may have been confiscated." S. BEMIS, *supra* note 46, at 447-49.

59. *See generally* M. JENSEN, *supra* note 6, at 265-76. A Virginia agent of a Glasgow firm advised his partner: "I would recommend your staying in Glasgow . . . . you would find Virginia not the same as when you left it things are so materially changed and it will require some considerable time to wear off the prejudices which the Citizens of this state have imbibed against the Merchts. who left this Country & as it were became voluntary partners in the war against them . . . . [Y]ou . . . have never favoured the subjugation of America, but the people at large are not capable of discriminating & will involve any person from Scotland in the same predicament & view them with the same jealous Eye." Letter from William Hay to James Baird (Mar. 25, 1783) (PRO/T/79/27, "John Hay & Co. & Jas. Baird.").

1782 when he attempted to appear in court on behalf of a Loyalist.[60] This kind of reaction by the American populace to the representatives of the hated enemy continued, indeed increased, in 1783 and 1784. A crowd seized and nearly lynched a Loyalist returning to New Hampshire.[61] An agent of a British creditor returning to North Carolina in 1783 was indicted and tried for treason; he was acquitted only after he was forced to swear that he would collect no debts.[62] In early 1785 an agent still found it necessary to warn his principal in Scotland of the physical danger inherent in the latter's returning to North Carolina.[63]

The several state governments followed the popular lead, expressing their dissent from the Treaty by enactments that completed implementation of the wartime confiscation statutes in apparent disregard of article 6[64] and by actions in conflict with the part of article 5 guaranteeing Loyalists a year's grace to attempt to reclaim their property.[65] Article 4, requiring the enforcement of the prewar debts, received the roughest treatment. Massachusetts and Connecticut acts allowed courts and juries to deduct wartime interest from prewar British debts.[66] Pennsylvania allowed executions for debts due between July 4, 1776, and January 1, 1777, to be made only in three equal annual payments commencing in 1785.[67] When the North Carolina legislature, under heavy pressure from

60. J. Waldrup, *supra* note 49, at 255. The Loyalist Joseph Williamson returned to Virginia in 1782 with the written permission of the Governor and the state Council, but he was nevertheless tarred and feathered by an angry crowd. The crowd's leader was thereafter elected to the state legislature, which then relieved him of possible liability for his deeds by a private act. I. HARRELL, *supra* note 29, at 137-38; Letter of Edmund Randolph to Thomas Jefferson (Apr. 24, 1784), *reprinted in* OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 74 (M. Conway ed. 1888) [hereinafter RANDOLPH PAPERS].

61. C. WARREN, *supra* note 3, at 32.

62. Memorial of John Spence, assignee of John Buchanan, to the British Claims Commission of 1802 (1806) (PRO/T/79/6, "Chas Reid & Co (Factor John Buchanan)").

63. Letter from John Syme to Archibald Hamilton (Jan. 15, 1785) (PRO/AO/13/85).

64. *See* Act of Dec. 23, 1783, ch. 406, 1776-83 N.J. Laws 384-87; Act of Dec. 23, 1788, ch. 49, 1788-92 Md. Laws [no pagination]; An act for safe keeping the land papers of the Northern Neck in the register's office, Sess. of Oct., 1785, ch. 47, § 5, 12 HENING, *supra* note 50, at 112 (Va.); An act to dispose of the waste and unappropriated lands in the Commonwealth of Virginia, on the eastern waters, Sess. of Oct. 1785, 12 HENING, *supra* note 50, at 100 (Va.); an Act directing the sale of confiscated property, ch. 6, Sess. of Oct., 1784, 1 Public Acts of Gen. Assy. of N.C. 373-75 (rev. ed. 1804); Act of Dec. 29, 1785, ch. 7, 1 Public Acts of Gen. Assy. of N.C. 396 (rev. ed. 1804); Act of Mar. 22, 1786, ch. 1338, 4 S.C. Stat. 756-59 (1838); Act of Feb. 22, 1785, ch. 310, 1775-1801 Digest Ga. Laws 316-17; Act of Feb. 10, 1787, ch. 376, 1775-1801 Digest Ga. Laws 361-62.

65. Governor Benjamin Harrison of Virginia proclaimed in December 1782 and again in July 1783 that no Loyalist who departed the state in 1777 or thereafter might returu. I. HARRELL, *supra* note 29, at 125-26; M. JENSEN, *supra* note 6, at 280.

66. An Act relative to debts due to persons who have been and remained within the Enemies power or lines during the late war, [no ch. nos.], Sess. of May 1784, 1784 Conn. Laws 283-84; Act of Mar. 11, 1785, ch. 24, 1783-1789 Mass. Laws 252-53.

67. Act of Dec. 23, 1783, ch. 169, 1782-1785 Pa. Laws 412-15.

creditor interests to obey the Treaty, took equivocal action in 1784, the courts refused to open themselves to British creditors.[68] And the Georgia courts refused to entertain suits for British debts despite the absence of legislation.[69] A South Carolina law continued the closure of its courts in 1783, and then in 1784 another law again continued the closure until January 1785, requiring in addition that judgments for debt obtained thereafter be paid in four equal annual installments not to commence until January 1, 1786, and denying interest on debts before January 1, 1780.[70] British creditors found it difficult to collect their debts in the Pennsylvania courts.[71] A New York court in a well-publicized case, *Rutgers v. Waddington,* refused to overturn the Trespass Act in 1784 despite Alexander Hamilton's eloquent argument that allowing owners of realty to recover rent and damages from users of their property during the British occupation of New York City violated both the Treaty and the law of nations. The judge, a nationalist with his ear to the groundswell of opinion, confusingly but diplomatically found that the Treaty applied to a portion of the plaintiff's claim but not to the other portion.[72]

68. N. RISJORD, *supra* note 47, at 119. The spring 1784 General Assembly in North Carolina entertained "five or six different Bills" about debts and Loyalists, "but the Parties were so ballanced that not one passed." In the fall 1784 session, a bill postponing recovery for British creditors for "some four or five years hence without Interest" also failed. Letter from Willie Jones to Archibald Hamilton (Dec. 30, 1784) (copy, PRO/AO/13/85).

69. In the summer of 1783, Georgia Judge George Walton "set aside a writ in the [unreported] case of Thompson (a British subject) *v.* Thompson," on grounds that the treaty had not yet been definitively ratified (ratification took place only in the late spring of 1784). Letter from Thomas Jefferson to George Hammond (May 29, 1792), *reprinted in* AMERICAN STATE PAPERS: FOREIGN RELATIONS 211 (1833). This ruling was interpreted by the courts of Georgia to bar suits by British creditors in the state. Letter from George Hammond to Thomas Jefferson (Mar. 5, 1792), *reprinted in id.* at 196; Letter from Phineas Bond to the Duke of Leeds (Nov. 10, 1789), *reprinted in 1896 Annual Report: Letters of Phineas Bond, British Consul at Philadelphia, to the Foreign Office of Great Britain, 1787, 1788, 1789,* 1897 AM. HIST. ASS'N 625. Jefferson's cagily legalistic rebuttal of Hammond's argument does not in fact deny Hammond's claim. *See* Letter from Jefferson to Hammond, *supra,* at 211-12. Further, a 1792 letter from the Senators and Representatives of Georgia states that since the peace, no suit by a prewar British creditor had reached a judgment either for or against the creditor, indicating the substantial truth of Hammond's claim. Letter from William Few, James Gunn, Abraham Baldwin, and Francis Willis to Thomas Jefferson (Apr. 25, 1792), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, *supra,* at 236.

70. Act of Mar. 16, 1783, ch. 1180, 6 S.C. Stat. 627-28 (1839); Ordinance of Mar. 26, 1784, ch. 1237, 4 *id.* 640-41.

71. "State of the grievances complained of by Merchants and other British subjects, having estates, property and debts due to them in the several States of America," [undated], 31 JOURNALS, *supra* note 6, at 786. The British merchants complained that "the Lawyers, dreading the resentment of some of the most violent among their Countrymen, have refused to engage in the recovery of these unpopular demands, and the Committee are well assured that not one Action for the payment of an old British debt has been prosecuted in this State." *Id.*

72. A thorough treatment of this 1784 case and other actions under the Trespass Act may be found in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 282-543 (J. Goebel ed. 1964). The case was given contemporary explanation by Letter from Thomas Jefferson to George Hammond (May

Debates in the Virginia legislature made clear that many Americans had a different view of the morality of contractual obligations than did merchants. Certainly the ravages that the war had inflicted upon Virginia's economy meant the people were unable to pay: The Treaty demanded payment not just in hard money, but in pounds sterling; Jefferson estimated that "[w]ere all the creditors to rush to judgement together, a mass of two millions of property would be brought to market [in Virginia] where there is but the tenth of that sum of money in circulation to purchase it."[73] In addition, the wartime anti-British legislation gave a certain impetus to peacetime anti-British legislation.

No society rests its actions upon grounds it deems overtly immoral. Virginia's debtors also claimed high moral justification for their refusal to repay. The prewar ambivalence about capitalistic ways was shattered by the harsh experience of the war and its ensuing depression,[74] though some planters at the apex of Virginia society remained morally ambivalent about the British debts. Most of those rural Virginians who had been tempted by the newer ways turned away from them and embraced wholeheartedly the pre-capitalist ethos in response to the crisis in their affairs. They were joined by many who had never been ambivalent.

These Virginians proclaimed adherence to a much more contextual and substantive concept of consideration than that of the merchants. Repayment would be grossly immoral, in that conceptualization. The debts were contracts founded on and naturally incorporating the realities of the time and place where they were made. Each contracting party expected the other to be honorable, but the British by haughtily and illegally forcing an unjust war upon their colonists had destroyed that trust. Further, the debts had been obtained upon the expectation that the fruits of Virginia's land and farms would provide the means to repay them, but the British had destroyed this consideration by laying waste to cattle, fields, crops, implements, and buildings, and by capturing or enticing away thousands of the slaves whose labor was commonly understood to be the most significant productive factor of all for the planters and many farmers. The destruction of consideration was enhanced by the British refusal to adhere to the Treaty provision by returning or paying for the transported slaves.

29, 1792), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 210 ("The first part [of the court's opinion] . . . was an unequivocal decision of the superior authority of the treaty over the law."); Letter from Alexander Hamilton to Secretary of State (Apr. 19, 1792), *reprinted in id.* at 232 (same).

73. Letter from Thomas Jefferson to Alexander McCaul (Apr. 19, 1786), *reprinted in* 9 PAPERS OF THOMAS JEFFERSON 388 (J. Boyd ed. 1954).

74. *See infra* text accompanying notes 78-80.

The British refusal to evacuate nine forts commanding the crucial Great Lakes-St. Lawrence water passage completed their perfidy and dishonor in the eyes of these debtors.[75] These forts, strung strategically along the Canadian border but all within the territory the British had ceded to the United States in the 1783 treaty, were not turned over despite the requirement in article 7 that all British forces be removed from American soil.[76] Indeed, most of the forts remained in British hands until 1796.

In 1783 George Mason reported that everywhere he heard the question, "If we are now to pay the Debts due to British Merchants, what have we been fighting for all this while?"[77] A petition from the citizens of Halifax County assumed that the debts were forfeited with the rest of the British property. With the amazingly persuasive Patrick Henry leading the debtor forces, aided by Richard Henry Lee but opposed by Mason, James Madison, and the lawyers (but not by all of the planters) at the top of Virginia's leadership, Virginia's General Assembly defeated bills in May 1783 and May 1784 which proposed to repeal all laws contrary to the Treaty and to open the courts to British creditors (allowing recovery in five annual installments). In the fall session of 1784, boosted by both a petition from Glasgow merchants accepting installment payments and Henry's absence in the gubernatorial mansion, the two houses of the Assembly approved slightly different versions of a plan that allowed payment in seven annual installments and denied wartime interest. The James River froze, however, apparently keeping four legislators from attending the last two days of the session, and without a quorum the bills died and Virginia's courts stayed shut. In 1787, the Assembly, displaying a pre-capitalist understanding of substantive consideration, resolved not to repeal the obnoxious legislation until the forts were evacuated and the slaves were returned or paid for, and then only in a manner consistent with the exhausted condition of the economy.[78]

75. This allowed the British to continue to inflame and supply the Indians in western New York and along and beyond the Ohio with whom the United States was still at war, to control the immensely lucrative fur trade of the old northwest, and to prevent American trans-Appalachian settlers from shipping their produce to market via the St. Lawrence.

76. Definitive Treaty of Peace, Art. 7, *reprinted in* S. BEMIS, *supra* note 46, at 449.

77. Letter from George Mason to Patrick Henry (May 6, 1783), *reprinted in* 2 PAPERS OF GEORGE MASON 769 (R. Rutland ed. 1970) [hereinafter MASON PAPERS].

78. For a discussion of Virginia's outraged refusal to repay British debts outlined in the previous three textual paragraphs (including the Halifax County petition and the 1783-87 activities in the General Assembly), see I. HARRELL, *supra* note 29, at 144-47; N. RISJORD, *supra* note 47, at 111-15; Evans, *Indebtedness During Confederation, supra* note 29, at 358-70; Main, *supra* note 29, at 98-104; *see also* Letter from William Anderson to Samuel Gist (Feb. 1, 1783) (PRO/AO/13/30) ("The depredations & plunder Committed by the British Army were indeed horrid. And the consequence is a determination here to make no retribution for British Property, and to proscribe british subjects

5. *The Depression of the 1780s.* Economic necessity joined righteous indignation to produce continued intransigence on the British debt question. In 1783 and 1784 there was a short, deceptive boom fueled by a flood of British goods dumped on a nation made hungry for commodities by eight years of homemade goods or no goods at all; these British goods were, however, mostly paid for with more debt. But by mid-1784, flood had become glut. With the closing of America's lucrative West Indies trade by a British government determined to continue America's economic dependence, with a succession of staple crop failures in the deep south and eventually a drastic fall in tobacco prices, with a hemorrhage of circulating specie as overextended British creditors called in their loans and as many states increased taxes (which had to be paid in hard money) to pay off war debts, and with the elimination of wartime paper money as states assiduously followed contemporaneous economic thought and called it in, a deep recession commenced in late 1784 and lasted into the 1790s. For the average farmer or planter or rural householder, there was nothing to pay debts with and a lot of debts to pay. Creditors needed cash to pay *their* creditors, so the payment in kind that might have been accepted in a world passing away was no longer allowed.[79] The courts of the nation suddenly filled to overflowing with

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from recovering their debts."); Letter from John Syme to Archibald Hamilton (Jan. 15, 1785) (PRO/AO/13/85) ("Mr. Wm. Moore [in North Carolina] who owes you considerably, prod[uce]d his accot. in the late Assembly, and ballanced it by depredations done by Lord Cornwallis & Lieut. Col. John Hamilton [Archibald's Loyalist brother and raider commandant]."). A somewhat sympathetic British agent, who had stayed in Virginia throughout the war, in a moment of exasperation wrote home some lines reflecting the pre-capitalist views of Virginia's debtors, with whom he dealt on a regular basis while trying to collect his debts: "I find that the Creditors have still an Idea of getting the last farthing of the[ir] Companies Debt, however unreasonable it may be that the destructive consequences of the War should fall only on one party." Letter from William Hay to James Baird (Dec. 27, 1789) (PRO/T/79/27, "John Hay & Co. & Jas. Baird"). The sharply contrasting impersonal morality of the capitalist world—and yet the link between the two worlds—is displayed poignantly in one of the letters of London consignment merchant John Nutt to his South Carolina attorney, Charles Pinckney.

> [I]f comparing sufferings would produce any advantage to either party[,] what it is that I have not suffered, if I was to enter into a calculation of the amount[,] it would appear incredible, for it is not the diminution of my Fortune by deaths & other aceidents which constitutes the heaviest part of my Loss, it is being deprived of an honorable & profitable business for 13 or 14 years, a business equal to the warmest wish of the heart of Man, at the same time by being wholly cut off from the use of a Capital justly acquired by the Industry of many years hard labour[.] I have been deprived of the means of entering into any Engagemts. or carrying on any business for want of that Credit which my fortune so well entitled me to, & has been so hardly withheld from me, & what outstrips all my Misfortunes is that of being left to the mercy of every one of my Creditors for personal liberty, Creditors that are no longer the same people they were in better days & that are clearly & loudly calling on me for paymt. of very large sums which I cannot discharge . . . .

Letter from John Nutt to Charles Pinckney (Sept. 5, 1788) (PRO/T/79/5, "John Nutt & Co.").

79. The best concise treatment of the credit crunch, the resulting money shortage, the ensuing depression, and the serious distress of the mostly rural debtor majority is D. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 19-36 (1980), which deals mostly

debt suits, as creditors were forced to sue by their web of commercial obligations as well as by their moral obligations.[80]

South of the Mason-Dixon line, the debt crisis produced still more legislation aimed at British creditors, while the courts in North Carolina, Virginia, and Georgia remained shut to their claims.[81] South Carolina in

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with Massachusetts (and somewhat with the rest of New England) but aptly characterizes the phenomenon as a whole. An older, more extended national treatment that still rings true, despite excessive optimism about "development," is M. JENSEN, *supra* note 6, at 183-93, 238-40, 302-12. Resolutely pro-creditor, but more recent, is R. MORRIS, *supra* note 43, at 130-48.

For accounts of the recession in the South, see J. NADELHAFT, *supra* note 47, at 145-58 (excellent treatment of South Carolina); Evans, *Indebtedness During Confederation, supra* note 29, at 361-63 (Virginia); Stiverson, *supra* note 47, at 134-37 (Maryland); J. Waldrup, *supra* note 49, at 110-14 (North Carolina). *See also* N. RISJORD, *supra* note 47, at 161-70 (Maryland, Virginia, and North Carolina).

For the rest of the country, see L. TURNER, *supra* note 51, at 44-47 (New Hampshire); V. HALL, POLITICS WITHOUT PARTIES: MASSACHUSETTS, 1780-1791 (1972) (supplements D. SZATMARY for Massachusetts); I. POLISHOOK, RHODE ISLAND AND THE UNION 1774-1795, at 103-09 (1969) (excellent treatment of Rhode Island); Kaminsky, *supra* note 47, at 229 (New York); Murrin, *New Jersey and the Two Constitutions,* in THE CONSTITUTION AND THE STATES, *supra* note 47, at 60-61 (New Jersey); Doutrich, *From Revolution to Constitution: Pennsylvania's Path to Federalism,* in *id.* at 41-42 (Pennsylvania); Hancock, *Delaware Becomes the First State,* in *id.* at 27-28; J. MUNROE, FEDERALIST DELAWARE 1775-1815, at 141 (1954) (both Delaware).

80. In rural northeastern North Carolina where James Iredell practiced, the years from 1782 to 1790 saw an "explosion of lawsuits" caused in large part by the "postwar depression which made debtors unable to pay their obligations." J. Waldrnp, *supra* note 49, at 106, 110. *See generally id.* at 91, 100-14, 147-52, 239. There were "thousands of insolvencies" in New York in the 1780s, where "[t]wo or three debtors petitioned for [legislative] relief each week in 1784 and 1785." In the same period, "[d]ebt-collection cases flooded the courts" of Virginia; between 1782 and 1785, the six county courts in the rural Valley of Virginia docketed and tried more than 18,500 cases, most of them for debt. P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUFTCY, 1607-1900, at 115, 200-01 (1974). I am obliged to Kathryn Preyer for bringing this volume to my attention. In Massachusetts in the period between August 1784 and August 1786, there was "a dramatic rise in court actions against debtors" that involved a huge percentage of the male rural population. "During 1786, Connecticut creditors initiated more than 6,000 actions, taking over 20 percent of state taxpayers to court." Similar floods of debt litigation occurred in Vermont and New Hampshire. D. SZATMARY, *supra* note 79, at 29-30.

81. In a famous letter written to the British Ambassador George Hammond, who had complained that the courts were closed to British debts in some of the southern states, Secretary of State Thomas Jefferson asserted that the courts in Virginia "have been open and freely resorted to by the British creditors, who have recovered and levied their moneys without obstruction." Jefferson also implied that the courts were equally open in North Carolina and Georgia. Letter from Thomas Jefferson to George Hammond (May 29, 1792), *reprinted in* AMERICAN STATE PAPERS: FOREIGN RELATIONS 211 (1833). Jefferson relied upon letters from the Senators and Representatives of these states, which made the same claims or implications. *See* Letter from North Carolina Senator Samuel Johnston to Thomas Jefferson (Apr. 13, 1792), *reprinted in id.* at 233 (1833); Letter from Georgia Senators and Representatives William Few, James Gunn, Abraham Baldwin, and Francis Willis to Thomas Jefferson (Apr. 25, 1792), *reprinted in id.* at 236; Letter from Virginia Senator James Monroe to Thomas Jefferson (May 1, 1792), *reprinted in id.* at 234; Letter from Virginia Senator William Branch Giles to the Secretary of State (May 6, 1792), *reprinted in id.* at 234.

The best that can be said about the claims made by these honorable and distinguished gentlemen is that they were disingenuous and legalistic, stretching or pinching the truth in the cause of patriotism. The only suits by British creditors pursued to judgment in the state courts of these three

1785 obliged a winning creditor to take property tendered by the debtor at three-quarters of its value as appraised by a local magistrate, and no creditor could sue without first asking the debtor in writing for payment.[82] The law quickly became known as the Pine Barren Act, since debtors bought up and offered worthless scrub pine country to their creditors; this Act along with the Installment Act effectively kept South Carolina's courts closed too.[83] Then, in 1787 and again in 1788, additional installment acts were passed, the former requiring three annual install-

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states before 1793 were essentially uncontested by the defendant either because a compromise had been negotiated whereby both parties gave up something (the defendant usually giving up interest during the war out of necessity or hopelessness), or because the defendant was a decedent's personal representative who, as a result of opposition by the heirs, devisees, or distributees to payment of British creditors, had to have a judgment on the record before he could pay the plaintiff's claim and close the estate, or because the defendant had decided the debts were just and should be paid but wanted a judgment to fend off the opprobrium of his neighbors. *See infra* note 179. The Johnston and Few-Gunn-Baldwin-Willis letters, *supra,* each admit that very few of these suits had been brought in North Carolina and Georgia respectively.

For examples of the overwhelming evidence against Jefferson's claims with regard to Virginia, see Affidavit of Benjamin Waller, (Sept. 12, 1810) (PRO/T/79/3, "Alexander Donald & Co."); Letter from Peter Lyons, Judge, Virginia Court of Appeals, to William Hay (July 8, 1799) (PRO/T/79/27, "John Hay & Co. & Jas. Baird"); Letter from John Warden to William Hay (June 22, 1799) (PRO/T/79/27); Letter from William Hay to William Moore Smith, (Feb. 3, 1799) (PRO/T/79/27, "John Hay & Co. & Jas. Baird") ("As the laws of Virginia prohibited the Recovery of British Debts, few ventured to try the Experiment of a Suit, except in cases where they knew the Defendants would not avail themselves of the Plea of British Debt, or where the Decision of a Court was necessary to justify Executors and Administrators in paying Debts which they thought were just and ought to be paid, but which the Legatees or Representatives of the deceased would not consent to pay . . . ."). For evidence with regard to North Carolina, see Letter from John Hamilton to Lord Grenville (Apr. 4, 1793) (PRO/FO/5/2); Letter from John Hamilton to Lord Grenville (June 22, 1796) (PRO/FO/5/15). For evidence regarding Georgia, see *supra* note 69.

82. Act of Oct. 12, 1785, ch. 1293, 4 S.C. Stat. 710-12 (1838).

83. *See* J. NADELHAFT, *supra* note 45, at 158-67. The Pine Barren Act was ruled expired, on a technicality, by South Carolina's Court of Common Pleas in January, 1787. *Id.* at 169. The effect of the Installment and Pine Barren Acts in closing the courts to British (as well as all other) creditors, and the pre-capitalist consumption propensities of the South Carolina planters, is evident from a letter of a South Carolina lawyer to his London consignment firm:

> From an intire stopage of our Courts of Justice we have becn able to collect but a very small proportion of the debts due us from the Planters. For tho' they are chiefly People of the first distinction they prefer speculating in Lands and Negroes to paying off their debts. I believe that such a Villainous Law as our Tender Law never before disgraced a Country thought to be civilized. By our endeavouring to inforce payment from some of those owing to us we have had within these few weeks past, several thousand acres of Pine Barren tendered to us, none of which lays within 150 miles of this City [Charleston].

Letter from William Searborough to John Lane (Oct. 7, 1786) (PRO/T/79/33, "William Parker"). An unreported opinion of the South Carolina high court in 1795 confirmed that these statutes effectively closed the courts:

> As to the time which elapsed since 1774 to the present period that is casily accounted for: from 1774 to 1783 the war prevented any thing being done and from 1783 to 1793 the repeated interference of the Legislature between Creditors and Debtors made it altogether impossible to recover debts during that time.

Greenwood & Higginson v. Air (S.C. Mar. 20, 1795) (unreported) (John Mathews & Hugh Rutledge, JJ.) (PRO/T/79/36, "Strachan, Mackenzie & Co.").

ments,[84] the latter (passed after the state had ratified a Constitution seemingly outlawing such legislation) requiring five.[85]

North Carolina legislation of 1785 closed its courts to Loyalist land-recovery suits. After arguments in 1786 and a lengthy wait while the judges hoped the legislature would repeal the statute, a courageous superior court in the celebrated case of *Bayard v. Singleton* in 1787 overturned the statute as violative of the North Carolina constitution's guarantee of jury trials. The court supported the jury's verdict in favor of a Patriot purchaser of the confiscated estate, however, on grounds that the Loyalist former owner was an alien incapable of owning land in North Carolina, against the plea that the Treaty forbade such a holding.[86] Both of the court's rulings catered to North Carolina's agrarian debtor majority. The North Carolina judges were (according to the British consul at Philadelphia) "by no means held in respectable point of view by the other states,"[87] but the alienage holding in *Bayard* was confirmed by a very respectable court, Maryland's Court of Chancery, in 1789.[88]

The debt crisis caused the Virginia and North Carolina legislatures in 1785 and 1786 to vote down attempts to open their courts to British creditors.[89] In response to Congress's plea in the spring of 1787 that laws contravening the Treaty be repealed, Virginia's complying legislation was rendered nugatory at the insistence of the debtor's great orator, Patrick

84. Act of Mar. 28, 1787, ch. 1371, 5 S.C. Stat. 36-38 (1839). George Miller, the newly-arrived British Consul for Georgia and South Carolina, thought that this installment act would be satisfactory to the British merchants. Letter from George Miller to Lord Carmarthen (July 10, 1787) (PRO/FO/4/5).

85. Act of Nov. 4, 1788, ch. 1431, 5 S.C. Stat. 88-92 (1839).

86. Bayard v. Singleton, 1 N.C. 5 (1787); Act of Dec. 29, 1785, ch. 7, 1 Public Acts of Gen. Assy. of North Carolina 396 (rev. ed. 1804); J. Waldrup, *supra* note 49, at 259-79.

87. Letter from Phineas Bond to the Duke of Leeds (July 12, 1789), *reprinted in 1896 Annual Report, supra* note 69, 1897 AM. HIST. ASS'N 600.

88. Harrison's Reps. (Md. Ch. 1789) (unreported) (secret trust in 1782 will whose beneficiaries were British subjects could not be enforced, since aliens could not hold Maryland real property either at law or beneficially), as summarized in Letter from Phineas Bond to the Duke of Leeds, App. XVII (Nov. 10, 1789) (PRO/FO/4/7); *see also* Letter from Bond to Leeds (July 12, 1789), *reprinted in 1896 Annual Report, supra* note 69, 1897 AM. HIST. ASS'N 600; Letter from Senators and Representatives of Maryland John Henry, Charles Carroll of Carrollton, John Francis Mercer, Samuel Sterret, Joshua Seney, William Vans Murray, Philip Key, and Upton Sheredine to the Secretary of State (undated), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 233 (1833) [hereinafter Letter from Maryland Senators and Representatives]; Letter from Thomas Jefferson to George Hammond (May 29, 1792), *reprinted in id.* at 204.

89. I. HARRELL, *supra* note 29, at 147-49 (Virginia); N. RISJORD, *supra* note 47, at 119 (North Carolina); *id.* at 135-36, 149-54 (Virginia); J. Waldrup, *supra* note 49, at 258 (North Carolina).

Henry, and repeal was made expressly contingent upon prior British compliance.[90]

In the summer of 1786 an aroused crowd of debtors gathered at the courthouse in Charles County, Maryland, to protest the filing of more than a hundred suits on behalf of a Glasgow creditor. Though the courts technically had been open in Maryland for more than two years, these were among the first suits filed. When faced with the action of the people embodied in an angry crowd, the thoroughly frightened lawyer dismissed his suits while the equally frightened judge closed the court.[91] It took the intervention of a creditor-oriented governor to get the suits and others like them back on the docket.[92] And in 1787, the Maryland legislature prohibited recovery by British creditors who refused to give bond for all debts they might have owed to Maryland citizens.[93]

6. *Non-Slave States Repeal "Legal Impediments."* Despite the continuance of the debt crisis in the South, hostility to British creditors

90. Act of Dec. 12, 1787, ch. 34, 12 HENING, *supra* note 50, at 528; I. HARRELL, *supra* note 29, at 148-53; Evans, *Indebtedness During Confederation, supra* note 29, at 365-71. At conferences which Ambassadors John Adams and Thomas Jefferson held in London in 1786 with Duncan Campbell, the chair of the British merchants' committee, the merchants at first adhered to their acceptance of instalments only if the wartime interest were also paid; later they buckled, accepting installments foregoing seven years' interest if the principal and all other interest were paid. *See* I. HARRELL, *supra* note 29, at 149-50. So much for the *real* sanctity of contract in the new morality of the commercial world: In fact, anything goes, all can be compromised, there is absolutely nothing sacred or unpurchasable (as the law-and-economics literature demonstrates with each page today); and the precocious 16th century description of life in capitalism by Thomas Hobbes (a war of all against all) turns out to be the most accurate description of commercial "morality."

91. N. RISJORD, *suupra* note 47, at 170-71. Agents for British creditors claimed that pressure was put on more than one Maryland attorney who, because of this pressure and the "violencc" used in Charles County, were "deterred from bringing others [suits] very generally." Letter from W. Cooke to Thomas Kearney (Sept. 15, 1806) (PRO/T/79/34, "Assignees of John & Gilbert Buchanan"); *see also* Memorial to British-American Claims Commission of 1794 (Nov. 28, 1798) (PRO/T/79/27, "Geo. & Andrew Buchanan").

92. Letter from Maryland Senators and Representatives, *supra* note 88, at 233; Letter from John Gwynn to William Vans Murray (Apr. 23, 1792), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 233-34.

The Governor's success in opening the Charles County courts to British creditors in 1786 apparently was permanent. The Glasgow merchants reported to the British Foreign Officc early in 1788 that they had "no complaint to make against the State of Maryland, for they have opened their Courts of justice and our Debtors are settling and making payments. It is against Virginia and North Carolina that we now chiefly complain." Letter from James Ritchie to Henry Dundas (Apr. 3, 1788) (PRO/FO/4/6).

93. Act of Jan. 20, 1787, ch. 49, § 3, 1788-1792 Md. Laws [no pagination]. *See* Memorial to British Claims Commission of 1802 [undated] (PRO/T/79/34, "Assignees of John & Gilbert Buchanan"); Letter from W. Cooke to Thomas Kearney (Sept. 15, 1806) ("Although the Act requires security for the payment of the Debts due here; yet as it could not be known certainly what the amount of those Debts were, it became an invariable practice to require security to the full amount of the [British creditor's Maryland] claims . . . .") (PRO/T/79/34, "Assignees of John & Gilbert Buchanan.").

seems to have begun to pass from the historian's view during this time north of the Mason-Dixon line, although there was still much actual popular resistance. Courts and juries still deducted war interest throughout the nation, based on a corollary of the theory of substantive consideration that debtors did not owe what the interdictions and exigencies of war prevented them from paying.[94] In a ruling similar to that in *Bayard*

94. We have clear evidence that in the 1780s judges and juries in New York and Pennsylvania deducted war interest, despite the lack of legislation like that in Massachusetts and Connecticut permitting them to do so. *See supra* text accompanying note 66; Hoare v. Allen, 2 U.S. (2 Dall.) 102 (Pa. 1789) (court ruled that American debtor could not be held liable for interest on mortgage due British creditor, since it would be a violation of law to pay debt to enemy); Neale's Ex'rs v. Sands (N.Y. Sup. Ct. 1786) (unreported) (in suit by executors of British creditor for prewar debt, Chief Justice of New York charged jury to act as Chancellors with power to reduce interest; jury subtracted wartime interest in its verdict; verdict was enforced), *noted in* Letter from Phineas Bond to the Duke of Leeds, App. XII (Nov. 10, 1789) (PRO/FO/4/7); Osborne v. Mifflin's Ex'rs (Pa. Sup. Ct. 1787) (unreported) (in suit by British creditor on prewar debt, Chief Justice of Pennsylvania directed jury to abate 7 1/2 years' war interest; jury deducted 6 1/2 years' interest; verdict was enforced), *noted in* Letter from Bond to Leeds, *supra*; Letter from William Rawle to the Secretary of State (Apr. 9, 1792), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 236 (1832) ("The *Hoare v. Allen* court, in this . . . directed the jury to deduct seven and a half years' interest. The jury, however, deducted eight and a half years' interest.")

