THE CONSTITUTION AND THE EARLY FEDERAL SYSTEM:

A SYSTEM OF GOVERNMENTS DIFFERENT IN NATURE

A Dissertation

Presented to

The Faculty of the Department

of History

University of Houston

In Partial Fulfillment

Of the Requirements for the Degree of

Doctor of Philosophy

By

Douglas A. Erwing

May, 2005

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The Framers reaffirmed their faith in republicanism during the constitutional convention by creating a federal system that preserved state governments and empowered a limited federal government. The federal system, rather than a conservative reaction against purported excesses of republicanism, actually guaranteed the continued viability of the states as important centers of governance.

The states retained the plenary power of governments rooted in a social compact. The Revolution brought about a shift in power from royal authority to the people. With power rooted in the people, state governments were reoriented around the people's branch, the legislature. These governments governed responsibly in the course of pursuing policies that aimed to win the war, care for their citizens at home and begin to reorganize their societies around republican principles.

The federal system enshrined in the Constitution included a new limited government of delegated powers that was to be added to the pre-existing state governments. The federal government was the product of drafters motivated to preserve republicanism. In the search for a compromise between the goal of empowering a national government and the value of protecting republican state governments, the Founders created a fundamentally new kind of government that was powerful but only within a limited realm. The Bill of Rights with the inclusion of the Xth Amendment only strengthened the protections for state governments within the federal system.

Debate during the ratification debates and over the Judiciary Act of 1789 assumed that the federal government was a government of limited and delegated powers. Federalists and Anti-federalists agreed that the Constitution created a federal government of delegated powers that would have different concerns from state governments. Their

argument was whether the allocation of powers within the federal system was proper and whether the barriers to hem the federal government in were sufficient. Congressmen, when crafting the Judiciary Act of 1789, made policy decisions within a constitutional framework that only mandated a blueprint for federal courts and federal jurisdiction.

The federal courts operated pursuant to constitutional directives that defined the government of which they were a part as a government of limited and delegated powers. Federal courts highlighted the difference in the scope and nature of federal power because federal courts had constitutional and statutory directives to use state judicial powers in some settings and federal judicial power in other settings. Federal courts adjudicated as if they were part of fully empowered governments of inherent authority when they used state judicial powers; the same federal courts adjudicated as part of a federal government of limited and delegated powers when utilizing federal judicial powers.

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SECTION I

THE THESIS

The Philadelphia convention produced a new formulation of governance. The Constitution, essentially a blueprint, ordained the creation of a federal system consisting of a new federal government and pre-existing state governments. Federal and state governments would be fundamentally different in nature as opposed to merely having different concerns. These two kinds of governments, one completely new, were to govern the same people, together, cooperatively.

The federal government was to be a limited government of delegated powers only. Its powers were only those that the people took from the states and delegated to it pursuant to the Constitution. The state governments would remain as they had been, governments of inherent authority, empowered by their very nature to deal with the fundamental issues of governance not parceled to the federal government by the Constitution. A federal system as outlined in the Constitution began operating in 1789; the experiment was in place.

The previously existing state governments remained liberty-enhancing governments of inherent authority. Their constitutions granted the all-encompassing power that had once resided in the king to the representative assemblies that were now entrusted with the power to nurture and foster liberty. The former parts of the king's executive machinery, state executive and judicial branches, were relatively weak,

particularly compared to their power in the colonial era. Governors, who had once wielded great powers, now often found themselves elected by the legislatures and reliant upon legislative support for salary and tenure in office. Judges and the courts were implements of legislative authority. Legislatures determined the jurisdiction of courts; state judges had their salary varied as the assemblies thought necessary; judicial review was frowned upon; and, if necessary, judges were impeached.

Rights at the state level were social contract rights. A combination of communal and individual rights, they revealed a sophisticated sense of the intrinsic relationship between rights and powers. Found in declarations of rights and in the body of state constitutions, rights at the state level were both freedom fostering and qualifiable. They were those principles upon which society was founded and which government should always respect, but they could be qualified if community needs required it. Liberty was thus not set in stone in constitutional provisions with guaranteed rights but was a flexible concept entrusted to broadly elected representatives assemblies.

State judiciaries reflected the character of the state governments. The legislatures controlled the law and the courts consistent with revolutionary principles that popular will should control judges and reshape the law. The assemblies controlled the jurisdiction of the courts and varied it as they saw fit. The assemblies were expected ultimately to grant new trials and appeals and to sculpt law that would comport with revolutionary ideology. State courts could exercise the power of judicial review, but they could not ultimately overrule the legislature. Such power was inconsistent with prevailing revolutionary concepts that gave the assemblies the plenary power of a parliament. Judges were to be automatons following legislative direction. It would take

a reaction at the state level, in response to judicial review at the federal level, before state courts fully exercised a power of judicial review that was more than essentially asking the legislature to review decisions. Finally, judges who challenged popular will as expressed by the legislatures faced legislative reprimand or the possibility of being impeached.

State courts continued to exercise broad powers uniquely characteristic of governments of inherent authority even as their role in the governments was diminished. They were relatively open forums for litigation, and in fact, then and largely even now, the only place in which genuinely new causes of action could be brought. State courts also had access to general principles of law to decide cases. Such principles are inherent in the nature of Anglo-American law and have no statutory basis. General principles, for example, would offer guidance in cases in which a court was confronted with truly original circumstances over which existing law offered inadequate guidance. General principles of law would not sanction a law that punished a man for a legal act or stripped A of property and gave it to B when A had broken no law. Although there might be no statute prohibiting the taking of A's property and giving it to B, a state court could rule such an action unconstitutional pursuant to a state constitution because it did not comport with the court's sense of what was just. State courts always had access to the entire body of general principles to resolve cases precisely because they were part of governments of inherent authority.

States utilized these principles of governance in the course of fighting two struggles: the Revolutionary War itself and a cultural war of sorts to reshape colonial society. In waging the former, often with armies occupying parts of their states, the legislatures acted responsibly and in accord with their constitutions. Legislatures

managed the procurement of resources and the fielding of armies. Assemblies also cared for their citizens who remained at home by managing absentee estates, granting new trials, allowing people to come and go through the war zone, making provision for pensioners, widows and orphans, and even licensing inn holders. The result, in great part due to their efforts, was victory in 1781. In the course of the second struggle, crafting a new society from the old, state legislatures rewrote laws, expanded representation, and enhanced local government. The result of this second struggle again was victory, but in 1787.

To these state governments, the Constitution added the federal government. Conceived in 1787 and created in 1789, the federal government was fundamentally different from any before it. Rather than a government of inherent authority empowered to deal with all of a society's substantive issues, the federal government was a government of only limited powers. The Constitution's purpose was twofold: to empower the national government to handle a number of issues including commercial matters, war, interstate disputes, and diplomacy that the Articles of Confederation had failed to handle effectively, and, at the same time, to structure that government so that republican liberty at the state level would not be infringed.

The conceptualization of rights within the Constitution and the structure of the federal government were both completely unlike the rights and structure of state governments. Constitutional rights, contained in Article 1, sections 9 and 10, were not the flexible rights found in state constitutions: they were rigid rights originally designed to form a barrier between the federal government and the states. The rights in Article I, section 9 protected the states and thus state citizens from actions by the federal

government that might have crippled liberty-enhancing state governments. The rights in Article I, section 10 insulated the federal government from state actions that might have hindered the federal government from carrying out its duties.

The federal government also had a structure that was different from state governments. Division of power rather than unity of power was the rule at the federal level. The Constitution empowered three coordinate branches. The Framers designed them so that through a system of checks and balances no one branch could assume to itself a dangerous quantum of power. Each branch was self-executing; power derived from the Constitution was laid out with relative specificity. Constitutional detail about the powers each branch could exercise served as both an empowerment and a limitation. Listing powers, as the Constitution did, empowered the relevant branch because, in the course of listing the powers, there could be no doubt that the federal government was to have those powers. Listing, as was done in Article I, section 8 for congressional powers and also for Article III federal courts, was also a limitation because listing specific powers excluded those not listed from the power of the relevant branch. The federal government and each of its branches embodied the overarching principle of the Constitution that the federal government was to be a government of only limited and delegated powers.

The federal courts highlighted the differences in the scope and nature of state and federal power, because federal courts had constitutional and statutory directives to use *state* judicial power in some settings and *federal* judicial power in other settings. The Constitution gave the federal courts the power to act like state courts in certain circumstances for compelling federalism reasons, such as the avoidance of conflict

between states. Federal courts handled these two settings differently because the governments were fundamentally different in nature. Federal and state judicial power differed both in the nature of their jurisdictions—the power to hear cases—and in the law—that body of rules and principles—that could be used to resolve cases.

When directed to use state judicial power pursuant to constitutional dictates and congressional directives, federal judges adjudicated as if they were part of fully empowered governments of inherent authority. They adhered to state jurisdictional principles and relied upon bodies of law to decide cases that otherwise only state courts could access. Federal judges, when utilizing state court powers, handled jurisdictional issues in a state court mode. State courts were courts of general jurisdiction and were not limited to a list of cases that they could entertain in the way that federal courts were otherwise limited in Article III. State courts were relatively open forums for litigation and could entertain new causes of action that might never have been brought before. When their constitutionally mandated jurisdiction directed the exercise of state court powers, federal judges used applicable federal law, state law, and general principles of law to resolve cases.

When federal judges utilized only federal judicial powers, they adjudicated as part of a federal government of limited and delegated powers. Jurisdiction and substantive law used pursuant to only federal judicial power differed from that used pursuant to state judicial power. Article III of the Constitution mandates federal court jurisdictions. This mandate serves as a limitation on federal power by preventing federal courts from trying cases not on the list. The mandate also ensures that all issues on the list can be tried in the federal court system. The list then both empowers federal courts to hear cases and

also limits possible efforts to expand the reach of the federal courts. Federal judges using federal judicial power resolved cases using only the Constitution, federal law and bodies of law to which they had access pursuant to express statutory directive. Federal courts did not have direct access to general principles to decide cases in the way that state courts did because the Constitution, creating only a limited government, does not grant such a power to the federal courts. The federal courts in fact treated state and federal judicial power differently because of the different nature of the state and federal governments.

Even though there had been agreement that the new governmental system should be a federal one with delegated powers, different views emerged in the wake of the convention about the scope and nature of federal powers. Practical accommodations, politics, and legal arguments, largely unanticipated by the Founders, would leave their mark during the course of establishing the federal government out of the blueprint ordained by the Constitution. The first challenges emerged in congress.

Continued debate over the balance between state and federal power even after the ratification of the Constitution complicated implementation of the federal court system. The Constitution had been ratified, but the Constitution's indefiniteness allowed for a range of ideas as to how federal power might be implemented. Everyone from ardent nationalists to states' rights advocates fought for their positions, because federal institutions still needed to be created in 1789, and the scope of federal power would be directly related to how deeply into state society independent federal institutions would be allowed to reach. Two plans for the creation of a federal court system came to dominate the debate in congress over what lower federal courts congress would ordain and establish. Advocates of a limited federal court system argued in congress that congress's

power to create lower federal courts should only be used to create federal admiralty courts and that all other federal matters should be tried in state courts. Advocates for a more vigorous federal court system, on the other hand, argued for a more extensive system of federal courts that would put a premium on federal claims being tried in federal courts. The compromise plan, the Judiciary Act of 1789, was more like the plan of those who wanted a stronger federal system, but it included important concessions so that the advocates of a more limited system would support it.

Congressmen had to address the difficulties of applying the theoretical system of federalism to the real world. Giving federal courts every case possible under Article III specifications might well have limited the reach and applicability of the Constitution, federal law, and treaties by making it expensive and time-consuming to litigate federal issues. To make certain that the Constitution, federal law and treaties could be given the greatest effect, congress utilized several devices that allowed state courts to resolve some cases within Article III's list of cases designated for the federal courts. If congress had failed to do this, some cases effecting federal issues would not have been fully litigated because of the expense of prosecuting their case. Thus, by limiting appeals, congress ensured that the less fortunate in society could have their day in court with the benefit of the Constitution, federal law or treaties and not fear having their victory appealed to courts at increasingly distant locations where they would inevitably lose only because they lacked the resources to travel to and litigate in far off courts.

Differences of opinion also arose later in the newly constituted supreme court as to the scope and size of the federal government and raised further controversy over the implementation of the theoretical system of federalism in the real world. Supreme court

justices argued over how fully empowered the Constitution made the federal government, and, correspondingly, the federal courts. All but one of the justices adjudicated as part of a limited government of only delegated powers. Constitutional and legislatively designed limits on the court were taken very seriously; and only the Constitution, federal law and treaties were relied upon as a basis for decisions when adjudicating only on federal bases. One justice, however, frequently argued that federal power was more expansive and that, correspondingly, federal courts did not need to pay as strict attention to jurisdictional limitations or be bound only to federal law as the basis for rulings. The federal court power that was implemented to ensure the enforcement of the Constitution was nevertheless a court system of a limited government of delegated powers.

Yet even after debate over how to implement the federal system, the federal government operated as a limited government, governing with state governments of inherent authority. Political debate in congress and difficulty in fleshing out Article III power failed to compromise significantly the federal system. Federal courts continued to fulfill their role as a powerful branch of the federal government. They found their power ultimately in the Constitution itself rather than in legislative empowerment as state courts did. Yet at the same time the federal courts operated as part of a limited government within the federal system. Federal courts adhered to constitutional and legislative limits to their jurisdiction and relied upon the Constitution and federal law when adjudicating federal issues. When handling issues under state law, federal courts used less restrictive jurisdictional principles and adjudicated using state law and general principles to decide cases.

