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A Sword for a Scabbard: Reflections on the Making of the Judiciary of 1789

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Abstract

The narrative of constitutional history usually takes a great leap forward from the ratification of the Constitution in 1788 to John Marshall's tenure as Chief Justice, beginning in 1801, and then treats the Supreme Court decisions of the next two decades as an updated version of the Federalist Papers.

A Sword for a Scabbard: Reflections on the Making of the Judiciary Act of 1789

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The narrative of constitutional history usually takes a great leap forward from the ratification of the Constitution in 1788 to John Marshall's tenure as Chief Justice, beginning in 1801, and then treats the Supreme Court decisions of the next two decades as an updated version of the Federalist Papers. The events that occurred during the 1790s, aside from the Bill of Rights and the search for judicial review precedents, are missing in those renditions of constitutional development. But the proceedings and accomplishments of the First Congress offer a fitting commentary on the work of the Philadelphia Convention.

Narratives of both legal and constitutional history have been overly reliant on judicial, at the expense of legislative, developments. The First Congress legislated some of the most basic and enduring aspects of our constitutional system. That Congress included such principals from the Constitutional Convention as Oliver Ellsworth and William Paterson—draftsmen of Article III and our subject, the Judiciary Act of 1789—and, of course, James Madison, as well as numerous veterans of the ratification conflicts who maintained their skepticism or opposition to the new arrangement.¹

Understanding the First Congress is crucial to understanding the implementation of the new Constitution and the formation of the new government. In some respects, the First Congress represented an ongoing constitutional convention; its work both filled in the “blanks” in the Constitution and effectively provided alternatives to the demand for a second constitutional convention. Yet aside from attention to the First Congress' passage of the Bill of Rights, historical literature rarely gives

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1. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-1989, at 51-52 (U.S. Govt. Printing Office, 1989). The volume is not always the most reliable. Ten out of twenty-six members of the Senate attended the Philadelphia Convention; twelve participated in state-ratifying conventions. In the House, only nine of sixty-five members served in Philadelphia, but twenty-eight were involved in the ratification procedure. *Id.*

us more than a brief catalog of the First Congress' legacy. We do not, for example, have a major study of the Judiciary Act.²

I

The twenty-six Senators and sixty-five Representatives who served during the first congressional term left a monumental and enduring legacy: the Bill of Rights; the Judiciary Act; the creation of the executive departments (which raised disturbing questions regarding presidential power and legislative prerogative to remove cabinet officers without senatorial consent, a terribly divisive issue which persisted through Reconstruction); the creation of fiscal and monetary measures, such as the establishment of national public credit through the funding of the federal debt, the assumption of state debts, the establishment of a revenue system, and the creation of a national bank; and last, but hardly least, the location of the national capital.³

The decision to propose constitutional amendments was irresistible despite widespread opposition among the members of the First Congress. But what kind of amendments should be passed? The ratification process had obligated the Constitution's supporters to include some guarantees for political and civil liberties. While Madison was not about to undo his own handiwork, he too recognized the necessity for guarantees of personal liberty. Strong opponents of the Constitution, unlike their moderate allies, however, demanded amendments that would substantially alter the Constitution's locus of power at the center. Patrick Henry and others openly feared a federal judiciary that might be too strong, too independent, and therefore desired amendments to keep it in check.

2. The best modern account of the legislative history of the Judiciary Act of 1789 is in 1 J. GOEBEL JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* ch. 11 (1971); see also, 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); Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 27 B.C.L. REV. 1101 (1985). The relative inattention to the First Congress reflects historiographical tastes and concerns. For the past four decades, historical scholarship has focused largely on the origins of political parties and then, quite naturally, flowed into a preoccupation with the ideological content of political conflicts. Ironically, the substance of those conflicts—such as the disputes over the Judiciary Act—has been essentially unnoticed and unanalyzed.

3. *See generally*, 1 Statutes at Large.

Madison's proposed amendments involved considerations of personal liberties, but the underlying issues—enumerated or implied powers; consolidationism or localism; and grants of limitations on power—spilled over into this other area of conflict. And this was especially true as Congress contemplated the implementation of Article III of the Constitution and the nature of the federal judiciary—a consideration that clearly had to account for the numerous amendments proposed in state ratifying conventions to limit judicial power.