Since states south of Maryland did not permit suits by British creditors, it is unlikely that their judges or juries were able to entertain the question. It is likely that judges and juries in the other states from Maryland northward deducted interest in the 1780s. *See* N. RISJORD, *supra* note 47, at 117-18 (county judges in Maryland before 1790 gave conflicting opinions on recoverability of war interest); Letter from Thomas Jefferson to George Hammond (May 29, 1792), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 214 (1832) (After Massachusetts' legislature in 1787 declared repealed all state laws contrary to the treaty, Massachusetts' courts in unreported and unnamed cases "changed their rule relative to interest during the war, which they have uniformly allowed since that time."); [Hartford] Connecticut Courant, May 9, 1791 (indicating that the Connecticut courts and juries had deducted war interest until the Connecticut statute permitting the same was overturned, as violative of the Treaty, in the first decisions of the new federal courts finding a state statute unconstitutional, in *Elliot v. Sage* and *Deblois v. Hawley* [C.C.D. Conn. 1791] [two unreported cases, Records of the Circuit Court (for Connecticut) from the April 1790 Term to the September 1796 Term, Connecticut Federal Court Files, RG 21, National Archives Regional Records Center, Waltham, Mass.]); Memorial to the British-American Claims Commission of 1794 (Nov. 15, 1798) (PRO/T/79/5 "Henry White") ("before the organization of the federal courts the Law [of New Jersey] on this Subject was considered as finally settled and in all adjustments of British Debts before that period, the abatement of interest was claimed as a right by the Debtor and allowed as a matter of Absolute Necessity by the Creditor"; the Memorial also claims that the state courts did not deviate from this principle thereafter).

The records of one Maryland creditor exhibit fourteen judgments on prewar debts certified by the clerk of court, dated between May 1786 (when the courts opened) and October 1792, all in favor of the creditor. In two judgments, interest was granted by the jury from before 1776; in two others, interest was granted from the 1760s, but these were expressly made subject to the court's opinion whether interest during the war was recoverable from British creditors; in yet two more, interest was granted payable only from 1783; in seven other judgments, interest was granted payable from various dates in 1784; and in one other, interest was granted payable from Feb. 19, 1793. (PRO/T/79/34, "Assignees of John & Gilbert Buchanan"). An agent in North Carolina claimed that in North Carolina interest was allowed only from the time a demand could be proved, "which in Case of Deaths &c, leaves the Date of the Writ the only Evidence which can be produced, & the Interest

v. Singleton, a Pennsylvania court held in late 1788 that where a Loyalist's estate had been confiscated but a debt owing to it had not actually been collected, the legislative act of confiscation was complete and final and thus collection would not violate article 7's guarantee against future confiscations. The court also held that article 4, eliminating all legal impediments to the collection of debts, gave its freedom to sue only to "real British subjects"—that is, to persons always adhering to the crown of Great Britain—and not to persons who at first had professed loyalty to the United States but had subsequently proved themselves disloyal (for the plaintiff had gone over to the enemy long after independence was declared).[95] And a New Jersey indictment of a Loyalist for a wartime atrocity—the lynching of a patriot in retribution for the hanging of a Loyalist spy—in direct contravention of article 7's prohibition of further prosecutions for war-related activity demonstrated that many folks in the northern part of the country were still very angry at the British.[96]

However, John Jay, now Secretary for Foreign Affairs under the Confederation, studied the state of American compliance with the Treaty in 1786 at the urging of both John Adams, now Minister to England, and Lord Carmarthen, the British Foreign Secretary, and complained to the Continental Congress that violations were widespread,[97] especially in New York and Virginia. The Continental Congress in spring 1787 found with a surprising unanimity that violations existed, and it requested all of the states to repeal any legislation contrary to the Treaty.[98] By February 1788, with New York acting only after the Constitution had been ratified, all the states north of the Mason-Dixon line except New Jersey passed repealing legislation or found that no offending legislation existed; but only the legislatures of Maryland and North Carolina below the line complied fully,[99] and of these two states the courts in North Carolina

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therefore is limited to the Bringing of the Suit." Interrogatory of William Hines (Apr. 25, 1803) (PRO/T/79/27, "John Hay & Co. & Jas. Baird").

95. *See* Camp v. Lockwood, 1 U.S. (1 Dall.) 393 (Phila. Ct. Comm. Pleas, Pa. 1788), *noted in* 3 INTERNATIONAL ADJUDICATIONS 157-58, 172-73 (J. Moore ed. 1931). There is a short but useful discussion of the problems of ascertaining what was meant by the term "real British subjects" in J. KUTTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 183-87 (1978).

96. This is the unreported 1788 case of John Smith Hatfield, best explained in Letter of Elias Boudinot to the Secretary of State (Apr. 11, 1792), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 232 (1832). The outcome of the case is uncertain. Apparently Hatfield at first jumped bail, then pleaded the Treaty as a complete defense on appeal of the trial court's denial of his habeas corpus action, and the case was still pending without action by the New Jersey attorney general in the spring of 1792. *Id.*

97. The diplomatic exchange that provoked Jay's report, as well as the report itself, can be found in 31 JOURNALS, *supra* note 6, at 781-874.

98. 32 JOURNALS, *supra* note 6, at 177-84.

99. *See* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 228-31 (1832) (containing copies of reports of the various states). The Governors of New Jersey and South Carolina sent letters

stayed shut to British creditors despite the legislation. Whatever contrary feelings may have existed in the Yankee countryside, as the shrewd Loyalist who performed as British consul in Philadelphia predicted, "the Courts of Law etc. in those States which have adopted the recommendatory resolve of Congress will make the Treaty of Peace the rule of decision."[100] By the spring of 1792 the British Ambassador, George Hammond, could report to his government that "in the New England and other states, which are attached to the present form of government, there exists the strongest disposition to observe implicitly the terms of the treaty."[101] After 1787, in those states where capitalist mores were strongest, opposition to the Treaty seemed to melt away, at least among judges, legislators, and other officials. In the slave south, where leaders and rural folk alike held to pre-capitalist ways, resistance to repayment remained absolutely adamant.

The notoriety of the transgressions against the Treaty made by legislatures and courts under the spell of debtors was widespread among the creditor element. They despaired of capturing control of the states and were certain, in Friendly's concise statement, that "[l]ocal animosity was so great that only national tribunals could compel the enforcement of a national treaty."[102] Congress's request was sent just about the time the Constitutional Convention was beginning its work, and noncompliance was then a national phenomenon. About the same time, James Madison wrote that "an appeal should lie to some national tribunal in all cases which concern foreigners, or inhabitants of other states."[103] National union, national honor, and more importantly national credit depended upon the "establish[ment of] justice" in forums freed from popular pressures, in which solemn treaty obligations could be safely enforced.[104] Only nationalists who lived among the debtors and knew their strength and determination could conclude, as did Madison, that such strong-arm tactics might not work: "[I]ll-timed or rigorous execution of the Treaty of Peace against British debtors" in the new courts might escalate the

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claiming that no such impediments existed, but the latter was in error, as the text has shown. The Virginia General Assembly passed an act conditioning repeal upon prior British compliance, which clearly does not count either. *See supra* text accompanying note 90.

100. Letter from Phineas Bond to the Duke of Leeds (Nov. 10, 1789), *reprinted in 1896 Annual Report, supra* note 69, 1897 AM. HIST. ASS'N 625.

101. Letter from George Hammond to Lord Grenville (Mar. 6, 1792) (PRO/FO/4/14).

102. Friendly, *supra* note 4, at 484 n.6.

103. Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *reprinted in* 9 MADISON PAPERS, *supra* note 9, at 370.

104. *See generally* M. JENSEN, *supra* note 6, at 422-28; E. COUNTRYMAN, *supra* note 43, at 167-74, 200-04.

level of debtor cohesiveness and opposition to a point dangerous or even fatal to the union.[105]

C. *The Domestic Debt Crisis and Democracy*

The damage done by the depression of the 1780s did not confine itself to the debtors of British merchants. Specie and currency evaporated for all, while debts remained and mounted for most. Domestic creditors pressed, sued, and jailed their debtors with an enthusiasm rivaling the most hardbitten of their British counterparts.[106] And the debtors, blessed with a heightened consciousness (thanks to revolutionary ideology) and, in many places, with heightened power (thanks to the democratic constitutions of the new states or to their status as "rich" and powerful planters), responded as sorely pressed debtors usually do. They picked up and moved out of town—a flood of immigration poured into the newly won western lands beyond the Alleghenies. They demanded relief in the forms of debt moratoria, a circulating and depreciated medium, and tender laws at least guaranteeing that such a medium would be acceptable for debts, at most reverting to barter. They stopped paying taxes. They resisted foreclosures and debt executions with the armed might of the local community. And at the height of the depression, they exercised their recently won right of revolution and tried to shut down the courts, which as always "functioned as the agents of the creditor interests demanding the payment of private debts."[107]

By 1786 seven states had yielded to the debtor pressure to issue paper money, the bulk of which was legal tender for most purposes; it depreciated as expected in four states but did not in three.[108] Madison was, as we have seen, quite aware of the debtor pressure, and he thought that "the evils issuing from these sources contributed more to the uneasiness which produced the convention" than the lack of power of the Confeder-

105. Letter from James Madison to Thomas Jefferson (July 24, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 9, at 196.

106. The conditions causing the depression were by no means confined to foreign debts. *See supra* notes 71, 72 and accompanying text.

107. M. JENSEN, *supra* note 6, at 309. Several of the assertions made in the text will be developed in the succeeding paragraphs. For a discussion of the heavy taxes and tax revolts, see *id.* at 304-09. For a treatment of the problem within one state, see J. NADELHAFT, *supra* note 45, at 125-27, 157-58 (South Carolina). For the flood of migration west, and its accompanying problems of land speculation, border disputes, separatist movements, and conflicts with Native Americans, see M. JENSEN, *supra* note 6, at 112-15, 310-11, 330-45, 350-59; R. MORRIS, *supra* note 43, at 220-44.

108. Merchants still opposed it in general, except in South Carolina, where it could not be used to pay foreign or out-of-state debts. The story of the tender law and paper money controversies is well told in M. JENSEN, *supra* note 6, at 309-26. *See also* R. MORRIS, *supra* note 43, at 154-59.

ation government.[109] The uneasiness was all on the part of the creditors, whose capitalist morality was aptly displayed in this instance by William Livingston, Governor of New Jersey and soon to be a delegate to the convention, in language that today has become ordinary rather than controversial: "The interest of the creditor coincides with that of the community. Not so the interest of the debtor. The former desires no more than his own. The latter wants to pocket the property of another."[110] The paper money episode culminated juridically in 1786 and 1787 in *Trevett v. Weeden,* a case in which Rhode Island's superior court judges ruled that the state's Emission Act was unconstitutional because it denied a jury trial to creditors who refused to accept the paper. The state legislature promptly reversed the decision, and all the judges save one failed to win re-election.[111]

Stay laws were also enacted. The South Carolina installment laws operated on domestic debts as well as foreign ones; Governor William Moultrie defended them as creating for British citizens "no other difficulties, or impediments, than have [been created for] the citizens of America, in the recovery of their debts."[112] Rhode Island's legislature enacted a series of personal debt moratoria, one of which was overturned in 1792 in one of the early decisions of the new federal courts holding a state law unconstitutional.[113]

Most distressing of all to the creditors were the popular uprisings provoked by the debt crisis. The most famous was Shays' Rebellion in Massachusetts, in which impoverished and indebted farmers and yeomen from the western part of the state rose in rebellion to close the courts, and created havoc from late summer 1786 until early summer 1787, well after the beginning of the Convention.[114] Similar but much shorter debt-based rural outbreaks in 1785, 1786, and 1787 temporarily closed local courts in South Carolina, Maryland, Connecticut, and Virginia (where a

109. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 10 MADISON PAPERS, *supra* note 9, at 212.

110. M. JENSEN, *supra* note 6, at 316 (quoting Livingston's essay signed *Primative Whig,* which first appeared in the *New Jersey Gazette.*)

111. The case is unreported, but is treated in, *e.g.* M. JENSEN, *supra* note 6, at 325; I. POLISHOOK, *supra* note 79, at 133-42, 153-54; D. SZATMARY, *supra* note 79, at 52-53.

112. Letter from William Moultrie to John Jay (June 21, 1786), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 231 (1832).

113. Champion v. Casey (C.C.D.R.I. 1792) (unreported) (finding unconstitutional a debt moratorium law "impairing the Obligation of Contracts"), *discussed in* The Providence Gazette and Country J., June 16, 1792; [Boston] Columbian Centinel, June 20, 1792. "In Conformity to a Decision of the Circuit Court, mentioned in our last, the Lower House of [the Rhode Island] Assembly voted on Wednesday, that they would not grant to any Individual an Exemption from Arrests and Attachments for his private Debts, for any Term of Time." The Providence Gazette and Country J., June 23, 1792.

114. D. SZATMARY, *supra* note 79, *passim.*

courthouse was razed), led to marches and tumults in New Jersey and Pennsylvania, and held the New Hampshire state legislature captive for five hours.[115] An upcountry South Carolina judge warned that "the people would not suffer . . . creditors to sue debtors."[116] The words of a Pennsylvania merchant summarized the fears of the creditors: The rebels wanted "[a] total abolition of all Debts both public and Private and even a general Distribution of Property . . . ."[117]

The popular concern about debt and depreciation, about speculation in land and the commercial paper that evidences debts, and generally about the intrusion of capitalist values into rural lives expressed itself in other ways too, including jury verdicts. Friendly dismissed the argument consistently put forward by contemporaneous supporters of the Constitution that popular bias against out-of-state creditors infected state courts.[118] However, Friendly's evidence is solely from the few reports of appellate opinions from the 1780s (opinions which, he concluded, show not the absence of bias altogether but rather no "*undue* prejudice" against out-of-staters).[119] Appellate courts at the time could not deal often with biased fact-finding or damages awards since trial juries had the final word on such matters, typically via the general verdict. Friendly's dismissal is founded upon no evidence whatsoever of jury activity in trial courts, and he utterly fails to see the question of local bias within its

115. *Id.* at 59, 78-79, 124-26. *See also* R. MORRIS, *supra* note 43, at 258-66.

116. Charleston Morning Post & Daily Advertiser, Feb. 21, 1786. The speaker, Judge Aedanus Burke, would soon become an important opponent of the Constitution.

117. Letter from Charles Pettit to Benjamin Franklin (Oct. 18, 1786), *reprinted in* 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 487 (E. Burnett ed. 1936).

118. Friendly, *supra* note 4, at 492-94. It must be noted that Frieudly stated accurately that the "early state reports give us only a fraction of the cases heard before the appellate tribunals, themselves an infinitesimal fragment of the total amount of litigation," *id.* at 493, and that he clearly recognized the profound impact which debtor legislation such as tender laws and insolvency laws had on the shaping of diversity jurisdiction (a "principal reason" which was "by no means without validity," *id.* at 497). His relative open-mindedness as a historian is in contradistinction to that of subsequent chroniclers of the origins of the federal judiciary: He goes so far as to say that if evidence were presented that "state judges had been notoriously unfair to foreigners [that is, to out-of-staters]," the story of state court bias repeatedly told by Madison, James Iredell, and other supporters of the Constitution duriug the ratification struggle, *see infra* note 194, would be acceptable. (Subsequent writers find the possibility of state court bias unthinkable.) Without such evidence, however, Friendly finds the argument insincere.

One purpose of this essay is to begin to present such evidence. I suspect, however, that Friendly's use of "notoriously" in the preceding quote—a very high standard of proof for those who wish to throw suspicion on state courts—is a good indication that most commentators today who are oriented toward the states-sovereignty view, as was Friendly, will want more evidence than can ever be presented that there was legitimate reason to suspect bias in the state courts of the 1780s merely because at crucial moments the judges fell into anti-creditor stances or, worse, did not prevent juries from doing so.

119. *Id.* at 493 (emphasis added).

context of the vehement opposition of Anti-Federalists to the lack of jury trial guarantees in the proposed Constitution.

Evidence *is* hard to come by, since we do not have many reports of state judicial activity in the 1780s and since digging up the facts involves back-breaking labor in musty court archives. But I have found *some* evidence, all of it interestingly enough from North Carolina, one of the two states that would soon reject the new Constitution. Conservative, creditor-oriented lawyers led an attack during the mid-1780s on the three judges of the North Carolina Superior Court (at the time, the state's highest court) for their dilatoriness, argumentativeness, and lack of ability.[120] The perhaps rough-edged and ill-educated judges whose dockets were suddenly crowded with debt cases may have been guilty of these charges, but they also were opposed to the Treaty and to the return of the Loyalists, and any dilatoriness in handling cases worked to the benefit of debtors. In 1786 creditor-oriented lawyers offered to prove misconduct to the legislature in an attempt to get the judges removed. They specifically argued (among other matters) that the judges' refusal to overturn the indictment of two Loyalists for returning without permission violated the Treaty, that the judges had disallowed suits by Loyalists whose property had been confiscated, and that one judge had struck six years' war interest off a British creditor's claim when the jury did not deduct interest.[121] However, the General Assembly not only voted two-to-one to dismiss all charges, they warmly commended the three judges.

A second instance involves apparently blatant bias by local juries against a famous out-of-state person of wealth. Robert Morris of Pennsylvania was the first great American entrepreneur; a merchant and trader on a vast scale by the 1780s, he "may well have been the biggest real estate speculator of all time."[122] As one of the first and foremost Americans engaging in the games of big-time finance, he was often the out-of-state creditor par excellence, and he was hated by many for his wealth, his foreclosures, his speculation, and widely rumored war profiteering during his stint as the nation's first minister of finance; but he was

120. The leaders of the attack were attorneys John Hay and Archibald Maclaine, the former an agent for British creditors in North Carolina and the latter the relative and friend of, and legal advocate for, many Loyalists, both with uncompromising natures, fiery tempers, and acerbic tongues. The story and the lively personalities of the various *dramatis personae* may be followed in P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 87-91 (1984); P. Smith, Creation of an American State: Politics in North Carolina, 1765-1789, at 488-91, 495-96, 517-21, 554-57 (1980) (unpublished doctoral dissertation, Rice University); J. Waldrup, *supra* note 49, at 109-14, 300-21.

121. Obviously the parties to that suit had agreed on the amount in advance, since the North Carolina courts were otherwise closed to such litigation.

122. Frank, *supra* note 1, at 19 (footnote omitted).

inevitably also sometimes sued for debt. In 1782 one John Cooper attached Morris's considerable North Carolina assets for a debt of £2700.[123] The jury in December 1783 awarded Cooper a verdict of £9700, *more than three times what he had sued for.* Then in 1787, in another attachment against him, Morris suffered a second defeat at the hands of a North Carolina jury whose verdict he also thought to be against the law and the evidence.

Although in these cases Morris was a debtor, the juries treated him according to his reputation as a harsh out-of-state creditor. Morris thought both juries biased against him, and his lawyer, Samuel Johnston, praised his reaching a settlement with Cooper without risking a new trial because "it would have been much against you to defend a Law Suit at so great a distance from home against an Adversary on the Spot ready to avail himself of every circumstance."[124] Johnston found the *Cooper* verdict "a very unfair attempt upon your property."[125]

Morris was in a position to do something about local bias, for he was one of the best-known and most powerful personages of his time. He was one of only two men to sign the Declaration of Independence, the Articles of Confederation, and the Constitution, and he had served from 1781 to 1784 as the United States Minister of Finance. President Washington later would accept the hospitality of Morris' home when the national capital moved from New York to Philadelphia in 1790, and Morris would serve as a Pennsylvania delegate to the Constitutional Convention and then as one of Pennsylvania's first two United States Senators. Johnston, Morris' lawyer, also attained prominence: He would become Governor of North Carolina and then one of the first two North Carolina Senators after that state finally joined the union. Although the jury ver-

123. The story of Robert Morris' troublesome North Carolina litigation is told in more detail in Holt & Perry, *Writs and Rights, "clashings and animosities": The First Confrontation Between Federal and State Jurisdictions,* 7 LAW & HIST. REV. 89 (1989).

124. Letter from Samuel Johnston to Robert Morris (Apr. 1, 1785) (Hayes Collection, Southern Historical Collection, Library of the University of North Carolina at Chapel Hill).

125. *Id.* Trial records of Morris' North Carolina jury defeats are available in the North Carolina State Archives. *See* Cooper v. Morris, Trial Docket 1781-86, Chowan County Court of Pleas and Quarter Sessions (entries for June, Sept., and Dec. 1782, Mar., June, Sept., and Dec. 1783, and Mar., June, Sept., and Dec. 1784); Allen v. Morris, Trial Docket 1786-87, Chowan County Court of Pleas and Quarter Sessions (entries for Dec. 1786 and Mar., June, and Sept. 1787); Minute Docket, 1787 and 1795-96, Chowan County Court of Pleas and Quarter Sessions (entries for Mar. 29, 1787 and June 28, 1787); Morris v. Allen, Record of the Pleadings and Decrees in the Court of Equity, 1788, at 252-98 (Superior Court of Law and Equity for Edenton District); *see also* Letter from Robert Morris to John Williams (Nov. 23, 1784) (John Williams Papers, North Carolina State Archives). Additional materials are available in the Hayes Collection, Southern Historical Collection, Library of the University of North Carolina at Chapel Hill. *See* Letters from Robert Morris to Samuel Johnston (Feb. 8, Mar. 10, and Mar. 15, 1785); Letter from Samuel Johnston to Robert Morris (Apr. 1, 1785).

dicts against Morris represent victories for debtors against creditors only in a sense, it is still a most meaningful sense because local bias was precisely the explanation for them subscribed to by these nationally prominent and influential members of the creditor group.

D. *Federal Courts as the Response to State Bias*

Courts and juries usually help creditors collect debts. But in the new United States during the democratic and depression-ridden 1780s, the tables were turned. John Marshall found that Virginia court reform in 1784 was opposed by those who were "against every Measure which may expedite & facilitate the business of recovering debts & compelling a strict compliance with contracts."[126] A solution to this problem was to establish *federal* courts, whose judges might not be so susceptible to local clamor raised by debtors and whose marshals might select a different sort of jury, or who might sit without a jury in the fashion of equity and the civil law. Indeed, mused the British minister instructing his representative to the peace negotiations with the Americans in October 1782, appeals to a federal court might give "Some Security [to British creditors] as to the American Courts of Justice, in lieu of their Right of Appeal [to the Crown] which subsisted when the Debts were contracted."[127] Debts, paper money, and violation of the Definitive Treaty of Peace by the nonpayment of British debts were among the forces impelling the Framers to travel to Philadelphia in 1787.[128] Other events, many related to such concerns, seemed to cry out to those interested in preserving the possibilities of commercial, manufacturing, and extractive development of the new country that changes in the Articles of Confederation were necessary. An august assemblage of Americans gathered in Philadelphia in the spring of 1787 to accomplish just that end, and among other things the invention of a federal judiciary was on their minds.

126. Letter from John Marshall to Charles Simms (June 16, 1784), *reprinted in* 1 THE PAPERS OF JOHN MARSHALL 124 (1974).

127. Memorandum from Lord Shelburne to Henry Strachey (Oct. 20, 1782) (Shelburne Papers, vol. 87:194, William L. Clements Library, University of Michigan), interpreted similarly by R. MORRIS, *supra* note 27, at 78.

128. Edmund Randolph of Virginia, whose creditor mentality is demonstrated by his belief that paper money was an "asylum opened in the temple of Fraud" because the chief reasou for its public support was to allow British debts to be paid off cheaply, thought that British debts had to be dealt with at Philadelphia by rendering the Treaty paramount to ordinary law. Letter from Edmund Randolph to James Madison (Apr. 4, 1787), *reprinted in* RANDOLPH PAPERS, *supra* note 60, at 72; Letter from Edmund Randolph to Arthur Lee (Sept. 24, 1788), *reprinted in id.* at 72.

III. FEDERAL COURTS ARE INVENTED: THE CONSTITUTION

A. *A Pro-Creditor Constitutional Convention*

It was fairly clear to contemporaries just who would be running the show at the Philadelphia Convention and just which direction the new plan would take. In state after state, representatives of debtor interests refused to accept places in their delegations to Philadelphia, preferring not to be tainted with its inexorably nationalistic and pro-creditor outcome.[129] Only New York elected a delegation with a majority opposed to a strong central government, and that majority, Robert Yates and John Lansing, left the Convention in disgust in July.[130] They were joined in leaving by John Francis Mercer and Luther Martin of Maryland.[131] George Mason and Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts waited until the end, but then refused to sign the document.[132]

Four plans of government were advanced at Philadelphia, the most important—and ironically, coming from Virginia, a very nationalizing and centralizing one—being that of Edmund Randolph and James Madison of the Virginia delegation. Each of the four, plus Mason's unsubmitted plan for a national judiciary drafted after August 27,[133] con-

129. Prominent skeptics of the Convention who boycotted it despite having been selected to their state's delegations include at least agrarian spokesperson Abraham Clark of New Jersey, Murrin, *supra* note 79, at 61, 67; agrarian leader Erastus Wolcott of Connecticut, Collier, *Sovereignty Finessed: Roger Sherman, Oliver Ellsworth, and the Ratification of the Constitution in Connecticut,* in THE CONSTITUTION AND THE STATES, *supra* note 47, at 95-96; Samuel Chase of Maryland, Stiverson, *supra* note 47, at 136, 142; Patrick Henry, Thomas Nelson, and Richard Henry Lee of Virginia, Briceland, *Virginia: The Cement of the Union,* in THE CONSTITUTION AND THE STATES, *supra* note 47, at 205, 207; and Willie Jones of North Carolina, P. Smith, *supra* note 120, at 554, 558, 564-65. Domination of the state government by the lowland aristocracy probably explains the failure of South Carolina to elect any representatives of the majority that opposed strong centralization, such as Rawlins Lowndes, Aedanus Burke, and Thomas Tudor Tucker. *See* J. NADELHAFT, *supra* note 45, at 179-80. Sam Adams of Massachusetts, a determined opponent of the Shaysites but not a representative of the creditors, refused election perhaps because he understood the lack of strength that opponents of centralization had in the Massachusetts legislature which made "[n]o attempt . . . to include anyone [in the Philadelphia contingent] who represented the interests of the Regulators [Shaysites], debtors, or farmers." Pro-debtor in his sympathies, the wealthy merchant John Hancock also was excluded from the Massachusetts delegation. Elbridge Gerry slipped through, but he opposed the final document because it outlined too strong a central government. *See* Fox, *Massachusetts and the Creation of the Federal Union, 1775-1791,* in THE CONSTITUTION AND THE STATES, *supra,* at 117-20, 122-23, 125.

130. *See* Kaminsky, *supra* note 47, at 233-36.

131. *See* Stiverson, *supra* note 47, at 142-43.

132. *See* Fox, *supra* note 129, at 120 (Gerry); Briceland, *supra* note 129, at 208 (Mason).

133. Mason probably wrote his plan in reaction to what he would always consider the overly centralizing language which emerged from the Convention's Committee on Detail. He nevertheless often mirrored or tracked the Committee's language.

The terminology "Mason's plan" will be used throughout this paper, since it was found in Mason's papers and formed the basis for Mason's consistent advocacy of change in the federal judici-

tained provisions for a national supreme court that would form a separate, third branch of the new government.[134] Little space in members' sparse notes of the Convention's debates—especially the notes assiduously taken by James Madison—is devoted to the judiciary branch, and there is no recorded debate on the extent of its jurisdiction.[135] Nevertheless, much of the strongly nationalist views promoting a national judiciary can be gleaned from the plans, from the one fierce debate over the judiciary that did eventuate, and from the work of the Committee of Detail, which actually drafted most of article III (dealing with the judiciary).

Four of the proposals gave the national court system jurisdiction over suits involving aliens,[136] whereas the fifth (plus two of the others) extended jurisdiction over "Questions . . . on the Construction of Treaties made by U.S."[137] Two (including Mason's) gave the United States the

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ary, both in the Virginia ratification convention and later. "With two or three further Amendments," he wrote in September 1789, "[s]uch as confining the federal Judiciary to Admiralty & Maritime Jurisdiction . . . I cou'd chearfully put my Hand & Heart to the new Government." Letter from George Mason to Samuel Griffin (Sept. 8, 1789), *reprinted in* 3 MASON PAPERS, *supra* note 77, at 1172. However, the plan was in the handwriting of John Blair.

134. The Virginia plan, drafted by Madison before the Convention opened and introduced by Randolph (as Governor of Virginia) on May 29, formed the essential basis for much of the Constitution that emerged. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-22 (M. Farrand rev. ed. 1937) (references in this essay are always to Madison's notes) [hereinafter FEDERAL CONVENTION RECORDS]. The New Jersey plan, submitted on June 15, was the only other plan used in debate. *See* 1 *id.* at 242-45. For Alexander Hamilton's plan, submitted on June 18, see 1 *id.* at 291-93; for Charles Pinckney's plan, drafted before the Convention and submitted May 29 but not debated thereafter, see 3 *id.* at 604-09; and for Mason's judiciary plan, which later became the basis of the Virginia ratification convention's proposed amendment on the federal judiciary, see 2 *id.* at 432-33.

135. Madison does say, most tantalizingly, that on July 17 "[s]everal criticisms [were] made on the definition" of "[t]he jurisdiction of Natl. Judiciary," 2 FEDERAL CONVENTION RECORDS, *supra* note 134, at 46, but neither he nor any other note-taker tells us what those "criticisms" were.

The Convention's consideration of a national judiciary may be found in 1 *id.* at 104-05 (June 4), 119-21, 124-25 (June 5); 2 *id.* at 27-29 (July 17), 45-46 (July 18), 400-01 (Aug. 24), 428-32 (Aug. 27), 437-38 (Aug. 28), 587-88 (Sept. 12), 628 (Sept. 15).

On the reliability of our evidence for the constitutional debates in the Convention, see generally Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1987).

136. 1 FEDERAL CONVENTION RECORDS, *supra* note 134, at 22 (Virginia Plan) ("jurisdiction . . . to hear and determine . . . cases in which foreigners . . . may be interested"); 1 *id.* at 242 (New Jersey Plan) ("authority to hear & determine . . . in all cases in which foreigners may be interested"); 1 *id.* at 292 (Hamilton's plan) ("jurisdiction . . . in all causes in which . . . the citizens of foreign nations are concerned"); 2 *id.* at 432 (Mason's plan) ("jurisdiction . . . shall extend . . . to controversies . . . between *a State and the citizens thereof* and foreign States, citizens or subjects").