The federal system remained the envisioned pairing of two different kinds of governments that governed cooperatively over the same people that the Founders had created in 1787. State and federal governments were fundamentally different with the state governments continuing to be the liberty-enhancing governments imbued with the Revolutionary notions of republicanism. Their legislatures were the focal points of these governments and they had the power to exercise legislative and judicial functions or compromise individual liberties if they thought necessary to fulfill their mission as agents of the people. These governments were now joined with a federal government that, although extremely powerful, was limited to a delegated realm of governance that ensured the continued viability of state governments. Division of power, specific grants of authority and protections to ensure that neither state nor federal government could intrude upon the realms of the other marked the federal government as a government of limited and delegated powers. This system that uniquely blended these two kinds of governments ensured the continued viability of republicanism and signaled the Founders continued faith in the democratic principles that animated the Revolution.

SECTION II

HISTORIOGRAPHY

In 1913 Charles Beard fundamentally altered the study of the Constitution with the publication of An Economic Interpretation of the Constitution. Beard argued that the Framers were a wealthy elite who drafted the Constitution in a way that secured their class's financial interests. His portrayal of the Founders as normal men, animated in no small measure by predictable motives of self-interest, was controversial and yet provocatively appealing.[1] Today's constitutional studies continue to bear the significant imprint of An Economic Interpretation of the Constitution, with their enduring quest for what motives lay behind drafting of the Constitution.

Beard offered his thesis in the midst of a debate not about the Constitution itself but about whether reverence for the Framers and their Constitution should preclude amending the Constitution. Beard's position ultimately prevailed. Having raised a sufficient specter of avarice in the creation of the Constitution, Beard succeeded in reshaping constitutional studies. Once the stain of self-interest had been pinned upon the previously untainted reputations of the Founders, historians, lawyers, and legislators were sufficiently challenged to come to grips with what the truths behind the myths might be

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[1] Charles Beard, An Economic Interpretation of the Constitution of the United States (1913; New York: The Free Press, 1986) 63 and 324 but also see Beard's denial that he imputed overt motives to the Founders at page lii of his introduction to the 1935 publication in which he disavows a deterministic approach. The introduction to the 1935 publication is included in the cited work.

For examples of hagiography see George Bancroft, History of the Formation of the Constitution of the United States of America, 2 vols. (New York: D. Appleton, 1882) and John Fiske, The Critical Period of American History, 1783-1789 (Boston: Houghton Mifflin, 1888).

even if the nation had benefited from the Founder's efforts. Literature about the Constitution would never be the same again.

Beard's work, though, proved enduring in ways that he did not fully intend. His work, in fact, inappropriately became central to the purported study of the Constitution even though he described its central thesis as "frankly fragmentary" and concluded his provocative work with a challenge to future historians to study the Founders' motives more fully.[2] Since the publication of An Economic Interpretation many historians have taken Beard's challenge, some agreeing with his economic interpretation, others seeing instead a Constitution rooted in political pragmatism or shaped by republican ideology. Yet for all the work done by succeeding historians, Beard's call for critical constitutional studies has lost its resonance. The debate is in a mature form with well-developed schools and seemingly little fertile ground left for study.[3]

The irony is that Beard's thesis is the reason why the debate on the Constitution has lost its energy. His specific thesis was so provocative and superficially compelling that it quickly became, and has remained, an orthodoxy even after many of the specific elements of his argument have been rebutted. His method of analyzing the Constitution remains even more enduring than his thesis and continues, in large measure, to be the way historians approach the study of the Constitution today. Thus, as we approach the hundredth anniversary of Beard's pioneering study, the contours of the Beardian shadow

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[2] Beard 24, 34, 74 and 294. Beard points out the need for scholars to complete studies of economic interests, analyze Treasury records, study the economic interests of those men at the Philadelphia convention, and analyze the economic conflicts over ratification.

[3] Gerald N. Grob and George Athan Billias, Interpretations of American History, 6th ed., 2 vols. (New York: The Free Press, 1992) 178. "Certainly by the end of the 1980s, most scholars found the debate over economic interests and the Constitution along Beardian lines to be neither helpful nor rewarding." Grob

cast over the literature on the Constitution in 1913 remain in significant part and thus the limits of Beard's work have become our limits in studying the Constitution.

Few if any of the first readers of An Economic Interpretation of the Constitution would have predicted its enduring and complicated legacy. Most were simply trying to come to grips with a work radical for its time. Beard assumed that the "social and economic interests determining the thought of the thinkers" ought to be central to studying the Constitution and that the struggle between interest groups, or "politics" in Beard's own words, was "the very warp on which constitutional law is woven."[4] With these assumptions he then used a deceptively simple approach to craft his argument. He limited the scope of his study to the period before the ratification of the Constitution, and thus ignored both the Constitution itself and the period afterward, for which there was case law. Having tailored his work to areas over which historians could claim expertise without challenging the legal profession on its ground, he then scrutinized the drafters' aims.

His conclusions were breathtaking. Beard argued that holders of personalty, including rich merchant creditors, speculators in depreciated Revolutionary War certificates, and land speculators played the critical role in drafting and ratifying a Constitution that protected those with just such interests.[5] Using Treasury Department records from 1790, Beard concluded that the men at Philadelphia were invested heavily in

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and Billias do not mean for this to include Gordon Wood and the republican thesis, but I will argue they really should.

[4] Beard 9; Merle Curti, "Beard as Historical Critic," Charles A. Beard: An Appraisal, ed. Howard K. Beale (1954, New York: Farrar, 1976) 197. See also Beard 19 where Beard says, "The whole theory of the economic interpretation of history rests upon the concept that social progress in general is the result of contending interests in society--some favorable, others opposed, to change."

personalty rather than real estate. In essence they were a creditor class that had financed the Revolutionary War, nascent manufacturing, and the purchase of Western lands through debt certificates. According to Beard, this creditor class, represented by those at the Constitutional Convention, pushed through a Constitution with the powers necessary to ensure the success of their investments. The new federal government with powers to tax, declare war, regulate commercial matters, protect the obligations of contracts, and dispose of western lands could protect their holdings and, more generally, allow the merchant class to hold sway over a class of farmer-debtors with markedly different financial interests.[6] Farmer-debtors, Beard implied, would have preferred to have the nation's limited financial resources invested in them through inflationary monetary policy and debtor relief statutes.[7]

After only a brief period of intense controversy, Beard's thesis had triumphed completely over critics and challengers alike. By 1938 its influence was such that it was recognized in one poll of scholars as one of the two most significant works of social science published to that point in the twentieth century; the other was Thorstein Veblen's The Leisure Class.[8] Yet the question remains why Beard's thesis so quickly became the preeminent view. Beard was not one of its strongest supporters. His defense of the work was lukewarm at best. He described the central argument as "frankly fragmentary" and in

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[5] Beard 324.

[6] Beard 176 and 26-30.

[7] Beard 31 and 63.

[8] Richard Hofstadter, "Charles Beard and the Constitution," Beale 88. Hofstadter says that in 1938 the editors of The New Republic queried scholars regarding what books should be discussed at a symposium called "Books That Changed Our Minds." Beard's An Economic Interpretation and Veblen's Theory of the Leisure Class were the two most frequently mentioned.

later works he even reverted to a traditional political approach in describing the Constitution's drafting.[9]

The explanation lies not in Beard's scholarship but in his ability to write so convincingly to a Progressive audience and in Progressivism's enduring qualities. Beard's work was clearly the product of a reformist urge even though he denied writing An Economic Interpretation with a specific agenda in mind.[10] This should not come as a surprise: he was after all a dedicated reformer. As an academic, he was a member of a small loose-knit group of scholars, including the philosopher John Dewey and historians Harry Elmer Barnes, James Harvey Robinson, Carl Becker, and Orin Libby, who were trying to refocus their disciplines on social and economic forces.[11] The historians, in particular, found institutional studies antiseptic and unpersuasive. They believed that social and economic forces were the agents shaping society and that academic disciplines needed to focus on the ways that these forces had shaped society. They were generally pragmatists who sought to make their disciplines, whether philosophy or history, practical and relevant. Their work was supposed to appeal to fellow academics but also influence public opinion and policymakers. Many among them, Dewey and Beard most prominently, invested huge amounts of time in projects that today seem only distantly

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[9] Beard, preface v. Beard would later actually abandon his own thesis in The Republic (New York: Viking Press, 1943), A Basic History of the United States (Philadelphia: Blakiston, 1944), and The Enduring Federalist (Garden City, NJ: Doubleday, 1948). McDonald argues that this may not be a sign of a genuine repudiation. He may have done this in part to win over conservative textbook editors in order to further sales of his books. This was McDonald's economic interpretation of the repudiation.

[10] Beard, introduction to the 1935 edition xlii, denied that "[An Economic Interpretation was] a work of the occasion, written with reference to immediate controversies . . . [including the] . . . thought of forwarding the interests of the Progressive party or of its conservative critics or opponents." He does say, however, that he was "influenced more or less by the 'spirit of the times'."

related to academic pursuits. For reform minded academics such efforts were central to their work.

Beard was indeed a reformer outside of academia. While in England as a graduate student he assisted "trade unionists, suffragettes, single-taxers, and socialists."[12] He was one of the founders of Ruskin Hall and mixed prominently with members of Britain's reform-minded Labour Party.[13] After returning to the United States he continued to give tirelessly to reform efforts. He was a constant contributor to The New Republic, helped establish the New School of Social Research in New York and devoted energy to municipal reform efforts.[14] He would go on to direct numerous state and municipal surveys including those that led to reorganization efforts in New York City and Delaware.[15] He chaired a committee that resolved a dairy strike in Connecticut; and he led a successful effort of the Missouri Pacific Railway Company's small bondholders to protect their rights against the industrialist-owners that culminated with Beard testifying on their behalf before congress.[16] He also campaigned with liberals in defense of the McNamara brothers who were charged with killing twenty-one people during a bombing of the Los Angeles Times.[17]

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[11] Forrest McDonald, "A New Introduction," An Economic Interpretation of the Constitution of the United States (1913; New York: The Free Press, 1986) xi.

[12] Eric F. Goldman, "Charles A. Beard: An Impression," Beale 4.

[13] Goldman, Beale 4.

[14] He was a long-time officer of the National Municipal League and the director of the New York Bureau of Municipal Research's training school for five years. See Luther Gulick, "Beard and Municipal Reform," Beale 49.

[15] Gulick, Beale 53-54 and 49.

[16] George S. Counts, "Charles Beard, The Public Man," in Beale 238.

Beard blended a historian's skill and expertise with the zeal of a reformer. He understood the degree to which histories of the Constitution had grown sclerotic, and also the need for history that could offer Progressives some insights into the Constitution. Again and again he critiqued histories of the two approaches that predominated in the era before his book, and he found them deeply flawed.[18] Nationalist School scholars such as George Bancroft and John Fiske described the Constitution in almost mythical terms as a divinely ordained document written by men with only the highest motivations.[19] The Constitution emerged from their books as a work of perfection drafted by demigods. The other school of historians, the Teutonic School, wrote history even further removed from turn-of-the-century America than the Nationalists. Teutonic scholars, John W. Burgess prominently among them, described the Constitution as descendent of ancient Germanic tribal institutions. They found the Constitution's antecedents in the woods of northern Europe centuries ago and for them the Constitution was the culmination of experimentation and development with freedom-enhancing institutions descended from Teutonic tribesmen. While such histories, particularly the Nationalists', were often comforting to read, their description of the Founders and the Constitution failed to comport with Progressive era notions of people and law. Such histories also failed to

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[17] Counts, Beale 237.

[18] Merle Curti, "Beard as Historical Critic," in Beale 197-198; and Beard 1-13.

[19] For examples of Nationalist School histories see George Bancroft, History of the Formation of the Constitution of the United States of America, 2 vols. (New York: D. Appleton, 1882) and John Fiske, The Critical Period of American History, 1783-1789 (Boston: Houghton Mifflin, 1888). A prime example of a Teutonic School historian is John W. Burgess. He wrote Political Science and Comparative Constitutional Law, 2 vols. (Boston: Ginn, 1891). Another scholar who applied the Teutonic School approach instead to English history is Bishop Stubbs in his Constitutional History of England, which Beard studied while at Oxford and which Beard's own dissertation critiqued and criticized. See Max Lerner, "Charles Beard's Political Theory," Beale 26.

offer lawyers, jurists and legislators any guidance as they struggled to adapt constitutional doctrine to the realities of American life in the twentieth century. Historians' failings then in some sense served as a calling for Beard, a reformer and historian, to delve into constitutional studies and write a relevant history of the Founders and the Constitution.

Beard also brought to An Economic Interpretation the commitment of a Progressive era expert. Progressives became enamored of experts, eager to utilize their skills and knowledge to cure societal ills. Beard, among many experts, brought his scholarly skills and devotion to research to bear on a variety of problems. He labored closely with Robert Moses to draft the report that would ultimately lead to the reorganization of New York City's transportation grid.[20] Beard, in this report as well as in many others, stressed the importance of serious scholarship, clear exposition of ideas, and, ultimately, comprehensive reform that would weaken entrenched special interests and empower the people broadly.[21] In his work to resolve a dairy strike in Connecticut he forced the parties to confront the realities of the industry after producing a statistical study that neither side could challenge.[22] Again and again, Beard brought the tools of the historian--detailed research, analytical thinking and effective writing--to assist fellow Progressives in solving problems.

The critical issue that probably focused Beard's various interests on the Constitution and thus ultimately led to An Economic Interpretation was Lochner v. New

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[20] Gulick, Beale 53.

[21] Gulick, Beale 53. See also Report of Reconstruction Commission to Governor Alfred E. Smith on Retrenchment and Reorganization in the State Government (Albany: State Printing Office, 1919) 4-5, 12-14.

[22] Counts, Beale 238.