A sampling: Maryland and Massachusetts proposed limiting federal court jurisdiction to a high dollar amount⁴ in suits between citizens of different states. Maryland and New York asked for a specific prohibition against judges holding any other office, apparently fearing jobbery.⁵ Virginia and North Carolina similarly requested a distinct separation for the judiciary.⁶ Virginia called for the federal court system to consist of only a Supreme Court and admiralty courts.⁷ The concerns in Virginia were particularly strong, the ratifying convention asked that the Supreme Court be limited to appellate jurisdiction in law, and not in facts, a position that again paralleled North Carolina's.⁸ New York stipulated that federal judicial power would not extend to criminal cases in which the state was a party, and that it would not comprehend any suits against the state.⁹ The New York convention also proposed that Supreme Court jurisdiction, or that of any other federal court, was "not in any case to be increased[,] enlarged[,] or extended by action[,] Fiction[,] Collusion[,] or mere suggestion."¹⁰

Samuel Livermore, a Federalist who continued to serve as Chief Justice of the New Hampshire Superior Court until 1790 while representing his state in the U.S. House of Representatives, demonstrated that such concerns regarding the judiciary's power pervaded various political factions. During the debates over the 1789 Judiciary Bill, Livermore charged that "this law will entirely change the form of government of the United States." For certain, he added, the law would "swallow up" the state courts.¹¹ Elbridge Gerry of Massachusetts, who

4. E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 173-205 (1979) (lists state proposals for constitutional amendments).

5. *Id.* at 178, 198.

6. *Id.* at 183, 199.

7. *Id.* at 187-88.

8. *Id.* at 188, 204.

9. *Id.* at 192.

10. *Id.*

11. *Debates*, Daily Advertiser, Aug. 25, 1789.

had refused to sign the Constitution in Philadelphia, was equally alarmed by the prospects for the judicial department—an “awful tribunal,” he called it. He feared that the Supreme Court, specifically, had an excess of power, both in law and in equity, and no appeal could be had from its decisions. The judges, he feared, would be too independent and could be removed only by impeachment—an inferior method, he thought, compared to the British practice of removal on the basis of an “address” by the House of Commons.¹² Yet some months earlier, as Congress debated whether presidential removal of a confirmed cabinet officer required senatorial consent, Gerry insisted that the determination of such constitutional questions belonged to the Supreme Court. “The Judges are the expositors of the Constitution and Acts of Congress,”¹³ he said. Gerry has the historical distinction of being among the first to establish a remarkable inconsistency on this subject.

Anti-Federalist Virginia Senator William Grayson revealed commonplace suspicions toward the new Constitution and in particular, toward the proposed judiciary. In 1789, Grayson warned Patrick Henry not to expect much from Madison’s pending amendments:

Some gentlemen here from motives of policy have it in contemplation to effect amendments which shall effect personal liberty alone, leaving the great points of the Judiciary, direct taxation &c, to stand as they are; their object is in my opinion unquestionably to break the spirit of the party by divisions.¹⁴

Grayson attacked a variety of Federalist measures: “Their maxim seems to have been to make up by construction what the constitution wants in energy.”¹⁵ After the judiciary bill had passed, he confidently argued that it possesses “so monstrous an appearance that I think it will be *felo de se* in the execution.”¹⁶ Grayson, believing that the nation would quickly recognize the dangers of a national judiciary and that

12. Letter from Elbridge Gerry to John Wendell (September 14, 1789), *copy in Documentary History of Ratification Project, Fogg. Collection, Maine Historical Society; reprinted in* 1 THE SUPREME COURT IN UNITED STATES HISTORY 76-77 (1922) [hereinafter SUPREME COURT].

13. *Id.*

14. 3 W. W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 391 (1969).

15. Letter from William Grayson to Patrick Henry (September 29, 1789), *reprinted in* SUPREME COURT IN UNITED STATES HISTORY note 12, at 406.

16. *Id.*

the Judiciary Act would then be no more, stated:

Whenever the federal judiciary comes into operation I think the pride of the states will take the alarm, which added to the difficulty of . . . the extent of the district in many cases, the ridiculous situation of the venue, and a thousand other circumstances, will in the end procure its destruction.¹⁷

Grayson's death in 1790 no doubt spared him a good deal of anguish in the years to come.