137. 3 *id.* at 608 (Pinckney's plan); 1 *id.* at 244 (New Jersey Plan) ("authority to hear & determine . . . by way of appeal in the dernier resort . . . in all cases . . . in the construction of any treaty or treaties"); 2 *id.* at 432 (Mason's plan) ("jurisdiction . . . shall extend to all cases in law and equity arising under . . . treaties made or which shall be made under their authority").

power to create courts of admiralty,[138] the other three extended jurisdiction over cases of capture,[139] and two of those others also provided jurisdiction over piracies and felonies on the high seas.[140] Only the strongly nationalizing Virginia plan provided for jurisdiction over cases between citizens of different states and for jurisdiction over "questions which may involve the national peace and harmony."[141] Although four granted jurisdiction over cases involving collection of the revenue,[142] only Mason's very late draft provided for jurisdiction over cases "arising under this Constitution, the laws of the United States and treaties."[143]

The problem of debts and the paper money, tender, and other laws enacted by states in response to debtor pressure lay heavy over the whole proceedings of the Convention. In introducing the Virginia Plan on May 29, Randolph noted that in 1777 (when the Articles had been drafted) "no rebellion had appeared as in Massts.—foreign debts had not become urgent—the havoc of paper money had not been foreseen—treaties had not been violated."[144] During the debate about whether to give Congress a veto over state legislation, on July 17, Madison records himself as having quite bluntly said: "Confidence cannot be put in the State Tribunals as guardians of the National authority and interests."[145] "What was to be done," Madison queried, in a direct reference to the British debt and other debt cases during the debate over whether to have lower federal courts, "after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?"[146]

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138. 2 *id.* at 432 (Mason's plan) ("judicial power of the United States shall be vested in . . . Courts of Admiralty to be established in such of the States as Congress shall direct" and extending the jurisdiction "to all cases of admiralty and maritime jurisdiction"); 3 *id.* at 608 (Pinckney's plan) (" 'in each State a Court of Admiralty' . . . 'for hearing and determining' all 'maritime Causes' which may arise therein").

139. 1 *id.* at 22 (Virginia Plan) ("captures from an enemy"); 1 *id.* at 244 (New Jersey plan) ("captures from an enemy"); 1 *id.* at 292 (Hamilton's plan) ("in all causes of capture").

140. 1 *id.* at 22 (Virginia Plan) ("all piracies & felonies on the high seas"); 1 *id.* at 244 (New Jersey Plan) ("all cases of piracies & felonies on the high seas").

141. 1 *id.* at 22 ("eases in which . . . citizens of other States applying to such jurisdictions may be interested").

142. 1 *id.* (Virginia Plan) ("cases . . . which respect the collection of the National revenue"); 1 *id.* at 244 (New Jersey Plan) ("cases . . . which may arise . . . on the collection of the federal Revenue"); 1 *id.* at 292 (Hamilton's plan) ("all causes in which the revenues of the general Government . . . are concerned"); 3 *id.* at 608 (Pinckney's plan) ("on the Regulations of U.S. concerning Trade and Revenue").

143. 2 *id.* at 432.

144. 1 *id.* at 18-19.

145. 2 *id.* at 27.

146. 1 *id.* at 124. In his great speech of June 18 supporting his own plan, Hamilton foreshadowed Madison's *Federalist No. 10* and epitomized the creditor viewpoint:

Yet there was by no means a consensus on the deficiencies of state courts, and only the Virginia Plan explicitly required lower federal courts other than admiralty courts.[147] The New Jersey and Pinckney plans specifically provided that federal jurisdiction would be appellate only (except for impeachments).[148] The Virginia Plan's requirement of lower courts was adopted at first, and then one day later at the strong insistance of lawyer and planter John Rutledge (who was hopelessly in debt[149]) inferior courts were struck out by a vote of five states to four, with two states divided.[150] Rutledge thought the "State Tribunals are most proper to decide in all cases in the first instance,"[151] and that "the right of appeal to the supreme national tribunal . . . [was] sufficient to secure the national rights & uniformity of Judgmts."[152] He also thought (and was seconded strongly on this point by the planter Pierce Butler of South Carolina) that lower courts would be "an unnecessary encroachment on the jurisdiction of the States" that would create "unnecessary obstacles to their adoption of the new system."[153] Roger Sherman of Connecticut had a different reason: He thought lower courts too expensive, "when the existing State Courts would answer the same purpose."[154]

> In every community where industry is encouraged, there will be a division of it into the few & the many. Hence separate interests will arise[.] There will be debtors & Creditors &c. Give all power to the many, they will oppress the few. Give all power to the few they will oppress the many. Both therefore ought to have power, that each may defend itself agst. the other. To the want of this check we owe our paper money—instalment laws &c[.]

1 *id.* at 288.

147. 1 *id.* at 21 ("National Judiciary . . . to consist of . . . inferior tribunals . . . .").

148. 1 *id.* at 244 (New Jersey Plan); 3 *id.* at 608 (Pinckney's plan).

149. R. BARRY, MR. RUTLEDGE OF SOUTH CAROLINA 359 (1942). Rutledge was so notoriously in debt and unable (or unwilling) to pay his creditors that even a staunch supporter, replying to an attack on Rutledge upon his nomination as Chief Justice of the United States in 1795, described his debt situation as one of "embarrassment[ ]" and lamely argued (in capitalistic language separating public from private morality) that "[p]ecuniary independence is not prescribed by the Constitution, as a qualification necessary to such as fill that office. . . . [I]f Mr. Rutledge was unable to answer on demand, every debt he owed, it was his misfortune. . . . His private moral character has nothing to do with his official uprightness . . . ." *John Rutledge, Vindicated: A South Carolinean to Benjamin Russell,* [Boston] Columbian Centinel, Aug. 28, 1795, *reprinted in* 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 791 (M. Marcus & J. Perry eds. 1985) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT]. *See also id.* at 792 n.4 (detailing Rutledge's debt obligations).

150. 1 FEDERAL CONVENTION RECORDS, *supra* note 134, at 104-05 (first vote successfully added inferior tribunals, on June 4); 1 *id.* at 125 (second vote defeated them, on June 5).

151. 1 *id.* at 119.

152. 1 *id.* at 124.

153. 1 *id.* at 124-25.

154. 1 *id.* at 125.

Madison and Robert Morris' lawyer, the "irrepressible speculator" James Wilson of Pennsylvania,[155] were convinced that lower federal courts "dispersed throughout the Republic with *final* jurisdiction in *many* cases" were absolutely necessary because of the ungovernability of state juries and state judges subject to debtor pressures and opposed to the interests of foreigners.[156] When the provisions requiring inferior tribunals were voted down, Madison and Wilson proposed, and the Convention accepted, that Congress be allowed to institute inferior tribunals if it desired.[157] In July a strong attempt was made to repeal even this compromise and to deny completely any lower national courts. Butler repeated his confidence that state courts could do the job, and debtor representative Luther Martin of Maryland concurred: "They will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere."[158] Randolph, ever to the point if not always blunt, protested: "[T]he Courts of the States cannot be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance."[159] The motion to reconsider ultimately was lost, and the possibility that Congress could create lower federal courts remained. But it was clear that the conjoined problems of debts and the degree of respect accorded to debtor-oriented state judiciaries would be among the biggest issues in contention when the finished Constitution was debated. Even these nationalists had wavered and were disputatiously divided on the issue.

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155. R. MORRIS, *supra* note 43, at 132. Already in severe financial difficulty in 1789 and thus passed over for Chief Justice in 1795 and 1796, Wilson eventually suffered the collapse of his pyramid of speculation, was jailed in New Jersey and again in North Carolina for nonpayment of debt while still retaining his seat as Justice of the United States Supreme Court, and died in abject, feverish poverty in his room in a tavern near the home of his friend and Supreme Court colleague James Iredell, in August 1798 in Edenton, North Carolina. *See* DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 149, at 613-14, 842, 858, 858-59, 869 (letters of prominent Americans discussing Wilson's difficulties); Diary of Thomas Shippen, (Shippen Family Papers, Library of Congress) (entry for Sept. 3, 1797); *see also* 1 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 149, at 46-48 (biographical sketch of Wilson).

156. 1 FEDERAL CONVENTION RECORDS, *supra* note 134, at 124.

157. 1 *id.* at 125-27.

158. 2 *id.* at 45-46.

159. 2 *id.* at 46. George Mason, who can be described (with Randolph and Gerry) as the Convention members on the dividing line between acceptance and rejection of the Constitution, supported lower federal courts. 2 *id.* at 46. But in his own plan for a federal judiciary, he eliminated diversity jurisdiction and lower federal courts (except admiralty courts), retaining appellate federal jurisdiction over questions arising under treaties. He remained ambiguous as to whether appellate federal jurisdiction extended to alienage cases—though he included "controversies . . . *between a State and the citizens thereof* and foreign States, citizens or subjects," that language raises the question whether the "and" between "State" and "the citizens thereof" is conjunctive; could it mean "or"? 2 *id.* at 432.

The jurisdictional language that emerged from the Committee of Detail is also worthy of close attention. The Convention's resolutions on the judiciary that went to that Committee on July 23 amounted to vague compromise language in a Madisonian proposal that was clearly designed to allow the Committee to flesh out the difficult matters: " 'The jurisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony.' "[160] Four eminent lawyers were elected to the Committee, including strong nationalists Wilson and Oliver Ellsworth, a Connecticut judge, and moderate nationalists Rutledge and Randolph. Wilson and Randolph had strong convictions and apparently matured ideas concerning the judiciary, and with Rutledge's aid they filled out the Convention's resolution in amazing detail.[161] "Questions involving the national peace and harmony" turned out to include controversies between citizens and foreigners (alienage jurisdiction), controversies between citizens of different states (diversity jurisdiction), and "all" admiralty cases. "All" cases arising under the national laws were retained directly from Madison's resolve.[162] The pressure to facilitate debt recovery in forums not subject to local debtor pressures played a significant, perhaps controlling, part in the introduction of these heads of federal court jurisdiction.

Changes in the jurisdictional and other provisions made by the Convention were equally significant. On August 25, Madison moved to amend what would become the Supremacy Clause of article 6, so that

> after the words "all treaties made" were inserted . . . [without dissent] the words "or which shall be made". This insertion was meant to obviate all doubt concerning the force of treaties preexisting, by making

160. 2 *id.* at 46, 132-33.

161. It appears that the industrious Randolph produced a draft in which Madison's "cases involving the national peace and harmony" were broken down into cases concerning the national revenue, diversity and alienage cases, and disputes between different states. Rutledge added admiralty and the jurisdiction later negatived by the eleventh amendment—"disputes between a State & a Citizen or Citizens of another State" (hereinafter referred to as "eleventh amendment jurisdiction"), 2 *id.* at 146-47. Wilson produced a more elegant and finished design (from which the final draft was derived), that included jurisdiction over ambassadors, admiralty, diversity, and alienage. Rutledge added to it disputes between different states and eleventh amendment jurisdiction. 2 *id.* at 167 n.17, 172-73. Both drafts included what we now call "federal question" jurisdiction, in language taken directly from Madison's resolution, but neither extended it to cases under the Constitution or treaties.

162. 2 *id.* at 186. "National peace and harmony" also turned out to require that controversies "between a State and the Citizens of another State" (eleventh amendment jurisdiction) be heard in the new national courts. *Id.* This clause was likely inserted to allow those who had loaned money or property to the states, primarily to finance the Revolution and to supply the army, to sue recalcitrant states that might plead sovereign immunity in their own courts or might otherwise refuse to be sued there. These debts were held mostly by speculators and merchants. For a good treatment of the problems of public debt and speculation in the resulting commercial paper that also plagued the 1780s, see M. JENSEN, *supra* note 6, at 302-08.

> the words "all treaties made" to refer to them, as the words inserted would refer to future treaties.[163]

On August 27, the "Judicial Power of the United States" was expressly extended to equity cases in which juries did not sit, on the motion of the Connecticut nationalist, William Samuel Johnson.[164] Later that day, on Rutledge's motion, cases arising under "treaties made or which shall be made" were added to the jurisdiction of the courts "conformably to a preceding amendment in another place" (obviously, the amendment to the Supremacy Clause).[165] Then, when the nationalist and speculator Gouverneur Morris of Pennsylvania asked whether the appellate jurisdiction of the Supreme Court extended to matters of fact "and to cases of Common law as well as Civil law," Wilson assured him that it did, and a clarifying amendment adding "both as to law & fact" after "appellate" was agreed to immediately without dissent.[166] "Appellate" jurisdiction in the mode of the civil law meant essentially a new trial without a jury in the reviewing court.[167]

The members of the Convention wanted to ensure not only that state violations of treaties could be remedied, but also that courts sitting without juries, *particularly* the Supreme Court hearing appeals in the manner of the civil law, would be permitted. It is clear that they hoped that the Supreme Court would be able to overturn (to repeat Madison's revealing words) "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an

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163. 2 FEDERAL CONVENTION RECORDS, *supra* note 134, at 417. A clause in the original Virginia Plan gave Congress the power to veto state laws "contravening" the Constitution. On May 31 it had been amended on Benjamin Franklin's motion to add after "Constitution" the words "or any treaties subsisting under the authority of the Union." 1 *id.* at 54. When this clause was under reconsideration on June 8, Charles Pinckney of South Carolina had wanted to make it even stronger, arguing among other things that treaties had not "escaped repeated violation." 1 *id.* at 164. And Madison, seconding Pinckney, had echoed him: "Experience had evinced a constant tendency in the States to . . . violate national Treaties." 1 *id.* at 164. However, Pinckney's motion had been defeated, 1 *id.* at 168, and the whole clause was struck out on July 17, 2 *id.* at 28, whereupon the clause that was to become the Supremacy Clause—by its terms explicitly binding the "Judges in the several States"—had been added unanimously, 2 *id.* at 29.

164. 2 *id.* at 428. As we shall see, Johnson, as Senator from Connecticut, was to argue strenuously for equity powers in the federal courts, contrary to the desires of the Constitution's opponents. *See infra* notes 282-99 and accompanying text.

165. 2 *id.* at 431.

166. *Id.*

167. *See* W. RITZ, *supra* note 3, at 6-7, 67-69. The two most learned and most discerning Anti-Federalist writers, "Federal Farmer" (supposed at the time to be Richard Henry Lee, but probably a New Yorker and not that respected and eminent Virginian) and "Brutus," understood the Constitution's description of the Supreme Court's jurisdiction as to law and fact to be a reference to the civil law's juryless mode of review. *See* 2 THE COMPLETE ANTI-FEDERALIST [hereinafter ANTI-FEDERALIST] ¶¶ 2.8.189, 2.8.192, 2.8.194 (H. Storing ed. 1981) ("Federal Farmer's" letters); *id.* ¶¶ 2.9.173-78 ("Brutus" essays).

undirected jury."[168] The British creditors would probably be able to obtain their interest as well as their principal, and perhaps out-of-state creditors would find a similarly happy haven in the new national court system. The broadly phrased but so far noncontroversial provisions designed to sweep the debt cases of foreigners and out-of-staters into federal courts which might sit (at least in review) without juries,[169] would join with the already raging controversy over lower courts to create a storm of protest during the ratification debates.[170]

B. *The Ratification Process Displays Pro-Debtor Strength*

It is probable that a majority of Americans in 1787 and 1788 opposed adoption of the new Constitution, although an unquantifiable portion of that opposition was not adamant. It is impossible to know which part or parts of the document (if any) were crucial in engendering this opposition. An important element was the overall nationalizing and an-

168. 1 FEDERAL CONVENTION RECORDS, *supra* note 134, at 124.

169. Ezra Stiles later recorded in his diary that Connecticut resident turned Georgia citizen and Convention delegate Abraham Baldwin declared to him that the Convention was "unanimous . . . [on] Causes between subjects of foreign or different States." 3 *id.* at 169-70.

170. The provision permitting citizens of one state to sue another state (eleventh amendment jurisdiction) would be a similar irritant. As with diversity jurisdiction, eleventh amendment jurisdiction would not be stoutly defended during the ratification debates. Federalists would resort to deflectory argnments, such as that by Madison in the Virginia ratification convention ("if a state should condescend to be a party, this court may take cognizance of it," 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (J. Elliott ed. 1836) [hereinafter STATE DEBATES], or to downright dissembling, such as that by Hamilton in THE FEDERALIST No. 81. Hamilton explicitly denied that this provision gave jurisdiction over suits based upon "an assignment of the public securities of one state to the citizens of another"—since the goals were to obtain the broadly phrased constitutional grants of judicial power and to ensure, through alienage jurisdiction and the appellate review power of the Supreme Court, that the Treaty would be enforced. John Marshall, in the Virginia convention, also denied that states could "be called at the bar of the federal court" under this provision, 3 *id.* at 555-56, but Marshall was not a member of the Philadelphia convention and may not have been dissembling. From the history I have recited it must be clear, although perhaps startling, that alienage jurisdiction was the most important head of jurisdiction in article III.

I do not agree with William Winslow Crosskey's thesis that Madison lied about the states sovereignty compromises he reports during the Convention in order to tone down, late in life, what Crosskey imagined to be the actual, extremely centralizing votes of that body. *See generally* W. CROSSKEY & W. JEFFRIES, *supra* note 3. Nor do I follow Friendly's argnment in his pioneering article on the origins of diversity jurisdiction that there is no pre-Constitution evidence of state court bias. However, I do honor their boldness and good judgment in one respect: I too find it necessary at times to doubt "the sincerity" (Friendly, *supra* note 4, at 493) of Framers such as Madison, Marshall, and Hamilton (just as I have doubted the sincerity of Jefferson, Monroe, and William Branch Giles in their assessment of the openness of Virginia's courts to British creditors, *see supra* note 81). On not a few occasions they proved themselves utterly human, in the heat of their nearly-frustrated desire to maintain and augment the commercial union they had fought and struggled for so hard. The swecping jurisdiction of the national courts intentionally allowed by the broad language of the Constitution was one of those times and occasions.

tidemocratic spirit of an instrument whose drafters had voted overwhelmingly (in secret) to impose a property qualification upon the officers of the new government, quibbling only over whether a requirement of *landed* property might not exclude too many manufacturers and merchants whose small numbers in 1787, Madison (who favored the restriction) noted, "will daily increase."[171]

The judiciary provisions clearly provoked an outpouring of controversy and antagonism. To many, these broadly and vaguely stated jurisdictional provisions, coupled with the grant of congressional power to create lower courts and the document's overall (albeit implicit) lack of faith that state courts would deal fairly with ordinary problems (and with debt cases in particular), meant the subversion of the state courts. George Mason raised this theme while speaking at the Virginia ratification convention against federal question jurisdiction:

> What is there left to the State Courts? . . . There is no limitation. It goes to every thing. The inferior courts are to be as numerous as Congress may think proper. . . . Read the 2d section, and contemplate attentively the extent of the jurisdiction of these courts, and consider if there be any limits to it. I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts.[172]

Further, many read the language of article III to require exclusive federal cognizance of all of the instances there mentioned, or at least of the federal question and alienage jurisdictions.[173]

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171. 2 FEDERAL CONVENTION RECORDS, *supra* note 134, at 121-26. The Committee on Detail disregarded its instructions and chose not to establish property requirements for national officials.

The Convention also seriously debated whether to require that *voters* be freeholders. Oliver Ellsworth and George Mason were apprehensive that such a restriction would leave out merchants and manufacturers, while James Madison and Gouverneur Morris demonstrated the wholeness and systemic nature of the capitalistic worldview and ethos by accurately predicting the demise of the importance of land ownership in a near future when (in Morris' words) "this Country will abound with [nonfreeholding] mechanics and manufacturers [artisans] who will receive their bread from their employers." The Convention voted solidly against freehold requirements for national voters. 2 *id.* at 201-06.

172. 3 STATE DEBATES *supra* note 170, at 521; *accord, e.g.*, 3 *id.* at 201 (William Grayson of Virginia); 4 *id.* at 136-37 (Samuel Spencer of North Carolina); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 513 (M. Jensen ed. 1976) [hereinafter cited as HISTORY OF RATIFICATION] (Robert Whitehill of Pennsylvania); *id.* at 525 (John Smilie of Pennsylvania); Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland . . .* [hereinafter cited as Martin, *Genuine Information*], ANTI-FEDERALIST, *supra* note 167, at ¶ 2.4.58; *id.* ¶ 2.7.41 ("Centinel"—a pseudonym of Samuel Bryan of Pennsylvania); Brutus, *Essays, reprinted in id.* ¶¶ 2.9.7, 2.9.134-158, 2.9.195; A Columbian Patriot [pseud. Mercy Warren of Massachusetts], *Observations on the Constitution* (1788), *reprinted in* 16 HISTORY OF RATIFICATION, *supra*, at 272, 279 [hereinafter Warren, *Observations*].

173. *E.g.*, 3 STATE DEBATES, *supra* note 170, at 527 (Mason of Virginia on alienage jurisdiction); 4 *id.* at 138 (Samuel Spencer of North Carolina on federal question jurisdiction); Martin, *Genuine Information, supra* note 172, at ¶¶ 2.4.58, 2.4.89-91.

The oppression of debtors (in the South this especially included "British" debtors) and of poor people in general was also a constant theme of the opposition to the proposed judiciary. Jurors chosen from the neighborhoods of poor or debtor defendants could exercise their power—through general verdicts (that is, those that combined the jury's judgment as to both law and facts, melded into the unreviewable phrases "guilty," "not guilty," or the equivalent)—to assess damages and thus to place a popular brake on tyrannical judges. There is ostensibly mandatory language in article III that the "supreme Court shall have appellate Jurisdiction, both as to Law and Fact."[174] There is also an absence of any constitutional guarantee of jury trials in civil cases. Most modern commentators seem not to understand or even suspect that the "appellate" jurisdiction given to the Supreme Court can easily be exercised either to revise jury determinations of fact or as a *trial* jurisdiction, for that is what what appellate jurisdiction meant in the civil law, in the New England states, and occasionally in the other states in 1787-89.[175] With these facts in mind, Patrick Henry said bluntly: "[T]he trial by jury is gone: British debtors will be ruined by being dragged to the fed-

174. U.S. CONST. art. 3, § 2; *see supra* text accompanying notes 164-70.

175. For a thorough treatment of "appellate" jurisdiction and Anti-Federalist fears in this regard, see W. RITZ, *supra* note 3, at 5-7, 30, 35-41, 65-69.

Those opposed to the Constitution, or at least to its judiciary provisions, well understood the civil law usages with regard to judicial establishment of facts and the lack of any trial by jury in civil cases. For example, John Smilie argued during the Pennsylvania ratification that:

> It was the design and intention of the Convention to divest us of the liberty of trial by jury in civil cases; and to deprive us of the benefits of the common law. The word "appeal" is a civil law term; and therefore the Convention meant to introduce the *civil* law. On an appeal the judges may set aside the verdict of a jury. Appeals are not admitted in the common law.

2 HISTORY OF RATIFICATION, *supra* note 172, at 525 (Wilson's notes); *accord,* 2 *id.* at 522 ("I fear there is an intention to substitute the civil law in the room of the common law.") (speech of Smilie on Dec. 7, 1787) (Yeates' notes). The most discriminating of the Anti-Federalist commentators said:

> [A]ppeals from an inferior to a superior court, as practiced in the civil law courts, are well understood. In these courts, the judges determine both on the law and the fact; and appeals are allowed from the inferior to the superior courts, on the whole merits.

ANTI-FEDERALIST, *supra* note 167, ¶ 2.9.173 ("Brutus" essays); *accord, id.* ¶¶ 2.8.189, 2.8.192 (Federal Farmer's letters).

In the Convention, as we have seen, *supra* text accompanying notes 164-68, members had to ascertain whether the appellate jurisdiction mentioned in article III extended to "cases of Common law as well as Civil law," 2 FEDERAL CONVENTION RECORDS, *supra* note 134, at 431, not whether it extended to civil law cases, and the amendment that put this language into article III followed immediately after the raising of these issues. It is an inescapable conclusion that the Framers assumed that the appellate jurisdiction extended to "cases of . . . Civil law" and thus intended the Supreme Conrt to exercise a civil-law mode of review sitting without a jury to revise juries' factual determinations or damage awards (i.e., interest in British debt cases), just as the Anti-Federalists suspected and charged. The back-stepping and dissembling of the supporters of the Constitution on this point—particularly that of James Wilson answering Smilie on the floor of the Pennsylvania ratification convention, 2 HISTORY OF RATIFICATION, *supra* note 172, at 575—can only be attributed to their desire to win the ratification vote.

eral court, and the liberty and happiness of our citizens gone, never again to be recovered."[176] A poor man who obtained judgment upon a jury verdict in a federal trial court or even in the state courts could be forced to retry the case in the Supreme Court, possibly at a distance of 500 miles, Mason noted, and "[h]e must bring his witnesses where he is not known, where a new evidence may be brought against him, of which he never heard before . . . ."[177]

Of alienage jurisdiction, Mason asked: "What effect will this power have between British creditors and the citizens of this state? . . . I wish every honest debt to be paid. . . . [T]here is not, in my opinion, a single British creditor but can bring his debtors to the federal court."[178] Henry

176. 3 STATE DEBATES, *supra* note 170, at 579-80; *see also* 3 *id.* at 540 ("The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances."); 3 *id.* at 545 ("Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off."); *accord,* 3 *id.* at 528 (Mason of Virginia: right of trial by impartial jury of vicinage a "great palladium of national safety"); Letter from Joseph Jones to James Madison, Oct. 29, 1787, *reprinted in* 10 MADISON PAPERS, *supra* note 9, at 228 ("that there exists in the constitution a power that may oppress . . . and that oppression will result from the appellate power of unsettling facts does to me appear beyond a doubt"); ANTI-FEDERALIST, *supra* note 167, ¶ 4.15.4 ("Hampden" essays) ("the inestimable right of a trial by jury . . . is the democratical balance in the Judiciary power; without it, in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens").

"Federal Farmer" explained the whole argument, in measured tones:

> I hold it is the established right of the jury by the common law, and the fundamental laws of this country, to give a general verdict in all cases when they chuse to do it. . . . Juries are constantly and frequently drawn from the body of the people, and freemen of the country: and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department. If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases. . . . Nor is it merely this controul alone we are to attend to: the jury trial brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings. . . . By the common law, in Great Britain and America, there is no appeal from the verdict of the jury, as to facts, to any judges whatever . . . but, by the proposed constitution, directly the opposite principle is established. An appeal will lay in all appellate causes from the verdict of the jury, even as to mere facts, to the judges of the supreme court.

ANTI-FEDERALIST, *supra* note 167, ¶¶ 2.8.190, 2.8.194 ("Federal Farmer's" letters); *see also* Warren, *Observations, supra* note 172, at 7-8. *See generally* Millon, *Positivism in the Historiography of the Common Law,* 1989 WISC. L. REV. 669.

177. 3 STATE DEBATES, *supra* note 170, at 524; *see also* 3 *id.* at 584 ("[W]e will not agree to a federal judiciary, which is not necessary for this purpose, because the powers there granted will tend to oppress the middling and lower class of people."); *accord, e.g.,* 4 *id.* at 143 (Joseph McDowall of North Carolina); 4 *id.* at 154 (Samuel Spencer of North Carolina); 2 HISTORY OF RATIFICATION, *supra* note 172, at 513 (Robert Whitehill of Pennsylvania); ANTI-FEDERALIST, *supra* note 167, at ¶¶ 2.4.92-94 (Luther Martin essay entitled *Genuine Information*); *id.* at ¶ 2.9.177-79 ("Brutus" essays); Warren, *Observations, supra* note 172, at 9.

178. 3 STATE DEBATES, *supra* note 170, at 526; *accord, e.g.,* 3 *id.* at 543 (Henry of Virginia) ("Every man who owes any thing to a subject of Great-Britain . . . is subject to a tribunal that he knew not when he made the contract."); ANTI-FEDERALIST, *supra* note 167, at ¶ 2.7.42 ("Centinel" essays) ("A London merchant shall come to America, and sue for his supposed debt, and the citizen of this country shall be deprived of jury trial, and subjected to an appeal [tho' nothing but the *fact* is disputed] to a court 500 or 1000 miles from home . . . .").

was similarly worried that alienage jurisdiction would "operate retrospectively," allowing pending cases to be transferred to the new courts, and perhaps even permitting the reopening of judgments (meaning, in the context, British debt judgments).[179] And with regard to diversity jurisdiction, Samuel Spencer of North Carolina exclaimed: "[V]ery great oppressions may arise. Nothing can be more oppressive than the cognizance with respect to controversies between citizens of different states. In all cases of appeal, . . . [there will be] a dreadful expense by going such a distance to the Supreme Federal Court."[180] Mason also pointed out that every case involving property or commercial paper could be rendered federal by the simple expedient of assigning title to a citizen of another state.[181]

Patrick Henry summed up much of the opposition to the proposed courts, explicitly contrasting the pre-capitalist morality of the debtors he championed to the morality of the Framers of the Constitution:

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179. 3 STATE DEBATES, *supra* note 170, at 542-43; *accord,* 3 *id.* at 529 (Mason worried about what he called ex post facto laws). Most Virginians were well aware that some suits by British creditors had languished on Virginia dockets for fifteen or twenty years. *See, e.g.,* Holt & Perry, *supra* note 123, at 107-08 & n.52. Although the courts in Virginia (and other southern states) had long been closed to contested claims of British creditors, some British claims had been allowed to reach judgment by mutual consent, although war interest may have been deducted. For example in Virginia: "In Novemr. 1785 they agreed to settle the Debt provided half the interest was given up. The claim being on open accot. [and thus nearly impossible to prove] the terms were agreed to." Remarks on the Claims of Gibson Donaldson & Hamilton, p. 44 (PRO/T/79/11, "Lux & Bowley"). And in North Carolina, one debtor's conscience led him to repay the principal of his debt even though it was uncollectible:

> The debt was on open account. Repeated applications were made in 1784 and the following years for payment. It was reply'd that as the debt had been paid into the Treasury of North Carolina agreeable to Law [all British debts had been confiscated in that state], no legal claim existed against him, but as he admitted the justice of the demand, he would pay the principal, provided it should be taken in a tract of Land at a valuation, but would allow no interest. Having no evidence of the debt except the Books recourse to law would have been fruitless; the offer was therefore accepted.

Remarks on the Claims of Gibson Donaldson & Hamilton, p. 59 (PRO/T/9/11, "Ransom Southerland"). And in Maryland it was stated:

> Your memorialists further shew that thus discouraged by the Popular Clamours, their Agents Could Make but little progress in the recovery of their said debts, those Suits that were sustained no Court of Justice would give Judgment for Interest during the War and the Agents of your Memorialists were obliged in all Cases to relinquish it [in settling claims.]

Memorial to British-American Claims Commission of 1794 (Nov. 27, 1798) (PRO/T/79/21, "Jas. Buchanan & Co.").

180. 4 STATE DEBATES, *supra* note 170, at 155 ("There does not appear to me to be any kind of necessity that the federal court should have jurisdiction in the body of the country"); *id.* at 164 ("The state courts can do their business without federal assistance."); *accord, e.g.,* 3 *id.* at 526 (Mason of Virginia: "Can we not trust our state courts with the decision of these?"); ANTI-FEDERALIST, *supra* note 167, ¶ 2.7.42 ("Centinel" essays) ("a very invidious jurisdiction, implying an improper distrust of the impartiality and justice of the tribunals of the states"); ANTI-FEDERALIST, *supra* note 167, ¶¶ 2.9.180-84 ("Brutus" essays).

181. 3 STATE DEBATES, *supra* note 170, at 526, 551.

> It sounds mighty prettily to gentlemen, to curse paper money and honestly pay debts. But apply to the situation of America, and you will find there are thousands and thousands of [debt] contracts, whereof equity forbids an exact literal performance. Pass that government, and you will be bound hand and foot. . . . Pass this government, and you will be carried to the federal court (if I understand that paper right,) and you will be compelled to pay shilling for shilling.[182]

The defenders of the Constitution were deeply worried that their document might fail of acceptance, and they began to backpedal rapidly on specifics, thereby hoping to retain the very broad judicial power outlined in article III by giving in on particulars. They promised repeatedly that in its first session Congress would legislate to set right all of the difficulties the objectors had pointed out.[183] In particular, they said, Congress would guarantee civil juries and would prohibit the Supreme Court from reviewing the factual determinations of trial juries;[184] they guaranteed that Congress would so regulate both trial and appellate federal jurisdiction as to make them inexpensive and not oppressive;[185] they suggested that the Supreme Court might be given sessions in different parts of the country to lessen the distance of travel;[186] and they broadly

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182. *Id.* at 318-19. Matthew Locke of North Carolina, in his only comments during that state's first ratification convention, said:

> [T]his alteration will not produce more impartiality than there is now in our courts, whatever evils it may bring forth. . . . It must be supposed that the same passions, dispositions, and failings of humanity which attend the state judges, will be equally the lot of the federal judges. . . . Great reflections are thrown on South Carolina for passing *pine-barren* and *instalment* laws, and on this state for making paper money. . . . Necessity compelled them to pass the law, in order to save vast numbers of people from ruin. . . . [T]he situation of the country, and the distress of the people are so great, that the public measures must be accommodated to their circumstances with peculiar delicacy and caution, or another insurrection may be the consequence.