York. The Lochner case was very controversial and attracted national attention.[23] It was a 1905 supreme court ruling in which the court struck down a New York state law that limited the number of hours that bakers could work. New York felt the law was justified to protect bakers from unfair labor contracts that forced them to work long hours in unhealthy working conditions. The court's five member majority ruled the law unconstitutional because it infringed the bakers' rights to contract for their labor freely. Four dissenting justices, among them Justice Olive Wendell Holmes, issued scathing dissents. Justice Holmes included in his opinion his now famous statement that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."[24] The dissent's basic point was that state legislatures, trying to protecting their citizens, should not be checked by socially conservative justices who cloaked their real reasons in weak constitutional arguments. The result infuriated reformers. The majority was using the Fourteenth Amendment, originally a reform amendment, to stymie the reform agenda of the Progressive movement. The case was evidence to many Progressives that the federal courts were a conservative bulwark against their reform legislation. It was also powerful evidence, regardless of how Progressives felt about the case, of an acrimonious debate among supreme court justices over how to interpret the Constitution.[25] The national

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[23] 198 U.S. 45 (1905).

[24] 198 U.S. 75 (1905). In his dissent, Justice Oliver W. Holmes said, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Spencer argued that the history of governmental efforts to further citizen's happiness through the passage of laws was a "testi[mony] to the futility of these empirical attempts at the acquisition of happiness. What is the statute-book but a record of unhappy guesses?" Spencer wrote that "progress is . . . a necessity . . . ." He argued that "human faculties [would] be moulded into complete fitness for the social state; evil and immorality [will] disappear; so surely must man become perfect." See Herbert Spencer, Social Statistics and Man versus State (New York: D. Appleton, 1897) 13 and 32.

attention the case drew elevated questions about judicial review and reforming the judiciary to the national stage during the 1912 presidential elections.[26]

Beard cites the case in his introduction in the midst of an extensive discussion of how devoid constitutional adjudication is of the underlying social and economic forces that shaped the Constitution.[27] He could not have helped realize how he, almost alone, was capable of offering valuable insights to reformers, lawyers, and jurists about the fundamental nature of the Constitution. Lochner would have served to focus an ongoing interest in the law, that included training in English law that lacked traditions of rigid constitutions and federalism. He had been exposed, as a municipal reformer, to law's various uses as an instrument of power and, as a historian, he was cognizant of legal academic debates reconceptualizing the fundamental nature of law.[28] These influences together with a reformers' impulse and the dedication of a Progressive expert made Lochner the catalyst that prompted Beard to write An Economic Interpretation of the Constitution.

Beard's work found a wide and receptive audience. In the broadest sense, Beard's theory was compelling because it dovetailed so nicely with prevailing Progressive era

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[25] Morton J. Horwitz, The Transformation of American Law, 1870-1960 (Cambridge: Harvard University Press, 1977) 3-6 and 33-64 on the role of Lochner in a major paradigm shift in legal thinking.

[26] During the Lochner era, from 1905 through the mid-1930s, the supreme court invalidated a number of state laws because they violated the Fourteenth Amendment. Progressives believed that the supreme court's invalidation of Progressive era state laws was evidence that the court was acting as a conservative bulwark against their reforms. The court's actions, centered on the Lochner decision, became an issue in the 1912 presidential race. See Beard, introduction to the 1935 Edition xli.

[27] Beard 9. See note 2 on this page quoting from Holmes's dissent and citing Lochner.

[28] Beard 7-14.

views of history and law. Reflecting back upon the past through the prism of their lives, those in the Progressive era were particularly receptive to the view that history was dominated by interest group politics.[29] Class, racial, economic, and political differences created multiple fault lines during the Progressive era, and Progressives had little trouble believing that earlier eras had also been plagued by such fault lines. Progressives integrated law into their view of persistent conflict by viewing it as just another tool that could be used to further one group's chosen ends. Beard captured both of these themes: his work is dominated by the struggle between various interests--in this case farmer-debtors and wealthy creditors--in which the creditors used the Constitution, in some sense the ultimate law, in an instrumentalist fashion to ensure their final security.

Beard's work also gained prominence because it supported efforts to enact Progressive legislation and Progressive constitutional amendments. In the same way that Beard had both mirrored and focused the struggles of reformers in the Progressive era generally, Beard's work was consistent with and bolstered emerging theories of law during the Progressive era. As part of the broad rejection of formalistic thought, the Progressives were skeptical of older perceptions of law that viewed law as benign, neutral, and discoverable. Beard himself decried the "devotion to deduction from 'principles' " that produced constitutional histories that were "dry and legal."[30] He was familiar with cutting edge legal theory: he mentions Von Jhering, Menger and Stammler, and cites Pound and Goodnow in An Economic Interpretation.[31] They, along with

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[29] Grob and Billias 162-164.

[30] Beard 9 and Merle Curti, Beale 197.

Brandeis, who was practicing, were arguing that law was not based on immutable principles that had to be discovered. Rather, law was made to serve interests. Progressives, Beard among them, came to view law as a creature of politics shaped by social forces. Beard's thesis blended beautifully with this theory of law and took it one step further by applying it to the supreme law, the Constitution. Beard argued that the Constitution, far from almost sacred law, was created in the political arena out of a conflict between competing interest groups. Addressing the Constitution in these terms demystified it, reduced it from an unalterable sacrosanct law to merely the law imposed by those in control at the time. Beard's thesis thus invited and sanctioned Progressives to push for their own agenda to be constitutionalized because constitutional law appeared only to be the convention of the social group in control at any particular moment. Four constitutional amendments between 1913 and 1920 and a host of Progressive laws were testament to the success of Progressives, in part relying on Beard's thinking, to use the law for their ends.[32]

Progressivism's successes were an achievement for Beard the reformer. There is no evidence that he envisioned specific pieces of legislation or constitutional amendments, but he was committed to a vague reform agenda that centered on a democratic political philosophy. He was committed to popular self-government whether on the municipal level or the federal level. Beard was not bashful about offering

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[31] Beard 9-14.

[32] The very number of constitutional amendments demonstrates that the Progressives were truly activist. Between 1791 and 1912 Americans amended the Constitution five times. Between just 1913 and 1920 Progressives amended the Constitution four times. These four were the Sixteenth Amendment which allowed an income tax, the Seventeenth Amendment which provided for the popular election of senators, the Eighteenth Amendment which instituted Prohibition, and the Nineteenth Amendment which granted women the right to vote.

intellectual backing to reformers by encouraging them to use the law for their purposes: years after the Progressive era was over a mellowed Beard could still say that "I am sure as fate, that [the Founders] intended to set up a government endowed with broad national powers and that they expected their posterity to use those powers in dealing with questions, crises, and disturbances arising from generation to generation."[33] It is hard to imagine that he was not pleased with the broad contours of change in the Progressive era: people seized the day and enacted laws that worked to further democracy and lessen the ills of urban, industrialized America.

Beard's eminence is also due to the fact that he offered guidance to those outside of academia, including jurists and lawyers, who were struggling to interpret the Constitution in light of the changes sweeping America in the early twentieth century. Beard made himself an expert on the Constitution at a time when experts were newly revered and at the very time that the supreme court was determining whether a variety of Progressive era legislation was constitutional. His work commanded attention as the voice of an expert.

The attention that An Economic Interpretation received as an authoritative work on the Constitution, and thus law, was an achievement of Beard the historian and expert. Beard interjected himself into what had previously only been a legal debate by couching his argument within an analytical framework that limited the scope of the study to what Beard and other historians could claim as their area of expertise. In essence, Beard ironically made himself the equal of lawyers on the topic of the Constitution by avoiding

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[33] Harold J. Laski, "Charles Beard: An English View," in Charles A. Beard: An Appraisal, ed. Howard K. Beale (1954, New York: Farrar, 1976) 18 quoting from Beard's The Republic at page 115.

legal matters and focusing on only the history. If Beard had argued with lawyers over the Constitution itself or the period after its ratification, for which there is case law, then he could have been dismissed as an upstart dealing with issues out of his area of competence. Instead he avoided the law itself, and in making full use of historical material relevant to the period before ratification only, Beard elevated the importance of his argument dramatically, and thus garnered it equal if not greater weight than those offered by legal scholars. Beard made himself the legal expert on the Constitution and, in the course of doing so, made himself the heretical expert who was called to appear before the New York Bar Association because " . . . some members of the New York Bar Association became so alarmed by the book that they formed a committee and summoned me to appear before it; and, when I declined on the ground that I was not engaged in legal politics or political politics, they treated my reply as a kind of contempt of court."[34]

Beard used the skills of his area of expertise—history—to force those in the legal community to reconceptualize the Constitution. Bringing diverse interests and skills to bear on the question of the Constitution's true meaning allowed Beard to meet the needs of various groups who sought guidance about how to interpret the Constitution. As an expert and reformer, Beard offered insights to reformers about the Constitution they desperately wished to utilize in their struggle to reform urban industrial America. Addressing a work on a subject of such currency to so large an audience and offering insights that comported with the spirit of the day virtually ensured Beard a devoted following.

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[34] See Beard, introduction to the 1935 edition xliv.

Yet Beard's book was greeted with a torrent of criticism when it first appeared; most of the negative comments came from indignant conservative leaders who denounced the book out of hand.[35] The criticisms included some who savaged Beard's thesis for impugning the reputation of the founders by attaching Marxian concepts of class to their actions;[36] others added the criticism that Beard was muckraking;[37] still others, often historians, moved beyond characterizing the work and attacked Beard's assumptions, research, and conclusions. Prominent among this latter group were historians Andrew McLaughlin, Charles Warren, and Edwin Corwin.[38] Their critiques did not grab the headlines, but they proved to be the most cogent.

Members of a Political School of history, they argued that the Constitution was the result of practical political compromises not self-serving economic motives.[39] They portrayed the Founders as politicians whose motivations ran the gamut from altruism to self-interest but who were acting from necessity rather than opportunism as they forged the Constitution in the course of a number of political and ultimately pragmatic

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[35] Former president Taft denounced it, as did the paper of future president Harding. See Beard, introduction to the 1935 edition xviii-xix.

[36] Significant among these was professor Theodore Clarke Smith who in an address to the American Historical Society in 1934 charged Beard with putting forward a theory that ". . . has as its origin, of course, the Marxian theories." See Beard, introduction to the 1935 edition xlv.

[37] Prominent among such critics was former President William Howard Taft who alleged that Beard had made a "muckraking investigation" of the Constitution. McDonald, "A New Introduction" xix.

[38] Prime examples of their work include Andrew McLaughlin, The Confederation and the Constitution (New York: Harper & Brothers, 1905), Charles Warren, The Making of the Constitution (Boston: Little, Brown 1928), Edwin Corwin, "Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," American Historical Review 30 (1925): 511-536.

[39] Warren 5. "Historians who . . . contend that these men [the drafters of the Constitution] were moved chiefly by economic conditions utterly fail to interpret their character and their acts." See also McLaughlin 69-82 and 221. McLaughlin recognized that "economic factors of course played their part" but that "no attempt to draw lines sharply dividing the people into classes can be successful."

compromises.[40] Rather than entrenching any one group in power, the Constitution solved problems for a variety of factions before fears of disunion could become a reality.[41] The Founders' success was such that no single section, class, or economic group opposed the Constitution's ratification.[42]

Edwin Corwin's attack on Beard was the most vigorous. Corwin critiqued An Economic Interpretation shortly after its publication, and found its thesis deeply flawed.[43] Corwin went straight to the heart of the matter; he argued that Beard's central contention was not born out by his evidence. First, Beard relied upon Treasury records from three years after the Constitution's ratification as proof of their holdings before the constitutional convention. Beard's argument thus rested upon the implausible assumption that the men in Philadelphia had not speculated in securities for the three years from 1787 and 1790. Corwin further argued that even relying on the 1790 records Beard's argument was unpersuasive. One-third of the securities held by the framers, according to Beard's own evidence, were state bonds that the federal government did not

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[40] Warren 67. Warren described the Founders as largely "disinterested, unselfish, and patriotic . . . " but he also saw a degree of self-interest motivating the Founders. See Warren 73-80. McLaughlin, in his A Constitutional History of the United States (New York: Appelton-Century-Crofts, 1935) 195 described the self-interest as protection of social class. According to McLaughlin many of the drafters feared "as the numbers of the unpropertied classed increased, they might combine to endanger property and public liberty, or would become the tools of opulence and ambition." In essence the better and wellborn at the convention feared losing their place of distinction in society and in the halls of power.

[41] This was particularly the argument that Warren put forward. He stressed the "Fears of Disunion" as he entitled his first chapter and "that without [a new Constitution] a dissolution of the Union and disappearance of republican government were inevitable." See Warren 54. McLaughlin was much less critical of the Articles of Confederation and thus placed less emphasis on the crisis than Warren, yet he nevertheless described the Articles as "moribund" and 1786 as the "year of gloom." See McLaughlin 144 and 147.

[42] On the point that the Constitution was not an achievement for any one group, see Warren 733 and McLaughlin 221.

assume. Of the remaining two-thirds of the securities held by the framers, most were held by five men who were inconsequential players in the drafting and one of them actually opposed the Constitution. Corwin's critique, as well as those of other Political School historians, were actually powerful, yet for all of their persuasiveness they simply fell on deaf ears. Beard's theory was just too compelling for too many people: it passed from scholarship to dogma, and it would not be until the 1950s and 1960s that historians began to reevaluate Beard.[44]

The attack came from two schools of thought that dominated the immediate post war period: a Consensus school that emerged in the early 1950s and a Neo-Progressive School that emerged in the early 1960s. Even though both schools agreed that Beard's thesis needed reevaluation, their differing assumptions led them to disagree about the degree to which Beard's work was flawed. Consensus historians tended to criticize Beard forcefully; they challenged his work internally and offered wholly new theories to explain the Constitution. Neo-Progressives, with assumptions closer to Beard's, challenged Beard less vigorously; they proved less willing to part with Beard's assumptions and more often conducted the more detailed studies that Beard said would be necessary to prove his theory.