Henry thought it meaningless to guarantee rights without considerations of power. He wanted additional restraints on national power, specifically "the uncontrolled power of the President over the officers. See how rapidly power grows, how slowly the means of curbing it."¹⁸ Henry himself, remember, was a man whose own grasp of power was slipping.

Yet Richard Henry Lee, generally an ally of Henry's (though far more concerned with principle), heard from other Anti-Federalist friends. Richard Parker, a judge of the Virginia General Court, told him: "The framers of the [Judiciary] Bill appear to have taken great pains to make it as little exceptionable as possible and to have guarded against the Mischiefs which many people dreaded from the Words of the Constitution and I think upon the whole the System a good one." Lee himself complained about a lower judiciary, but he worried that if Congress did not create one, citizens could be tried under Article III in "a distant court where the Congress may sit."¹⁹ "Distance"—a fear skillfully exploited in the rhetoric of the American Revolution—continued to resonate in American political life. Clearly, Anti-Federalist thought on judicial matters was far from uniform.

James Madison, our primary guide for the 1787 Philadelphia Convention, was a key player in the First Congress, and his activities provide some understanding of legislative developments, including the passage of the Judiciary Act. Madison's legislative efforts, his

17. *Id.*

18. Letter from Patrick Henry to Richard Henry Lee (August 28, 1789), reprinted in SUPREME COURT, *supra* note 12, at 398.

19. Letter from Richard Henry Lee to Edmund Randolph (Oct. 1787), reprinted in 2 THE LETTERS OF RICHARD HENRY LEE 454 (J. Ballogh ed. 1970); letter from Richard Parker to Richard Henry Lee (July 6, 1789), letter from Mann Page to Richard Henry Lee (July 23, 1789), reprinted in LEE FAMILY PAPERS, (available on Microfilm at the University of Wisconsin in Madison, Wisconsin).

correspondence, and his replies provide valuable insights. As he steered the Bill of Rights through Congress, Madison clearly perceived the linkage between amendments and attempts to restrict the scope of the Constitution, including any meaningful implementation of Article III. Gerry, however, saw Madison's proposals as merely diversionary, as they did not "serve any other purposes than to reconcile those who had no adequate idea of the essential defects of the Constitution."²⁰

Former Virginia Governor Edmund Randolph wrote to Madison on June 30, 1789, endorsing the idea of a strong Supreme Court of nine to eleven members.²¹ Randolph complained that the proposed bill had jurisdiction "inartificially, untechnically and confusedly worded. Would it not have been sufficient to have left this point under the constitution itself?"²² Then, as if suddenly realizing that judges interpret laws, he added: "[w]ill the courts be bound by any definition of authority, which the constitution does not in their opinion warrant?"²³

Randolph thought that the "minute detail" could be left to the judges.²⁴ After the Supreme Court was assembled, Randolph suggested that the judges should be consulted as to their jurisdictional authority. Randolph thus anticipated what became a commonplace proceeding whenever Congress considered jurisdictional authority.²⁵

Madison realized that the judiciary bill was "pregnant with difficulties," since it related to the "most criticised" part of the Constitution, but also because it was "peculiarly complicated & embarrassing."²⁶ He knew the importance of courts "to carry federal justice home to the people," but the number of offices and expenses raised

20. Letter from Elbridge Gerry to John Wendell (September 14, 1789), reprinted in SUPREME COURT, *supra* note 12; see also Bowling, 'A Tub to the Whale': The Founding Fathers and Adoption of the Federal Bill of Rights, 8 J. EARLY REP. 223-51 (Fall 1988), which traces the development of the Bill of Rights in the First Congress. Bowling is co-editor of the *Documentary History of the First Congress* and is most knowledgeable about the sources. His work disputes Warren, *New Light on the History of the Federal Judiciary Act of 1789* 37 HARV. L. REV. 49 (1923), who argued for a greater intimacy between the passage of the Bill of the Rights and the Judiciary Act.

21. THE PAPERS OF JAMES MADISON 273 (Rutland & C. Hobson eds. 1979).

22. *Id.* at 274.