4 *id.* at 168-70.

183. For example, in THE FEDERALIST No. 80, Alexander Hamilton stated:

> If some partial inconveniences should appear to be connected with the incorporation of any of them [federal judicial powers] into the plan it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.

184. *E.g.*, THE FEDERALIST No. 81 (A. Hamilton); 2 HISTORY OF RATIFICATION, *supra* note 172, at 573-74 (James Wilson of Pennsylvania); 3 STATE DEBATES, *supra* note 170, at 534 (Madison of Virginia); 3 *id.* at 558, 560-61 (John Marshall of Virginia); 3 *id.* at 572-73, 576 (Edmund Randolph of Virginia); 4 *id.* at 145, 152 (James Iredell of North Carolina); 4 *id.* at 151 (Archibald Maclaine of North Carolina).

185. *E.g.*, 3 STATE DEBATES, *supra* note 170, at 519-21 (Edmund Pendleton of Virginia) ("The appeals may be limited to a certain sum. I make no doubt it will be so. . . . Congress can prevent that dreadful oppression which would enable many men to have a trial in the federal court, which is ruinous."); 3 *id.* at 572, 576 (Edmund Randolph of Virginia); 4 *id.* at 146-47 (James Iredell of North Carolina); "A Landholder VI" [pseud. Oliver Ellsworth of Connecticut], 3 HISTORY OF RATIFICATION, *supra* note 172, at 490; "A Citizen of New Haven" [pseud. Roger Sherman of Connecticut], in 3 *id.* at 527.

186. *E.g.*, 3 STATE DEBATES, *supra* note 170, at 535-36 (Madison of Virginia); 4 *id.* at 147 (James Iredell of North Carolina); "A Landholder VI" [pseud. Oliver Ellsworth of Connecticut], in

hinted that Congress would not exercise its power to create lower federal courts, but would instead use the state supreme courts as the inferior federal courts.[187] Charles Pinckney, an important member of the Philadelphia convention, told the South Carolina legislature that Congress would not "ever think of giving these courts a retrospective jurisdiction."[188]

The defenders of the Constitution also stressed in state convention after state convention that national jurisdiction was concurrent not exclusive, meaning that plaintiffs whose case or citizenship fit them within federal jurisdiction nevertheless would be able to choose to enter state courts if they wished.[189] They were eerily silent on the important question of alienage jurisdiction, which would cover the crucial British debt cases,[190] but, as Friendly said, "the most astounding thing . . . [is] the apathy of the defense" of diversity jurisdiction.[191] "As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance," said James Madison, the first propounder of diversity jurisdiction.[192]

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3 HISTORY OF RATIFICATION, *supra* note 172, at 490; "A Citizen of New Haven" [pseud. Roger Sherman of Connecticut], in 3 *id.* at 527.

187. *E.g.*, 3 STATE DEBATES, *supra* note 170, at 517 (Edmund Pendleton of Virginia); 3 *id.* at 536 (Madison of Virginia, with Wilson the strongest proponent of mandatory lower federal courts in the Convention); "A Landholder VI" [pseud. Oliver Ellsworth of Connecticut], 3 HISTORY OF RATIFICATION, *supra* note 172, at 490; "A Citizen of New Haven" [pseud. Roger Sherman of Connecticut], in 3 *id.* at 527. Even Hamilton, who thought that there were "substantial reasons against" having the state courts become the lower federal courts, was willing to consider the state judges sitting in the federal circuit courts along with federal judges. THE FEDERALIST NO. 81.

188. [Charleston] City Gazette, Nov. 15, 1788. Pinckney was expressly speaking to the question of British debts. He adhered to his argument in a later letter to Madison, believing

> that giving to the federal Judicial *retrospective jurisdiction in any case whatsoever*, . . . from it's being an ex post facto provision, & from the confusion & opposition it will give rise to, will be the surest & speediest mode to subvert our present system & give it's adversaries the majority.

Letter from Charles Pinckney to James Madison (Mar. 28, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 34-35.

189. *E.g.*, 2 HISTORY OF RATIFICATION, *supra* note 172, at 518-19 (James Wilson of Pennsylvania); 3 STATE DEBATES, *supra* note 170, at 554 (John Marshall of Virginia); 4 *id.* at 141 (Samuel Johnston of North Carolina) ("The opinion which I have always entertained is, that they will, in these cases [federal question jurisdiction], as well as in several others, have concurrent jurisdiction with the state courts, and not exclusive jurisdiction. I see nothing in this Constitution which hinders a man from bringing suit wherever he thinks he can have justice done him."); 4 *id.* at 163 (Archibald Maclaine of North Carolina). Hamilton devoted most of THE FEDERALIST NO. 82 to this point.

190. The strange remarks of Madison on this point appear, like those of most defenders and proponents of the Constitution, completely to miss the point. 3 STATE DEBATES, *supra* note 170, at 533-34. An exception was James Wilson, in the Pennsylvania ratification convention. *See infra* text accompanying note 193.

191. Friendly, *supra* note 4, at 487.

192. 3 STATE DEBATES, *supra* note 170, at 533; *accord, e.g.*, 3 *id.* at 549 (Edmund Pendleton of Virginia); 3 *id.* at 556 (John Marshall of Virginia) ("Were I to contend that this was necessary in all

Although the proponents of the Constitution backed off with regard to the details, they made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary. On the floor of the Pennsylvania ratification convention, James Wilson presented the position most cogently and clearly. Speaking about both alienage and diversity, he said:

> This part of the jurisdiction, I presume, will occasion more doubt than any other part . . . . [I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? . . . [H]ow will a creditor feel, who has his debts at the mercy of tender laws in other states? . . . There have been installment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit. Is it not an important object to extend our manufactures and our commerce? This cannot be done unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained unless we give the power of deciding upon those contracts to the general government. . . . Merchants of eminence will tell you that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live. . . . Further, it is necessary, in order to preserve peace with foreign nations. Let us suppose the case, that a wicked law is made in some one of the states, enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince or sovereign, of the injustice that has been done him. What can that prince or sovereign do? . . . If the United States are answerable for the injury, ought they not to possess the means of compelling the faulty state to repair it?[193]

No sympathy with or understanding of the pre-capitalist world and its morality infects Wilson's words; and the same was true of all those who defended the judiciary to be set up under the Constitution.[194] They

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cases, and that the government without it would be defective, I should not use my own judgment."); 3 *id.* at 572 (Edmund Randolph of Virginia); 4 *id.* at 142 (Samuel Johnston of North Carolina).

193. 2 HISTORY OF RATIFICATION, *supra* note 172, at 518-20 (reporter's paragraphing disregarded).

194. *See, e.g.*, Edmund Randolph speaking of the federal judiciary as a whole:

> [T]he judiciary . . . are to inforce the performance of private contracts. The British debts, which are withheld contrary to treaty, ought to be paid. Not only the law of nations, but justice and honor require that they be punctually discharged.

3 STATE DEBATES, *supra* note 170, at 478. James Madison, speaking of appeals to Supreme Court, said:

> It has been urged, that this [appeals where facts could be re-examined] would be oppressive to those who, by imprudence or otherwise, come under the denominatiou of debtors. . . . If this system should have the effect of establishing universal justice, and accelerating it throughout America, it will be one of the most fortunate circumstances that could happeu for those men. . . . To those . . . who are involved in such encumbrances, relief cannot be granted. Industry and economy are their only resources. It is in vain to wait for money, or temporize. The great *desiderata* are public and private confidence. . . . The establishment

were quite sure that contracts must be honored so credit could be obtained, and "just and impartial" new federal courts (as viewed from

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of confidence will raise the value of property, and relieve those who are so unhappy as to be involved in debts.

3 *id.* at 538. Madison, speaking of alienage jurisdiction, stated:

> The States are . . . independent of each other. We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us.

3 *id.* at 583. Edmund Pendleton, speaking of diversity jurisdiction, said:

> Suppose a bond given by a citizen of Rhode Island to one of our citizens. The regulations of that state [rendering depreciated paper money into legal tender] being unfavorable to the claims of the other states, if he is obliged to go to Rhode Island to recover it, he will be obliged to accept payment of one third, or less, of his money. . . . Is it just that a man should run the risk of losing nine tenths of his claim? Ought he not to be able to carry it to that court where unworthy principles do not prevail? Paper money and tender laws may be passed in other states, in opposition to the federal principle, and [to the] restriction of this Constitution, and will need jurisdiction in the federal judiciary to stop its pernicious effects.

3 *id.* at 549. James Iredell, speaking of the whole federal judiciary, stated:

> The same measure of justice . . . ought to prevail in all [states]. A man in North Carolina, for instance, if he owed £100 here, and was compellable to pay it in good money, ought to have the means of recovering the same sum, if due to him in Rhode Island, and not merely the nominal sum, at about an eighth or tenth part of its instrinsic value. To obviate such a grievance as this, the Constitution has provided a tribunal to administer equal justice to all.

4 *id.* at 147. William R. Davie of North Carolina, speaking to the whole federal judiciary, said:

> Without a general controlling judiciary, laws might be made in particular states to enable its citizens to defraud the citizens of other states. Is it probable, if a citizen of South Carolina owed a sum of money to a citizen of this state, that the latter would be certain of recovering the full value in their courts? That state might, in future, as they have already done, make pine-barren acts to discharge their debts. . . . They might pass the most iniquitous instalment laws, procrastinating the payment of debts due from their citizens, for years—nay, for ages. . . . It is essential to the interest of agriculture and commerce that the hands of the states should be bound from making paper money, instalment laws, or *pine-barren acts*. By such iniquitous laws the merchant or farmer may be defrauded of a considerable part of his just claims. But in the federal court, real money will be recovered with that speed which is necessary to accommodate the circumstances of individuals. . . . It is necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another.

4 *id.* at 157, 159. Alexander Hamilton, writing of diversity jurisdiction, stated:

> I allude to the fraudulent laws which have been passed in too many of the States. . . . To secure the full effect of so fundamental a provision [the privileges and immunities clause] against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens . . . . The reasonableness of the agency of the national courts, in cases in which State tribunals cannot be supposed to be impartial speaks for itself.

THE FEDERALIST No. 80. Hugh Williamson, writing of alienage and diversity jurisdictions, said:

> It is provided in this system that there shall be no fraudulent tender in the payment of debts. Foreigners with whom we have treaties will trust our citizens on the faith of this engagement, and the citizens of different states will do the same. . . . [I]t is at least possible that some State may be found in this Union, disposed to break the Constitution, and abolish private debts by such tenders. In these cases the Courts of the offending State would probably decide according to its own laws. The foreigner would complain and the nation might be involved in war for the support of such dishonest measures. Is it not better to have a Court of Appeals in which the Judges can only be determined by the laws of the nation? This Court is equally to be desired by the citizens of different States.

Remarks on the New Plan of Government, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 399-400 (P. Ford ed. 1892).

within their pro-creditor morality, which did not admit that the pro-debtor position might be just, and within which the application of rules that allowed creditors to win *was* considered impartiality) would be there expressly to see that contracts would be enforced. Strikingly forceful in this regard were those scattered commentators who saw the new national courts as a substitute for a standing army. William R. Davie of North Carolina argued bluntly: "[I]t will be necessary to consider in what manner laws can be executed. For my own part, I know but two ways . . . . The first mode is coercion by military force, and the second is coercion through the judiciary."[195]

Even with a strategic retreat from their position on the judiciary, the proponents of the Constitution were forced to scramble, scheme, organize, and pray for a victory that almost eluded them. Massachusetts voters elected a majority against the Constitution, but many opponents lived in the forty-six townships that could not afford to send delegates to the convention, and many others who attended were subjected to pressure by those "determined to use every ploy that would help achieve their goal" (pressure that was repeated in every state ratifying convention).[196] Finally, the surprising conversion of Sam Adams (fearful of disunion) and John Hancock (whose vanity was flattered) to grudging support of the document, and the willingness of the Constitution's champions to accept suggested amendments (rather than required ones), brought victory by twenty-one votes out of the 355 votes cast.[197] New Hampshire voters

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A Maryland writer summed it up in language just becoming modern. Although the writer's words admitted the intensely controverted state of affairs, it nevertheless assumed the pro-creditor position to be unquestionably just:

> The antifederalists in every state, seem to have conceived a violent antipathy to these courts, while merchants and those who expect to carry on any sort of commerce with the citizens of the different states, are anxious to see them established. . . . [W]e hope the merchants, manufacturers and friends to credit and national character, will appoint men to the assembly [who elect Senators], and to congress, who are favourers to their speedy establishment.

"Federalicus," Maryland Gazette, or the Baltimore Advertiser, Oct. 3, 1788.

195. 4 STATE DEBATES, *supra* note 170, at 155; *accord, e.g.*, 3 HISTORY OF RATIFICATION, *supra* note 172, at 541-45, 548-54 (quoted passage from 553) (Oliver Ellsworth, in the Connecticut ratification convention: "[W]e see, how necessary for the Union is a coercive principle. . . . The only question is, shall it be a coercion of law or a coercion of arms? There is no other possible alternative. . . . I am for coercion by law, that coercion which acts only on delinquent individuals."). William Samuel Johnson, in the Connecticut ratification convention, said:

> [O]ur commerce is annihilated; our national honor, once in so high esteem, is no more. . . . The Convention saw this imperfection in attempting to legislate for states in their political capacity: that the coercion of law can be exercised by nothing but a military force. They have therefore gone upon entirely new ground. . . . The power which is to enforce these laws is to be a legal power vested in proper magistrates. The force which is to be employed is the energy of law . . . .

3 *id.* at 545-46.

196. Fox, *supra* note 129, at 121.

197. *Id.* at 121-27.

also elected a majority against the Constitution, but thanks to a number of events, including a strategic postponement of the ratification convention from February to June (by which time eight states of the necessary nine had already ratified and none had rejected), a few interim delegate election successes by supporters, the absence of eight opponents on the day of the vote, and the willingness of supporters to accept suggested amendments, the Constitution carried by ten votes out of the 104 votes cast.[198] New York voters elected a large majority against the Constitution, and Governor George Clinton also vigorously opposed it. But the well-organized proponents were able to use complacency and dissension among the opponents, threats of the secession of New York City, the willingness of both proponents and some key opponents to accept suggested amendments, and the mid-convention accession of New Hampshire and Virginia to the union (meaning the possible isolation of New York should she now reject) to gain acceptance by three votes out of the fifty-seven cast.[199] The election of delegates in Virginia produced an almost evenly split ratification convention and a magnificent debate, but the pressure of eight states' prior ratification (New Hampshire's ratification did not become known until after the vote), the willingness of Madison to swallow his pride and agree to suggested amendments, and Edmund Randolph's swing back to Sam Adams-like support for union over disunion carried the vote for the Constitution by ten votes out of the 168 cast.[200] Even after New York became the eleventh state in the union, North Carolina and Rhode Island rejected the Constitution by huge majorities.[201]

The new government had come into being only by the slimmest of margins, and its supporters' pragmatic backsliding on a few important constitutional provisions that had provoked strenuous dissent plus the lack of an articulated but less centralizing alternative were probably the keys to its reluctant acceptance.[202] Proponents knew that their support

198. Daniell, *Ideology and Hardball: Ratification of the Federal Constitution in New Hampshire,* in THE CONSTITUTION AND THE STATES, *supra* note 47, at 189-98.

199. Kaminsky, *supra* note 47, at 240-48.

200. Briceland, *supra* note 129, at 210-21.

201. *See* Conley, *First in War, Last in Peace: Rhode Island and the Constitution, 1786-1790,* in THE CONSTITUTION AND THE STATES, *supra* note 47, at 276-85 (Rhode Island by popular vote rejected the Constitution overwhelmingly in March 1788, and its legislature refused even to call a ratification convention until January 1790. Even then a majority of those elected were opposed to the Constitution, causing one postponement of the convention. Ratification ultimately occurred by a one-vote margin.); Watson, *State's Rights and Agrarianism Ascendant,* in *id.* at 260-65 (North Carolina rejected the Constitution by 100 votes out of 268 cast).

202. John Quincy Adams was much later to remark that the Constitution "had been extorted from the grinding necessity of a reluctant nation." J. ADAMS, THE JUBILEE OF THE CONSTITUTION. A DISCOURSE DELIVERED AT THE REQUEST OF THE NEW-YORK HISTORICAL SOCIETY 55 (1839),

was to a significant degree weak, suspicious, and liable to dissolve, yet they believed that the reorganization had to work or else the nation would be torn asunder by internal and external pressures. Shortsighted supporters desired to give the opponents no relief for their demands, but the more clear-headed, like Madison and Oliver Ellsworth, knew that the shaky national union depended on concessions.

More than two hundred different amendments to the Constitution, embodying approximately eighty different substantive changes, were suggested by the various state ratification conventions. Sixteen of the eighty proposed important alterations in the national judiciary.[203] Some proposals would have guaranteed jury trials in noncriminal cases, and some would have limited or eliminated federal question jurisdiction. New York, Virginia, and Pennsylvania would have restricted the lower federal courts to admiralty jurisdiction; New York, Virginia, North Carolina, and the minority in Pennsylvania would have eliminated diversity and alienage jurisdiction altogether; and Massachusetts, New Hampshire, and Maryland would have placed a minimum amount-in-controversy limitation on diversity cases and a higher limitation on appeals. Maryland would have required trials by jury in all actions on debts or contracts. Virginia proposed that national jurisdiction should "extend to no case where the cause of action shall have originated before the ratification of this Constitution."[204]

It was clear to some observers that

> the effect of . . . [the restrictions proposed by Virginia] would have been to divest the General Government of *all control,* not only over *many* questions arising under the *Constitution and laws of the United States* but over *all questions* relative to *infractions of the 4th article of the Treaty of Peace;* and questions respecting *debts due by citizens of*

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quoted in R. MORRIS, *supra* note 43, at 317. Gouverneur Morris, a prominent participant in Philadelphia and a supporter, asked his colleagues in the Senate in January 1802:

> if they have not seen the time when the fate of America was suspended by a hair? . . . Never, in the flow of time, was a moment so propitious, as that in which the Convention assembled. The States had been convinced, by melancholy experience, how inadequate they were to the management of our national concerns. The passions of the people were lulled to sleep; State pride slumbered; the Constitution was promulgated; and then it awoke, and opposition was formed; but it was in vain. The people of America bound the States down by this great compact.

11 ANNALS OF CONGRESS 40 (1851).

203. W. RITZ, *supra* note 3, at 20; Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 55 (1923). Warren talked of seventy-nine changes, whereas Ritz uses eighty. Given the large number of proposals, it is difficult to boil them down to generic types, and the slight difference between these two experts is not surprising.

204. *See* 2 HISTORY OF RATIFICATION, *supra* note 172, at 597-99, 623-25 (Pennsylvania); DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1019 (Massachusetts), 1024-26 (New Hampshire), 1027-34 (Virginia), 1034-38 (New York), 1044-51 (North Carolina); 2 STATE DEBATES, *supra* note 170, at 550-51 (Maryland).

> *Virginia,* to citizens of *other states,* and to the citizens and subjects of *foreign nations*.[205]

As Professor Ritz has noted, "[T]he dilemma that members of the First Congress faced was to cater to these [sorts of] demands without seriously crippling the national judiciary" from their standpoint of support for the new order.[206]

IV. FEDERAL COURTS ARE INVENTED: THE JUDICIARY ACT OF 1789

A. *The Stage and the Players*

The First Congress under the new Constitution was supposed to assemble and commence its business on March 4, 1789, but on the appointed day only thirteen Representatives and eight Senators had arrived.[207] It took thirty Representatives and twelve Senators to make quorums. The Senate did not have its quorum until Richard Henry Lee of Virginia appeared on April 6 and since the House had just previously made its quorum, Congress could get down to business—albeit a month late. In the important task of building a goverument, the House first took up the problems of revenue, while the Senate undertook to fashion a judiciary.[208]

The First Congress's handiwork, embodied in the Judiciary Act of 1789,[209] endures essentially to this day as the framework of the national judiciary. The system in the Act was for all useful intents and purposes contained in the bill as it emerged in July from the Senate. The Senate bill in turn was derived in its main outlines and important features directly from the product of the judiciary committee's drafting subcommittee (a subcommittee analogous to the Committee of Detail), which consisted of Oliver Ellsworth, who had served two years previously on the first Committee of Detail in the Convention, and two other Conven-

205. "Marcus" [pseud. Oliver Wolcott Jr. of Connecticut], BRITISH INFLUENCE ON THE AFFAIRS OF THE UNITED STATES PROVED AND EXPLAINED 10 (1804). I am indebted to William Casto for bringing this pamphlet to my attention.

206. W. RITZ, *supra* note 3, at 20; *see, e.g.,* Letter from James Madison to Thomas Jefferson (Mar. 29, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 37 ("I hope and expect that some conciliatory sacrifices will be made, in order to extinguish opposition to the system, or at least break the force of it, by detaching the deluded opponents from their designing leaders."); Letter from Tench Coxe to George Thatcher (Mar. 12, 1789) (Independence National Historical Park Collection, Philadelphia) ("If due attention be [illegible] to removing the jealousies & fears of the large part of the Opposition we may gain strength & stability without impairing one essential [illegible] of the constitution.").

207. Letter from Fisher Ames to John Lowell (Mar. 4, 1789) (Duane Norman Diedrich Collection, William L. Clements Library, University of Michigan).

208. W. RITZ, *supra* note 3, at 13.

209. 1 Stat. 73.

tion delegates, William Paterson of New Jersey and Caleb Strong of Massachusetts. The remarkable strength and durability of the Judiciary Act of 1789, which was meant to be a temporary compromise solution to the series of difficult political problems raised about the judiciary during the ratification debates, is due mainly to three factors operative during the First Congress, to be detailed, and an overwhelming fourth factor—the happenstance of political history—which will be partially unfolded in future essays.

First, the Senators had all been reared in what was predominantly a pre-capitalist world, and were trained to engage courageously and relatively communally in open substantive debate about what were universally regarded as substantive community concerns, rather than having been given political training in a selfish, procedurally-oriented, public-relations world like the one we live in, an alienated and centerless world riven into supposedly separate public and private spheres that has deadened us after two centuries of the dominance of capitalist relations. Moreover, the skills of the Senators in 1789 had been tested and tempered in the fire of a terrible war in which substantive principles were constantly alluded to—a war they had won against all odds—and during and after which intense substantive public concern and debate over political issues were the experience of nearly everyone. They were used to frequent conversation about first principles, and they lived in a time when each decision seemed perilous. The debate over the judiciary, as a result, was full, thorough, and principled.

Second, and a direct result of the first factor, the Senate organized and conducted itself in a manner designed to achieve optimum substantive results. On their first two important tasks, the judiciary and the subject of crimes against the national government, the Senators divided themselves into two "Grand Committees," each containing one Senator from each state. When new Senators arrived, they were allocated to one or the other of these two committees. The judiciary committee, at least, "followed the practice of the Continental Congress and the Constitutional Convention, that is, they proceeded by debating, and either adopting or rejecting, a series of general resolutions."[210] They conversed about general principles, thereby getting antagonisms and problems directly and clearly into the open.

Third, at least three key people seemed to understand fully the political need to achieve compromise on the controversial subject of the judiciary, and were intelligent and perspicacious enough to grasp and

210. W. RITZ, *supra* note 3, at 13-14, 16 (quotation found at 16). I have taken the liberty to apply the usage "Grand Committee" here; it was what the Continental Congress called a committee which had a member from each state. *See, e.g.*, M. JENSEN, *supra* note 6, at 418-20.

articulate most of the elements necessary to achieve that compromise. There was the commercially oriented brilliant lawyer from Virginia, James Madison, who with his unerring ability to foretell the direction and force of the political winds had grasped the strength and a sense of the needs of the pre-capitalist countrymen with whom he had been raised. Madison already had set out several compromise positions for the judicial bill in his speeches in the Virginia ratification convention,[211] and he had promised his constituency, when running successfully (against James Monroe) for a seat in the first House of Representatives, that "the Judiciary department . . . ought to be so regulated, as to render vexatious, and superfluous appeals, impossible."[212] In the First Congress, Madison ably defended the Senate bill when it came to the House, and worked tirelessly for a set of constitutional amendments that would satisfy many Anti-Federalists and fence-sitters without essentially weakening the new government's overall power.

Helping shape the judicial bill in the Senate was another eminent Virginian, idolized as the mover of independence in 1776 and perhaps the best-known member of Congress: Richard Henry Lee. His election to the Senate, along with that of William Grayson, had been secured in the Virginia legislature by Patrick Henry to ensure that the views of opponents of the Constitution would be presented ably. A good representative of his debtor neighbors, he was opposed to "vexatious oppressive" trials in cases "concerning property between Citizens of different States, and between Citizens and foreigners" in distant courts sitting possibly without juries.[213] However, Lee was not so vociferous and unyielding an opponent as was Henry, for Lee found in the Constitution "a great many excellent Regulations . . . and if it could be reasonably amended [it] would be a fine System."[214] A far-sighted statesman and a good debater, sufficiently deeply principled and egocentric to press his views even if in a

211. Madison argued that Congress could use the state judiciaries for federal business; he thought Congress would cure the problem of the absence of jury trials by legislation and would require the Supreme Court to sit in different regions, "to render it more convenient." 3 STATE DEBATES, *supra* note 170, at 534-36. Possible limitations were also thought of by others. The idea of a jurisdictional amount had been raised in several conventions, for example, and Roger Sherman casually mentioned the specific possibility that "the courts of the particular states will be authorized by Congress to try causes under the laws of the Union" (that is, what we call federal question cases). "A Citizen of New Haven" [pseud. Roger Sherman], 3 HISTORY OF RATIFICATION, *supra* note 172, at 527.

212. Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), *reprinted in* 11 MADISON PAPERS, *supra* note 9, at 416-17.

213. Enclosure in letter from Richard Henry Lee to George Mason (Oct. 1, 1787), *reprinted in* 3 MASON PAPERS, *supra* note 77, at 999.

214. Letter from Lee to Mason (Oct. 1, 1787), *reprinted in* 3 MASON PAPERS, *supra* note 77, at 1000.

distinct minority, Lee would prove to represent his moderate position quite well.

The most important single contribution was provided by Oliver Ellsworth. A creditor-oriented proponent of a strong national government, Ellsworth combined the tenacious qualities of a Connecticut Yankee lawyer and judge, including tirelessness, with a debating technique that overwhelmed opponents through systematic and repetitious defense of his position. His blunt but effective statesmanship grew from a grudging but serious understanding of how important it was to make drastic concessions to the position Lee represented while maintaining the essential strength of the federal judiciary.

We have little direct evidence for the sources and details of Ellsworth's plan. It is probable, however, that he arrived in New York, the seat of the new government, with a judiciary plan in mind which reflected serious discussions with his Connecticut friends Roger Sherman, William Samuel Johnson, Richard Law, and Oliver Wolcott.[215] It is likely that Ellsworth's plan was altered and deepened through discussion of a Massachusetts plan brought along by Caleb Strong.[216] Quite early in

215. It is clear from surviving letters, the debates at the Connecticut ratification convention, and the articles Ellsworth and Sherman published in support of the Constitution that these well-educated and intelligent friends (friends both of each other and of the new government, though Wolcott was only lately converted) consulted each other, and considerable thought had been given to the framing of the judiciary. *See generally* W. BROWN, THE LIFE OF OLIVER ELLSWORTH (1905).

It is probable that the plan or ideas evolved among these Connecticut thinkers centered on a system of *nisi prius* courts, that is, a large body of judges riding singly or in small groups into the countryside to try cases, but serving as a whole group sitting at the center of government to resolve difficult or novel questions of law—the system then in force in Massachusetts, New York, and Great Britain. No district or circuit courts would then have been necessary. W. RITZ, *supra* note 3, at 60-63; Letter from Richard Law to Oliver Ellsworth (May 4, 1789) (Jenkins Collection, Friends Historical Library, Swarthmore College) ("The Sketch you have [sent from New York] appears to me to be plausible & feasible & preferable to the Plan of *Nisi prius* Courts"). William Samuel Johnson appears to have been the principal proponent of the *nisi prius* arrangement of the federal courts. *See* Maclay, "The Diary of William Maclay and Other Notes on Senate Debates," *reprinted in* 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791, at 88 (K. Bowling & H. Veit eds. 1988) [hereinafter MACLAY'S DIARY] (entry for June 24, 1789) ("The first debate that arose was whether there should be Circuit Courts or courts of Nisi Prius. This distinction was started by Mr. Johnson of Connecticut."); *see also infra* text accompanying notes 249-53. Ellsworth apparently moved away from the *nisi prius* idea when he encountered the plan from Massachusetts.

216. Strong received several thoughtful letters from his friends on the Massachusetts bench, particularly from David Sewall (who would become the first United States District Judge in Maine). Ritz has published Sewall's striking letter of May 2, 1789, as well as a letter from Robert Treat Paine (another Massachusetts high court judge) of May 18, 1789, and Strong's response to Paine dated May 24, 1789. W. RITZ, *supra* note 3, at 201-08. An earlier, even-more striking letter from Sewall to Strong, published in pertinent part in Appendix 3, *infra*, suggested (a) limiting the Supreme Court's appellate jurisdiction to questions of law via writs of error, (b) placing the revenue jurisdiction in the admiralty courts, (c) accepting the Massachusetts convention's notion of an amount in controversy limitation on the Supreme Court's jurisdiction, and (d) having the Supreme Court sit in three divisions in different areas of the country—all ideas accepted in Ellsworth's scheme. Sewall

the deliberations of the judicial committee Ellsworth became the sponsor of a complicated and ingenious compromise scheme of organization and jurisdiction for the new courts. His scheme was by and large acceptable to Lee, upon whom he had made a personal and somewhat petty attack in a well-known newspaper article of late 1787.[217] Ellsworth reported to Wolcott in late May: "We have no schism, nor much locality. Mr. Lee as yet goes with us."[218] Lee himself wrote almost simultaneously to Patrick Henry: "I am satisfied to see a spirit prevailing that promises to send this [judiciary]B system out free from those vexations and abuses that might have been warranted by the terms of the Constitution."[219]

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also suggested that the state supreme courts try diversity and alienage cases, and that the federal admiralty court districts not be coterminous with state boundaries—ideas not accepted in Ellsworth's scheme. Letter from Sewall to Strong (Mar. 28, 1789) (Caleb Strong Manuscripts, Forbes Library, Northampton, Massachusetts). Similar ideas were expressed in a Letter from Sewall to Congressman George Thatcher (Apr. 11, 1789) (Chamberlain Collection, by courtesy of the Trustees of the Boston Public Library); *see also* Letter from Massachusetts high court judge Nathaniel Peaslea Sargeant to John Adams (Apr. 25, 1789) (Adams Family Papers, Massachusetts Historical Society).

Another probably interlocking group of Massachusetts judiciary thinkers centered around Representative Fisher Ames and John Lowell of Boston, still another high court judge and soon to be Massachusetts' first federal district judge. Writing to a Boston attorney friend that drafting the judiciary legislation "will be great work," Ames enclosed "a first imperfect sketch of a Judicial System, which has been proposed and is the subject of conversation of three or four persons only." The plan included a district judge for each state with full federal trial jurisdiction, concurrent with state courts, and a $300 amount-in-controversy limitation on diversity and alienage cases. The objects, as stated by Ames, were "[t]o prevent expence . . . and to allay jealousy . . . . By narrowing rather than extending jurisdiction, perhaps something may be done towards effecting both." Ames asked his friend to "converse with the Judges, and such of our brethren of the Bar as you may meet with," especially James Sullivan and Theophilus Parsons. Letter from Fisher Ames to a Boston Attorney (Mar. 15, 1789) (Ameriean Revolution Collection, by courtesy of the Trustees of the Boston Public Library); *see also* Letter from James Sullivan to Elbridge Gerry (Mar. 29, 1789) (Gerry-Knight Papers, Massachusetts Historical Society) (Sullivan did not like plan; letter revealed portions of plan dealing with full jurisdiction for district judges plus their concurrent jurisdiction); *see also* Letter from Fisher Ames to John Lowell (Apr. 8, 1789) (AMs 771/8, The Rosenbach Museum & Library, Philadelphia); Letter from Christopher Gore to Rufus King (Mar. 27, 1789) (Rufus King Papers, courtesy of the New-York Historical Society).