In general Consensus historians muted differences and conflict in American history: consensus, unity, and continuity characterized America's past. The threat of communism and the marked contrasts between the free world and that behind the Iron Curtain influenced their overall perspective. They also pointed to the welfare state and

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[43] See his original review and critique in "A Theory of the Constitution," The History Teacher's Magazine Feb 1914: 30.

post-war prosperity as evidence that the class and economic struggles that dominated the Progressive era were an aberration. To Consensus historians, American society in the aftermath of World War II looked relatively prosperous with minimal class tension. The reduction of tension in the United States coupled with the stark differences between the communist and capitalist systems made the differences that Progressives stressed seem relatively inconsequential. Consensus historians argued that conflict was not within the United States but between the Soviet and American systems.[45]

Neo-Progressives argued that genuine conflict was endemic to American history. The notion of consensus was a superficial fiction; McCarthyism, civil rights and cultural dissension all led the Neo-Progressives to believe that conflict was endemic to the 1950s as it had been throughout American history. They continued the Progressive tradition of writing about history in terms of interest group politics, but added to it new methods and material and often produced a more complex picture than Progressives had, but a view rooted in struggle nonetheless.[46]

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[44] McDonald, "A New Introduction" xxii-xxiii.

[45] See Robert E. Brown, Charles Beard and The Constitution (Princeton, NJ: Princeton University Press, 1956) and his companion works Middle Class Democracy and the Revolution in Massachusetts, 1691-1780 (1955, New York: Harper & Row, 1969) and Virginia 1705-1786: Democracy or Aristocracy (East Lansing: Michigan State University Press, 1964); Douglas Adair, "The 10th Federalist Revisited" William & Mary Quarterly, January 1951; Lee Bensen, Turner and Beard: American Historical Writings Reconsidered (Glencoe, Ill: Free Press, 1960); Edmund Morgan, The Birth of the Republic, 1763-1789 (Chicago: Chicago University Press, 1956); Daniel Boorstin, The Genius of American Politics (Chicago: Chicago University Press, 1953).

[46] Merrill Jensen, The Articles of Confederation (1940, Madison: The University of Wisconsin Press, 1962) and The New Nation: A History of the United States during the Confederation, 1781-1789 (1950, New York: Knopf, 1962); Jackson Turner Main, Antifederalists: Critics of the Constitution, 1781-1788 (Chapel Hill: University of North Carolina Press, 1961); Forrest McDonald, We the People: An Economic Interpretation of the Constitution (Chicago: Chicago University Press, 1958) and E Pluribus Unum: The Formation of the American Republic (1965, Indianapolis: Liberty Press, 1979).

Consensus School historians demolished Beard's specific thesis that the Constitution was an economic tool of wealthy creditors. Robert E. Brown and Lee Benson challenged Beard on his own terms by analyzing the conclusions Beard reached from his evidence. Brown's book, which mirrored Beard's chapter by chapter, showed that Beard made faulty assumptions, slanted evidence and built arguments based on faulty logic. In particular Brown demonstrated that Beard's argument that wealthy aristocrats and speculators had achieved an undue influence in both the drafting and ratification of the Constitution simply was not true. Brown's brief sketch of economic interests showed that those in favor of the Constitution and those opposed to it had the same economic interests at stake. Furthermore, even if those holding securities had held sway at the Convention, Brown showed that Beard had failed to delineate clearly exactly how economic motives affected the founders: was it simply that a preoccupation with economic interests made them more likely to draft a Constitution that favored speculators or was it that they consciously sought to line their own pockets? In the end, Brown's intemperate attack effectively crippled Beard's thesis by showing that his arguments about economic causation and the undue influence of speculators were unsupportable.

Benson's critique of Beard, while tempered compared to Brown's, was nevertheless equally cogent. Benson charged that Beard's thesis rested on a confused notion of economic determinism, his "system of classification" was not applied "rigorously," and his linkage between economic interests and voting blocks was not sufficiently investigated.[47] In short, due to problems with his assumptions, classifications of voters and the interests that flowed from these, Beard's thesis was left, in Benson's

[47] Benson 100-101, 116 and 117.

eyes, unproven. At best, "The data now available indicate that some of Beard's claims are potentially verifiable and that some are not."[48]

Other scholars, generally Neo-Progressives, conducted the more detailed studies that Beard said would be necessary to prove his thesis. The result of their efforts was a Beardian thesis that some declared dead and others modified practically beyond recognition. In a series of histories covering the Revolution and Confederation, Merrill Jensen detailed an America of much greater complexity than Beard had, riven at heart by social forces rather than economic ones. Jensen argued that "during the Confederation political lines formed and changed on various issues, but always there emerged from the welter of complexities the broad outline of social cleavage."[49] Jensen found that the division expressed itself in economic, political and even religious debates and could be traced to a struggle between "conservatives" and "radicals" that predated the Constitution. Although not expressly rebutting Beard's contentions about the economic interests of those in Philadelphia in 1787, Jensen's work even further weakened Beard's view by arguing that while economic tension continued to plague the young nation in the last years of the confederation, on the whole the nation prospered during the confederation era. Thus, while Beard portrayed those at the convention working feverishly to salvage their economic interests, Jensen's view of confederation era economics implies that the Founders might not have had the economic motives imputed to them by Beard.

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[48] Benson 214.

[49] Jensen, The New Nation 260.

Forrest McDonald's We the People: The Economic Origins of the Constitution was a response to the challenge issued by Beard to investigate more fully the economic interests of the Framers. McDonald found that Beard's thesis rested on a grossly oversimplified picture of economic classes and economic interests. There were, in fact, a complex set of social groups with a variety of property interests. The variety of socio-economic groups, even if they were generalized into debtor and creditor classes, had important divisions within them that would have prevented a conspiracy of personalty holders.[50] After an exhaustive study measuring Beard's conclusions against his evidence, McDonald concluded, "On all counts, then, Beard's thesis is entirely incompatible with the facts."[51]

E. James Ferguson and Jackson Turner Main added to the work done by Jensen and McDonald to flesh out the revolutionary period; both found that Beard's thesis necessarily required qualification to survive. Ferguson concluded that many of the Framers did not have the economic incentives Beard attributed to them. He concluded that many states had found means to finance their state debts and often the debts their citizens had incurred by purchasing revolutionary war certificates. He also found important examples of men holding public securities who had opted to back existing state governments rather than put their faith in a new untested central government.[52] Jackson Turner Main substantially qualified Beard by arguing that class divided Federalists from

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[50] McDonald, We the People 358-399.

[51] McDonald, We the People 349-357.

[52] E. James Ferguson, The Power of the Purse: A History of American Public Finance, 1776-1790 (Chapel Hill: University of North Carolina Press, 1961) 335-337, and commenting upon Beard directly at 338-343.

Anti-federalists with economic considerations being only one of those features that distinguished the upper from the lower classes. What those economic interests were did not matter; those that were wealthy, regardless of what their wealth was composed of, favored the Constitution. Main went on to point out that numerous states and most towns failed to fit neatly within his explanation and impliedly Beard's. Most townspeople, including the poor, were Federalists, and in six states significant constituencies failed to act in accord with even this theory.[53]

Yet, amid the welter of criticism of Beard's specific thesis, the Beardian model endured. Lee Benson criticized Beard, but he nevertheless argued that the Constitution grew out of class conflicts between those who were "commercial-minded" and those who were "agrarian-minded."[54] Jackson T. Main accepted a degree of criticism directed at Beard, but he defended Beard's conception of class conflict that led to the Constitution.[55] Ferguson's view, although certainly contradicting Beard's specific thesis, nevertheless only analyzed the framers' motives as a response to property holdings; Ferguson found that public finance was the critical issue prior to the Constitution and that "as a group the creditors supported the Constitution."[56] Even McDonald, who demolished the central element of Beard's thesis, continued to address the Constitution in Beardian terms, though he did make some allowance for ideology and politics.[57] Merrill Jensen qualified

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[53] Main 259-266.

[54] Benson 216.

[55] Jackson Turner Main, "Charles Beard and the Constitution: A Critical Review of Forrest McDonald's We The People," William and Mary Quarterly, January 1960.

[56] Ferguson 340.

Beard's use of economic argumentation and conspiracy theory, but nevertheless argued that the Constitution grew out of a long struggle between "conservatives" and "radicals," whose positions on the need for a central government were connected to economic factors.[58] Historians seemed to be confirming Beard's general thesis, rather than moving beyond it.

As Beard's thesis endured in a modified form, Beard's methodology remained the unquestioned method of choice. The search continued to be for the Founders' motives in studies that canvassed the period before the opening of the First Congress.[59] In short no one, including Beard's critics, was stepping outside of his paradigm for studying the Constitution. After thrashing Beard, Robert Brown argued that the Framers of the Constitution were motivated by a desire to create a democratic Constitution with a pluralistic economy; like Beard, he hunted for the Holy Grail of intentions. Forrest McDonald in We the People was avowedly Beardian: he completed an economic study of the Constitution the way Beard prescribed. In E Pluribus Unum McDonald continued to study those factors that would have influenced the drafters in Philadelphia and those in the ratification debates. His sophisticated analysis focuses on debtors, creditors, special interests, nationalists, and republicans: all categorized according to their interests in the Constitution, economic, ideological, or political. Related studies such as Ferguson's and Main's were essentially Beardian in their approach to the Constitution. Ferguson, in The

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[57] McDonald, We the People 321. McDonald says, "Debtors and creditors, public and private, had been and would continue to be the most dynamic elements in American politics."

[58] Jensen, The New Nation 351.

[59] See Robert C. Palmer, "Liberties as Constitutional Provisions," William E. Nelson and Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic (New York: Oceana Publications, Inc., 1987).

Power of the Purse, analyzed the Constitution in terms of economic interests; Main's focus was on economic and class interests that underlay the Constitution. It is "interests," motives and aims that are being searched for without either recourse to the Constitution itself or to the period immediately after ratification when the Founders actually carried out their intentions.

The Constitution itself receives scant attention in the search for motives. The debate wholly concerns the politics and forces that brought about the Constitution. In neither of Robert Brown's works dealing directly with the Constitution does he discuss constitutional provisions.[60] Forrest McDonald does not reference a single constitutional provision in a chapter entitled "The Constitution" which he says "consists of analysis of the Constitution itself." There is only a cursory discussion of the structure of the federal government and its relationship with state governments in two pages. The remaining text of the chapter focuses on debtors, creditors and special interests.[61] Merrill Jensen's work, although offering insights on the Constitution, does not deal with it explicitly. He stops short of either the Constitution or the federal government. E. James Ferguson and Jackson Turner Main deal with the Constitution only tangentially. In not one of these works is there any serious effort to work with the Constitution itself. The result of Consensus and Neo-Progressive efforts to reevaluate Beard was simple: Beard's methodology survived and so did his thesis in a modified form. Consensus and Neo-

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[60] Robert E. Brown, Reinterpretation of the Formation of the American Constitution (Boston: Boston University Press, 1963) and Charles Beard and the Constitution.

[61] McDonald, E Pluribus Unum 309-332, 314.

Progressive historians had simply pulled Beard forward. Beard endured and it would fall to another group of scholars to try to move beyond him.

Finally, with Consensus and Neo-Progressive historians losing sway in the 1960s and having failed in their bid to replace Beard's work, another school of historians arose that was critical of Beard. The Ideological or Republican School differed from earlier schools by accepting the Founder's rhetoric at face value, rather than seeing it as merely masking deeper underlying motives. Adherents of this approach disdained Beard's materialistic view of history and instead focused on the political culture and ideological framework in which the Founding Fathers operated.

In The Creation of the American Republic, 1776-1787, Gordon Wood argued that the men of the revolutionary era acted in the way that they did largely because of republican ideology. Wood argued that the Constitution was the product of changes in the conceptualization of sovereignty and constitutionalism that occurred between the Revolution and 1787. Aristocrats and the natural elite increasingly sought to limit the power of the people, and with the Constitution achieved a degree of conservative control over the masses.[62]

Wood argued that revolutionary leaders founded republican governments in 1776 that sought to empower the people and foster both communal and individual rights. The result of their efforts, however, was governments that often abused their powers. In an attempt to restrain the excesses of democracy the founders worked to limit the power of legislative sovereignty at the state level. They did this first with the Massachusetts

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[62] Gordon Wood, The Creation of the American Republic, 1776-1787 (New York: W.W. Norton, 1969) 47-90, 430-446, 507 and 562. See also Jack Rakove, Original Meanings, Politics and Ideas in the Making of the Constitution (New York: Knopf, 1997) 21, 29-30, 50-51 and 204-205.

Constitution of 1780, and finally achieved with the federal government a limited government that could prevent tyrannies of the majority. Their notion of popular sovereignty was one designed to empower a government that would control the vices of the states and enable the better sort to exercise a predominant influence. The Constitution of 1787 then was a counterrevolution of sorts by the natural elite designed to protect rights and restrain democracy at the state level.

Wood's work, even for its excellent elucidation of revolutionary era thinking, is essentially not a constitutional study, but a cultural study that is Beardian. Wood comments at length upon the nature of ideology that led to the revolutionary state governments. He then traces growing unease and finally outright distrust of state governments. He concludes with an analysis of ideological tenets among the Founders as they headed to Philadelphia. It is brilliant history but it is not constitutional history. He makes no references to provisions of the Constitution itself and does not focus on the period when the federal government was being put into operation. His interpretation is, as Forrest McDonald has called it, "Beard without the dollar signs": it is focused on motives of the framers and stops short of integrating the Constitution or the early operation of the federal government into it.[63]

Wood's work was followed by a series of works that attempted to explore the original intent of the Framers. The results often confirmed that some semblance of republicanism was woven into the constitution even if its exact contours were difficult to discern. Often, too, those who explored the original intent of the founders agreed that federalism was integral to the constitutional system. Too frequently though those

[63] McDonald, "A New Introduction" xxxiii.

exploring the original intent only contributed ammunition to an ongoing political and legal debate about the degree to which we can know the Founders intentions for purposes of resolving current legal disputes.[64] The answer proffered was that the search for original intent was fraught with perils because of the complex web of ideas underlying the constitution.