23. *Id.*

24. *Id.*

25. *Id.* (Note, for example, the dominant role of Chief Justice William Howard Taft during the legislative formulation of the Judiciary Act of 1789).

serious objections.²⁷ Madison worried about conflicts with local jurisdictions over criminal matters. "The most that can be said in its favor is that it is the first essay, and in practice will be surely an experiment. In this light, it is entitled to great indulgence"²⁸

Madison's friend, Edward Carrington, urged Madison to use state courts as inferior federal courts in all matters, except for admiralty questions.²⁹ When Madison campaigned against James Monroe for his congressional seat, he promised to propose an amendment to protect citizens against excessive appeals to a distant Supreme Court. The federal judiciary, Madison said, "ought to be so regulated, as to render vexatious, and superfluous appeals, impossible."³⁰

But once elected—just barely, at that—Madison moved from his somewhat passive stance to a more forthright posture regarding the authority of the federal courts—a position which he maintained until the end of his life. In his August 29, 1789, speech, Madison noted that reliance on the state courts as federal courts was "liable to insuperable objections." The state courts, he flatly argued, could not be trusted, largely because they were so dependent on state legislatures and thus "would throw us back into all the embarrassments which characterized our former situation."³¹ Madison rarely hesitated to raise the specter of anarchy as the alternative to his beloved constitution. Above all, he knew that deploying state judges would not be "compatible with the constitution, or safe to the federal interests."³² Madison and his old rival, Richard Henry Lee, had different, but complementary, fears of "distant" justice.³³

Madison's concerns for judicial power mirrored his nagging perception that the Constitution's most vocal opponents sought nothing less than its emasculation. To disarm them, he developed his strategy of amendments which ultimately became the Bill of Rights. In a June 8, 1789, speech to the House, Madison insisted that most agitation cen-

27. *Id.*

28. Letter from James Madison to Samuel Johnston (July 31, 1789), reprinted in THE PAPERS OF JAMES MADISON, *supra* note 22, at 318.

29. *Id.* at 323.

30. Letter from James Madison to Samuel Johnston (Aug. 3, 1789), reprinted in THE PAPERS OF JAMES MADISON, *supra* note 21, at 322-23; 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1789-1790, at 339 (Gordon DenBoer, et al. eds. 1984).

31. THE PAPERS OF JAMES MADISON, *supra* note 21, at 367-68.

32. *Id.* at 368.

33. See *supra* note 17, and accompanying text.

tered around personal rights. The nation needed reassurance as to the limits of national power in that area. He offered "a door opened to consider" amendments for the security of rights, but said: "I will not propose a single alteration which I do not wish to take place, as intrinsically proper in itself, or proper because it is wished for by a respectable number of my fellow citizens."³⁴ In other words, he would not consider any amendments that affected the structure and allotment of powers to the national government—meaning *nothing* on the judiciary.

Thomas Jefferson, then in Paris, was pleased with Madison's proposed amendments on personal rights. Moreover, Jefferson readily observed, in a March 1789 letter to Madison, that a symbiotic relationship existed between the new Bill of Rights and the creation of a federal judiciary, a relationship that would exalt the potential role of a federal judiciary.

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary.

* * *

This is a body, which if rendered independent, & kept strictly to their own department merits great confidence for their learning & integrity. In fact what degree of confidence would be too much for a body composed of such men as Wythe, Blair, & Pendleton? On characters like these the 'civium ardor prava jubentium' would make no impression.³⁵

II

The Framers of the Judiciary Act of 1789 openly acknowledged the widespread expressions of concern in the ratifying conventions regarding the potential power and threat of the federal judiciary.³⁶ At the same time, various factions worried that the Constitution had failed to

34. THE PAPERS OF JAMES MADISON, *supra* note 21 at 199-200.

35. Letter from Thomas Jefferson to James Madison (March 15, 1789), reprinted in THE PAPERS OF JOHN MADISON, *supra* note 21, at 13.

The last sentence translates as "the fiery enthusiasm of citizens ordering base things"—certainly, a not altogether uncharacteristic anti-popular will sentiment from Jefferson. So much for Jefferson's (a) faith in the people (the last sentence often is omitted when the quotation is rendered); and (b) consistency.

36. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 41 (Bickford & Veit eds. 1986).

provide adequate safeguards for separation of powers. When Madison introduced his proposed amendments, he included one that contained specific language to insure separate and independent branches of government:

That the Legislative, Executive, and Judiciary Powers of Government should be separate and distinct, and that the members of the two first may be restrained from oppression by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, [and] return into the mass of the people.³⁷

The measure passed the House but was rejected by the Senate. Original intent? If the actions of the First Congress are any indication—and who might understand original intent better—then clearly an explicit expression of separation was deliberately rejected. Neither the Framers of the Constitution nor the members of the First Congress were separation-of-powers purists. The Constitution, after all, granted concurrent jurisdiction in certain matters—Leonard Levy's recent work on original intention and the control of foreign affairs illustrates a case in point.³⁸ The Framers and the first congressmen alike would endow a judicial department, but aside from the constitutional prescriptions for independence, they chose not to enunciate separation with absolute precision.

Richard Henry Lee enthusiastically embraced Madison's proposal. Lee complained that the Constitution concentrated excessive power in the President and the Senate, granting authority over treaties, the appointment of officers, and the power to try impeachments of officers they had jointly appointed:

Is there not a most formidable combination of power thus created in a few, and can the most critic[al] eye, if a candid one, discover responsibility in this potent corps? Or will any sensible man say, that great power without responsibility can be given to rulers with safety to liberty? It is most clear that the parade of impeachment is nothing to them or any of them—as little restraint is to be found, I presume from the fear of offending constituents.³⁹

37. *Id.*

38. L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION ch. 2 (1988).

39. Letter from Richard Henry Lee to Edmund Randolph (October 16, 1787), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 62 (Kaminski & Saladino eds. 1988).

Interestingly, however, Lee feared that the executive power to appoint judges would make judges less amenable to resisting executive tyranny and protecting liberty. Thus, Lee, like his fellow Virginian Jefferson, assumed judges had such a role.⁴⁰

What did the failure of Madison's separation amendment mean? Perhaps the doctrine was not sacrosanct, after all. More specifically, the defeat of the amendment reflected both a fear of and a sense of institutional rivalry against a too-independent judiciary. The Anti-Federalists wanted to restrict federal judicial power, and separation, it seems, would only have enhanced the central government's judicial power. Since the Anti-Federalists lacked the votes to defeat such an amendment themselves, perhaps jealousy, self-serving legislative prerogatives, and their own fears of the judiciary or the executive, infected the ranks of the majority—a majority that spanned both nascent political parties. In any event, shared values as well as shared concerns produced a broad consensus on this issue.

Obviously, the provisions of the Constitution dictated a balancing of powers, but the rejection of a reinforcing amendment revealed both the taught tradition of legislative supremacy, as well as the anti-judiciary animus. Such an interpretation, however, must be advanced cautiously as attitudes toward the judiciary basically reflected momentary political considerations. In any event, the rejection of the separation of powers amendment offers reason to pause and consider the fluidity of "constitutional principles" as they emerged from the Philadelphia Convention, and as they were eventually implemented.⁴¹

40. *Id.* at 63.

41. In the recent case testing the constitutionality of the Independent Counsel provision of the Ethics Act, Justice Scalia noted in an impassioned defense (almost a eulogy, as he delivered it) that "[t]he framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantees of a just government." If that is so, then the First Congress might be guilty of original sin in the so-called perversion of original intention! Scalia cited Madison's Federalist 47 paper, and added his own corollary: "Without a secure structure of separate powers, our Bill of Rights would be worthless." He also acknowledged, like Hamilton, that "a mere parchment delineation of the boundaries" was inadequate. But the Framers, and those who most immediately implemented their work, were not *always* going to insist on absolute separation. Yes, legislative power could not be delegated; but it has been. Is the judicial power delegated to military courts, ostensibly under executive authority? Scalia was right when he said that the suit was about "power"—about the allocation of power among the branches, so that, as Madison warned, we would not have "a gradual concentration of the several powers in the same department." Scalia, of course, saw the Independent Counsel provision, as the opening wedge in establishing such a gradual concentration