217. In the article, "A Landholder, VI" wrote:

> [George Mason's] reasons [for opposing the Constitution] . . . have been revised in New York by R.H.L. [widely if probably erroneously thought to be the author of "Letters from a Federal Farmer"] and by him brought into their present artful and insidious form. The factious spirit of R.H.L.—his implacable hatred of General Washington [untrue]—his well-known intrigues against him in the late war—his attempt to displace him and give the command of the American army to General [Charles] Lee [untrue]—is so recent in your minds it is not necessary to repeat them.

Letter from a Landholder [pseud. Oliver Ellsworth] to the *Connecticut Courant* (Dec. 10, 1787), *reprinted in* 3 HISTORY OF RATIFICATION, *supra* note 172, at 487.

218. Letter from Oliver Ellsworth to Oliver Wolcott (May 30, 1789) (Wolcott Papers, Connecticut Historical Society).

219. Letter from Richard Henry Lee to Patrick Henry (May 28, 1789), *reprinted in* 2 THE LETTERS OF RICHARD HENRY LEE 487 (J. Ballagh ed. 1911) [hereinafter LEE LETTERS].

Ellsworth clearly deserves the encomiums he has received as the father of the Judiciary Act of 1789. Like a good lawyer, he had thoroughly digested the situation and considered his proposed solution; he knew when to yield but forcefully presented his complex and apt plan; and he worked ceaselessly to obtain adoption of it. "[M]y chum Ellsworth has been at it [the judicial bill] night and day these three months," Congressman Abraham Baldwin reported to Joel Barlow in mid-June.[220] Congressman William Smith of South Carolina, a supporter of the Constitution, wrote about Ellsworth's efforts in a revealing letter:

Lee had been much less optimistic in late April, writing "that this Session of Congress will pass Laws of a nature so gracious as to quiet alarms amonst those who reflect not, that 'the safety of liberty depends not so much upon the *gracious manner,* as upon the *Limitation of Power.*' " Letter from Richard Henry Lee to Samuel Adams (Apr. 23, 1789) (Samuel Adams Papers, Rare Books and Manuscripts Division, New York Public Library, Astor, Tilden and Lenox Foundations). But a perceptive member of the judicial committee, Senator William Maclay of Pennsylvania, hinted on April 29 that Lee was supporting "a most expensive and enormous Machine of a Federal Judiciary" (this was the first mention of the judicial bill in a diary that was commenced only on April 24). MACLAY'S DIARY, *supra* note 215, at 10. By May 10 Lee was reassuring Sam Adams that the judiciary bill "will come forth in a spirit of moderation that will quiet the apprehensions of many, whilst federal justice may be effectually administered thereby." Letter from Lee to Adams (May 10, 1789) (Lee Family Papers, The Beinecke Rare Book and Manuscript Library, Yale University). Later that month Madison reported to Jefferson that "[b]oth the senators from Virginia particularly Lee go with the Majority in the Senate." Letter from James Madison to Thomas Jefferson (May 27, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 185. Another member of the judicial committee, Senator Paine Wingate of New Hampshire, had assured the President of his state in late April that "the principal characters who were in opinion not to adopt the new Constitution are not disposed to continue their opposition, but appear willing to give it their aid." Letter from Paine Wingate to John Pickering (Apr. 27, 1789) (Gratz Collection, Historical Society of Pennsylvania).

220. Letter from Abraham Baldwin to Joel Barlow (June 14, 1789) (Pequot Papers, The Beinecke Rare Book and Manuscript Library, Yale University).

As early as the end of April, Senator Paine Wingate wrote his brother-in-law Timothy Pickering that "Mr. Ellsworth seems to be the leading projector, who is a very sensible man." Letter from Paine Wingate to Timothy Pickering (Apr. 29, 1789) (Pickering Papers, Massachusetts Historical Society). Tristram Lowther, a young North Carolina lawyer visiting in New York City, sent a copy of the judicial bill as printed by the Senate back to his mentor, James Iredell, with the comment that "it was principally drawn up by a Mr. Elsworth of Connecticut." Letter from Tristram Lowther to James Iredell (July 1, 1789), *reprinted in* 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 260 (1857). "[T]his Vile Bill is a child of his [Ellsworth]," Maclay wrote in his diary on June 29, "and he defends it with the Care of a parent." MACLAY'S DIARY, *supra* note 215, at 91 (entry for June 29, 1789). A Connecticut lawyer, upon receipt of a copy of the bill from Ellsworth, thought that he could "discern by the features that Conneeticut folks wasnt far of[f] when it was begotten." Letter from Jesse Root to Benjamin Huntington (June 22, 1789) (Huntington Autograph Book, Jervis Public Library, Rome, N.Y). A future United States Attorney General wrote that he had "been Amusing [himself] with the Connecticut reports" because "the judiciary bill smells a little of the laws of that state." Letter from William Bradford to Elias Boudinot (July 12, 1789) (Wallace Collection, Historical Society of Pennsylvania). Fisher Ames, on the other hand, thought that "Mr. Strong, Mr. Ellsworth, and Mr. Paterson, in particular, have their full share of this merit" for the hard work done on the judicial bill. Letter from Fisher Ames to George Richards Minot (July 7-8, 1789), *reprinted in* 1 WORKS OF FISHER AMES 64 (S. Ames 2d ed. 1854), a portion unaccountably not printed in 1 WORKS OF FISHER AMES 683-88 (W. Allen 3d ed. 1983) [hereinafter AMES PAPERS].

> Mr. Ellsworth who was principally concerned in drawing the Bill is a Judge of the State of Connecticut of much reputation for legal knowledge: he is a man of remarkable clearness of reasoning & generally esteemed a person of abilities. I met him last night & took notice of some of your objections [to alienage jurisdiction] which he endeavoured to refute [at great length and in great detail, arguing] the convention had in view the condition of foreigners when they framed the Judicial . . . . Juries were too apt to be biased against them, in favor of their own citizens & acquaintances: it was therefore necessary to have general Courts for causes in which foreigners were parties or citizens of different states.[221]

Nevertheless Lee was not far off the mark when, near the end of the long first session of the First Congress, he wrote Patrick Henry that "I have endeavoured successfully in the Judiciary Bill to remedy, so far [as] a law can remedy, the defects of the Constitution in that line."[222] The Judiciary Act solved many if not most of the problems raised by the opponents of the Constitution,[223] and was much closer to the wishes of those opponents than it was to the wishes of Ellsworth, James Wilson, and the other advocates of a strong, unfettered judiciary.[224] Edward Carrington, a Virginian who supported the Constitution, voiced the fears

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221. Letter from William Smith to Edward Rutledge (Aug. 9-16, 1789), *reprinted in* Rogers, *The Letters of William Loughton Smith to Edward Rutledge, June 6, 1789 to April 28, 1794* (pt. 1), 69 S.C. HIST. MAG. 1, 22-23 (1968). Smith usually is called "William Loughton Smith" by historians, but he did not add his father's name as his own middle name until 1804. *Id.* at 1.

222. Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789) (Patrick Henry Papers, Library of Congress). The letter has been printed, but without the quoted portion. Lee was simultaneously decrying the proposed amendments to the Constitution, finding "[a]s they came from the House of Representatives, they were far short of the wishes of our [state] convention, but as they are returned by the Senate they are certainly much weakened." *Id.*

223. There were, of course, lingering suspicions among the opponents of the Constitution. "Centinel Revived" put into words suspicions he shared with Lee: "[T]his is but a legislative regulation; that[,] when the public ferment is lulled, may be at any time repealed; and that this is the intention, no one can doubt, when he beholds this very Congress" restricting jurisdiction by statute but "decidedly refusing to make it a fundamental alteration in the form of government" by way of amendment. "CENTINEL Revived No. XXVI," [Philadelphia] Independent Gazette, Aug. 29, 1789. "Centinel Revived" was referring to the refusal of Congress to accept any of the amendments proposed by the state conventions that restricted the jurisdiction of the federal courts in any way. *See infra* text accompanying notes 341-347.

224. Richard Parker, a judge of the Virginia high court, wrote to Richard Henry Lee that the framers of the committee bill "have taken great pains to make it as little exceptionable as possible and to have guarded against the Mischiefs which many people dreaded from the Words of the Constitution and I think upon the whole the System a good one." Letter from Richard Parker to Richard Henry Lee (July 6, 1789) (Lee Family Papers (No. 38-112), Manuscripts Division, Special Collections Department, University of Virginia Library). And Mann Page, a great Virginia planter, wrote to Lee later in July that "the Senate have taken great Pains to remove from the Minds of the People those Apprehensions which they entertained of the Dangers which might arise under that part of the Constitution." Letter from Mann Page to Richard Henry Lee (July 23, 1789) (Lee Family Papers (No. 38-112), Manuscripts Division, Special Collections Department, University of Virginia Library.)

of many that "the two Govts. will contend in all cases of disputed jurisdiction, with unequal talents & the weakest must be worsted."[225] Surprisingly, however, the compromises over the judicial bill show that it was the federal government that was "the weakest" of the two in 1789.

B. *The Great Compromise of 1789: Ellsworth's Plan*

Most of the fundamental pieces of Ellsworth's compromise solution had been accepted by the judicial committee two and a half weeks after the committee began its debate. "Some general principles have been settled by a majority of the committee," Senator Paine Wingate of New Hampshire wrote the President of that state on April 27, "but the system is yet immature."[226] Those general principles, however, included almost all of the major points of compromise that were found in the Act when it was signed into law by President Washington on September 24. A letter from Senator Ralph Izard of South Carolina shows that the compromise had been put in place by Friday, April 24, when Congress took a recess to enjoy President Washington's gala inauguration.[227] The major points of compromise then decided are:

> (A). Severe limitations and restrictions were to be placed upon the federal courts' jurisdiction:
>
> > (1). Federal question cases must be tried in state courts, and appeals will be allowed to the Supreme Court *only*

225. Letter from Edward Carrington to James Madison (Nov. 9, 1788), *reprinted in* 11 MADISON PAPERS, *supra* note 9, at 336.

226. Letter from Paine Wingate to John Pickering (Apr. 27, 1789) (Gratz Collection, Historical Society of Pennsylvania).

227. Letter from Ralph Izard to Edward Rutledge (Apr. 24, 1789) (Ralph Izard Papers (Roll 229), South Caroliniana Library, University of South Carolina) (published in pertinent part in Appendix 3, *infra*). Izard's letter apparently copied verbatim the resolutions adopted by the judicial committee between the date of a previous, lost letter and the date of his writing. Izard concluded by noting that "[T]he arrival of the President, & the preparations for the ceremonial of his public reception have interrupted the proceedings of the Committee." *Id.*

The details cannot be gotten entirely from Izard's letter and must be completed by reference to several other crucial letters, but Izard's is the only clear evidence that the major point of vesting federal question jurisdiction in the state courts was in place by April 24.

For those other crucial items, see (listed in apparent chronological order) *Extract of a Letter from a Gentleman at New York to his Friend Here, Dated April 28, 1789,* [Savannah] Georgia Gazette, May 21, 1789; Letter from Oliver Ellsworth to Richard Law (Apr. 30, 1789) (Ernst Law Papers, Connecticut Historical Society); Letter from David Sewall to Caleb Strong (May 2, 1789), *reprinted in* W. RITZ, *supra* note 3, at 201-02 (responding to apparently lost letters from Strong dated Apr. 18 and Apr. 22, 1789, which probably paralleled the letters from Izard sending verbatim copies of the resolutions passed by the judicial committee); Letter from Arthur Lee to Charles Lee (May 8, 1789) (Lee Family Papers, Virginia Historical Society); *Extract of a Letter From a Gentleman in New-York, to his Friend in Winchester, Virginia,* State Gazette of [Edenton] North Carolina, July 30, 1789 (for varying interpretations of this letter by Warren and Ritz, in which Ritz appears to be correct for the most part, see W. RITZ, *supra* note 3, at 169-72); Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *reprinted in id.* at 205-08.

(a). from final decisions in the highest court of the state, and

(b). in those instances where the state court had ruled against the federal law in question.

(2). Alienage and diversity cases must be tried in the new national courts, subject to a jurisdictional amount of $500. Appeals to the Supreme Court in such cases will be subject to a jurisdictional amount of $2000.

(3). Supreme Court jurisdiction would exist on appeal only by way of a writ of error, a mode of appeal which prevented issues of fact from being re-examined.

(4). No appeals in federal criminal cases would be allowed.

(B). In return, there would be a highly articulated three-tiered system of national courts:

(1). A district court, consisting of a single judge, would sit in each state. Its jurisdiction would be confined to admiralty, petty crimes, custom cases and suits by the United States above a jurisdictional amount of $100.

(2). The United States would be divided into three circuits. Circuit court jurisdiction would consist of alienage and diversity cases above the $500 minimum, major crimes, and appeals (subject to a jurisdictional amount of $300, but with no limitation on the re-examination of facts) in admiralty.[228]

(3). The circuit courts would not be staffed with separate judges, but each would have two (of the six) Supreme Court judges plus the district judge of the state in which it was sitting.

At some time during the two weeks after the inauguration, the last element of these fundamental compromises was put into place through committee debate,[229] probably at the insistence of Lee,[230] but perhaps also because of practical considerations such as those suggested by Judge David Sewall of the Massachusetts high court, a thoughtful correspond-

228. Jurisdiction also was to be given to the circuit courts over suits by a state or by the United States in which the amount in controversy was greater than $300. The former, eleventh amendment jurisdiction, was later eliminated from circuit court cognizance, and the amount in controversy limitation for the United States was raised to $500 for alienage and diversity. *See infra* note 258 and accompanying text.

229. David Sewall's May 2 letter to Strong clearly states that jurisdiction in alienage and diversity cases was not concurrent in the April 22 draft he read. *See* Letter from David Sewall to Caleb Strong (May 2, 1789), *reprinted in* W. RITZ, *supra* note 3, at 201. None of the other evidence clearly dated from April 1789 mentions the matter of concurrent jurisdiction with the state courts in those important heads of jurisdiction. The first indication of the concurrent jurisdiction comes in the letter reprinted in the Edenton newspaper on July 30. For a list of these sources, see *supra* note 227.

230. It was, one might note, only after these two weeks that Lee began to report his feeling of comfort with the progress of the judiciary committee. *See* Letter from Richard Henry Lee to Samuel Adams (Apr. 23, 1789) (Samuel Adams Papers, Rare Books and Manuscripts Div., New York Public Library, Astor, Tilden & Lenox Foundations,); Letter from Lee to Adams (May 10, 1789) (Lee Family Papers, The Beinecke Rare Book and Manuscript Library, Yale University); *supra* note 219 and accompanying text.

ent of Senator Caleb Strong.[231] This last element, in effect, changed point (A)(2), above, to read as follows:

> (2). Jurisdiction over alienage and diversity cases above the amount of $500 would be concurrent between state and federal courts.
>
> (a) Defendants in diversity and alienage cases brought in state courts would have the power to transfer such cases to the federal circuit courts, but only before trial.
>
> (b) Litigants in such cases must abide by a choice to stay in state courts, and litigants in diversity and alienage cases of $500 value or below would never obtain federal jurisdiction, since no appellate jurisdiction would be established over state court diversity and alienage decisions analogous to that over state court federal question decisions.
>
> (c) Appeals to the supreme court from federal circuit court decisions in alienage and diversity cases would be subject to a jurisdictional amount of $2000.

These provisions tended to solve most of the large problems with article III put forward by the opponents of the Constitution. State courts would retain a great deal of that jurisdiction many had thought to be rendered exclusively federal by the Constitution, but in alienage and diversity cases worth more than $500 only at the option of both parties and in federal question cases subject to appellate review. The latter was an arrangement approved by most persons at the time, although some understood that it likely would create friction.[232] The $500 amount-in-controversy limitation would prevent many cases of small amount, thus presumptively those concerning poor people, from being brought into

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231. In a letter to Caleb Strong (May 2, 1789), *reprinted in* W. RITZ, *supra* note 3, at 201-02, Sewall writes:

> The Business of the Circuit Court . . . seems so large that some doubts may be raised, whether they will be able to perform it and to meet twice a year . . . [as] the *Supreme Judicial.* Perhaps a concurrent Jurisdiction in some matters in the State Courts Where the parties Shall incline to make use of them, may afford some relief, in this Respect.

232. James Monroe pointed out this difficulty in the Virginia ratification convention. "We find, sir, that two different governments are to have concurrent jurisdiction in the same object. May not this bring on a conflict in the judiciary? And, if it does, will it not end in the ruin of one or the other?" 3 STATE DEBATES, *supra* note 170, at 582.

Proponents of the Constitution often took the position that such conflict would not occur because the two governments would operate upon entirely separate subject matters. Richard Dobbs Spaight, in the first North Carolina ratification convention, said, "I declare that, in that [Philadelphia] Convention, the unanimous desire of all was to keep separate and distinct the objects of the jurisdiction of the federal from that of the state judiciary." 4 *id.* at 139. But such a separation was impossible, as the compromise in the Senate judiciary committee showed. Federal questions, which at the time were expected to consist of questions of the unconstitutionality of state laws, would arise most naturally in the midst of state-law cases, and the compromise recognized this by giving the trial jurisdiction of these issues to the state courts. As Judge Samuel Spencer of the North Carolina high court accurately predicted in the same North Carolina convention, "[t]here will be, without any manner of doubt, clashings and animosities between the jurisdiction of the federal courts and of the state courts, so that they will keep the country in hot water." 4 *id.* at 136-37.

federal court,[233] and it also would exclude a huge number of the British debt claims.[234] "Retroactive" application of alienage jurisdiction would be prevented at least to the extent that cases brought by British creditors already pending on state court dockets could not be transferred. Not all federal question cases were appealable, though the most important were; yet only issues of federal law would be considered on those appeals. No appeal to the Supreme Court of issues of fact would be possible, and the $2000 limit would save the litigants in many cases—again, especially poorer litigants—from having to travel to the capital for appeals.

Staffing the circuit courts with Supreme Court justices both saved money and assured the proponents of a strong judiciary that the most important judges would sit in the trial of the cases involving alienage and diversity that were likely to cause the most difficulty, especially those

233. A careful study of tort judgments given by the highest court in Connecticut in 1786-1795 (covering the first three volumes of *Connecticut Reports*) found only two greater than $66.60, a $249.75 judgment for assault and battery in 1786, and a $999.00 judgment for total destruction of a prosperous business in 1792. The lowest judgment was for a penny, and a total of six were under $10.00. Casto, *supra* note 3, at 1113-14 & n.93. Casto has converted these judgments into dollars from New England pounds, which were worth $3.33 in 1789. *Id.*

For comparative purposes, the average annual wages of the lower-class artisans (i.e., laborers, mariners, shoemakers, and tailors), who made up a large portion of Philadelphia's population in 1762, were about £60, whereas the other working members of the artisan's family probably brought in £25-35, all of which went to cover annual expenditures for necessities (including food, rent, fuel, and clothing, but excluding rum, taxes, medical treatment, soap, starch, candles, chamber pots, brooms, tableware, and furniture) of abont £60. The depression of the 1780s limited the availability of work and drove wages down. By the late 1790s annual wages for journeyman shoemakers had risen to about £117, but expenses had risen to about £120. Smith, *The Material Lives of Laboring Philadelphians, 1750-1800,* in MATERIAL LIFE IN AMERICA 1600-1860, at 233, 243, 247, 251 (R. St. George ed. 1988).

234. Evans, *Indebtedness During Confederation, supra* note 29, at 349-50 (the great majority of the prewar British debts were under £100); Sheridan, *supra* note 29, at 181 (of the two large Glasgow firms whose books he examined in detail, 94% of the prewar debts were less than £100); Hobson, *supra* note 29, at 181-82 ("The largest class of debts in Virginia was contracted at stores throughout the Piedmont region . . . . Most of these debts fell below the federal jurisdictional amount."); S. BEMIS, *supra* note 46, at 436-37; C. RITCHESON, *supra* notc 46, at 66-67; *see also, e.g.,* Notebook entitled "Considerations on the various Subjects of Enquiry . . . ," 16 (PRO/T/79/27, "John Hay & Co. & Jas. Baird") ($500 amount in controversy limitation on alienage suits in federal courts considered a "legal impediment" under treaty, since so many British debts precluded from recovery thereby); Memorial to British-American Claims Commission of 1794 (Nov. 28, 1798) (PRO/T/79/27, "Geo. & Andrew Buchanan") (stating that most of this firm's debts were too small to take to federal court); (PRO/T/79/25) ("Archd. and Jno. Hamilton & Co.") (contains detailed account books for three stores, seven from Nansemond, Va., four from Halifax, Va., and three from Wake, N.C., and the fattest account book from each store lists debtors with debts too small to be sued upon in federal court).

All of the historians cited in this footnote, plus myself, have carefully examined some or all of the voluminous materials in the British Public Record Office deriving from the claims made by the British merchants. There are complete aceount books of prewar debts from firm after firm like Archd. and Jno. Hamilton & Co., just cited, and the evidence is overwhelming that the large majority of the debts were under the jurisdictional amount of $500, or £150 sterling at 1789 cxchange rates.

valued between $500 and $2000 for which no appeal would be allowed. Proponents could be satisfied that a highly articulated judiciary would carry the message (through charges to grand juries) of what many considered an alien government and its existence, dignity, power, and capability to the very doorsteps of the people in all of the states.[235] They also would be pleased both with the absence of a jurisdictional amount limitation on federal question appeals from the state courts and with the jurisdiction of the district courts, which concerned only matters over which there had been essentially no contention, so that the judgments of the most numerous and scattered branch of the new judiciary would be likely to cause no uproar or public condemnation. Whereas there was much in the plan for proponents of the new government, it was still a weak bill from their standpoint.[236] Framed from a knowledge of their own weakness, it was mostly a hope for the future. Ellsworth's brilliant choice escalating the presence and numbers of governmental officials beyond what most had expected rather than granting judges all the power the Constitution might allow was nevertheless a choice from weakness; a position of strength would have demanded that the federal courts be fully empowered.

By May 11, the committee finished its debate on the general principles of the new judiciary. Strong told Congressman Fisher Ames that "the principles of the [Judiciary] System are in some forwardness in the Comee. of Senate," and Senator William Maclay of Pennsylvania (a member of the judicial committee) recorded in his diary that day the appointment of a subcommittee to draft a bill.[237] The subcommittee consisted of Ellsworth, William Paterson of New Jersey, and Strong; the latter wrote on May 24 that the subcommittee "have been employed some time and will not be able to report the Bill until the later part of

235. William Paterson made these arguments, in defending the Ellsworth scheme during debate in the Senate on June 23, that with circuit courts "you carry Law to their Homes, Courts to their doors—[you] meet every Citizen in his own State." The expense to litigants would be less, Paterson surmised, because there would be "not many Appeals," given the presence of Justices of the Supreme Court at the trial and the dollar limit on appeals. He contrasted this alternative to a system that used the state courts as federal trial courts: "Appeals from the State Tribunals" would be "Monstrous—you will make it expensive & oppressive." MACLAY'S DIARY, *supra* note 215, at 479-80 (notes made by William Paterson in preparation for his speech on June 23).

236. Senator Pierce Butler's very fragmentary notes of the beginning of the Senate debate on the judiciary bill on June 22 describe Paterson, a drafter of the bill: "He objects to the Bill because it [is] not Strong Enough." MACLAY'S DIARY, *supra* note 215, at 454 (fragmentary notes of Pierce Butler taken during debate on June 22).

237. Conversation recounted in letter from Fisher Ames to John Lowell (May 11, 1789) (Fisher Ames Folder, courtesy of the New-York Historical Society); MACLAY'S DIARY, *supra* note 215, at 33 (entry for May 11, 1789). Maclay commented, "I do not like it in any part. Or rather I generally dislike it. But we will see how it looks in form of a Bill." *Id.*

this or the beginning of the next Week."[238] In fact, the draft bill was not brought out of the subcommittee until June 12, when Maclay found it "long and somewhat confused." The committee however reported it to the Senate, and "a number of Copies were ordered to be Struck off," that is, printed, for the use of the Senate in the debate and to be sent out for constituent comment.[239]

C. *Alternatives: The Virginia Plan and* Nisi Prius

Agreement within the judicial committee did not mean that other schemes of judicial organization would not be put forward. Two alternatives to the highly articulated system Ellsworth supported were presented: no lower federal courts except admiralty courts, and a system of *nisi prius* courts. Both would have reduced the number of federal judges by eliminating all or many of the district courts.[240]

When the full Senate began debate on June 22 about the committee's proposal, Lee[241] and Grayson of Virginia presented the Virginia plan

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238. Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *reprinted in* W. RITZ, *supra* note 3, at 205. Strong's letter gives many details of the bill *as it was then in draft in the subcommittee.* It would be a mistake to read all the details mentioned in his letter as having been already debated and decided in the full judicial committee.

239. MACLAY'S DIARY, *supra* note 215, at 75 (entry for June 12, 1789).

240. These two schemes also are noted in W. RITZ, *supra* note 3, at 54-56, 61-63, although Ritz does not see that both schemes meant the absence of district courts. Ritz seems confused when Maclay tells us that at the end of the debate on these alternatives on June 24, "the Vote was for district Courts." MACLAY'S DIARY, *supra* note 215, at 88 (entry for June 24, 1789). Ritz says, "Maclay writes as though a system using circuit courts and one using courts of *nisi prius* were two different and opposing systems, and says the vote was for district courts. This leaves his meaning in the air." W. RITZ, *supra* note 3, at 62-63. It is true that *nisi prius* and circuit courts were not mutually incompatible systems, and that a *nisi prius* system might look very much like the circuit court system set up under the committee proposal. Ritz is also right to point out that the

> Process Act, passed almost simultaneously with the Judiciary Act [in 1789], requires the process to issue from the supreme or circuit courts to 'bear the test of the chief justice of the supreme court' while the process from the district court was to 'bear test of the judge of such court.' This is some indication that the circuit courts were not viewed as a separate court, but rather as a part of the one supreme court; in other words, they were viewed as something resembling a *nisi prius* system.

Id. at 63. But, similarity does not mean identity; and the circuit courts designed by the subcommittee were not supposed to reserve questions of law for all the judges sitting as the Supreme Court, as would courts of *nisi prius*; rather, they were (in Paterson's words) to bring "Courts to their doors—[to] meet every citizen in his own State"—and all knotty legal questions were to be decided on the circuit, either on the spot or after a period of consideration by the judges. MACLAY'S DIARY, *supra* note 215, at 479 (Paterson's notes of his own speech given June 23). As Paterson said on June 23 in defense of the Ellsworth scheme, the "Circuit Courts" were "not in the Nature of Nisi Prius." *Id.* The short of it is that the circuit courts were not considered by the Senate in 1789 to be *nisi prius* courts, no matter what the resemblance.

241. Lee had worked diligently in the judicial committee to achieve a compromise favorable to the position of Patrick Henry and the debtors, and he had accomplished a great deal. He also must have known the views of most of his nineteen colleagues by mid-June. Nevertheless Lee felt duty-bound to proclaim openly his support for the pure pro-debtor position on the national courts, a

that proposed, in Maclay's apt words, "[T]he jurisdiction of the [lower] Federal courts should be confined to cases of admiralty and Maritime Jurisdiction."[242] They desired to use the state courts as the trial courts of the federal system, a scheme that many Americans—both opponents and proponents of the Constitution—favored in 1789.[243] But the drafters of the judicial bill argued that such a scheme would "too strongly mark an inferiority in the State to the federal Courts."[244] By exercising federal jurisdiction and probably receiving a concomitant payment of salary, supporters of the Ellsworth scheme thought that either "they [state judges] become your Judges & so fixed upon you during good Behavior & entitled to a permanent Salary" (even if the state retired or impeached them) or they nevertheless remained state judges, thus rendering federal judges "entirely dependant upon the State."[245] The Virginia plan was voted down by the Senate after a day and a half of full debate. The same

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position he had been elected to support. Perhaps he also hoped to be able to achieve an even more favorable law in the full Senate.

242. MACLAY'S DIARY, *supra* note 215, at 85 (entry for June 22, 1789). The Virginia plan derived directly from Mason's unpropounded judiciary proposal written during the Convention and had been adopted on a recommendatory basis by Virginia's ratifying convention.

243. *See, e.g.*, Letter from David Sewall to Caleb Strong (Mar. 28, 1789) (Caleb Strong Manuscripts, Forbes Library, Northampton, Mass.), republished *infra* in Appendix 3; Letter from Christopher Gore to Rufus King (Mar. 27, 1789) (Rufus King Papers, courtesy of the New-York Historical Society) (reporting the views of Francis Dana, Boston lawyer and judge); Letter from Samuel Huntington to William Samuel Johnson and Oliver Ellsworth (Apr. 30, 1789) (Independence National Historic Park Collection, Philadelphia); Letter from Samuel Livermore to John Pickering (July 11, 1789) (Dreer Collection, Historical Society of Pennsylvania); Letter from Edward Carrington to James Madison (Aug. 3, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 323; Letter from William Bradford to Elias Boudinot (Sept. 1, 1789) (Wallace Papers, Historical Society of Pennsylvania) ("The general opinion this way [in Philadelphia] is in favor of *commencing* all suits in the State Courts . . . .").

244. Letter from Caleb Strong to Ichabod Tucker (May 7, 1789) (Tucker Family Papers, Essex Institute, Salem, Mass.); *accord*, MACLAY'S DIARY, *supra* note 215, at 479 (Paterson's notes of his own speech, delivered against the Virginia plan on June 23, stating that the Virginia plan "has the Ap[pearance] of casting a Stigma upon State Courts."). In a letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789) (Ernst Law Papers, Connecticut Historical Society), Ellsworth commented that under the Virginia plan

> [T]here must be many appeals or writs of error from the supreme courts of the States, which by placing them in a subordinate situation, & subjecting their decissions to frequent reversals, would probably more hurt their feelings & their influence, than to divide the ground with them at first & leave it optional with the parties entitled to federal Jurisdiction, where the causes are of considerable magnitude[,] to take their remedy in which line of courts they pleased.

245. MACLAY'S DIARY, *supra* note 215, at 478-79 (Paterson's notes of his own June 23 speech); *accord*, Letter from Caleb Strong to Ichabod Tucker (May 7, 1789) (Tucker Family Papers, Essex Institute); Letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789) (Ernst Law Papers, Connecticut Historical Society). Other shrewd observers had of course noticed this. *See, e.g.*, Letter from James Sullivan to Gerry (Mar. 29, 1789) (Gerry Papers II, Massachusetts Historical Society); Letter from Fisher Ames to John Lowell (Apr. 8, 1789) (AMs 771/8, The Rosenbach Museum & Library, Philadelphia). Other contemporaries repeated these arguments too. *See, e.g.*, Letter from Robert Morris to Richard Peters (Aug. 24, 1789) (Peters Papers, Historical Society of Pennsylvania).

plan was put forward by Thomas Tudor Tucker of South Carolina and several other opponents and mild supporters of the Constitution when the judicial bill came before the House in late August. Opposition came from Madison, the fast learner William Smith of South Carolina, Egbert Benson of New York, Fisher Ames of Massachusetts, and others who rehearsed the arguments of the bill's drafters.[246] Theodore Sedgwick of Massachusetts, however, raised a new argument in defense of the Ellsworth plan:

> [T]he object of the present motion . . . goes to divest the government of one of its most essential branches . . . . It is essential that a government possess within itself the power necessary to carry its laws into execution . . . . Suppose a state government was inimical to the federal government, and its judges were attached to the same local policy, they might refuse or neglect to attend to the national business . . . . These are not chimerical suppositions . . . ; indeed facts have already occurred to prove to us how dangerous it would be to make the state legislatures the sole guardians of the national faith and honor . . . . The discharge of *bona fide* debts due from the citizens of America to the subjects of Britain was all that Britain required. . . . State after state, legislature after legislature, made laws in positive opposition to the treaty; and the state judiciaries could not, or did not, decide contrary to their state ordinances.[247]

The flaw in this argument—that federal appellate jurisdiction over state judges did not automatically render them federal judges—was astutely and cogently voiced by Edward Carrington, a Virginia supporter of the Constitution. Letter from Edward Carrington to James Madison (Aug. 3, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 323. In fact, appellate jurisdiction already was given by the plan with respect to federal question cases, without the danger of the state courts becoming federal courts; and similar arguments could be advanced with regard to the concurrent jurisdiction the compromise conferred on state courts in alienage and diversity cases. *See* [New York] Gazette of the United States, Sept. 5, 1789 (remarks of Congressman James Jackson of Georgia, opposing the judicial bill, on Aug. 29, 1789). Any federalizing of state judges would result not from the nature of things, but rather from the necessity of the federal government to control state judges. An amendment to the Constitution, proposed in 1791 by Congressman Egbert Benson of New York to accomplish the elimination of lower federal judges and their replacement with the state supreme judges, made this quite clear. *See generally* Holt, *"Federal Courts as the Asylum to Federal Interests": Randolph's Report, The Benson Amendment, and the "Original Understanding" of the Federal Judiciary,* 36 BUFFALO L. REV. 341 (1987).