Works by Martin Edelman,[65] Harry Jaffa,[66] and Leonard Levy[67] all have weighed in on the merits of original intent as a mechanism for current supreme court adjudication and all have concluded that a single original intent cannot be gleaned from the Founder's work. Furthermore, they argue, because the court's function in a large and diverse society is to protect rights, a search for eighteenth century meaning would fail to provide the context for adjudication of issues with a twentieth century context. Edelman, Jaffa and Levy all agree that republicanism underlies the constitution but they provide virtually nothing in the way of analysis for the historian to come to terms with what form that took.

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[64] For an example of a well-respected scholar crafting a solid argument for purposes of affecting the current legal debates see Raoul Berger, Federalism: The Founders' Design (Norman: University of Oklahoma Press, 1987). Berger argued that the supreme court has erred in usurping the system of federalism enshrined in the constitution. The Framers intended federalism and dual sovereignty to define the relationship between the state and federal governments.

[65] Martin Edelman, Democratic Theories and the Constitution (Albany, State University of New York Press, 1984). Edelman showed that republican and democratic theories are contained within the constitution and competing modern notions of democracy are at play in supreme court adjudication today.

[66] Harry Jaffa, Original Intent and the Framers of the Constitution (Washington, D.C.: Regnery Publishing, 1984). Jaffa argued that original intent is no better a method of discerning the meaning of original intent that what the critics contend the court has been doing. Jaffa shows that original intent has been a tool of conservative interests to enshrine their beliefs into the constitution.

[67] Leonard Levy, Original Intent and the Framers' Constitution (New York: Collier Macmillan, 1988). Levy argued that original intent is not a value to be pursued because the society is always in transition as it pursues its fundamental task of protecting rights that only have meaning in a modern context.

took. Their works are political in nature rather that serious historical inquires designed to understand the greater structures established by the constitution.

The culmination of historical efforts with regard to original intent was the Pulitzer prize winning history by Jack Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution.[68] Rakove concluded that the fundamental meaning of the constitution is much harder to grasp than one might at first think because of the diversity of ideas and shifting notions of many of those who drafted the constitution. His is a brilliant history about the problems of discerning a single original intent. Rakove demonstrates that notions of federalism and republicanism were central to the constitutional system created in 1787 but that even these were imbued with fixed definitions that can be relied upon today. Rakove's is a brilliant history that shows much that we cannot be certain of but it fails to offer us an informed means of using the evidence that we do have to understand what the Founder's intended.

Despite all the complexity that Rakove brings to light, he, like Wood and those before him, relies upon largely intellectual and cultural studies to understand the meaning of the Constitution. There is no analysis of the Constitution itself or any analysis of the government that was created. What we are left with is a lesson about what we cannot know based upon the political, biographical, cultural and intellectual studies that underly Rakove's study. The question remains what we might learn from studying the larger structures created by the Constitutional system and the government created pursuant to the system.

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[68] Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (New York: Alfred A. Knopf, 1997).

For all the seeming progress we really have not stepped that far at all beyond Beard. Beard's theory endures in a modified form and we continue to interpret the Constitution in the same framework that Beard did, with a heavy emphasis on the Founders and what personal interests they were serving. Beard's methodology remains the method used to produce Constitutional studies. Scholars continued another characteristic of Beard's: they are not actually analyzing the Constitution itself. Whether viewing the Constitution as a document framed out of economic, political or ideological interests, historians have sought their answers largely as Beard did: they have canvassed the period before the opening of the First Congress, searching for the Founders' experiences and needs that led them to act as they did in Philadelphia. This approach has produced a variety of landmark studies. Scholars have completed biographical sketches and studied economic interests. They have detailed political, cultural and ideological developments. The result has expanded our understanding of the revolutionary era through a rich intellectual and cultural history--yet virtually all of it focused on the period before the ratification of the Constitution. Historians have failed to integrate into their analyses the ultimate expression of the Founders' intent: the Constitution itself and how it was implemented. Beard introduced a healthy skepticism about the Founders' motives into constitutional studies; adhering to Beard's skepticism has, however, blinded most constitutional historians to conceiving of the Constitution in some fashion other than in terms of self-interest. While it is certainly true that historians should not cease to study motives, the point remains that in the intense focus on the individuals in Philadelphia we have lost sight of the broader systemic changes mandated by the Constitution. The persistence of historians in constructing constitutional studies in terms of personal aims

has produced works that do not analyze the very document that was the ultimate expression of the Founders' intent.[69]

[69] Beard does not attempt any serious examination of the terms of the Constitution apart from his analysis of The Federalist. He devotes one chapter to the Constitution as such in which he discusses four powers of the government only. See Beard 152-189.

PART I

STATE GOVERNANCE

CHAPTER I

STATE GOVERNMENTS: CONSTITUTIONS AND GOVERNANCE

SECTION I

CONSTITUTIONS

State governments were broadly empowered governments based upon the principle that " . . . all power is vested in, and consequently derived from the people"[1] and that the legislators " . . . are [the people's] trustees and servants, and at all times amenable to them."[2] The Revolution brought with it the revolutionary concept that popular will should reign supreme and the people's branch, the legislature, should wield the lion's share of power.[3] The drafters of the state constitutions followed this principle as they weakened the executive arm of government that included governors and judges and made executive and judicial functions dependent upon the legislature. This shift in focus and power stripped executive offices, long bastions of monarchical and aristocratic

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[1] Virginia Bill of Rights of 1776, Section 1. See also North Carolina Constitution of 1776, Section 1 and Constitution of Pennsylvania of 1776, Section IV. The Preamble to the Massachusetts Constitution of 1780 said, in part, that, "The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good."

[2] Virginia Bill of Rights, Section 2. Also see Pennsylvania Declaration of Rights of 1776, Article IV, and Constitution of Massachusetts of 1780, Article V which says, "All power residing originally in the people, and being derived from them, the several magistrates and officers of government . . . are the substitutes and agents, and are at all times accountable to them."

[3] This definition of "the people" obviously did not include slaves, women or often, the landless.

influence, of their authority as the legislatures became the centerpieces of state governance.

Rebels though they were in their view of the source of power in government, they nevertheless continued to adhere to some traditional notions of governance. The most significant among these was a confidence in governments of inherent authority.[4] Their protests had not been against such fully empowered governments; rather they rebelled against governmental power beyond their control and used to deny their rights.[5] As evidence of their continuing faith in governments of inherent authority, the new state constitutions contained very few absolute prohibitions on the reach of governmental power. This uncontroverted nature of state governance which was unaffected by the U.S. Constitution was such that the supreme court could say in 1798 that, ". . . All the powers that remain in the state governments are indefinite."[6] There were no lists of specific

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[4] Gordon Wood, The Creation of the American Republic 1776-1787 (New York: W.W. Norton, 1969) 134. Wood points out the degree to which the new governmental institutions maintained a nature of power the same as that under the British.

[5] See a variety of sources regarding the causes of the American Revolution. Whether viewing the Revolution in the light of Progressive, Consensus, Neo-Progressive, Ideological or the New Left perspective, they are devoid of colonial complaints about the quantum of power in the British government. The rebels came to fear the use of power unsanctioned by the people to deprive them of the liberty they thought they had as Englishmen under the English Constitution. The source of governmental power and its use, not the amount of power that government could wield were at the root of the Revolution. See J. Franklin Jameson, The American Revolution Considered as a Social Movement (Princeton, NJ: Princeton University Press, 1926), Arthur M. Schlesinger, Sr., The Colonial Merchants and the American Revolution (New York: Columbia University Press, 1918), Daniel Boorstin The Genius of American Politics (Chicago: Chicago University Press, 1953), Robert E. Brown, Middle-Class Democracy and the Revolution in Massachusetts (1955, New York: Harper & Row, 1969), Edmund Morgan, Birth of the Republic 1763-1789, (Chicago: University of Chicago Press, 1956), James Kirby Martin, Men in Rebellion (New Brunswick, NJ: Rutgers University Press, 1973), Bernard Bailyn, The Ideological Origins of the American Revolution, (Cambridge: Belknap Press, 1967), Gordon Wood, The Creation of the American Republic, 1776-1789 (New York: W.W. Norton, 1969)

[6] This was the case in all the state constitutions. Only the state of Massachusetts with its Constitution of 1780 described the legislative powers in a laundry list as if to limit the powers. The list, however, only highlighted the general nature of the legislative powers and the similarity in legislative powers that Massachusetts shared with the other states. The items on the list were all very general. They included a power "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and

powers that state governments could exercise in state constitutions, because the power of governance at the state level was virtually unfettered. Until the Civil War even individual rights delineated in bills of rights could be abridged if the community's welfare necessitated it.[7] In fact, of those few powers specifically granted to state governments was this very power to legislate generally regarding the issues of a state's society. This power, called the police power, vested in state governments the authority to legislate over all fundamental issues of society, including the community's health, safety, and morals.[8]

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ordinances . . . for the good and welfare of this commonwealth," the power to appoint officers, and to impose taxes. This was hardly the list of specific powers found in the United States Constitution, Article I, Section 8. Judges both of the supreme court and Massachusetts commented upon the general empowerment of the legislative branches at the state level and the minor difference written into the Massachusetts's constitution. The supreme court said: " . . . all the powers that remain in the state governments are indefinite; except only in the State of Massachusetts . . . ." 3 Dallas 387 and yet the Massachusetts's supreme court described Massachusetts's power as broad and ill-defined in the state's constitution: "It is much easier to perceive and realize the existence and sources of this power [the legislature's power] than to mark its boundaries, or prescribe limits to its exercise." Commonwealth v. Alger, 7 Cush. 84.

[7] See Palmer in Nelson and Palmer 61-84 for a discussion by Palmer arguing that the rights in the various declarations of rights were important principles but that they could be abridged if the circumstances required.

Also see examples of various state laws suspending the protection against habeas corpus and ex post facto laws. See Acts and Resolves of the Commonwealth of Massachusetts, Chapter 3, May session 1782: "An act for suspending the Privilege of the Writ of Habeas Corpus for four months" and Acts and Resolves of the Commonwealth of Massachusetts, Chapter 1, January session 1783: "An act for suspending the Privilege of the Writ of Habeas Corpus for four months."

[8] References to this power and the people's control of the police power are at Constitution of North Carolina, Article II, Constitution of Pennsylvania, Declaration of Rights, Article III. See Blackstone's definition at Black's Commentary, vol. 4, 162. Chief justice of the Commonwealth of Massachusetts Shaw described it as "the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same." Commonwealth v. Alger, 7 Cush. 84. Also, "This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State." Thorpe v. Rutland & Burlington R R Co., 27 Vt. 149. The police power depends upon communal rights: Each must accommodate others in the exercise of their rights. For additional cites see Thomas M. Cooley, A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union (Boston: Little, Brown, 1868) 572-579. The use of the police power as a legitimate means to regulate state society has diminished in the twentieth century as nationalizing influences brought before federal courts cases regarding the Fourteenth Amendment and eminent domain. In each setting justices invariably expressed hostility to the police power when presented

Not only were the state governments broadly empowered, but they were also thoroughly majoritarian. As Jefferson described them, "All the power of government, legislative, executive, and judiciary result to the legislative body."[9] Although written at a time when Jefferson had grown less sanguine about governments being so thoroughly republican, his statement was nevertheless an accurate appraisal of state governments. All power was derived from the people; the legislatures represented popular will and wielded the power of governments of inherent authority on the people's behalf. Thus it was only natural that the legislatures, as the embodiment of popular will, were chosen to implement the republican principles at the heart of the Revolution. Empowering government, not restraining it, was at the heart of republican state governments.[10]

The confluence of the traditional conceptualization of governmental power and the revolutionary notion that the people should be the source of power played the greatest part in producing the revolutionary notion of liberty that became associated with state governance. Far from viewing fully-empowered governments dominated by legislatures as a threat to the public good, fully empowered legislatures wielding power over the health, safety, and welfare of communities was central to enhancing liberty.[11] This

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with eminent domain and claims based on the Fourteenth Amendment. Nevertheless, in the realm of obligations of contracts the courts have generally upheld state legislation against obligations of contracts objections since the New Deal. Home Building & Loan Ass'n v. Blaisdell 290 U.S. 398 (1934) and Epstein, "Toward a Revitalization of the Contract Clause," University of Chicago Law Review, vol. 51, 703 (1984). Nevertheless even here see Holmes's dissent in Tyson and Brother V. Banton, 273 U.S. 418, 445-446 (1927) and Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) evidencing his distaste for the police power. See also Palmer, "Obligations of Contracts: Intent and Distortion," 37 Case Western Reserve Law Review 631 (1987)

[9] Merrill D. Petersen, ed., Thomas Jefferson (New York: The Library of America, 1984) 245. This quote is drawn from Jefferson's Notes on the State of Virginia which is included in its entirety in this compilation.

[10] Massachusetts was the only state that put in place an institutional check on its assembly by giving the governor a qualified veto of legislation. See Constitution of Massachusetts, Chapter I, Section I, Article II.

liberty was not reliant upon the restraint of government but rather upon the empowerment of government. Freedom was found in communal rights, the contours of which were articulated by legislatures closely linked to the people. This approach was in sharp contrast to today's conceptualization of liberty, which is defined by individual rights protected by restraints on government.