III

The Judiciary Act of 1789 ultimately emerged as a compromise, a testimony to the restraint and tentativeness of the majority. The three-tiered judicial system was ambiguous, even flawed, and the scope of jurisdiction was less than that desired by the more nationalistically-minded Federalists. The Anti-Federalists, however, suffered a decisive defeat when Congress insisted on a separate federal lower judiciary despite the opposition's contentions that existing state courts would be sufficient. Certainly, to that extent, the Judiciary Act of 1789 fulfilled some of the worst fears of the Constitution's opponents. Some Federalists immediately called for expanding the numbers and powers of the federal courts. Attorney General Edmund Randolph bluntly spelled out the inadequacies of the law in a 1790 message to Congress.⁴² Yet the legislature failed to respond to repeated pleas from both the Washington and Adams Administrations to clarify and expand jurisdiction, and to create separate, intermediate courts of appeal. Finally, in 1801, after the decisive victory of Jefferson and his partisans, the congressional Federalists acted. Undoubtedly, their own political purposes overshadowed the Judiciary Act of 1801, but the partisan pall should not obstruct the substantive qualities of the law, including the jurisdictional arrangements and the reorganization of the intermediate courts.

The Jeffersonians subsequently repealed the Act in 1802. Jefferson himself had, by then, acquired a new perspective on the judiciary, fearful that it had become a Federalist "bastion" to defeat the goals of "republicanism." But in what may have been the final enduring achievement of Republican Reconstruction (which I have defined elsewhere as the reconstruction of the legal and constitutional system "to insure constitutional and political hegemony for the physically and economically dominant sections of the nation"⁴³), Congress, in 1875, passed the Jurisdiction and Removal Act, largely incorporating what the Federalists had intended in 1801, and what many of them had favored in 1789, as well.

of criminal investigation and prosecution in Congress. But perhaps Scalia has turned Madison on his head: the Independent Counsel statute, passed in pursuance of a specific constitutional authorization, can be seen as preventing a "concentration" of powers in "the same department." It is not my intention to offer any brief in behalf of the statute. See generally, *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (Scalia, J., dissenting).

42. AMERICAN STATE PAPERS, Misc. No. 17.

43. S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 167 (1968).

The times dripped with irony. Jefferson's reversal had profound consequences at the time, and offered new legitimacy to anti-judiciary attitudes. Fisher Ames, a Massachusetts representative, generally identified as a "High Federalist," worried in 1792 that the judiciary threatened an already too limited Congress. After the Circuit Court struck down a congressional act in the *First Hayburn's Case* in 1792, Ames complained that judicial review would "embolden the States and their Courts to make many claims of power, which otherwise, they would not have thought of."⁴⁴ That was 1792; but things change, and they do not always remain the same. Fearful of a Jeffersonian dismantling of the system that had been made safe for Federalism, Ames despairingly wrote in 1801:

So that one great barrier of the Constitution, erected to answer the ends of justice and public safety, when either government or the people themselves 'feel power and forget right,' may be subverted indirectly; though not directly. . . . Instead of stopping the flood of democratic licentiousness, this dam is to be the first obstacle that is swept away.⁴⁵

IV

A great deal of the current debate over "Original Intention" reflects a political agenda. We must realize that so much of what happened in 1787, and over the next decade, was filled with ambiguity and contradiction. The documentary evidence often overwhelms and confuses—but not always. James Madison, for one, knew that section 25 of the Judiciary Act of 1789 constituted the linchpin for the appellate authority of the federal courts, and provided an opening wedge for judicial review. Madison understood that it established supremacy over state courts, and at the end of his life, he remarked that it should be viewed as such "permanently," and he registered "surprise . . . that any other [view] should ever have been contended for."⁴⁶ Yet powerful and vocal advocates for the opposition serenely invoked their notions of "original intention" until the Civil War.

44. Letter from Fisher Ames to Thomas Dwight (April 25, 1792), *reprinted in 2 WORKS OF FISHER AMES* 942-43 (Ames ed. 1983).

45. 1 *WORKS OF FISHER AMES*, *supra* note 44, at 250.

46. 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 425 (Rives & Rendall eds. 1984).

political maxim, we must "watch their feet, not their mouths." If so, we will recognize that the Judiciary Act of 1789 resolved the debate over the nature of the judiciary by creating a relatively powerful, *national* judicial authority. Congress acknowledged that a federal judiciary was indispensable both to serve the demands of national power and as a *peaceful* forum to harmonize the unique federalistic system established by the Constitution—recurrent, ever-relevant themes in American constitutional history. For that we can celebrate, as well as commemorate, the Judiciary Act of 1789.