246. 1 Cong. Reg. 263-66, 283-330 (1789) (debates of Aug. 24, 29, & 31, 1789); *see also* Letter from Peter Silvester to Francis Silvester (Aug. 27-28, 1789) (Silvester Family Papers, courtesy of the New-York Historical Society).

247. 2 Cong. Reg. 294-95. In a long memorandum to John Lowell, Fisher Ames mused through all the various arguments in favor of the Ellsworth plan, concluding:

> So far therefore as the public tranquillity may be disturbed by the clashing of intricate claims of jurisdiction—so far as the energy of the Govt. may be impaired by entrusting its powers to those who will feel a motive and be furnished with the means of abusing the trust—so far as the union will be endangered by the diversity of the rules of action and of the proceedings in courts and by extinguishing the vital principles of it's existence it seems

The Virginia plan met with the same result in the House, however, being defeated thirty-one to eleven.[248]

After the defeat of the Virginia plan in the Senate, William Samuel Johnson of Connecticut and some others put forward a second alternative to the Ellsworth scheme. They wanted to replace the district and circuit courts with a *nisi prius* system, whereby a large group of judges would ride out, singly or in small groups, to try cases in the hinterlands but would return collectively to the center for deliberation, consultation, and ultimately decision on difficult reserved questions of law.[249] Defenders of a *nisi prius* system argued it would be less expensive, saving the costs of travel to the center for parties and witnesses, and also would create uniformity in decision.[250] It is important to note that the loose and broad language about the judiciary in article III of the Constitution "is sufficiently flexible so that the Supreme Court could have developed as a superior court with trial jurisdiction over the entire country."[251] After a half-day's debate, the Senate on June 24 also rejected *nisi prius.*[252] "It is well to keep in mind, though, that the decision might have been different,"[253] and the resulting judicial system might have been different in ways we might not be able to imagine. The Constitution places only very broad limits on the ways in which Congress can use its power to organize the national judiciary.

D. *Adjustment: More Restrictions, Some Expansiveness*

The defeat of these two alternatives exhausted any real opposition and meant the triumph of the Ellsworth plan.[254] The rest of the history

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little better than madness to my understanding to adopt the state courts. It is delivering the Govt. bound hand and foot to it's enemies to be buffeted[.]

Memorandum of Fisher Ames to John Lowell (no date) (Duane Norman Diedrich Collection, William L. Clements Library, University of Michigan) (this memorandum originally was enclosed in a letter from Ames to Lowell [July 28, 1789] [David Library of the American Revolution, Sol Feinstone Collection, No. 59, on deposit at the American Philosophical Society, Philadelphia]). I am grateful to Kenneth Bowling for bringing this memorandum to my attention.

248. Letter from Fisher Ames to John Lowell (Sept. 3, 1789) (Duane Norman Diedrich Collection, William L. Clements Library, University of Michigan); Letter from Fisher Ames to George Richards Minot (Sept. 3, 1789), *reprinted in* 1 AMES PAPERS, *supra* note 220, at 714. The Virginia plan for the judiciary was also defeated three times as a part of the proposed amendments to the Constitution, twice in the House in August (just before the debate on the judiciary bill) and once in the Senate in early September. Warren, *supra* note 203, at 119-20, 127.

249. MACLAY'S DIARY, *supra* note 215, at 88 (entry for June 24, 1789). *See also supra* note 215.

250. *Id.* at 480-81 (Paterson's notes of debates on *nisi prius* proposal).

251. W. RITZ, *supra* note 3, at 63.

252. MACLAY'S DIARY, *supra* note 215, at 88 (entry for June 24, 1789).

253. W. RITZ, *supra* note 3, at 56.

254. There was real apprehension among the supporters of the Ellsworth plan about the possibility that the Virginia plan might be substituted, and perhaps about the *nisi prius* plan. The fact that William Paterson made such elaborate preparation for debate on the former issue is one bit of evi-

of the bill in the First Congress is one of adjustment and tinkering. Although much of the alteration was accomplished for technical reasons or to solve minor political problems, the overall theme of the adjustment of the judicial bill was to restrict the power of the federal courts.

Many restrictions emerged from the Ellsworth-Paterson-Strong subcommittee, which knew the way the political wind was blowing. The subcommittee scrupulously adhered to the element of the compromise that protected the right to trial by jury; their draft bill mentions it specifically with regard to the petty criminal jurisdiction of the district court, requires it with regard to the common law civil actions that were added to district court jurisdiction in the work of the subcommittee,[255] requires all civil and criminal actions in the circuit courts be tried to a jury except

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dence. For this preparation, see MACLAY'S DIARY, *supra* note 215, at 475-80; Letter from Thomas Dwight to Theodore Sedgwick (Sept. 3, 1789) (Sedgwick I Papers, Massachusetts Historical Society). Evidence of the apprehension is apparent in the letter from Dwight to Sedgwick:

> [T]he judicial bill which you mention as being well supported and by a respectable majority I had supposed would meet with a more formidable opposition than almost any thing else, & that all kinds of fear & jealousies would be excited on the Subject. It is a pleasing consideration, that so indispensable a part of the system is like to be established without difficulty."

Id. See also Letter from John Adams to Francis Dana (July 10, 1789) (Adams Family Papers, Massachusetts Historical Society); Letter from Fisher Ames to Theophilus Parsons (Aug. 3, 1789), *reprinted in* T. PARSONS, MEMOIR OF THEOPHILUS PARSONS 467 (1854).

255. Section 10 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 [for the meaning of this notation, see below in this footnote]. The Senate during debate consolidated these two different jury trial provisions into one, which read: "and the trial of issues in fact in the District Court, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury." Warren, *supra* note 203, at 75 & n.61.

There are several numbering problems with regard to the Judiciary Act of 1789. The subcommittee draft (herein called "the draft bill") had thirty-two sections, the first twenty-five of which were numbered (except that one section was skipped in the numbering process). When this draft was printed for use and distribution about June 15, 1789 ("the printed bill"), it had thirty-two sections, which unaccountably were unnumbered.

During the month-long Senate debate, two sections were dropped, four were added, one was dropped and then put back in, perhaps one was added and then deleted (*see infra* note 295), and one was split into two sections. Thus, the bill that passed the Senate ("the Senate bill"), and eventually was signed into law, had thirty-five sections.

The numbering problems presented to historians by all these changes have been compounded by the failure of other commentators to be careful or precise. Most importantly, Ritz unaccountably insists that there were thirty-three sections both in the draft bill and in the printed bill, and that all the sections in the draft bill were numbered by the subcommittee. W. RITZ, *supra* note 3, at 127-28. (These are errors which the editors of his book chose neither to correct nor, erroneously, to point out in an editorial footnote.) Ritz has the thirty-five sections of the Senate bill correctly numbered, but he notes only the net addition of new sections 10 and 34 during the Senate debate, *id.* at 128, failing to note that, at some unknown time during the debate, Section 26 of the draft bill was divided in two, becoming Sections 27 and 28 of the Senate bill.

References in this essay to section numbers will, without more, refer to the Senate bill. References to the draft bill or to the printed bill will be so designated. In the footnotes, the Act as codified will be cited to alone if the relevant language and the numbering persisted unchanged from the version under discussion.

those of equity and "admiralty and maritime jurisdiction,"[256] and requires that trials in the Supreme Court "in all actions at law against citizens of the United States" be by jury.[257] The $500 minimum amount in controversy limitation on original or removal jurisdiction over diversity and alienage suits was adhered to,[258] while a few other minor jurisdic-

256. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 76.

257. *Id.* § 13, at 80.

258. *Id.* § 11, at 78 (circuit court original jurisdiction); *id.* § 12, at 79 (circuit court removal jurisdiction).

Wilfred Ritz has insisted that the $500 limitation in section 11 did not apply to diversity and alienage jurisdiction. W. RITZ, *supra* note 3, at 57-58. He bases his argument upon the semicolon which appears in both the printed bill and the printed Act. I reproduce below first, the relevant passage as it appears in the printed bill, second, the relevant passage as it appears in the printed Act, bracketing the semicolon in both instances.

> [T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of (500) dollars, and the United States are plaintiffs or petitioners[;] or a foreigner or citizen of another state than that in which the suit is brought, is a party.

> [T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners[;] or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Although the literal text can surely be taken as Ritz reads it, no court has ever read it in such a fashion, so far as I can determine, and all of the letters describing the development of this section in the committee written by those who were in a position to know, and mentioning the $500 limitation, attach it to alienage and diversity jurisdiction. *See* Letter from Ralph Izard to Edward Rutledge (Apr. 24, 1789) (Ralph Izard Papers, South Caroliniana Library, University of South Carolina, republished *infra* in Appendix 3); Letter from Oliver Ellsworth to Richard Law (Apr. 30, 1789) (Ernst Law Papers, Connecticut Historical Society); Letter from Arthur Lee to Charles Lee (May 8, 1789) (Lee Family Papers, Virginia Historical Society) (says "$300" instead of "$500," and vaguely claims that it is to attach "in all CL & equity cases"); Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *reprinted in* W. RITZ, *supra* note 3, at 205-08.

The Izard letter, just mentioned, and the handwritten draft of the bill used for the first printing together demonstrate that the semicolon remained in its place due to an oversight. Izard, a judicial committee member reporting to eminent legal friends at home, apparently was copying verbatim the resolutions the committee had debated and passed. The relevant one as he copied it reads in pertinent part, with the semicolon again italicized:

> That the Circuit Courts have . . . original jurisdiction in Cases at Common Law, & in Equity, where the matter in dispute exceeds Three Hundred Dollars, & a State, or the United States, be a party; or where it exceeds Five Hundred Dollars, and a Foreigner, or Citizen of another State be a party . . . .

The handwritten draft bill as it emerged from the subcommittee reads at the relevant place in pertinent part, omitting language that has been struck through:

> [O]f all Suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of [500 written over 300] dollars and the United States are plaintiffs or petitioners; or a foreigner or citizen of another state than that in which the suit is brought is a party.

In the handwritten draft, above the language immediately following the semicolon, there appear the words "or a State is plaintiff or petitioner & the Suit is Against," which then have been struck out. Also struck out from the draft are an ampersand, four words, and a blank space directly after the semicolon: "& where it exceeds [blank] dollars." Another ampersand at the end of these last struck words has been changed to read "or," the "or" which immediately precedes "a foreigner or a citizen of another state."

tional amounts were added. The $2000 minimum amount in controversy limitation on the appeal of such cases to the Supreme Court was, curiously, severely restricted so as to apply only to cases appealed to the circuit courts from the district courts; as a result diversity and alienage cases originally brought in the circuit courts or removed there from state courts had only the $500 limitation on appeal.[259] The subcommittee already had removed eleventh amendment jurisdiction from the circuit court, where the original Senate resolution had placed it,[260] and had lodged it with the Supreme Court[261] because of the extremely controversial nature of that jurisdiction. Then it further clarified such jurisdiction by excepting from it (consistent with the language of article III, section 2) cases "between a state and its citizens."[262]

Three subcommittee additions each eliminated significant portions of article III jurisdiction, reserving yet more suits for state courts. First, section 14 restricted federal courts from awarding habeas corpus to prisoners in state or local jails; habeas could be awarded only to persons in jail "under or by colour of the authority of the United States";[263] thus federal habeas would not lie to a person imprisoned under state law or

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It seems that, at some late stage of drafting, the subcommittee decided to delete circuit court jurisdiction over states as plaintiff, allowing the whole of this sensitive eleventh amendment jurisdiction to reside in the Supreme Court, and it further decided to make the amount in controversy the same for all the kinds of circuit court jurisdiction mentioned in this place rather than have two different amounts. But in the making of these changes, the semicolon that Izard's letter shows that, from the adoption of this resolution, had separated United States and eleventh amendment jurisdiction, on the one hand, from alienage and diversity jurisdiction, on the other (where each of the two subsets had had its own amount in controversy), inadvertently was left in the section when the two subsets were merged. The error was never corrected, but there is no reason to believe that the subcommittee, the committee, the Senate, or the House ever meant from the semicolon's continued presence that alienage and diversity jurisdiction were not subjected to the $500 amount in controversy required by the compromise.

259. The relevant language of section 21 in the draft bill was as follows:

> And upon a like process, may final judgments and decrees in civil actions and suits in equity in a circuit court brought there by original process or removed there from courts of the several states, or if the matter in dispute exceeds the sum or value of (2000) dollars exclusive of costs, removed there by appeal from a district court; be re-examined and reversed or affirmed in the supreme court . . . .

Interestingly enough, this provision passed the Senate unscathed and was only changed back to the original understanding of the compromise by action of the House. *See infra* text accompanying notes 349-350.

260. Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *reprinted in* W. RITZ, *supra* note 3, at 206-07 (where the eleventh amendment jurisdiction of the circuit courts has already become limited to instances of states being plaintiffs); Letter from Ralph Izard to Edward Rutledge (Apr. 24, 1789) (Ralph Izard Papers, South Caroliniana Library, University of South Carolina), republished *infra* in Appendix 3.

261. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

262. *Id.* "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State." U.S. CONST. art. III, § 2.

263. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

authority.[264] Second, in response to criticism by opponents of the new judiciary, the circuit and district courts were denied jurisdiction over suits by those persons to whom bonds, notes, or other negotiable paper had been assigned "unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made" (the assignee clause).[265] This restriction would prevent the easy creation of diversity or alienage jurisdiction in debt cases. Third, in a startling breach of the general understanding that admiralty and maritime cases would be exclusively federal, to say nothing of article III's mandatory language that "the judicial Power *shall* extend . . . to *all* Cases of admiralty and maritime Jurisdiction,"[266] the subcommittee added what has become known as the saving to suitors clause, which excepted from exclusively federal admiralty and maritime jurisdiction certain actions by "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[267]

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264. This of course was not changed until the Habeas Corpus Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

265. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. For the opponents' critique that probably led to the insertion of the assignee clause, see *supra* note 181 and accompanying text. The assignee clause did not prevent the creation of diversity jurisdiction by other forms of assignment, notably the sale of title to land, and during debate the Senate cut back on it even further by excepting "foreign bills of exchange" from the clause's coverage. *See* Warren, *supra* note 203, at 80 & n.73.

Warren says that the assignee clause was added by the Senate after debate began on the bill, despite the presence of the clause in the printed bill, because it "was written on a separate slip of paper and pasted to the draft." *Id.* at 80. Warren makes the error of assuming that the bill that emerged from the subcommittee would not have been so sloppy as to have been sent to the committee with slips wafered on, so that all waferings must represent action taken during the Senate debate. He further ignores the fact that the Senate used a printed version in its deliberations, not the single handwritten draft that embodied the subcommittee's handiwork, *see* W. RITZ, *supra* note 3, at 9, 137-38 (describing Warren's false assumption), and the printed version clearly contains the assignee clause in section 11. He ignores the fact that the assignee clause also appears in the draft bill in a deleted section in a clerk's handwriting above section 26 (which became section 27 of the Senate bill). However, the language of this deleted section is very blotted and almost impossible to read today, so perhaps it was too blotted for Warren to have read correctly when he discovered the draft bill in the early 1920s. The wafered-on provision containing the assignee clause was probably Ellsworth's last-minute method of moving it from one place in the draft to another, before the bill was reported out to the full committee.

266. U. S. CONST. art. III, § 2 (emphasis added).

267. Section 10 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76.

The subcommittee also added puzzling language to section 21 of the draft bill that seemed to have the effect of denying the Supreme Court power to hear admiralty and maritime cases by writ of error. The handwritten draft originally read, "And upon a like process [writ of error], may final judgements and decrees in civil actions . . . in a circuit court . . . be re-examined and reversed or affirmed in the Supreme Court . . . ." Ellsworth added "suits in equity" after "civil actions" and the lengthy phrase "brought there by original proeess or removed there from courts of the several states, or if the matter in dispute exceeds the sum or value of 2000 dollars exclusive of costs, removed there by appeal from a district court," after "in a circuit court". These additions violated the resolution embodying the compromise that limited to a minimum of $2000 all diversity and alienage appeals to the Supreme Court, so the Senate rearranged the language by exchanging the last two clauses of

The subcommittee did not act completely contrary to the strong nationalism of its members, though, nor did it forget the needs of creditors, in particular the British creditors. These sentiments of the subcommittee were demonstrated in the draft bill in several ways, not the least of which were several provisions that gave (or might be construed to give) great power to federal judges. In three of these instances, the Senate after much debate changed the language of the subcommittee so as to place greater restrictions on the federal judiciary in debt cases.

Section 25 of the draft bill, the only section of the draft written in Caleb Strong's handwriting,[268] attempted to take the issue of damages (that is, interest) away from the jury and give it to the judge as chancellor in cases on covenants, bonds, or other evidences of debt under seal in which "forfeiture breach or nonperformance" was found by the jury.[269]

Ellsworth's addition, placing the amount-in-controversy limitation after the "removed there by appeal" language.

The preceding section (section 20 of the draft bill) allowed admiralty and maritime cases to go to the circuit court from the district court by "an appeal" rather than solely on writ of error, meaning, as Ritz astutely notes, that facts could be redetermined by a trial de novo in the circuit court. *See* W. RITZ, *supra* note 3, at 69. This is the only language in the Act that refers to review by appeal rather than by writ of error, and given the importance placed upon the latter and the fact that it is in a separate section, the language cannot have been unintentional.

However, admiralty and maritime actions were technically neither "civil actions" nor "suits in equity" as required by section 21 of the draft bill, so they were technically not eligible for writs of error to the Supreme Court. Ritz concludes that this result was intentional and the Senate intended that only one appeal be allowed in admiralty and maritime cases—from the district to the circuit court. The circuit court, after all, was staffed primarily by Supreme Court justices. *Id.* at 68-72.

I think, however, that the argument underlying Ritz's conclusion—that admiralty and maritime causes could not have been thought of as "civil actions"—presents too fine a distinction. It appears that Ellsworth was trying to prevent the use of writs of error in the minor kinds of civil jurisdiction in the district court, such as "alien tort" actions and revenue enforcement actions, which had been added to the draft during the work of the subcommittee and over which circuit courts were given writ-of-error appellate jurisdiction by the preceding sentence of section 21 of the draft bill. Although Ritz's careful search discloses no other instance in the Judiciary Act in which the word "action" refers to anything but "proceedings at law," *id.* at 95, he does admit that "[t]hese words—['causes,' 'suits,' and 'actions']—were extensively used in the eighteenth century," *id.* at 93. But sufficient research has not been done as to show whether they were used so precisely as to draw distinctions between different types of judicial proceedings. It seems that generally "suits" referred to equity proceedings, "actions" to proceedings at law, and "causes" to admiralty proceedings or criminal proceedings. *Id.* at 93, 94. He further says that " 'Cause' is the broadest term used in the Judiciary Act." *Id.* at 94. If there was no *precise* term for an admiralty or maritime proceeding, one might conceive of using the term "civil action" to refer to it, especially if one were as inventive as was Ellsworth. In fact as Chief Justice, Ellsworth construed the term "civil action" in section 21 of the draft, now become section 22, as including admiralty and maritime actions, against precisely the objection that no writ of error was therein provided for in admiralty cases. Wiscart v. d'Auchy, 3 U.S. (3 Dall.) 321, 328 (1796).

268. *See* Warren, *supra* note 203, at 50.

269. And be it further enacted, That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, where the forfeiture[,] breach[,] or non-performance shall be found by jury, by the default or confession of the defendant, or upon demurrer, the court before

Many British creditors would not have their war interest denied by juries[270] if this provision became law. The Senate, however, would not concur. "The Jury were the proper Chancellors in such a case to assess the damages," Maclay wrote in his diary, analogizing to the practice of chancery judges to "chancer" bonds—that is, to reduce the judgment on a bond from the forfeiture amount of double the debt to that of the actual debt.[271] "I liked them much better than the Judges, they were from the Vicinity and best Acq[u]ainted with the parties and their Circumstances," he continued in distinctly precapitalist language.[272] The Senate amended the provision to give the issue of damages back to the jury.[273]

Section 15, dealing with the required production of evidence, came from the subcommittee with a clause enabling a plaintiff upon motion to show "that he has by casualty, and without fault or negligence of his own been deprived of evidence necessary to support his action"; whereby the court could "require the defendant to disclose on oath his or her knowledge in the cause."[274] Many British creditors, despite their diligence, did not have the necessary evidence to prove their cases, either under strict rules of evidence on unsealed or "book" debts (requiring the testimony of long-gone clerks or agents), or because the books had been seized by marauding Patriots (a job done by law and local committee in North Carolina) or had become damaged by being hidden from marauders.[275]

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whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity.

Section 25 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 26, 1 Stat. 73, 87.

A suit on a bond or other sealed instrument was essentially a formality, since the instrument normally contained a liquidated damages or "forfeiture" amount twice the amount of the debt covered by the instrument and confessed judgment and consented to *ex parte* proceedings if the due date had passed. On such instruments, "[c]reditors used the judicial system and the sheriffs, not for the resolution of disputes or the determination of legal questions, but rather as a collection service for unpaid obligations." J. Waldrup, *supra* note 49, at 95.

270. *See supra* text accompanying note 89.

271. For the necessity of having to chancer a bond, *see supra* note 269. Note that common law courts often did not have the power to vary the amount due on a bond from the verdict as given by the jury. The original wording of section 25 would have given federal judges the power to render a judgment on a bond for "so much as is due according to equity." In the first American case (of which we have any knowledge) approving the jury's deduction of war interest on a British debt, the jury reputedly was charged that "they must consider themselves as Chancellors." Neale's Ex'rs v. Sands (N.Y. Sup. Ct. 1786) (unreported), *as summarized in* Letter from Phineas Bond to the Duke of Leeds, app. XIII (Nov. 10, 1789) (PRO/FO/4/7); *see supra* note 94.

272. MACLAY'S DIARY, *supra* note 215, at 97 (entry for July 2, 1789).

273. Warren, *supra* note 203, at 101.

274. Section 15 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82.

275. *See, e.g.,* Opinion letter of George Keith Taylor (Mar. 30, 1806), *contained in* Letter from Thomas Gordon to Gilbert Hamilton (May 22, 1806) (with regard to open or book debts, "proofs to substantiate the Debts at this late period *cannot* be procured"). Taylor, having served for a short while as a federal circuit judge, gave his opinion that:

Maclay objected to the provision because "extorting evidence from any Person was a species of Torture and inconsistent with the Spirit of freedom," and his constituents believed that "no *Person could be compelled to give Evidence against himself.*"[276] Surprisingly, perhaps, he was supported by Paterson and Strong, and after a long and heated debate lasting over two days, the whole clause was struck from the bill.[277]

Despite the resolutions and the compromise that talked of limiting the Supreme Court's appellate jurisdiction by writ of error,[278] a common-law procedure restricting the reviewing court to issues of law, Ellsworth (who apparently drafted the sections of the act dealing with Supreme Court review of lower courts) used a phrase unknown to the common law or to any other legal system so far as I know, "petition in error."[279] Although the reasons for this usage are unknown, Ellsworth may have intended to allow the Supreme Court to interpret the phrase, or to fashion practice using the "petition," in novel and unfettered ways. Other writs named in the draft bill, such as mandamus and habeas

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> [I]f the Clerks or other attendants on the store of the Company commencing an action are still alive, they must prove that the goods charged were delivered by them or in their presence or that the articles were charged in their hand writing or that of some other deceased Clerk or storekeeper with whose writing they were acquainted. Should all the Clerks and storekeepers be dead the proof of the handwriting of the individual by whom the Charge was entered on the day book and that he was clerk or storekeeper to the Company will be admitted.

(PRO/T/79/25, "Buchanan, Hastie & Co."); *see also* Memorial to the British Claims Commission of 1802 (May 31, 1804) (cannot recover in America due to the near total destruction of books and bonds that "was occasioned by their anxiety to preserve them from a Party of Men who went about the Country for the avowed Purpose of destroying them"), and undated Deposition of Sarah Yuille (stating under oath that the books had been buried to protect them; later her husband, the store agent, "had them taken up & found them in a ruined situation, very wet & a number of them entirely rotten & the ink erased") (PRO/T/79/2, "James Murdock & Co."); Memorial to the British-American Claims Commission of 1794 (Aug. 13, 1798) (the original books and the bonds were buried in an iron chest because of the merchants' haste to leave; by 1784 water had seeped in and "the books were so much injured as to be perfectly illegible, and the smaller papers totally destroyed") (PRO/T/79/2, "McCall, Dennistoun & Co."); Memorial to the British Claims Commission of 1802 (undated) [1806 from internal evidence] (debts had become unrecoverable because one local factor, in debt to the company, refused to give up the books of his two stores upon demand, and they were soon seized and carried off by unknown intruders; with regard to other stores, the October 1779 North Carolina Act appointing commissioners to seize confiscated property, which in North Carolina included debts owed to British merchants, resulted in the seizure of the books and papers necessary to prove the debts) (PRO/T/79/6, "Chas Reid & Co. (factor John Buchanan)").

276. MACLAY'S DIARY, *supra* note 215, at 91-92 (entry for June 29, 1789).

277. *Id.* at 91-93 (entries for June 29 and 30, 1789).

278. *See* Letter from Ralph Izard to Edward Rutledge (Apr. 24, 1789) (Ralph Izard Papers, South Caroliniana Library, University of South Carolina), republished *infra* in Appendix 3; *see also supra* text accompanying notes 227-28, 233-34.

279. Goebel makes the essentially wild claim that "petition in error" was "a method used to secure review by the House of Lords in England, and still the method of pursuing a supersedeas for review in Virginia." J. GOEBEL, *supra* note 3, at 478. Ritz demonstrates effectively that there was neither in 1789 nor today "any well-established distinctive judicial procedure known as 'petition in error.'" W. RITZ, *supra* note 3, at 67.

corpus, were known to the common law, and if those writs were peremptory and intrusive (such as the two just named), then they were required to be "agreeable to the principles and usages of law."[280] Even this supposedly restrictive language is broad and opaque enough to be relaxed considerably in practice since there were no "principles and usages of law" strictly applicable to the novel situation of the national court system in 1789, but at least limiting language was there for the other writs. It was totally absent from the phrase "petition in error." This door left ajar could be used by the Court to fashion a selective review of facts since a "petition in error" obviously was something different from a "writ of error." The Senate changed the phrase back to the compromise understanding, so that it read "writ of error."[281]

A fourth major battle pitted Ellsworth against the other advocates of a strong judiciary. This was the battle over federal equitable jurisdiction; courts of equity could reduce judgments because of equitable circumstances,[282] but they sat without juries and might also require the payment of interest where juries would not. Ellsworth, an opponent of equity, had restricted federal equity jurisdiction in section 16 of the draft bill, by language which required "[t]hat suits in equity shall not be sustained . . . in any case where remedy may be had by law."[283] When the clause came up on July 1, there was much argument against such a restriction led by Johnson of Connecticut, but upon the vote Maclay recorded that "the Clause stood on the Question."[284] Nevertheless, equity proved a contentious issue, and at some later point, "probably before July 11, the word 'complete' was inserted before 'remedy.' "[285] But, on July 11, the Senate changed its mind after more furious debate and deleted section 16.[286] Then, on July 13, Maclay asked Ellsworth "if he would not Join me in an attempt to regain the Clause, we had lost on Saturday."[287] Ellsworth moved a provision "nearly in the Words of the Clause we had lost,"[288] adding only "plain, adequate and" before "com-

280. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81 (habeas corpus); *accord, id.* § 13, at 81 (mandamus) ("in cases warranted by the principles and usages of law").

281. W. RITZ, *supra* note 3, at 68.

282. *See supra* note 271 and text accompanying notes 269-73.

283. Section 16 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82-83. Maclay said that Ellsworth "is generally for limiting the Chancery powers." MACLAY'S DIARY, *supra* note 215, at 104 (entry for July 9, 1789).

284. MACLAY'S DIARY, *supra* note 215, at 95-96 (entry for July 1, 1789).

285. W. RITZ, *supra* note 3, at 175-76, 177.

286. *Id.* at 176; MACLAY'S DIARY, *supra* note 215, at 106 (entry for July 11, 1789). The motion to delete was made by Paterson. Warren, *supra* note 203, at 96. In general, Warren misunderstood the sides in this battle, as Ritz explains. *See* W. RITZ, *supra* note 3, at 175-77.

287. MACLAY'S DIARY, *supra* note 215, at 107 (entry for July 13, 1789).

288. *Id.*

plete."[289] With Lee also in support, Maclay made a long peroration against federal chancery powers in judges. "[A]s the bill stood [without the section], Chancery was open to receive every thing," he argued;[290] "all actions may now be tryed in the federal Courts by the Judges, without the intervention of a Jury. The Tryal by Jury is considered as the Birth right of every american."[291] Upon this appeal to the strong sentiment in favor of jury trials, the Senate reinstated section 16 (as amended).[292]

In the meantime, the Senate had raised another important question concerning equity jurisdiction and debtor-creditor relations. The usual mode of presentation of evidence in equity was by deposition, but Ellsworth desired to eliminate this practice and had during the composition of section 16 of the draft bill twice added, then struck, language that would have required oral testimony in equity as at common law.[293] Similar language was then added to section 28 of the draft bill, where it appeared in the printed version of the subcommittee draft.[294] On July 9, apparently without deleting this language, the Senate voted to add (as Maclay saw it) "a Hasty kind of amendment . . . that in the Circuit Courts, under the name of equity they should have all the depositions copied, and sent up on an Appeal as Evidence to the Supreme Court, on the rehearsing of facts or Words to that import."[295] On July 10, Ellsworth, seconded by Strong, moved at Maclay's suggestion to reconsider this amendment. Maclay records himself as having argued: "[N]ow we see what Gentlemen would be at, it is to try Facts on civil law principles, without the aid of a Jury. . . . The question was put and we carried it."[296] As an ameliorative provision, Ellsworth proposed a new section requiring federal equity courts "to cause the facts on which they found their

289. W. RITZ, *supra* note 3, at 176.

290. MACLAY'S DIARY, *supra* note 215, at 107 (entry for July 13, 1789).

291. *Id.* at 109 (entry for July 13, 1789).

292. W. RITZ, *supra* note 3, at 177.

293. *See* 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1182 and opposing unnumbered page (1986) [hereinafter FIRST FEDERAL CONGRESS] (respectively giving the language Ellsworth added to section 16, the first try of which he crossed out, and exhibiting a photograph of this sheet of the draft bill showing Ellsworth's interlineations and crossings-out). The added language, "And the mode of receiving testimony in suits in equity & in ca[us]es of admiralty & maritime jurisdiction shall be the same . . . as in trials at common law, or as is herein after specially provided for", is not crossed out on the draft, but it should have been, since Ellsworth shifted this provision to section 28 of the draft bill, as is seen by the text accompanying the next footnote.

294. Section 28 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88.

295. This clause, which may have been a separate section, was deleted the next day, and no trace of it remains among the papers of the judiciary committee. The only evidence we have for it is in Maclay's diary. MACLAY'S DIARY, *supra* note 215, at 105 (entry for July 10, 1789).

296. *Id.* at 106 (entry for July 10, 1789).