The empowering of state legislatures that fostered popular will and advanced liberty necessitated the weakening of state executives. The governors had been the focal point of monarchical power during the colonial era, but now governors would be subordinated to the legislatures because the source of authority was not royal but popular power exercised by assemblies. In the new republican governments not only would governors wield reduced powers but they would do so during shorter tenures. Frequent elections[12] usually by the assemblies[13] and term limitations[14] were the chosen means to

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[11] Beyond just the natural impetus to shift power caused by the Revolution itself, Bernard Bailyn sees the pent up frustration of governmental inefficiency caused by residual royal influences leading to an exaggerated response by the colonists. The royal influences persisted in the colonies long after they had been done away with in England. The frustrations were shaped by impulses distinctive to the British-American colonies. See Bernard Bailyn, The Origin of American Politics (New York: Vintage Books, 1967) 67-71. Gordon Wood argues that the colonists' views were shaped by the Whig science of politics and a fear that the English constitution was being destroyed in a conspiracy of those in England who wanted to take away the rights of Englishmen. See Wood 10-40.

[12] Constitution of Delaware of 1776, Article 7; Constitution of Virginia, clause 7; Constitution of North Carolina, Article XV; Constitution of Pennsylvania, Section 19. Pennsylvania's constitution created a twelve person executive of which four seats were elected every year.

[13] In Delaware the governor was chosen by joint ballot of the assembly. See Constitution of Delaware, Article 7. In Virginia the governor was chosen by joint ballot of both houses. See Constitution of Virginia, clause 7. In North Carolina the governor was chosen annually by the assembly. See Constitution of North Carolina, article XV. In Pennsylvania the governor was chosen annually by a joint ballot of the assembly and the council. See Constitution of Pennsylvania. In New Jersey the governor was chosen annually by joint ballot of the assembly and the council. See Constitution of New Jersey, Article VII. New York and Massachusetts were exceptions to the rule here. In Massachusetts the "supreme executive" was chosen annually by the people. See Constitution of Massachusetts, Chapter II, Section I, Article II. Under the Constitution of New York, Article VI, the legislature passed legislation in 1778 making the election of the governor by the people. See p. 1333 of Thorpe.

[14] In Delaware the governor was limited to a three year term without opportunity for immediate reelection. See Constitution of Delaware, Article 7. In North Carolina the governor was limited to a one

prevent another Berkeley or Hutchinson from centralizing power in one man and his clique. They also found their powers dramatically diminished. Control over raising armies,[15] pardoning crimes,[16] and laying lengthy embargoes,[17] which had once been executive powers exclusively, would now be exercised only with legislative oversight.

Not surprisingly, governors also lost control over initiating legislation and assembling or proroguing the assemblies. Legislatures assumed control over the power to initiate legislation. Delaware's constitution was unexceptional in stating that, "All money-bills for the support of government shall originate in the house of assembly. . ."[18] This empowerment included, for virtually all the states, legislative control over the money bills necessary for the executives' operation.[19] State assemblies also gained the right to adjourn or prorogue themselves[20] and thus denied in states such as Virginia the

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year term with a limit of three terms in six years. See Constitution of North Carolina, Article XV. In Virginia the governor was limited to one year terms with no more than three in succession and a four year hiatus before returning to office after being out of office. See Constitution of Virginia, clause 7. In Pennsylvania the governor, called a president, was limited to a one year term with no more than three terms before a four year hiatus. The president was elected by the general assembly and the council. See Constitution of Pennsylvania, Section 19.

[15] Constitution of Delaware, Article 9; Constitution of North Carolina, Article XIV; Constitution of Pennsylvania, Section 20; Constitution of Virginia, clause 12; Constitution of Massachusetts, Chapter II, Section I, Article VII.

[16] Constitution of Delaware, Article 7, Constitution of North Carolina, Article XIX, Constitution of Virginia, clause 7. In all three of these states, the constitution gave the governors the power of granting pardons unless the assembly was undertaking the prosecution or the "law shall otherwise direct." The Constitution of Pennsylvania, Section 20, however, did give the president the sole power to pardon. The Constitution of Massachusetts required the advice of the council in order to grant a pardon. See Constitution of Massachusetts, Chapter II, Section I, Article VIII.

[17] Constitution of Delaware, Article 7; Constitution of North Carolina, Article XIX; Constitution of Pennsylvania, Section 20; Constitution of Virginia, clause 7.

[18] Constitution of Delaware, Article 6; Constitution of North Carolina, Article X; Constitution of Pennsylvania, Section 9; Constitution of Virginia, clause 6; Constitution of Massachusetts, Chapter I, Section 3, Article VII.

[19] The Delaware Constitution, Article 7; Constitution of North Carolina, Article XIX; Constitution of Pennsylvania, Section 20; Constitution of Massachusetts, Chapter II, Section 1, Article XIII.

right that the governor had utilized for over 150 years to prorogue the assembly when he saw fit.[21]

All state constitutions even limited a governor's ability to exercise freely those powers they retained by requiring either the assent of the assembly or the advice and consent of privy councils that were attached to the executive office. Privy councils, composed of between four and ten members chosen by the legislatures, supervised the exercise of much executive power.[22] Such councils were not new, but their role changed to comport with the shift in power from executive to legislative branches. Such councils in the colonial era had served to offer the king's representative, the governor, advice on matters of state. In the wake of the Revolution, the councils were designed to restrain rather than bolster executive power by limiting the executive's freedom to utilize his powers. The executives now had to seek the consent of the legislature either directly or

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[20] Delaware denied the president the ability to prorogue or adjourn the assembly and only with the advice of the executive council could the president call the assembly into session early. See Constitution of Delaware, Article 10. North Carolina granted the state assembly the express power to control its adjournment. See Constitution of North Carolina, Article X. The Constitution of Virginia denied the governor the power to prorogue the assembly. In fact the assembly was given the power to adjourn itself. The governor could, with the consent of the executive council, call the assembly into session early. See Constitution of Virginia, Article VIII. The Constitution of Massachusetts rested the power to adjourn or prorogue the assembly in the assembly. See Constitution of Massachusetts, Chapter II, Section I, Article V.

[21] Bailyn, The Origins of American Politics 67. Governors in the colonial period had the power to prorogue the lower houses of the assemblies and often did.

[22] The legislatures of Virginia, Delaware, North Carolina, South Carolina, Maryland and Massachusetts each elected the members of the privy council. See Constitution of Virginia, clause 9; Constitution of Delaware, Article 8; Constitution of North Carolina, Clause XIV; Constitution of South Carolina, Clauses V and III; Constitution of Maryland, Clause XXVI; Constitution of Massachusetts, Chapter II, Section 3, Article I. The privy council of Pennsylvania was popularly elected. See Constitution of Pennsylvania, Section 19. New Jersey and New York did not have a council separate from the legislature that was appended to the executive office.

Not all privy councils were composed of legislators. Delaware's privy council consisted of four members, none of whom could be legislators. See Constitution of Delaware, Article 8. The Virginia privy council consisted of eight members and could consist of either legislators or the people at large chosen by the assembly. See Constitution of Virginia, Clause 9. The North Carolina council of state consisted of seven members chosen by the assembly. See Constitution of North Carolina, Clause XIV. The Constitution of Pennsylvania went even farther toward empowering the council by making it the executive and the governor, or president, simply one of the councillors. See Constitution of Pennsylvania, Section 19.

through these privy councils, which were often chosen by the legislators, in order to proceed with virtually any exercise of power.[23]

The assemblies also gained authority over state courts that they exercised by control over both judges' tenure and state court jurisdiction. This subordination of the judiciary was a feature of revolutionary thought. The judiciary was viewed as an arm of the executive[24] and therefore it was inevitable that the judiciary would fall under legislative control. The dependence of the judges on governors was "dangerous to the liberty and property of the subject."[25] Americans were "too apprehensive of the possible arbitrariness and uncertainties of judicial discretion to permit themselves easily to allow 'judges to set aside the law' made by the representatives of the people."[26] The people placed their trust in the legislatures and its enactments or codification efforts, not in unelected judges and judicial review.[27] A judge was meant to be a "mere machine"[28]

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[23] The Constitution of Virginia provided for a council of eight. The governor had to seek the advice of the council in order to call up the militia, call the assembly into session early or fill vacancies in the militia. See the Constitution of Virginia, Clauses 12, 8, and 11 respectively. The Constitution of Delaware called for a privy council of four. The president had to seek the advice of the council before he could lay an embargo, call the assembly into session early, or embody the militia. See the Constitution of Delaware, Articles 7, 10 and 9 respectively. North Carolina's council consisted of seven members and had to be consulted by the governor regarding laying certain embargos or prohibiting exportation of a commodity. See Constitution of North Carolina, Clause XIX. South Carolina's privy council consisted of seven men elected by the legislature to advise the president. See Constitution of South Carolina, Clause V. Maryland's council was a body of five men elected by the legislature. The governor was to consult with them on embodying the militia and all matters dictated by law. Their records were periodically reviewed by the legislature. See Constitution of Maryland, Clauses XXVI and XXXIII. Massachusetts's constitution called for a ten member council elected by the general assembly that advised the governor on money bills, military post and civilian appointments, and adjournment of the assembly. See the Constitution of Massachusetts, Chapter II, Section 3, Article I and Chapter II, Section 1, Articles IV and V.

[24] Wood 159-160.

[25] Wood 160.

[26] Wood 304.

[27] As to the lack of judicial review, see Nevins 168-169.

[28] Wood 161, quoting a Jefferson letter to Pendelton.

following the dictates of the legislatures even more than they had followed the orders of colonial governors.

In all states the legislatures controlled the tenure of judges and determined their salaries.[29] In Virginia, as in many other states, "the judiciary . . . were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes . . . judiciary powers, no opposition is likely to be made . . . ."[30] In all states except for Pennsylvania, Massachusetts and Vermont the judges were appointed either by the legislatures or in processes that required legislative approval.[31] Even in Massachusetts the appointment required the approval of the privy council, which was chosen by the assembly from those elected to the upper house.[32] Tenure was usually during "good behavior" with the ever-watchful legislators ready and

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[29] As to appointment and tenure: Constitution of Virginia, clause 13: The assembly appoints the judges of high courts. They serve during good behavior. Constitution of Pennsylvania, Sections 20, 22 and 23: The council appointed judges above the rank of county judges. Although appointed for fixed terms they could be removed at any time by the legislature for "misbehavior." Constitution of Delaware, Art.12: The president and council appointed the judges who would serve during good behavior. North Carolina Constitution: Art. XIII: judges appointed by joint ballot of the assembly to serve during good behavior. In Georgia the judges were appointed annually by the legislature. For this last reference to Georgia see James Madison, Notes of Debates in the Federal Convention of 1787 contained within Charles Stansill, ed., Documents Illustrative of the Formation of the Union of American States, (Washington D.C.: Government Printing Office, 1927) 391 citing a speech that Madison gave. The judges of South Carolina, Massachusetts, and New Jersey also served during good behavior.

On judicial tenure in the colonies see Bailyn, The Origin of American Politics 67-69 and Bernard Bailyn, ed., Pamphlets of the American Revolution, vol. I, (Cambridge: Belknap Press, 1965) 66-68, 249-255 and 699. Judges during the colonial era served with an insecure tenure. The insecurity of judges in their tenure was not a new feature of the rebel governments; they simply continued the treatment of the judges from the colonial era.

[30] Thomas Jefferson, Notes on the State of Virginia (1788, Chapel Hill: University of North Carolina Press, 1995) 120.

[31] Constitution of South Carolina, Section XX; Constitution of New Jersey, Section XII; Constitution of Delaware, Article XII; Constitution of Virginia, Paragraph 13; Constitution of North Carolina, Paragraph 13; Constitution of Maryland, Section XLVIII; and Constitution of New York, Clause XXIV. The governor appointed judicial officers with the advice and consent of the council. See Constitution of Massachusetts, Chapter II, Section I, Article IX.

[32] Constitution of Massachusetts, Chapter II, Section 1, Article 9 and Chapter II, Section 3, Article II.

willing to remove those who usurped the legislature's power.[33] Even judges who were elected also usually fell under the control of the legislature. If they were not legislators themselves, they might have their salaries varied or simply have cases removed from their courts.[34]

In addition to control over tenure and salary, state legislatures also controlled state courts by having ultimate control over the cases a court could hear.[35] If they chose, the legislatures could convene themselves as a court and directly hear and determine cases.[36] In Virginia, the legislature "in many instances decided rights which should have been left to the judiciary . . ."[37] In Vermont, the legislature became a court of chancery in all cases over £4,000, reversed judgments, stayed executions after judgments, and prohibited land title suits and private contract actions.[38] If the legislature did not constitute itself as a

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[33] As to their service at the pleasure of the assemblies see footnote 30. As to the ease of removing them see Nevins 167. Also see Madison, Notes, 391 citing the removal of judges in Rhode Island by the legislature for their failure to execute an unconstitutional law.

[34] The legislatures were given a relative free reign in dictating salaries by constitutional provisions that described them as only required to be adequately fixed. The constitutions do not indicate that the assemblies varied salary. See Constitution of Virginia, Clause 13: They shall have "fixed and adequate salaries." Pennsylvania and Delaware each fixed salaries according to their constitutions. See respectively Sections 23 and 12. Yet in Federalist No. 48 Madison said "The salaries of the judges, which the Constitution expressly requires to be fixed, had been occasionally varied." See Jack Rakove, ed., James Madison (New York: The Library of America, 1990) 285.

[35] State court jurisdiction was invaded by the executive branch even during the colonial era when separation of powers was well defined and valued. See Wood 159. Here again the rebel government structured so that the legislatures could conduct judicial business was not revolutionary; in fact it simply carried over the colonial tradition of subordinating the judiciary to the dominant branch of government. During the colonial era this was the governor; during the revolutionary era this was the legislature.