. . . decree" to appear on the record.[297] On July 11 Paterson moved a substitute that would have required federal equity courts "to cause the evidence exhibited at the hearing to be reduced to writing"—thereby allowing the reviewing court to see all the evidence and providing a basis for reversal on the facts—but it failed. Then Johnson moved to substitute "evidences" for "facts" in Ellsworth's language, which also would have resulted in fattening the record with a verbatim transcript of the testimony, but this motion also failed and the Senate accepted Ellsworth's new section.[298] The Senate proved itself to be opposed to judges sitting without juries and trying or reviewing factual determinations, precisely the position taken by the pro-debtor forces during the ratification struggle. To underline this position, the Senate added to section 21 of the draft bill that no reversal could occur in either circuit or Supreme Court "for any error in fact."[299]

Other, more minor restrictions were also written into the bill by the Senate. In diversity cases, under the subcommittee draft, neither party had to be a citizen of the state where the case was brought. The Senate limited diversity jurisdiction to instances in which one of the parties was "a citizen of the State where the suit is brought."[300] Although, pursuant to the compromise, Supreme Court appellate jurisdiction over state court

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297. Judiciary Act of 1789, ch. 20, § 19, 1 Stat. 73, 83.

298. Warren, *supra* note 203, at 97-99. Maclay reported that, after the heated July 11 debate,

> [a]s we came down the Stairs Docr. Johnson was by my side. Doctor (said I) I wish you would leave off, using these side Winds, and boldly at once bring in a Clause for deciding all Causes on civil law principles without the aid of a Jury. No No said he the Civil law is a name I am not very fond of. I reply'd, you need not care about the name, since you have got the thing.

MACLAY'S DIARY, *supra* note 215, at 106 (entry for July 11, 1789).

299. Section 21 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84-85.

300. *Id.* § 11, at 78 (original jurisdiction); *id.* § 13, at 79 (removal jurisdiction); Warren, *supra* note 203, at 79, 90-91. This change can be seen by comparing the portions of Section 11 of the printed bill, and of the final Act, *supra* note 255.

Alienage jurisdiction was not similarly limited so as to prevent suits in which aliens were parties on both sides. Warren, *supra* note 203, at 79, is wrong in reading the Constitution to require that aliens be restricted to one side of a controversy, or as requiring anything more than "minimal alienage," where one of the parties to a suit is an alien and an opposing party is a state or a citizen of the United States. The Constitution says simply: "judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2.

However, the language of the Act, as passed, permitted cases in which neither party in an alienage case was required to be a state or a United States citizen, so it did go too far: "[T]he circuit courts shall have original cognizance . . . of all suits . . . where . . . a foreigner . . . is a party." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; *accord, id.* § 12, at 79 (removal).

Warren also misreads the draft bill when he avers that at one point it confined alienage and diversity to instances where the alien or the citizen of another state was defendant. Warren, *supra* note 203, at 78 n.67. No such restriction appears in any extant version of the bill—given the reasons for these jurisdictions, it would have been absurd to limit them to instances where the diverse party

decisions in federal question cases already was limited to the federal questions, the Senate restricted it still further to errors appearing "on the face of the record."[301]

The outcry from opponents of the Constitution about the failure of the Convention to restrict criminal trials and jurors to the "vicinage" or neighborhood where the crime was committed was voiced in an amendment proposed by Lee and Grayson of Virginia to section 27 of the draft bill, dealing with jury selection. The amendment would have restricted the venire of juries in capital cases to the county wherein the crime occurred. It was rejected twice, on July 9 and again on July 13, but after the House accepted such a provision on September 14 the Senate concurred in the amendment.[302] And in section 31 of the draft bill the subcommittee included a clause permitting federal judges, on their own knowledge or on the complaint of others, to examine and jail or bail "any person . . . for any offence against the laws of the United States."[303] Maclay and Lee vigorously opposed this inquisitorial provision, which was supported by Strong and Ellsworth. Maclay records a loss in this fight, but the clause was eventually expunged.[304]

Not all of the expansive provisions of the draft bill were limited by the Senate, and not all of the changes made by the Senate were restrictive. A dramatic exception to the concern for jury trials was the subcommittee's placement of the judicial enforcement of revenue laws on the high seas within the jury-less admiralty and maritime jurisdiction. This exception went further even than the laws of England. Not only did the Senate not object (at least to the point of altering the provision), it added "seizures on land" or on waters within domestic rather than international jurisdiction, plus "all suits for penalties and forfeitures incurred, under the laws of the United States," to the jurisdiction of the district courts (although juries would sit in those suits).[305]

Another minor but revealing failure to restrict the power of the judges was the inability of some Senators to keep circuit-riding Justices from voting on appeals of their own decisions. On July 7, Grayson, Ma-

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or alien were defendant—and this error probably derives from Warren's inability to decipher correctly the many changes made in this portion of the draft bill.

301. Section 24 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85; Warren, *supra* note 203, at 104-05.

302. Warren, *supra* note 203, at 106; *see infra* text accompanying note 351.

303. This language is found only in Section 31 of the draft bill; *see* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91-92.

304. MACLAY'S DIARY, *supra* note 215, at 99-100 (entry for July 3, 1789); Warren, *supra* note 203, at 107-08.

305. Section 10 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 9, 1 Stat 73, 76; *see also* Warren, *supra* note 203, at 74-75.

clay, and others succeeded in adding language to section 4 prohibiting the district judges from voting in the circuits on their own appeals. Maclay wrote in his diary that it "was agreed to" that "the Effect of this determination . . . would prevent, the Circuit Judge, from sit[t]ing in the Supreme Court on an appeal When he had given original Judgt,"[306] but such a restriction on the powers of the Supreme Court justices appears nowhere in the final act, and Warren notes that the two written motions contained in the record to amend the act in this way are both marked failed.[307]

The subcommittee draft restricted to defendants the power of removal of actions involving citizens of the same state concerning title to land granted by more than one state. The Senate, in what Warren calls "a very great amendment," allowed removal by either party.[308] The action does not seem very expansive of federal jurisdiction, since in such a suit each party claimant is equally entitled to a federal court, and it would not be extraordinary for the person claiming under an out-of-state grant to be plaintiff in the action. This head of jurisdiction was universally accepted during the ratification debates.

Perhaps the most startling bit of expansiveness by Senate action lay in the treatment of federal criminal jurisdiction. The draft bill gave to the district and circuit courts exclusive "cognizance of all crimes and offences cognizable under the authority of the United States, and defined by the laws of the same."[309] During debate the Senate deleted the clause, "and defined by the laws of the same," which confined federal criminal jurisdiction to those acts positively outlawed by legislation, and thus left the courts with a potentially quite expansive common-law criminal jurisdiction.[310] This action becomes less surprising when we recognize that, as Ritz has pointed out at great length,[311] it was probably meant as a temporary and stop-gap measure. The crimes committee, consisting of each Senator not on the judiciary committee, had been empowered to produce a bill "defining the crimes and offenses" of the United States, but it was unable to create a comprehensive list of the definitions of federal crimes, and it eventually reported a bill providing only for criminal punishments. Even this bill did not pass during the first session of the First Congress, but rather was put over until the second session pending study of state criminal laws. Of the three crimes created by legislation of the

306. MACLAY'S DIARY, *supra* note 215, at 103 (entry for July 7, 1789).

307. Warren, *supra* note 203, at 95 & n.101.

308. *Id.* at 92.

309. Sections 10 and 11 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-79.

310. Warren, *supra* note 203, at 73, 77.

311. W. RITZ, *supra* note 3, at 18-19, 111-25.

first session of the First Congress,[312] two were specifically defined but one (perjury) apparently was left for common-law definition by the federal courts. Nevertheless, as Ritz puts it, "extensive provision[s]" were made by the First Congress in 1789 for the "prosecution [of these] crimes and offenses."[313] There would have been a good deal of interchange amongst the Senators on the judicial and crimes committees, and it is likely (as Ritz concludes[314]) that the deletions of the "defined by the laws" language from the judicial bill were made in anticipation of Congress's failure to pass a crimes bill in the first session so that the courts would be able to protect the nation and the populace until such a bill might pass. Criminal common law was not only not unthinkable in 1789, in that prepositivist era it was quite a familiar phenomenon. Even though the deletions were not intended as a very expansive maneuver, the implication is earthshaking. No matter how little common-law jurisdiction Congress may have expected the federal courts to exercise as a stop-gap measure, there seemed to be no doubt that the federal courts, and thus the federal government, could exercise such a power.

Section 34, added to the bill at an unknown but probably quite late time (probably by the subcommittee upon recommittal of the bill on July 13)[315], has been long thought to be a general choice-of-law command for federal courts to apply state law of the state where the federal court is located, in diversity cases and other instances in which federal law does not apply by command of Constitution, statute, or treaty. Ritz argues cogently that section 34 was probably a direction that the federal courts refuse to apply a British common law of crimes, but rather to construct (when defining federal crimes until Congress could pass a crimes act) a more republican, more American, common law of crimes as one of the "laws of the United States."[316]

One of the many evidences supporting Ritz is that the subcommittee originally proposed without apparent qualm that the federal judicial dis-

312. *Id.* at 114.

313. *Id.*

314. *Id.* at 146, 148.

315. Senator Wingate of the judicial committee reported home on July 11 that the "judicial bill has had three readings in the Senate and is now to be committed in order to make some little alterations and amendments and then it will be ready to go to the other house." Letter from Paine Wingate to Timothy Pickering (July 11, 1789), *reprinted in* 2 C. WINGATE, LIFE AND LETTERS OF PAINE WINGATE 318 (1930). On July 17, the judicial committee "corrected" the subcommittee's work, and later that day the Senate debated and passed the bill. MACLAY'S DIARY, *supra* note 215, at 116 (entry for July 17, 1789). Ritz argues convincingly that Section 34 was probably one of those "little alterations and amendments" added to the bill duriug this time. W. RITZ, *supra* note 3, at 128-31.

316. W. RITZ, *supra* note 3, at 98-148 *et passim.* The quote is from U.S. CONST. art. III, § 2.

trict of New Hampshire include Maine, then a part of Massachusetts.[317] After the President of New Hampshire indignantly protested this apparent mark that New Hampshire was "inferior to any other state in the Union,"[318] and after George Nicholas of Kentucky (then a part of Virginia) wrote to James Madison that if Kentucky did not receive a district court of its own under the judicial bill "Kentuckey will renounce the government within three months from the time she gets the information,"[319] the Senate split Massachusetts and Virginia into two districts each, although Maine and Kentucky were not made part of the circuit system.[320] Congress was clearly not thinking in terms of national courts having to apply the law of each discrete state if it could imagine placing two states into the same judicial district.

E. *Expansiveness in Sections 13 and 14*

The subcommittee also drafted expansive language, in two interlocking provisions which the Senate accepted without amendment, that potentially embodied the open-ended, strongly centralizing, omnivorous jurisdiction that the opponents of the Constitution feared. Many of the Constitution's supporters (including many in the Senate, who voted for one or more of the restrictions just detailed) were suspicious of expansive jurisdiction, but Ellsworth, Strong, Paterson, and many other proponents of the Constitution desired that the federal judiciary be perceived as powerful in a strong, open-ended sense.

The most expansive and open-ended language emanating from the subcommittee was contained in section 14, which has come to be known as the "all-writs" provision. It gave United States judges the power to issue habeas corpus, "and *all other writs* not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[321] Courts within the common-law tradition used such writs for administrative purposes, mostly the accomplishment of minor details, and such is the import of the limiting language, "exercise of their respective jurisdictions" and "agreeable to the principles and usages of law." But the writs also could be used to deal with matters of great moment, since they were broad and relatively open-ended.

317. *See* Section 2 of the draft bill, *as amended,* Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73.

318. Letter from John Pickering to Paine Wingate (July 1, 1789) (Emmet Collection, Rare Books and Manuscripts Division, New York Public Library, Astor, Lenox and Tilden Foundations).

319. Letter from George Nicholas to James Madison (May 8, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 138.

320. *See* Judiciary Act of 1789, ch. 20, §§ 2, 4, 10, 12, 1 Stat. 73, 73-79.

321. *Id.* § 14, at 81 (emphasis added).

There were some apparent limits to this broad power. Language in the same section restricted federal habeas corpus for jailed persons to those jailed under federal authority, as we have seen,[322] and section 13 seemed to limit the issuance of writs of prohibition to district judges sitting in admiralty and maritime cases and to limit writs of mandamus "in cases warranted by the principles and usages of law" to "courts appointed, or persons holding office, under the authority of the United States."[323]

"All other" common-law "writs" included more than prohibition and mandamus, however. One of the most powerful was the peremptory writ of certiorari, which a superior court could use to draw to it the record and parties of any case in any inferior court that lacked jurisdiction or was biased or incompetent.[324] Another powerful and intrusive writ that could have been found by a federal court to be included under the "all-writs" language was the writ of injunction, which could prevent a state court from taking a certain case or from exercising its power in some other way. The phrase "necessary for the exercise of their . . . jurisdictions" could easily become expansive in the hands of a federal judge wishing to protect what he thought was his constitutional power. Further, no one could predict what might lie hidden in the phrase "agreeable to the principles and usages of law" in the completely novel situation of a national judiciary and the strange federal arrangement of one-government-made-from-many. Section 14 thus could be a tool for the destruction of all the careful limitations in the other sections, should a federal court be so minded.

A second possibility for expansion lay deeply hidden in the wording of section 13, the only section dealing with the jurisdiction of the Supreme Court, and the concomitant wording of the other sections of the draft and the Act. The Constitution specifies that the "judicial Power of the United States, shall be vested in one supreme Court" and that "the supreme Court shall have original jurisdiction" in two specified instances (including "those in which a State shall be a party"); in "all the other Cases before mentioned [the other types of jurisdiction, such as diversity and federal question jurisdiction], the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."[325] This language can be, and usually is, read as directly creating the Supreme Court and as directly vesting its original jurisdiction therein. However, while the appellate jurisdiction of the

322. *See supra* text accompanying notes 263-64.

323. Judiciary Act of 1789, ch. 20, § 13, 1 Stat 73, 80.

324. *See* Holt & Perry, *supra* note 123, at 102-03 & nn.40, 41.

325. U.S. CONST. art. III., §§ 1, 2.

Court is also considered to be directly vested by the Constitution, the "exceptions and regulations" clause has given rise to two conflicting theories of the nature of this kind of direct vesting. One theory is that, by using its power to "except," Congress can take away any kind of jurisdiction that is not original in the Supreme Court, not only *from* the Supreme Court, but from all federal courts. This is the usual reading, deriving from Chief Justice Marshall's strained construction of the Constitition and the Judiciary Act in *Durousseau v. United States.*[326]

To my mind a less strained reading of article 3, one which places great emphasis on the "shalls," on the separation of powers, and on the suspicion of state courts which as we have seen was the primary impetus for national court jurisdiction, is that the "exceptions and regulations" of Congress may eliminate only the appellate aspect of the Supreme Court's jurisdiction, leaving it with original jurisdiction in the instances excepted. An intermediate position of this reading is that, though Congress can "except" jurisdiction from the federal court system, it must do so explicitly, by overt negative words. At the heart of this view is that federal jurisdiction inheres in the federal courts by virtue of the Constitution.

The Constitution nowhere expressly gives Congress the power to decide whether any portions of the "judicial Power" enumerated in article III, section 2 might *not* be exercised by the federal courts. In two places Congess is given the power to erect lower federal courts,[327] but the power to create courts does not necessarily carry with it the power to grant or withhold jurisdiction from them. To the contrary, the Constitution plainly says that the "judicial Power of the United States, *shall* be vested" in the federal courts, and that it "*shall* extend to" the heads of jurisdiction enumerated in article III, section 2.[328] One conld easily conclude that the entire "judicial Power" of the United States must reside either in the Supreme Court, or, if Congress chooses to create lower federal courts, in all federal courts together.[329]

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326. 10 U.S. (6 Cranch) 307, 314-15 (1810).

327. U.S. CONST. art. I, § 8 ("To constitute Tribunals inferior to the supreme Court"); *id.* art. III, § 1 (". . . such inferior Courts as the Congress may from time to time ordain and establish").

328. U.S. CONST. art. III, §§ 1, 2 (emphasis added).

329. On August 27, the Convention rejected explicit language that could have been interpreted to give Congress the power to control and restrict national court jurisdiction, 2 FEDERAL CONVENTION RECORDS, *supra* note 134, at 431; it refused to insert at an unspecified location in article III the language "[i]n all the other cases before mentioned the Judicial power shall be exercised in such a manner as the Legislature shall direct," then unanimously voted to delete the following language from the end of what became article III, section 2: "The Legislature may assigu any part of the jurisdiction above mentioned . . . in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." *Id.* (language from 2 *id.*

The reading of the judiciary portion of the Constitution given in the previous paragraphs seems more consistent with the actual language than any other interpretation, especially the prevalent reading today that Congress has something just short of plenary power to alter (and even to delete parts of) the jurisdiction of the national courts.[330] The "plenary power" reading is theoretically more democratic, since Congress is the elected branch. But this "plenary power" reading seems strangely inconsistent with the desires and beliefs of the members of a Constitutional Convention distrustful of the popular democracy then being exhibited in many of the states; these were men more interested in credit and development than in extending the franchise, empowering the powerless, or terminating slavery. And given this reading of the Constitution, most of the Judiciary Act of 1789 was unconstitutional in the modern sense of thinking of its seemingly mandatory language (all those "shalls") as *actually* mandatory. Fortunately, most of the Framers were not positivists.[331]

The draft bill and Act can be read with minimal distortion as consistent with the second reading of the judiciary portions of the Constitution proposed above, although this reading or theory is not widely held to-

186-87). The meaning of these votes is unclear, but they may indicate a consensus in the Convention for mandatory jurisdiction.

330. That these points were moot and by no means settled is demonstrated by the need felt by a particularly astute member of the First Congress to explain at length the theory of congressional power over the national courts, jurisdiction which today is almost unquestioned in its orthodoxy:

> The Judicial powers of the General Government are defined in the Constitution but those powers will remaiu a dead letter unless Congress shall establish [ac]ts to carry them into effect. This they may do either [in wh]ole or in part. They may distribute the exercise [of th]ose powers among such inferior Courts as they [choo]se to establish. [H]aving established District [& Circ]uit Courts & assigned to each their respective Jurisdictions they canuot by construction extend their Jurisdiction to omitted Cases. These must remain in their original State 'till Congress by a Legislative act shall constitute a Court with power to take [cognizance] of them or extend the powers of the Court[s] already constituted.

Letter from John Brown to Harry Innes (June 18, 1790) (Harry Innes Papers, Library of Congress) (partially mutilated portions restored). The apparently unproblematic acceptance by Congress of federal criminal common-law jurisdiction, *see supra* text accompanying notes 309-16, is another indication of the inability of eighteenth century contemporaries fully to grasp what was entailed in a uotion of courts of limited jurisdiction.

331. Legal positivists see law entirely as a consciously produced human artifact, as morally relative or even neutral, and as completely malleable by those in power. Thus, to most positivists, law is what the sovereign dictates, and the various ways people act to order their own social and economic behavior should be called something else such as "custom," whereas questions of right and wrong must be put iuto still other supposedly disjoined conceptual boxes called "morality" and "ethics." Profound certainties underlie positivist thinking, including (a) words have sharp and clear meanings; (b) a power hierarchy is a normal, inescapable, and good part of human social existence; (c) causes are always distinct from and prior to effects, and certain effects always flow from certain causes; (d) legislators have those meanings in mind and intend to exercise that power by requiring those specific actions or consequences by their dictates, in order to cause desired effects. To a positivist, a "shall" in law or the Constitution is intended to be mandatory, and to limit the actions of humans in a precise and predictable way. *See generally* Millon, *supra* note 176.

day[332] and may be, in fact, anathema.[333] Section 1 of the draft is consistent with such a theory; it does not purport to create or establish the Supreme Court, but only to specify the number of its judges and the frequency and timing of sessions.[334] Importantly, section 13 is also quite consistent with such a reading, since it purports only to regulate the jurisdiction of *other* courts, not to limit the appellate jurisdiction of the Supreme Court.[335] Only one clause of the entire draft bill or Act—the habeas corpus restriction in section 14—is phrased in absolute negative terms and can be said absolutely to deny jurisdiction to all federal courts.[336] All other restrictions are phrased positively or in such a fashion as to allow section 14 to be construed as an exception to them. This positive phrasing is just as "Exceptions" and "Regulations" should be phrased, allowing the reader of the bill and Act to imagine it to be possible that all the residual jurisdiction "vested" by the two "shalls" in article III in the Supreme Court is still there.

It follows from this generous construction of the Constitution, and a correspondingly generous canon of construction of the judicial bill, that the remainder of the Judiciary Act, especially including sections 9, 11, 12, and 25, consists merely of "Exceptions" and "Regulations" and should not be read as grants of power as they usually are regarded today. Any sort of case falling outside the jurisdiction of the lower federal courts as explicitly mentioned in sections 9, 11, and 12, or the Supreme Court, as explicitly mentioned in the writ-of-error "Regulation" of sec-

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332. It has recently been advanced in Clinton, *supra* note 3.

333. Note how quickly, effortlessly, and without explanation the gurus of the usual reading of the Constitution dismiss the best modern exposition of this reading. *See* P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 385-86 (3d ed. 1988)[hereinafter HART & WECHSLER] (dealing with Clinton, *supra* note 3).

334. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

335. In two instances, section 13 disavows that "original" jurisdiction automatically means "exclusive" jurisdiction. I think this reading is consistent with the theory stated in the text, though reasonable persons have taken the opposite view. Also, the last sentence of section 13 purports to empower the Court to issue writs of prohibition and mandamus; this can be read also as a regulation of appellate rather than a limitation of original jurisdiction, or these writs can be viewed as procedural and regulatory rather than as types of the exercise of jurisdiction. I imagine the latter view would have been that of eighteenth-century contemporaries of the Act. I agree with Warren that "Section 13 and the Constitution are in accord." Warren, *supra* note 203, at 93 n.98.

336. *See supra* text accompanying notes 263-64. Two other provisions appear to be denials of jurisdiction, but the assignee clause, *see supra* text accompanying note 265, only purported to restrict district or circuit courts (not the Supreme Court), and the limitations on Supreme Court jurisdiction under section 24 of the draft (which became the famous section 25 of the Act), *see supra* text accompanying note 301, could be gotten around by appellate review via a writ of certiorari under section 14. All of the other "restrictions" on jurisdiction that have been referred to in this essay are phrased positively rather than negatively, and all can equally be gotten around through use of one or more of the peremptory writs expressly authorized by section 14, particularly writs of certiorari. Casto's refutation of Clinton, Casto, *supra* note 3, fails to recognize either the careful use of positive language throughout the Judiciary Act or the potential import of section 14.

tion 25, but within one of the heads of jurisdiction in article III, section 1, would *still* be subject to the appellate power of the Supreme Court, exercisable through any ordinary or extraordinary procedure the Court considered necessary (such as a writ of certiorari or a writ of injunction under section 14, as previously discussed), or at least subject to the original jurisdiction of the Supreme Court.

A court favoring a generous, nationalizing construction of the Constitution could have construed these two expansive provisions, sections 13 and 14, to have eaten up any or all of the apparent restrictions the Senate had argued about for months.

It is fruitless to speculate about the degree to which these possible loopholes were placed there by conscious design by the proponents of a strong judiciary.[337] Class is primarily a group phenomenon, not primarily an individual one, and class analysis posits the contrary of the overly deterministic notion central to capitalist thought that each individual somehow is programmed by social and economic circumstances to act only in a certain way.[338] The bill and the Act were, as has been amply demonstrated, the result of the direct collision of two contrary sets of expectations about the nature of the national government and of the national judiciary. It is not surprising that provisions representing each of these two sets of expectations found their way into the final product.

Given the strongly nationalizing desires and beliefs of the subcommittee that drafted the bill, it is not surprising that strongly nationalizing language and provisions exist in the draft. This nationalist language was not intruded via a conspiracy, however. A successful conspiracy would have been politically impossible because Lee, Maclay, and the other opponents of a strongly centralizing judiciary were too shrewd and too cognizant of the dangers. As we have seen, they did ferret out several suspicious (but more specific) provisions. Further, it was impossible for Ellsworth and his nationalist colleagues to have anticipated all the detailed questions, to have presented solutions for them, and then to have concealed those devices.

The politics of ambiguity is normal when coalitions are made and compromises are negotiated. One searches for evocative language into which different people can read their different hopes and expectations. People live not in the abstract—not in reflective equilibrium—but rather in constant activity and turmoil, and despite our abilities all of us have limited vision—hindsight is always much better. In the heat of the mo-

337. I am deeply indebted to L.H. LaRue for his help in thinking through the issues in this and the following three paragraphs of text.

338. For elaboration, see Appendix 2.

ment, we do not notice everything we might be expected to notice. In addition, self-deception is a more frequent human phenomenon than is deception, especially in groups of great people, and Ellsworth and Lee both worked very hard to achieve a workable solution to the puzzle of the judiciary, thus becoming prime candidates for self-deception. Ellsworth's arguments during the debates over the equity powers of the courts show him to have been more "localist" than he knew, whereas Lee's happiness with the end product demonstrated that he was a greater nationalist than he believed.[339] Finally, and realistically, the bill and the Act did contain many provisions that looked like, and were drafted and adopted to look like, real restrictions. Section 14 itself contained what looked like real restrictions. The open-ended possibilities in sections 13 and 14 have to be searched for diligently.

When all is said and done, however, my arguments about the generous and open-ended language of the bill, the Act, and the Constitution remain only abstract structural arguments, only possibilities of interpretation allowed by the open-endedness of language in general and of the language used. A word, the law, and history are all alike in this regard. Numerous possibilities result from the fact that life is full of collisions—that is, the possible constructions of language are caused by politics, they are always to be filled in by politics, and they are in fact always filled in by politics. They were in this instance filled in by politics, although that is a tale told in another place.[340] A collision of expectations produced a compromise product, with typical Janus-like provisions that looked in each direction. The lack of clarity of language and intent is not opaque, but suggestive—not fatal, but life-giving. More need not be said.

F. *The Judiciary and the Bill of Rights*

The judiciary bill's passage through Congress significantly blunted the momentum of the drive to amend the Constitution. True to his pledge to his constituents and to his understanding of the strength of the Constitution's opponents, Madison worked tirelessly during the First Congress for amendments that would satisfy some of those opponents without crippling the new government. As a congressional proponent of the Constitution put it early in the First Congress: "All reasonable & proper amendments will be obtained, those tending to jar the foundations

339. Maclay judged that Lee had been too supportive of a bill he himself considered "Vile" and "calculated for Expence," before the final vote. When Lee joined Maclay to vote against it, Maclay wryly commented: "[H]ad Mr. Lee joined in my Objections against it at an early period, perhaps we might have now had it, in better form." MACLAY'S DIARY, *supra* note 215, at 116 (entry for July 17, 1789).

340. *See* Holt & Perry, *supra* note 123.

of united government will be discarded."[341] Those foundations would be jarred, proponents believed, if the jurisdiction and power of the national court system were to be limited as proposed by the amendments from Virginia and some of the other states. As Lee put it in a letter to Patrick Henry: "I think, from what I hear and see, that many of our amendments will not succeed, but my hopes are strong that such as may effectually secure civil liberty will not be refused."[342]

Despite sentiment from some proponents of the Constitution that it would be reasonable to have "an abridgment of the Jurisdiction of the federal court in a few instances, and some fixed regulations respecting appeals" as well as "the trial by jury being expressly secured . . . in all cases,"[343] Madison's timidity in walking the tightrope between proponents and opponents of a strong role for the judiciary, combined with his basic pro-creditor viewpoint, resulted in proposals that would impede the Constitution's empowerment of the judiciary in only three primary ways: He proposed 1) to guarantee trial by jury, 2) to prevent the reexamination of jury-found facts, and 3) an amount-in-controversy limitation on appeals to the Supreme Court.[344] Since these proposals were not made

341. Letter from Richard Bland Lee to Leven Powell (Mar. 29, 1789) (Leven Powell Papers, Library of Congress); *accord, e.g.,* Letter from Paine Wingate to Timothy Pickering (Mar. 25, 1789) (Pickering Papers, Massachusetts Historical Society); Letter from James Madison to Thomas Jefferson (May 27, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 186 ("A Bill of rights . . . with a few other alterations most called for by the opponents of the Government and least objectionable to its friends"); Letter from Madison to Jefferson (June 13, 1789) (has introduced amendments "most likely to pass thro' 2/3 of that Hs. & of the Senate & ¾ of the States"), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 218; Letter from James Madison to Edmund Randolph (June 15, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 219 ("limited to points which are important in the eyes of many and can be objectionable in those of none. The structure & stamina of the Govt. are as little touched as possible.").

342. Letter from Richard Henry Lee to Patrick Henry (May 28, 1789), *reprinted in* 2 LEE LETTERS, *supra* note 219, at 487. Lee's colleague William Grayson wrote to Henry:

> Some gentlemen here from motives of policy have it in contemplation to affect amendments which will affect personal liberty alone, leaving the great points of the Jud[iciar]y & direct taxation &c. to stand as they are; their object is in my opinion unquestionably to break the spirit of the party by divisions . . . .

Letter from William Grayson to Patrick Henry (June 12, 1789) (George Meissner Collection, Washington University, St. Louis).

343. Letter from William R. Davie to James Madison (June 10, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 211.

344. With regard to trial by jury, Madison proposed two provisions: criminal ("The trial of all crimes . . . shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . .") and civil ("In suits at common law between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate."). With respect to the jurisdiction of the Supreme Court, he proposed to add the following: "[B]ut no appeal to such court shall be allowed where the value in controversy shall not amount to [blank] dollars: nor shall any fact triable by a jury, according to the course of common law, be otherwise reexaminable than may consist with the principles of common law." 4 FIRST FEDERAL CONGRESS, *supra* note 293, at 11.

until June 8, it is clear that the Senate's early compromises on the judicial bill had eliminated the need to put forward other restrictions on the national judicial power.[345] And when the amendments were considered in the Senate, the amount-in-controversy limitation was eliminated precisely on the ground that the judicial bill already had taken care of the problem.[346]

Except for a guarantee of jury trials and a prohibition on the review of jury-found facts—both of which reflected concern for debtors, especially in British debt cases—the compromises that Ellsworth, Lee, and the other senators adopted in April and May and wrote into the Judiciary Act prevented any constitutional amendment reducing or restricting the jurisdiction of the national courts.[347] Because the Act left almost untouched the great potential that could be read into the vague language of article III, this was a distinct victory for the proponents of the Constitution, the most important and perhaps the only major victory they achieved on the national judiciary in the first session of the First Congress.

G. *House Debate, Passage and Reactions to the Judiciary Act*

A House exhausted by the summer heat and by the difficulty of energizing the new government debated the judicial bill at length in September, but made only two noteworthy (and restrictive) if relatively

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The House committee filled the blank in with "one thousand." On August 17, the House defeated attempts both to strike out the entire jurisdictional amount provision and to raise the dollar amount to three thousand dollars. The committee report also required criminal juries to be composed of freeholders, but this was struck out by the House; and the civil law jury trial was strengthened to read: "In suits at common law the right of jury trial shall be preserved." 4 *id.* at 29-30 & nn.25, 26, & 29. The House collated Madison's various proposals into seventeen separate amendments, of which the criminal jury provisions were in the 10th, the civil jury provisions in the 12th, and the amount-in-controversy and no-review-of-jury-facts provisions were in the 11th. 4 *id.* at 35-39. The Senate eliminated the 10th and 11th amendments, but inserted the no-review-of-jury-facts provision from the 11th into the 12th. A twenty-dollar minimum was also added to the 12th. After other deletions, 12 renumbered amendments remained. 4 *id.* at 43-45. The House insisted upon an impartial jury of the "district wherein the crime shall have been committed," and ordered this inserted into what became the 6th Amendment, to which the Senate concurred. 4 *id.* at 48.

345. *See* Warren, *supra* note 203, at 114-15.

346. Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 402 ("The Senate have sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles. . . . A fear of inconvenience to a constitutional bar to appeals below a certain value, and a confidence that such a limitation is not *necessary*, have had the same effect on another article."); Letter from Madison to Pendleton (Sept. 23, 1789), *reprinted in* 12 *id.* at 418 ("It will be impossible I find to prevail on the Senate to concur in the limitation on the *value* of appeals to the Supreme Court, which they say is unnecessary, and might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount.").

347. *Accord,* W. RITZ, *supra* note 3, at 5, 7, 19-21.

minor alterations.[348] The $2000 amount-in-controversy limitation on appeals from the circuit courts to the Supreme Court was expanded so as to apply to diversity and alienage cases.[349] This change would eliminate the possibility of many poor and middling persons being dragged to the seat of the Court to face appeals in British debt cases and other creditor litigation, and it perhaps coincidentally restored a term of the original Senate compromise which had been lost due to Senate subcommittee drafting.[350] On September 14, what was now section 29 was twice amended, to include the principle of vicinage (juries drawn from the locality of the crime) in capital cases, and to require that federal juries be selected "by lot or otherwise" according to state law, to the extent "practicable by the Courts or Marshals."[351] These requirements tended to satisfy grievances strongly expressed by opponents of the Constitution. As in the Senate, however, attempts to achieve more radical demands of those opponents were failures—such as the attempted elimination of non-admiralty lower federal courts.[352]

An equally exhausted Senate quickly concurred with the essence of the House bill, and on September 24 President Washington signed the bill into law.[353] Congressional sentiment held, in the words of Congressman Fisher Ames, that it was "an experimental law, . . . [passed] in the confidence that a short experience will make manifest the proper alterations."[354] James Madison saw the Act as "defective both in its general

348. Most observers agreed with Congressman Benjamin Goodhue that "no material alterations" had been made in "the Judicial bill . . . as it came from the Senate." Letter from Benjamin Goodhue to [Insurance Officers] (Sept. 13, 1789) (Goodhue Papers, New York Library Society); *accord, e.g.*, Letter from Thomas Hartley to Tench Coxe (Sept. 13, 1789) (Tench Coxe Papers, Historical Society of Pennsylvania); Letter from Paine Wingate to John Langdon (Sept. 17, 1789); *reprinted in* 2 C. WINGATE, *supra* note 315, at 334; Letter from Rufus King to Caleb Strong (Sept. 20, 1789) (Thompson Papers, Hartford Seminary).

349. Section 22 of the Act reads, in relevant part: "[U]pon a like Process, may final judgments and decrees in civil Actions and suits in equity in a circuit Court brought there by original process or removed there from courts of the several states, or removed there by appeal a district court where the matter in dispute exceeds the sum or value of Two thousand Dollars exclusive of Costs, be re-examined and reversed or affirmed in the supreme court . . . ." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84. *Compare supra* note 259.

350. For the compromise, *see supra* text accompanying notes 226-31. For the Senate's declension from the compromise with regard to the $2000 minimum on diversity and alienage appeals, *see supra* text accompanying note 259.

351. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88.

352. *See supra* note 248 and text accompanying notes 246-48. Constitutional opponent William Grayson saw hope even in these votes. "[T]he amendment of Virginia respecting this matter [the judiciary] has more friends in both houses than any other, & I still think it probable that this alteration may be ultimately procured." Letter from William Grayson to Patrick Henry (Sept. 29, 1789) (Patrick Henry Papers, Library of Congress).

353. W. RITZ, *supra* note 3, at 17-18.

354. Letter from Fisher Ames to George Richards Minot (Sept. 6, 1789), *reprinted in* 1 AMES PAPERS, *supra* note 220, at 717.

structure, and many of its particular regulations." But he voted for it primarily because it would satisfy British creditors. "The most I hope is that some offensive violations of Southern jurisprudence may be corrected," he said, "and that the system may speedily undergo a reconsideration under the auspices of the Judges who alone will be able perhaps to set it to rights."[355]

Some opponents of the Constitution, like William Grayson, found the bill "monstrous,"[356] but most were relieved and not unpleased at the restrictions it placed upon the judicial power. Arthur Lee, brother of Richard Henry, said "it is difficult to say how . . . [the Judiciary Act] coud. have been framed less exceptionable. We must try some experiments & try them with temper."[357] Proponents of the Constitution had grave reservations. Some accurately foresaw terrible battles arising from "the concurrent Jurisdiction of the Federal with the State Courts which will unavoidably occasion great embarassment & clashing."[358] Some southerners simply were concerned about practicalities. "To me it appears that the Judiciary system is . . . too unqualified," wrote George Walton of Georgia. "Should the british debts be entirely and at once sued for from Virginia inclusive south, the consequences would be ruinous."[359] But most proponents were upset over the lack of judicial power in the Act. "Our judicial system is not free from difficulties," said the new Chief Justice of the United States, John Jay, "and I think the judges will often find themselves embarassed."[360] Edward Carrington predicted, "The Judiciary System is so defective that it will doubtless undergo much alteration in the next session of Congress."[361]

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355. Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 9, at 402.

356. Letter from William Grayson to Patrick Henry (Sept. 29, 1789) (Patrick Henry Papers, Library of Congress).

357. Letter from Arthur Lee to Tench Coxe (Aug. 4, 1789) (Tench Coxe Papers, Historical Society of Pennsylvania).

358. Letter from John Brown to Harry Innes (Sept. 28, 1789) (Harry Innes Papers, Library of Congress). Opponents of the Constitution similarly predicted with accuracy battles arising from the power of the Supreme Court to reverse a state court under Section 25 of the Act. "[T]he part or clause in the Judicial Bill which gives writs of Error to the Court of the United States upon Judgment given in the State Courts will be a Source of Contention." Letter from James Sullivan to Elbridge Gerry (Oct. 11, 1789) (Gerry II Papers, Massachusetts Historical Society).

359. Letter from George Walton to John Adams (Jan. 28, 1790) (Adams Family Papers, Massachusetts Historical Society).

360. Letter from John Jay to Edward Rutledge (Nov. 16, 1789) (extract of letter quoted for sale in Rendell's Inc. catalogue).

361. Letter from Edward Carrington to Henry Knox (Oct. 25, 1789) (Henry Knox Papers, Massachusetts Historical Society).

V. THE VIRTUES OF HISTORICISM

The reasons for these varied reactions to the Judiciary Act of 1789 are evident from the history of the origins of the Act. First, compromises between colliding economic organizing principles, between competing value systems, are rarely satisfying to either party, largely because true compromise is a delusion in such a situation. Second, and much more important, the restrictions on the national judicial power in the Act vastly outweighed its expansiveness. Although Walton accurately understood that any grant of alienage jurisdiction to national trial courts meant grave difficulties for British debtors—the Constitution is after all a nationalizing and creditor-oriented document, and the national court system was there in large part because state courts could not be trusted to handle creditors' suits against debtors—most of the restrictions in the Act resulted directly or indirectly from a political need to cater to the desires of the pro-debtor majority and were enacted to limit the power of the federal courts. Some restrictions were made expressly on behalf of the debtor interest.

The weakness of the new government lay in its lack of popular support, and much of that lack stemmed from the power wielded by the debtor interest as demonstrated first in the responsiveness of state legislatures and courts and later in the near rejection of the Constitution. In order to get the new government started without widespread unrest, dissent, and perhaps secession, such catering was necessary. As the new government gained increased strength and respect, many supporters of the Constitution hoped, debtor-oriented restrictions could be eliminated and the federal judiciary made the true guardian of a nationalizing and creditor-conscious Constitution.

When the origins of our federal court system are viewed in their context of social and economic history, many questions, such as those posed at the outset of this essay, find answers. In particular, it becomes clear that the system was constructed neither in the abstract nor within a conviction that law was separated from politics, but rather the contrary. The framers of the system worked within a living and unquestioned understanding that law was politics, that they were solving immediate and great political problems the best way they could.[362]

362. Congressman Abiel Foster, one of the few members of the New Hampshire delegation to Congress who supported the Judiciary Act, challenged its opponents "to suggest a plan for administering Justice, in those instances in which the general Government is invested with it by the Constitution, which will be less objectionable than the general principals contained in the present one." Letter from Abiel Foster to Oliver Peabody (Sept. 23, 1789) (Chamberlain Collection, reprinted by courtesy of the Trustees of the Boston Public Library).

They understood legal rules, and particularly the Constitution, in this same way. For them, the Constitution provided only the broadest of frameworks, a set of suggestions and guidelines, not a blueprint. Where the Constitution was absolute and specific, as with the existence of "one" supreme court, they followed suit. But where, as in most of article III, the Constitution was broad and vague, they filled in with the best system they could devise given their principles and the political possibilities and needs of the time.

Nothing in article III, for example, authorizes the exclusion of litigants from federal court through a jurisdictional amount-in-controversy limitation; the text, which uniformly uses the word "shall" in describing the jurisdiction and power of federal courts and lists no exclusions whatsoever, bolsters the contrary argument. Moreover, an amendment to the Constitution containing such a limit was expressly proposed during the First Congress, some indication that an amendment was needed before any jurisdictional amount could be enacted; and it was rejected, some indication of a denial of congressional authority so to limit federal jurisdiction.

Nevertheless, several jurisdictional amounts were included in the Judiciary Act of 1789, as we have seen, without the first argument of their unconstitutionality being made. Members of the First Congress did this *not* because they were following some sort of map hidden in the words of the Constitution mandating jurisdictional amounts ("original intent"), *not* because they were fleshing out structural requirements that they as incredibly brilliant theorizers could divine from the Constitution's sparse words, but because the practical politics of the moment dictated such a course. Many people were upset at the possible costs of litigation in federal courts for the poor and those in middling circumstances. Some wanted at least some debt cases to be excluded. Those people had political power and demonstrated it often. Since a majority of the populace did not favor the new government and there were internal and external threats to its very existence, the Constitution's supporters thought it was necessary to set jurisdictional amounts in order to maintain and increase the wavering support the shaky new government possessed. They had promised to do so in the ratification debates, and this promise was met in the First Congress. They did not trouble themselves over either the lack of explicit authorization in the Constitution or the implications in its language that jurisdictional amounts were improper.

Basically the supporters of the Constitution did not believe that the words of the Constitution were so definite, so inflexible, so dictatorial as the positivist views of today would hold. They understood life to be lived from within its practice, not from theoretical dictates and strictures;

they believed that the meaning of words derives from practice, not theory; and they understood that the new government would be established and maintained through the practicalities of politics, not because of the hollow ramifications of structures or theory. As Jefferson Powell has shown, the very concept of "original intent" was often unpersuasive to them.[363]

The trouble with recent ingenious theories about the "meaning" of article III is that, despite their ingenuity, they are not very critical: They replicate much of the trouble that plagues the existing theories. They are ahistorical and positivist because they manipulate the historical evidence quite selectively from a present-minded theory of what the Framers ought to have done, and they operate from a much too restricted, mandatory, and hierarchical concept of the meaning of words. Robert Clinton focuses on the "shalls" in article III, and spins out a wonderful structural theory from them,[364] but his theory was nothing more than one of many political possibilities of the meaning of the Constitution to the Framers—one never accepted, because politics pushed people down a different path. Akhil Amar focuses on the "alls" in section 2 of article III and spins out an equally wonderful structural theory,[365] but it too was not one that most people had in their minds then—nor was it one that was ever followed, for the same reason. Both theorists take the Constitution's words too literally; neither attempts to see what really happened from the standpoint of the people who took actions at that time. Both assume that politics—words, life, history, class—is divorced from law.

For all their replication of many of the difficulties brought on by capitalism and the adoption of a capitalistic ethos and worldview, the efforts of Clinton and Amar are at least better than the usual view of the origins of the federal courts because they can imagine a past and a future that are different. Not only is the mainstream position unable to recognize (and to criticize) its own positivism, not only does the mainstream position ignore the crucial importance of economic and political interests within a view that law and politics are separate, the deterministic mainstream position cannot imagine that matters could have been any different than they were, or that they can be any different than they are.[366] For example, the mainstream's chief criterion for judgment of the histor-

363. Powell, *supra* note 3.

364. Clinton, *supra* note 3.

365. Amar, *supra* note 3.

366. *See, e.g.*, HART & WESCHLER, *supra* note 333, at 1-34, 366-68, 379-87, *passim.*

ical meaning of the Constitution is what the First Congress actually did.[367]

This essay has attempted to demonstrate the opposing virtues of historicism. Its "theme is as old as Thucydides. It is chronology."[368] The adoption of this theme flows from the understanding that history *is* theory, that "historical episodes themselves establish[ ] their own peculiar constraints and rules for interaction."[369] Further, this essay has undertaken to establish chronology within a full socioeconomic conception of human history.[370] It has integrated the conflicts and the incompletenesses of life into the history of the federal judiciary. And it demonstrates the contingency of history. By its example it shows that matters can be better than they are.

367. *Id.* at 386-87.

368. S. COHN, DEATH AND PROPERTY IN SIENA, 1205-1800: STRATEGIES FOR THE AFTERLIFE 10 (1988). *Accord, e.g.*, S. GOULD, WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY 15 (1989) ("[T]he primary criterion of order in the domain of contingency is, and must be, chronology."); LaRue, *Constitutional Law and Constitutional History*, 36 BUFFALO L. REV. 373, 373 (1987) ("[T]he most important fact about any case is its date.").

369. S. COHN, *supra* note 368, at 11.

370. It thus avoids a "toothless, relativistic approach." *Id.* at 11.

APPENDIX 1: A PARTIAL NOTE ON SOURCES

A. *Primary Sources*

Some of the evidence cited in this essay was discovered in the Public Record Office, the national archives of the British government, located in London. The records I consulted there are arranged (1) according to the pertinent ministry in the cabinet, (2) in numbered classes, and (3) in numbered volumes or file folders. Sometimes a series number is intruded between class and file or volume. In Treasury class 79 (T/79), the large file folders contain smaller file folders, each holding the claim made by a British merchant to either the British-American Claims Commission of 1794 or the British Claims Commission of 1802 (or both) and usually identified by the name of the claimant. The ministry records I consulted were those of the Foreign Office (FO), the Audit Office (AO), and the Treasury (T). Hereinafter, such records will be cited in the form PRO/FO/4/16, indicating a reference to folder or volume 16 of class 4 of the Foreign Office records. PRO/FO/95/1/512 indicates a reference to folder or volume 512 of series 1 of class 95 of the Foreign Office records; PRO/T/79/27, "John Hay & Co. & Jas. Baird" refers to the claim filed by the firm of John Hay & Co. & Jas. Baird in folder 27 of class 79 of the Treasury records.

An excellent and nearly complete edition of the writings of those individuals who opposed the Constitution in 1787-88 has been compiled by Herbert J. Storing.[371] Rather than cite to the original publication of these writings, I have used Storing's edition.

In 1834 Congress ordered that all the important American public papers and documents be published for the period 1789-1834 which theretofore had been made known to the public via pamphlets and in other separate publications. The result was an extremely valuable thirty-seven volume collection called *American State Papers,* compiled into several series or classifications such as "Foreign Affairs," "Indian Affairs," and the perhaps inevitable "Miscellaneous," each of which series had its own set of volume numbers.

B. *Secondary Treatments of the Judiciary Act of 1789*

There are only three notable treatments of the Judiciary Act of 1789. The first was Charles Warren's massive, loving, and insightful 1923 article in *Harvard Law Review,* entitled *New Light on the History of the Federal Judiciary Act of 1789.*[372] It contains several inaccuracies—

371. THE COMPLETE ANTI-FEDERALIST (H. Storing, ed., 1981) (7 vols.).

372. Warren, *supra* note 203.

Wilfred Ritz acerbically points out several of them in the next work to be discussed, and others are discussed in my own essay—but most were due to haste or the stubbornness and blindness resulting from the interpretive framework within which Warren worked (in his case, not so surprisingly, a relatively uncritical pro-creditor framework). Warren nevertheless did a massive amount of primary research, most of which has not been approached for its thoroughness until the present study, much less duplicated (and Warren did it without any prior bibliographic aid, searching endlessly through newspapers, correspondence, and even the attic and basement of the Capitol to discover and collect most of his material on his own); and much of his work, especially its depiction of a struggle between those desiring a strong national government and those desiring a much weaker version, stands up to the test of time. All historians make errors (indeed, as the editors of Ritz' volume, including myself, have carefully pointed out, Ritz himself errs in several minor ways), and Warren's do not overthrow the utility of his work.

The second is Wilfred J. Ritz's new study, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence.*[373] As co-editor of this volume, I have had access to its page-proofs and cite them herein. A relentless and usually sure questioner of apparent myths, interpretive frameworks, and supposed facts, Ritz exhibits a tenacity that rivals Ellsworth's and a superb instinct for ferreting out both the heart of a historical problem and the attitudes and beliefs of those who *then* had the problem. Ritz refuses to look at matters through present-day eyes, insisting on "rewriting the history of the judiciary act" from assumptions and beliefs that were contemporaneous to its genesis. He postulates, quite simply, that there was very little belief in legal positivism in 1789, and as a result most people then understood "law" and the role of judges much differently than they do now (as the assumptions of legal positivism are today so widespread as to be usually unquestioned). From this position, he develops a whole new way of understanding the context and meaning of the Act, especially of Section 34; and his work has had a great impact upon my own, as perhaps has been seen.

The third is that of Julius Goebel, *Antecedents and Beginnings [of the Supreme Court] to 1801.*[374] Prolix and dense to the point of obscurity, this massive work arrives at no large conclusions outside of an uncritical positivist, pro-creditor interpretive framework. I have not found Goebel's suprisingly error-prone volume, and the only apparently thor-

373. W. RITZ, *supra* note 3.

374. J. GOEBEL, *supra* note 3.

ough work, of much use, and I agree with the criticism of it leveled by Ritz throughout his book.

APPENDIX 2: AN INTRODUCTION TO CLASS

Class is not a mathematical matter of counting noses or of comparing static categories of wealth or occupation or status, although those characteristics of human social existence are relevant and important to class. Moreover, class is not a deterministic way of predicting precise individual behavior by extrapolating from characteristics of wealth, status, or occupation that they may have. Rather, class is a way of understanding and expressing the tendencies and interactions of human life and human history as it has been and is lived in social groups, dynamic, ever-changing, full of conflict, full of possibility, full of both pain and hope. Class is primarily a social or group phenomenon, a matter of individuals acting within groups rather than individuals acting as individuals. Any individual might exhibit simultaneously characteristics of two different classes, move during her lifetime from one class to another, express conflicting class views at different times during a period of intensive class warfare (such as existed during the Revolutionary and early national periods of United States history), or exhibit characteristics differing from those of others in her same socioeconomic position because of individual or idiosyncratic experiences or self-reflections. Class deals primarily with social tendencies and forces, not primarily with individual characteristics.

Class is a way of looking at and dealing with the political and social world arising from *socioeconomic exploitation.* Class revolves around fundamental clashes between competing ways of life, it deals with conflicting lifestyles and mores emanating from, and in turn reinforcing, conflicting modes of organizing the means of production.[375]

In the capitalist mode of production, it is the politically "free" wage laborer whose exploitation is at the core of the economic organization of production. An entire economic system is externally characterized by democratic political forms and egalitarian ideology at the geographic core; colonialism at the geographic margins; an interconnected and always-expanding system of essentially lawless or "private" markets; the production of commodities and the increasing commodification of everyday life; the taking of profits as a higher social goal than the maintenance of human community or health or safety; an overweening emphasis on trade and commerce such that worth is not based on the substantive or use value of items but on an abstracted and artificial exchange value; and an ethos of selfish, individualistic, competitive, essentially antisocial

375. *See generally* de Ste. Croix, *Class in Marx's Conception of History, Ancient and Modern,* 146 NEW LEFT REVIEW 94 (1984); Holt, *The New American Labor Law History,* 30 LABOR HIST. 275, 282-83 n.13 (1989).

striving and interpersonal warfare. All of these characteristics revolve around, emanate from, and are dependent upon the extraction of surplus labor (the value workers produce minus the cost of their reproduction) by the bosses or owners of the means of production, from supposedly consenting but actually ignorant or deceived "free" wage workers through the partial myth of their freedom.

The precapitalist mode of production is variously also called the "feudal" or "Asiatic" or (when viewed from the bottom up and somewhat misleadingly) the "household" mode of production.[376] In this mode, the political system is openly characterized by hierarchy, including hierarchically organized groups or social classes; status and human sentiment within an accepted notion of hierarchy as natural are the most important values; wealth derives from direct control of land and of unfree workers who are in some way juridically less than fully human, who are on the bottom rungs of the social hierarchy and juridically tied to the land, their occupation, or an overlord; exchange is basically barter-centered, and substantive or use values constitute worth; what the capitalist world thinks of as the noble calling of banking, the pre-capitalist world calls the sin or crime of usury, and merchants in the latter world have very low and marginalized status; and investment goes into land or slaves/serfs/peons or prestige rather than savings or "capital." All of this revolves around, emanates from, and is dependent upon the extraction of surplus value from unfree labor: from the serfs, peasants, or slaves at the bottom of the ladder, by their owners or masters who are close to its top and legally entitled to this surplus through their ownership not of tools and plants, but of land and of the workers themselves. Force, rather than ideology, constitutes the system's ultimate glue.

Both systems are exploitative. Both have wealthy members and poor members. Both have exchange. The great struggle over exploitation is between the exploiters and the exploited in each system, and this struggle is what is specifically meant by the term "class struggle." But there is also warfare between class systems when one class system replaces another, and warfare within the valueless and atomistic realms of capitalism, that is, warfare among segments of the ruling class (what Hobbes presciently called the war of all against all). Warfare is the social norm, in a classed society.

376. *See* Merrill, *Cash is Good to Eat: Self-Sufficiency and Exchange in the Rural Economy of the United States,* 4 RADICAL HIST. REV. 42 (1977); Henretta, *Families and Farms: Mentalite in Pre-Industrial America,* 35 WM. & MARY Q. (3d Ser.) 3 (1978); Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century,* 50 PAST & PRESENT 76 (1971); Dawley, *E.P. Thompson and the Peculiarities of the Americans,* 19 RADICAL HIST. REV. 33 (1978).

During Elizabethan times and the civil wars of the 17th century, capitalism began to become the dominant class system in England, although the power of capital was not fully consolidated there until the 19th century.[377] The socioeconomic ethos of capital spread through much of the urban portions of the realm of England, whereas it was much less central in rural areas and the colonial hinterlands. As the American colonies grew, the ethos of capital became more infused there among the wealthy and powerful people of the urban seaboard communities. As Ernst, among others, has argued,[378] the American Revolution developed out of the conflict between the capitalists at home and the capitalists in the colonies. "But even in the towns [u]nrestrained competition. . . was an alien notion. . . . Traditional ties of social responsibility. . . could be maintained only when economic life was pervaded by a sense of what was equitable, not simply what was profitable."[379]

An alternative to capitalism was simultaneously developing in the colonies. The way of life southern planters were coming to cherish was centered on slavery rather than on "free" labor. While its system produced commodities for exchange, and it was a commercial society in this important sense, southern slave society was not primarily focused on profit but lived by and shared the precapitalist values of most of the other members of an American society that was predominantly rural, agricultural, and barter-oriented.[380]

Most American debtors in the 1780s were rural agriculturalists and fell on the side of the exploited, whether they were from the north or the south or whether they suffered under a precapitalist nonslave, slave, or capitalist system. But their fit to class was not perfect, since debtors and creditors do not form distinct classes; they are not uniformly related to ownership of the means of production in opposite fashion. Rural smallholders and peasants were joined by debtors of other stripes. Most

377. *See, e.g.*, C. HILL, THE CENTURY OF REVOLUTION 1603-1714 (1966); G. RUDE, THE CROWD IN HISTORY: A STUDY OF POPULAR DISTURBANCES IN FRANCE AND ENGLAND 1730-1848 (rev. ed. 1981); E. HOBSBAWM, THE AGE OF REVOLUTION 1789-1848 (1962); E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1966); M. DOBB, STUDIES IN THE DEVELOPMENT OF CAPITALISM (rev. ed. 1963).

378. J. ERNST, *supra* note 44.

379. G. NASH, THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION 32 (1979).

380. *See, e.g.*, E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE, *supra* note 40; E. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN ECONOMY AND SOCIETY OF THE SLAVE SOUTH, *supra* note 40; M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981). The slaveocracy was already sufficiently strong in the 1780s to protect itself from the full domination of northern capital in the making of the Constitution. *See* S. LYND, CLASS CONFLICT: SLAVERY AND THE UNITED STATES CONSTITUTION 185-213 (1967).

planters were also in debt, and many allied themselves with their smallholder neighbors because of their debt situation, because they shared much of the basic precapitalist morality of the smallholders, and because they feared the capitalist ways that produced the morality of their creditor/capitalist opponents and threatened their emerging slave system at its core. Many budding entrepreneurs and small merchants, who like the planters and Robert Morris were both debtor and creditor as they were enmeshed in the capitalist system of debt, also joined the debt protest because they were recently come to entrepreneurialism or they were relatively poor, in order to eliminate competition and to obtain the benefit of partial insolvency or bankruptcy without its pain and ignominy.[381] And some planters joined with their socioeconomic antagonists of the entrepreneurial, commercial north in the pro-creditor/pro-Constitution camp, out of a fear of social revolution or because they thought a strong central government necessary to guarantee against slave insurrection.

Nevertheless the fissure between debtors and creditors in the 1780s was a matter of class. The split between debtor and creditor approximated class struggle in terms of the primary antagonists (except for the planters), and the debtors thought they were being exploited. The struggle was described, understood, and fought in class terms (especially by the creditors). The conflicting moralities were those of different class structures, different ways of life. The issue was the replacement of a precapitalist way of life with a capitalist one, a struggle that has lasted to our own time.[382]

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381. Evans, *Indebtedness During Confederation, supra* note 29, at 370-71, notes the legislative petitions of Richmond and Petersburg merchants in 1784, 1786, and 1787 opposing both Virginia citizenship for British creditors and the adoption of repayment schemes.

382. For additional insight on the two conflicting ways of life, see, e.g., D. SZATMARY, *supra* note 79, at 1-18 (describes and compares "the two worlds" of commerce and pre-commerce in rural New England during the Revolution and the Confederation); J. PRUDE, THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSETTS, 1810-1860 (1983) (describes the losing struggle of rural Massachusetts farmers to retain precapitalist ways in the first half of the 19th century); B. FIELDS, SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY (1985) (shows the clashes between the culture of slavery and the culture of capital in a "border" state); S. HAHN, THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850-1890 (1983) (demonstrates the persistence of precapitalist ways in rural late 19th century Georgia); THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION: ESSAYS IN THE SOCIAL HISTORY OF RURAL AMERICA (S. Hahn & J. Prude eds. 1985) (essays about the forced destruction of precapitalist ways in 19th century America); J. HALL *et al.*, LIKE A FAMILY: THE MAKING OF A SOUTHERN COTTON MILL WORLD (1987) (demonstrates the clash between precapitalist and capitalist ways as cotton mills came to the South in the early 20th century); J. GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980) (showing the persistence of precapitalist ways in Appalachia into the mid 20th-century).

APPENDIX 3: TWO IMPORTANT 1789 LETTERS

Excerpt from a letter from David Sewall to Caleb Strong (Mar. 28, 1789) (Caleb Strong Manuscripts, Forbes Library, Northampton, Massachusetts.) Reprinted by permission.

A certain uniformity of decisions throughout the United States, whether in the federal or State Courts, is an object that may be Worthy of consideration; and as a means of obtaining this desideratum, Suppose they should be so constituted as to have a certain necessary connection with each other—For this purpose suppose that Suits properly Cognizeable at Common Law should be Originated, in such of the Supreme Judicials of the respective States, Where Judges hold their offices during good behaviour; and have competent provision made for their support—This might operate as a powerfull incentive to make the Judges of the S.C. in the respective States have a permanency in the office, and make them more respectable—And offences arising from Transgressions of Penal Statutes of Congress, might be cognizable in the S.J. of the State Courts, Which by the Supposition are to be Competently Supported by the Individual States and will always be attended with Grand and Petit Jurors of the best quality the State affords—from such a provision the expense of the Inferior Judiciary of the united States would certainly be supplied, without any Expence to the Treasury of the United States—That Writs of Error should lie from these several courts to the S.J. of the U.S. in all causes of a federal kind to a certain amount, within a limited time—let *one* Trial by Jury be final in that respect, unless from the usual causes, for which by law a new Trial ought to be granted. For what Reason in Nature can be assigned why a man's property should be under the Considera. of a Jury oftener than his life?—and is not the repeated Trial of Facts by Jury a N. Englandism which in some future period, may Operate in a pernicious manner, When it shall happen that Evidence of any kind may be procured.

A maritime or Admiralty Court whose proceedings are according to the Course of the Civil Law, must be erected from some quarter—and suppose the Territory of the united States divided into a number of districts in the division of which no regard is had to the boundarys of particular States, in these several districts suppose Admiralty Judges resident, and in whose Courts all Seizures of property for breach of the acts of Trade and Revenue where the process is *in Rem* may be determined—and from these Admiralty Courts let an appeal lie in causes to a certain limited Value to the S.J. of the U.S.—and as their divisions may be considerably large Territories let the Admiralty Courts be ambulatory in their respective districts. As the Laws of Trade and Commerce are to be uniform and made by Congress, there can be no need of any *State* Admi-

ralty, or maritime Courts; let the admiralty courts Jurisdiction be so fully plainly and clearly defined, as to give full speedy and effectual remedy in all matters within their Jurisdiction. And When a Felony or Piracy commited on the high Seas is to be determined some mode should be devised for providing a Jury—unless the admiralty Judge is joined to the Supreme Judicial of the State as the case has been under the old Confederation.

From this Admiralty Court an appeal in causes to a certain amount should lay to the S.J. of the U.S.—And as to the S.J. of the United States a Central Situation and Stationary will be at such a distance from the extremes (6 or 700 miles) as to make it exceedingly expensive and burthensome. Suppose therefore the Territory divided into three grand Districts, in which a major part of the Justices of the S.J. shall hold a Court once a year—at Stated Times—and perhaps Twice a year in the Center, in case the admiralty divisions are *Nine three* of them may make one of the districts where the S.J. shall hold a Session *once* at least a year—Perhaps the Sheriffs of the respective states may execute process of every kind in their respective Bailiwicks for the present—as to writs of prohibition & mandamus to the admiralty Courts the State Courts ought not to Interfere, if it can possibly be avoided lest there be a clashing of Jurisdictions—But how these are to be procured from the Supreme J. of the U.S. when they are held as seldom and at such remote distances, is difficult to guard & provide Sufficiently for.

Excerpt from a letter from Ralph Izard to Edward Rutledge (Apr. 24, 1789) (Ralph Izard Papers, roll 229, South Caroliniana Library, University of South Carolina, Columbia, South Carolina). Reprinted by permission.

I have informed General Pinckney [in a previous letter, now lost] how far a Committee of the Senate had agreed on a plan for establishing the judicial power of the United States, when my letter was written. They have since come to the following resolutions:

—That the Circuit Courts have appellate jurisdiction from the district Courts in all cases, except Criminal, where the matter in dispute exceeds Three Hundred Dollars; & original jurisdiction in Cases at Common Law & in Equity, where the matter in dispute exceeds Three Hundred Dollars & a State, or the United States be a party; or where it exceeds Five Hundred Dollars, and a Foreigner, or Citizen of another State be a party, saving the option of an immediate resort to the supreme Court in cases where by the Constitution that Court has original jurisdiction.

—That Actions commenced in a State Court where title of Land is concerned, & the matter in dispute exceeds Five Hundred Dollars, & the parties claim under grants of different States may on motion of the party claiming under the grant of another State than that in which the suit is commenced, be removed to a Circuit Court, & proceed as other Actions at Law originating there.

—That the Circuit Courts have cognizance of all Crimes not cognizable by the district Courts.

—That Appeals may be had from the Circuit Courts to the supreme Court in all Causes, except criminal, where the matter in dispute exceeds Two Thousand Dollars; but shall not subject Facts to a revision.

—That from an ultimate determination of any Cause in the highest Court of Law, or Equity of a State, where is drawn in question the validity of a Statute of, or an authority exercised under a State, on the ground of their being repugnant to the Constitution, Laws, or Treaties of the United States, & the determination is in favour of their validity; or where is drawn in question the validity of a Law, or Treaty of, or an authority exercised under the United States, on the ground of their exceeding the powers vested in the United States, & the determination shall be against their validity, a writ of Error may be had to the supreme Court for the Trial of such questions of validity only, so that there be not a reversal for any other Error, or Defect.

The arrival of the President, & the preparations for the ceremonial of his public reception have interrupted proceedings of the Committee.