[36] As to Maryland, see Sections X, XII and XXXIII; For North Carolina, see Section XIX; For Virginia, Paragraph 7; Delaware Articles 12 and 13. Certainly some of these are for prosecuting impeachments, but they do evidence a legislative role in judicial affairs.

[37] Jefferson 120.

[38] Wood, 407 and Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," American Historical Review 30 (1924-1925) 517-520.

court, it might simply pass laws having the effect of determining judicial disputes through ex post facto laws or even prohibiting suits from being brought. In New Hampshire, for example, "the state legislature freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases and even determined the merits of disputes."[39] Massachusetts, as we shall see, was also a state in which the legislature wielded judicial powers frequently; in fact, it did so more frequently after its 1780 constitution than before.

Although vesting so much power in the legislatures that neither the governor nor the courts could function independently might seem to be liberty running amok, the fact remained that this was the governmental formulation that mirrored the revolutionary concept of liberty. The legislatures were supreme by design at the state level because state constitutions accurately reflected the overriding revolutionary principle: power was to rest in, and flow from, the people. As the expression of popular will, state constitutions elevated the legislative assemblies from the periphery of government to the focal point. This core republican desire to empower the legislatures fully led to the subordination of the executives and state courts to the legislatures so that governors and judges would further legislative policy rather than challenge popular will. Because of the revolutionary change in the source of power for governments that remained fully empowered, the people reigned supreme and liberty was fostered.

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[39] Corwin 514 The passage of the law at issue in Calder vs. Bull at 3 U.S. (3 Dallas) 386 (1798) is further evidence of legislative control of judicial matters. See also four examples from New Hampshire in Edward Corwin, The Doctrine of Judicial Review (Princeton, NJ: Princeton University Press, 1914) 71. As to examples from Pennsylvania see The Report of the Committee of the Council of Censors (Philadelphia: Bailey, 1784) 23-27 and James Madison, Alexander Hamilton and John Jay, The Federalist (1788, New York: Penguin Books, 1987) No. 48, 311.

SECTION II

A CASE STUDY OF REPUBLICANISM IN PRACTICE: THE COMMONWEALTH OF MASSACHUSETTS

The government of Massachusetts played a critical role, in conjunction with the other states, in successfully winning the Revolutionary War.[40] The legislative branch, first of the interim government and then under the Constitution of 1780, was central to these efforts, since it passed the laws and resolves necessary to marshal men and material and manage finances and the inevitable disruptions on the home front. As the war was raging, the Massachusetts government also began fighting a second war of sorts; this was a battle to mold colonial society so that it would comport with revolutionary principles.

The laws and resolves from 1775 through 1783 reveal a society engulfed in a war in which the government pursued reasonable and responsible policies that addressed the challenges of war and the upheaval its citizens were forced to endure. Far from democracy run amok, the legislatures pursued a consistent set of policies that aided in the martial victory and furthered republicanism. The government operated within a vibrant democracy and answered the call of those in need and directed the war effort while working to reshape society consistent with revolutionary ideology. The legislature

[40] I have canvassed the laws and resolves of Virginia and North Carolina also to test my thesis that republicanism at the state level produced sound governance. Although not appearing in this dissertation, the evidence from these two states is consistent with the nature of governance found in Massachusetts. Massachusetts is the only one of the three that has records of all the laws, public resolves and private resolves. The records of Virginia and North Carolina do not include private resolves that offer valuable evidence about the scope of governance.

exercised control over both the law and courts consistent with the longstanding tradition of parliamentary powers that the legislative branch could act as a court of last resort and revolutionary principles that popular will should control the judges and reshape law. The legislature's assumption of both executive and judicial functions was in accord with the Massachusetts's constitution. Although it might seem inconsistent with democratic principles today to vest such authority and discretion in an assembly, such empowerment was perfectly in keeping with revolutionary thought that placed faith, first and foremost, in the people and their representatives.

The greatest challenge faced by Massachusetts, as with all the states, was the war itself. In July, 1775, newly independent Massachusetts faced the Herculean task of winning a war for which, like her sister states, she was unprepared. In evaluating the prospects for victory even the most sanguine supporters of the Revolution surely blanched. Massachusetts, like her sister states, had no army or navy, few capable commanders, and no hard currency or ready war material. Her governmental institutions were in transition and there was little time to prepare for the onslaught of redcoats and the Royal Navy. Yet Massachusetts's republican government fielded troops equipped with the material of war and managed the financial hurdles that countries at war inevitably face. The acts and resolves during the early war years indicate that the government was involved in the intimate details of the war from fielding and supplying troops to financing the cost of the war.

The legislature also passed a series of acts and resolves not directly involved with the war effort itself that were nonetheless related to the crisis at hand. They were products, not of a tyranny of the majority, but rather of a legislative assembly responding

reasonably to the chaos of war. These responses involved arresting those "conspirators" remaining in the Commonwealth and also allowing Loyalists who were not actively conspiring against the Commonwealth to exit Massachusetts for British territories. The legislature handled absentees' estates by claiming them, caring for the wives and children left upon them and trying to gather what money could ultimately be gained through their orderly management and, ultimately, sale. The legislature assumed the role of a court and handled many probate matters. Almost always the rationale for these was clearly the sale of real estate of those who were deceased in order to provide support for widows, minors and heirs. The legislature also granted new trials in rare instances if one party had failed to have a full and fair opportunity to litigate the dispute that was the subject of the lawsuit. The reason for allowing these new trials invariably was related to the turmoil on the home front that prevented people from gathering evidence or even appearing in court. These legislative interventions in litigation were consistent not only with the republican empowerment of the assembly but also with the actions a superior court might have taken in similar circumstances.

The second effort of the legislature was to begin to remake colonial society. The rebel government proved capable of undertaking this challenge also as legislators strove to reconstruct colonial society to further the link between people and government through new laws and more representation. This second struggle had at its basis a fundamental faith in the revolutionary republicanism and in the time-tested power of fully empowered governments. Woven together for the first time, state governments wielded the power that flowed from the people and utilized the power of governments of inherent authority to centralize governance in legislatures that were accurate reflections of popular will.

They thus set forth a system of proportional representation and assisted in the organization of towns so that more people could be represented in the legislature. Even before the final British defeat at Yorktown, the legislature had empowered a commission to rewrite the laws of Massachusetts so that they would reflect revolutionary ideology. A comprehensive redrafting of many of Massachusetts's laws would follow in 1784.

The Massachusetts legislatures crafted policy through the acts and resolves it passed. The acts were laws in the traditional sense as we know laws today. They numbered between thirty-five and sixty per year; they were passed in full session and they applied to the public generally. The resolves were the second mechanism by which the legislature governed. It issued approximately 700 resolves per year. They could be either public or private but were always specific in nature and usually in response to petitions made by citizens. They applied either to an individual or a small group of individuals or they commanded that an action be taken in response to a unique set of circumstances. In contrast to the general application of laws, the resolves often provided relief to those at the margins of the application of laws.

The legislatures of 1775 and 1776 faced the tasks before a new government fighting for its very existence with invading troops on its soil and enemy sympathizers in its midst and no formalized government in place. The government that filled the vacuum of power left by the collapse of the royal government was a legislative body rooted in popular sovereignty elected pursuant to the terms of the charter of 1691.[41] It began

[41] The provincial congress had actually requested from the continental congress authority to exercise the powers of a government. The continental congress recommended that a legislature and council be chosen pursuant to the terms of the charter of 1691. Massachusetts followed this recommendation and elected a legislature as it had under the old charter. The legislature in turn elected a council of twenty-eight

operating in July 1775 from Watertown, Massachusetts along with a council of twenty eight that was selected by the legislature. Although the movement for a state constitution began almost immediately with the towns of Concord and Norton calling for a constitutional convention, it would not be until 1780 that a constitutionally sanctioned government assumed power in Massachusetts.[42]

In its first sessions the ad hoc government pursued three general policy goals with fifty-four pieces of legislation: it filled the vacuum of power occasioned by the end of British rule; it began to direct the war effort and deal with the consequences of war on the home front; and, finally, it began to reshape colonial society. Legislative intrusion into

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members. The governor's office was simply left vacant. The ballot for election of this ad hoc legislature was given to all freeholders who owned realty worth 40 shillings or other property worth £40. A more radical step to draft a wholly new frame of government was rejected initially. (Allan Nevins, The American States During and After the Revolution, 1775-1789 (New York: The Macmillan Company, 1924) 88-89). Whereas Allan Nevins and Jackson Turner Main characterize the early legislative bodies as legislatures, Merrill Jensen sees the legislatures prior to 1780 as more provincial congresses similar to those that had operated in 1774 and 1775. See Jackson Turner Main, The Sovereign States, 1775-1783 (New York: New Viewpoints, 1973) 177-178 and Merrill Jensen, The Articles of Confederation (Madison: University of Wisconsin Press, 1962) 52-53.

[42] The arguments of these towns was that the constitution was a compact rooted in the authority of the people and therefore that it should be crafted by the people rather than the revolutionary legislature. See Nevins 175; Jackson Turner Main sees the call of western towns and counties for a constitution convention as part of the struggle between eastern commercial interests and western agrarian interests. Western counties, which opposed the deflationary monetary policy and heavy taxes supported by eastern interests, wanted a convention to insure that their voices were heard in the course of drafting the new constitution. See Main 178.

The politics of this early period were dominated by two factions that vied for control of the government of Massachusetts. One faction was led by John Hancock; the other by Sam Adams. The Hancock faction generally succeeded in effectuating its policies until 1779-1780. Only with the defeat of the early constitution and the return of Sam Adams to Massachusetts, as a delegate to the state constitutional convention, did the Adams's faction start to unseat Hancock and his allies. The opposition to Hancock manifested itself in support for James Bowdoin who succeeded to the governorship in 1785 only to be unseated in 1787 by a resurgent Hancock. See Nevins 212-214. Main argues that these two factions were really quite similar and that the true split in Massachusetts was between eastern commercial interests that dominated the legislature and governorship during the pre-constitutional period and western agrarian interests that lacked the political power to have their interests effectively represented. See Main 177-183.

executive and judicial functions, including electing the judges,[43] served the greater good of Massachusetts's society by furthering care of widows, minors, heirs and the wounded.

Among its first acts were laws to address issues arising from the vacuum of power after the British rule effectively ended but before the rebel government began its formal existence. The legislature legitimized the actions and resolves of the congresses that had operated during the interregnum, and gave the force of law to the informal committees that had handled governance issues prior to the creation of the legislature.[44] The legislature also revived or extended various laws that had expired or were about to expire so that there would be a degree of continuity.[45] Similarly, those who needed licenses but who had been unable to procure them during the interregnum received permission to apply for and renew their licenses. These included retailers and innholders who had been prevented from renewing licenses because of "grievous and oppressive acts of Parliament."[46] Finally, the legislature, as part of its efforts to formalize its place and remove the taint of royal government, issued a law commanding a new style of writ in which the royal seal was removed and that provided that recognizances would be issued in the name of Massachusetts Bay rather than the king.[47]

The legislature also began the task of fielding an army and navy and financing the war. It called for the formation of a state militia, the creation of units of cavalry, and

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[43] Nevins 167.

[44] Chapter 1, July Session of 1775.

[45] Chapter 5, November Session of 1775.

[46] Chapter 2, September Session of 1775.

[47] Chapter 12, December Session of 1775 and Chapter 2, May Session of 1776.

armed ships and reinforcement for the American Army.[48] The record of Massachusetts's government to direct a war effort, like other states, was mixed. Militias would prove to not be the solution to winning the Revolutionary War; thirteen governments without a strong central government lacked coordination in their efforts and too often simply responded to emergencies.[49] In the field of finance a number of laws funded the war through bills of credit[50] and provided for the printing of money for the state treasury.[51] New laws also protected the currency against forgery.[52]

The legislature also began to address the social and economic turbulence caused by the war. Various laws aimed to prevent the spread of small pox after elements of the army became infected. Inoculating hospitals were established for a brief time. Laws provided for the prosecution of looters in Falmouth in the wake of a British raid there. To facilitate financial transactions by setting down a mechanism for "speedy and cheap" debt recovery, the legislature set out the form of an acknowledgement and appointed persons to take recognizances for debts of twenty pounds or less.[53] The legislature

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[48] As to armed ships, see Chapter 1, September Session of 1775; Chapter 10, November Session of 1775; and Chapter 16, November Session of 1775. As to forming and regulating the militia, see Chapter 1, November Session of 1775. As to forming military units and reinforcing the American Army, see Chapter 1, November Session of 1775; Chapter 13, November Session of 1775; and Chapter 21, August Session of 1776.

[49] See Main 225-227. The Massachusetts's government pursued a disastrous invasion of a British port in Main that the central government refused to support.

[50] Chapter 2, June Session of 1775; Chapter 1, May Session of 1776; Chapter 9, August Session of 1776; Chapter 11, August Session of 1776; Chapter 26, August Session 1776; and Chapter 28, August Session of 1776.

[51] Chapter 17, November Session of 1775; Chapter 4, May Session of 1775; Chapter 24, August Session of 1776; and Chapter 26, August Session of 1776.

[52] Chapter 9, November Session of 1775.

[53] As to disease, see Chapter 6, May Session of 1776 and Chapter 8, May Session of 1776. As to looters, see Chapter 4, November Session of 1775. As to debt recovery, see Chapter 14, November Session of 1775.

balanced the needs of the military effort and the needs of creditors: it prevented soldiers from being arrested for small debts[54] but also repealed limits on suits to collect debts from a 1770 law that would have forced creditors to sue soldiers immediately or face losing their rights ever to collect debts.[55] It aided town governance and the choice of town officers in "the event that town officers are away in service of country."[56] The occupation of all or parts of the counties of Middlesex, Suffolk and Cumberland by British troops required new times and places for holding the various courts within these counties.[57] Finally, acts put in place a system of wage and price controls for farm labor and various trades and the prices for a variety of goods[58] and even briefly prohibited the export of lumber and other building materials for ships.[59]

The legislature also began to manage a society at war with a number of laws designed to root out the enemies remaining within the state and to squelch dissent. These enactments were consistent with the Massachusetts Constitution and republican majoritarianism and the needs to mobilize for the successful prosecution of the war. Colonial officials were officially removed from office if they held their office by grant from the executive branches of the former government.[60] An act prescribed the form and the taking of a new oath that all civil and military officers would have to use to swear

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[54] Chapter 31, August Session of 1776.

[55] Chapter 25, August Session of 1776.

[56] Chapter 30, August Session of 1776.

[57] As to Middlesex County, see Chapter 2, November Session of 1775. As to Suffolk County, see Chapter 3, November Session of 1775. As to Cumberland County, see Chapter 7, May Session of 1776.

[58] Chapter 14, August Session of 1776.

[59] Chapter 10, August Session of 1776 and Chapter 15, August Session of 1776.

[60] Chapter 4, July Session of 1775.

allegiance to the state.[61] Also, the legislature acted upon a resolve of the continental congress and passed a law disarming the "disaffected" and requiring that they take a loyalty test.[62] The legislature also punished by statute speech critical of the revolutionary cause made in public or private.[63]

The legislature, among its first acts, also began to fulfill the promise of the Revolution by expanding and equalizing representation and providing better protection for some citizens less able to care for themselves. These laws furthered republicanism by expanding the number of citizens who would have a voice in governance. The legislature voided a law that denied representation to a number of towns and districts pursuant to a law of the former general court.[64] Another law provided "for a more equal representation in the General Court." Towns of 220 inhabitants would be able to choose three representatives to the General Court; towns of 320 would have four representatives and so on in proportion.[65] Massachusetts also acted upon a resolve from the continental congress to count the inhabitants of the colony.[66] The applicability of guardianship expanded to include the deaf and dumb, and the children of the deaf and dumb, "idiots" or those non compos mentis.[67] Five laws combined parishes, formed precincts and

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[61] Chapter 5, July Session of 1775.

[62] Chapter 7, December Session of 1775 and Chapter 26, August Session of 1776.

[63] Chapter 29, August Session of 1776.

[64] Chapter 3, July Session of 1775.

[65] Chapter 15, March Session of 1776.

[66] Chapter 6, November Session of 1775.

[67] Chapter 20, August Session of 1776.

incorporated towns.[68] Even in this early period the legislature moved to establish regular operations of governance.

The legislature also passed 734 resolves during the first eighteen months of governance that went along with the fifty four pieces of legislation. Of the 734 resolves 705 have to do directly with the war; they reveal a legislature deeply involved in the executive powers of marshalling resources and directing the war effort. In contrast to most but not all of the pieces of legislation, the resolves addressed specific needs or specific situations. They almost always involved the issuance of a specific directive. Resolves procured blankets, firearms, gunpowder, cannons, rope, salt, provisions, shoes, stockings, shirts, salt-petre, and horses. Resolves called for raising troops, forming new units, appointing officers and ranking officers of individual units. The legislature commanded the completion of fortifications, delivery of guns to individual units and the delivery of medicine to sailors in specific hospitals. Resolves also dealt with regulating the trade of rum and beef. Troops were paid; pensions were granted. A newly created Board of War composed of nine persons was to direct troops, procure provisions, supplies and munitions and impress;[69] similarly, a Board of Accounts was to receive accounts related to war expenditures.[70] The legislature through its resolves even weighed in on strategic matters such as the routes troops should travel and the use of militia forces to reinforce the Northern Army. While today we might view such resolves as legislative

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[68] As to combining parishes, see Chapter 11, August Session of 1776. As to forming precincts, see Chapter 12, August Session of 1776. As to forming towns, see Chapter 13, August Session of 1776 and Chapter 17, August Session of 1776.

[69] Resolve 75, August Session of 1776 and Resolve 124, October Session of 1776. The resolve empowering the Board of War to "impress" does not define the power. It may have extended only to men but could have also extended to war material and supplies also.

[70] Resolve 100, May Session of 1776.

intrusion into a field traditionally executive in nature, these were reasonable acts of governance taken by the leading branch of Massachusetts's government.

The twenty-nine resolves not dealing with the war created committees and boards, provided for those in need of support and protected absentees' assets from waste. Resolves created a Committee of Correspondence with congress[71] and a Court of Enquiry to try, disarm and detain persons "inimical to the American colonies."[72] Resolves supplied relief to families of soldiers from the "exorbitant prices of necessaryies," directed prisoner exchanges, and provided corn to the poor of Boston, Marblehead, Glocester and Charlestown as well as adding some to the poor rolls. Other resolves commanded the repair of roads and approved the rebuilding of bridges. Finances were regulated with the laying and collecting of taxes. The legislature even prevented the sale of Negroes or their treatment other than as prisoners if captured on the high seas after word spread that two Negroes captured on the highs seas were going to be sold at public auction.[73]

During this early period, six of the twenty-nine resolves not directly related to the war effort played a role in managing assets through probate, sequestration and equity-based rulings. These resolves, which over time come to dominate the content of the resolves, implemented a consistent policy to allow the sale of assets for widows and minor heirs. The policy provided assets for minor children and wives along with an orderly satisfaction of debts. These first resolves enabled an executor and administrator to sell property as long as the proceeds were disbursed to heirs as they reached lawful

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[71] Resolve 11, May Session of 1776.

[72] Resolve 216, May Session of 1776 and Resolve 220, May Session of 1776.

[73] Resolve 83, August Session of 1776.

age[74] and empowered a wife-administratrix to sell property of a deceased husband.[75] A third allowed a wife-administratrix to sell the real estate of a dead husband to satisfy debts due to the state.[76] A committee of safety received an order to lease a farm for a year and prevent waste.[77] Another resolve directed committees of correspondence in each county to take an inventory of Tory estates and to lease them so that towns would not have to bear the expense of providing for the families left on the estates.[78] A final resolve stayed executions on attachments of Tory estates.[79]

In 1777 and the first legislative session of 1778, the Massachusetts legislature remained intimately involved with the larger issues of war: fielding military units, managing the upheaval of society, providing financing and detaining those dangerous to the state. The legislature shifted its initial focus slightly from fielding armies to managing society and providing financing, although it did pass laws raising cavalry units[80] and regulating the militia.[81]

Its efforts to finalize a constitution for the state, however, unraveled. The towns had earlier called for a constitutional convention for the express purpose of drafting a

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[74] Resolve 84, October Session of 1776.

[75] Resolve 109, October Session of 1776.

[76] Resolve 154, December Session of 1776.

[77] Resolve 128, December Session of 1776.

[78] Resolve 109, May Session of 1776.

[79] Resolve 121, August Session of 1776.

[80] Chapter 33, May Session of 1777.

[81] Chapter 23, May Session of 1777.

constitution but the legislature had balked and instead called for the citizens to elect representatives in 1777 who would not only serve to conduct legislative business but also draft a constitution. The constitution produced by the legislature and council was submitted to the people on March 4, 1778 and soundly defeated.[82] Efforts began anew to craft a constitution but only through a convention that would finally convene in 1779.

The legislature was obviously straining to raise adequate credit and borrow money to fund the war effort. It borrowed money,[83] extended bills of credit[84] and encouraged towns to raise money in an effort to lessen the share of the public debt.[85] To aid the general economic situation, new laws protected the currency by making forgery of continental certificates, lottery tickets, notes, bills of credit or coins illegal.[86] The debt in Massachusetts, as in a number of the states, was ballooning quickly. Massachusetts's paper debt would reach £11,000,000 by 1780.[87]

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[82] Its defeat was overwhelming: 9,972-2,083. Two factors lead to its defeat. It was not drafted by a convention of the people. The failure to fulfill the republican demands of towns and Boston that the constitution be drafted by a body other than the legislature to insure that it was a product of the people and superior to the legislature crippled the effort from its inception. Boston, for example, voted that her representatives could not even participate in drafting the constitution. The constitution was also defeated because it was out of step with the republican sentiments of the people. The constitution contained no bill of rights and an upper house that was indirectly elected. The Essex Result, although characterized as a more conservative critique of the constitution, nevertheless included demands for a bill of rights, a directly elected Senate and independence of the governor from the legislature. Drafted by Theophilus Parsons, it included demands that would not be met including election of the governor, representatives and senators, not directly, but only through county conventions and a veto in the hands of the governor. See Nevins 175-178.

[83] Chapter 43, March Session of 1777; Chapter 12, May Session of 1777; and Chapter 19, May Session of 1777.

[84] Chapter 13, May Session of 1777.

[85] Chapter 41, March Session of 1777; Chapter 15, May Session of 1777; and Chapter 19, May Session of 1777.

[86] Chapter 37, March Session of 1777 and Chapter 44, March Session of 1777.

[87] See Merrill Jensen, The New Nation, A History of the United States During the Confederation, 1781-1789 (New York: Knopf, 1962) 307. Most of this astronomical sum was due to be paid by 1785. Yet as high as the face value of the paper debt was it was not that burdensome a debt. Massachusetts had western

Those laws related to managing society indicate that even if the worst effects of the war had yet to be felt, citizens of Massachusetts had come to feel the effects of war on their state soil. The legislature acted to prevent disease,[88] monopolistic practices[89] and the sale of goods at public auction so that goods would not be bid up in price.[90] New laws punished desertion and embezzlement.[91] For the first time, Massachusetts had to pass laws dealing with absentees' estates and prisoners[92] and directed how intestate estates should be administered if the judge died, resigned or was removed.[93] Finally the legislature extended the maritime jurisdiction to allow compensation to those whose vessels were wrongfully seized.[94]

Among the laws managing society, the legislature continued to deal with the enemies that remained within Massachusetts. Far from a government pursuing policies that were oppressive, these laws served the critical purpose of protecting the new republican government from enemies in its midst. Since the Revolution was severing

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lands that might be used to pay down the debt and a large citizenry that might reasonably be expected to bear the tax burden then existing. As to the debt not being as large as Jensen sees it, see Main at 361.

Massachusetts was not alone among the states in struggling with what to do with its paper debt. Some advocated a continuation of the policies by which the war was paid for with paper certificates. Other saw the futility of this policy as tender acts and regulatory laws increasing failed to prop up the value of paper certificates. They wanted a change of policy that would lead to a hard money policy. Taxes and debts would be payable in species and the paper certificates would be converted to specie obligations. This struggle, fought in Massachusetts and many other states, was a debate over policies that would have better left to a national government. To the extent that the Articles of Confederation Congress weighed in on the issue, it advocated policies of fiscal reform that would end the use of paper certificates. See Main 256-257.

[88] Chapter 39, March Session of 1777.

[89] Chapter 46, March Session of 1777 and Chapter 6, May Session of 1777.

[90] Chapter 2, May Session of 1777 and Chapter 9, May Session of 1777.

[91] Chapter 36, March Session of 1777.

[92] Chapter 38, March Session of 1777; Chapter 35, March Session of 1777; and Chapter 10, May Session of 1777.

[93] Chapter 30, May Session of 1777.

[94] Chapter 31, May Session of 1777.

prior political allegiances and not simply repelling foreign invaders, the problem of domestic treason required aggressive measures and yet those measures provided for legal procedures for those being held and trials rather than more extreme steps. One statute set forth a definition of treason and the mode of trials.[95] The legislature mandated the creation of lists of "those dangerous to the State"[96] and the restraint of certain persons deemed to be dangerous to the state.[97] Finally, it passed a law calling for oaths of allegiance to be taken.[98]

As in the first eighteen months, laws further restructured the basic political organization of Massachusetts and provided for the establishment of the political organization of republicanism. These actions included the erection of parishes,[99] the incorporation of towns,[100] the setting off of parts of towns into parishes[101] and precincts[102] and even the de-annexation of part of a town and the annexation of it to another.[103] Towns would be the fundamental political unit that would voice sentiment to the legislature about, among other issues, the drafting of the new constitution.

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[95] Chapter 32, March Session of 1777.

[96] Chapter 48, March Session of 1777.

[97] Chapter 45, March Session of 1777.

[98] Chapter 17, May Session of 1777 and Chapter 24, May Session of 1777.

[99] Chapter 26, May Session of 1777.

[100] Chapter 11, May Session of 1777; Chapter 40, March Session of 1777; Chapter 22, May Session of 1777; and Chapter 20, May Session of 1777.

[101] Chapter 28, May Session of 1777.

[102] Chapter 29, May Session of 1777.

[103] Chapter 34, March Session of 1777.

During the same eighteen-month period between March of 1777 and April of 1778 the legislature passed 1,154 resolves. Of these, 1,028 related directly to the war. Most of the war-related resolves involved the details of fielding and supplying armies. They included resolves directing the acquisition of knapsacks, cartouch boxes, uniforms and belts, gunpowder, rope, salt, shoes, stockings and shirts and lead. They also ordered payment to troops, the procurement of horses, the delivery of guns, the exchange of prisoners and the appointment of courts martial.[104] Other resolves directed the construction of armed vessels and fortifications, the procurement of medicine for wounded troops and the creation of a commissary of pensions.[105] The legislature authorized searches and seizures for military stores from houses.[106] Judges of probate, under a resolve, could appoint persons where no agents had been appointed to prosecute waste of absentee estates.[107] In societies that did not maintain the separation of powers that we expect of governmental branches today, the legislature simply acted consistent with the overarching notion that the people and their representatives should govern regardless of whether those issues might be considered properly within the realm of any particular branch.

Those resolves unrelated to the direct issues surrounding the military forces pursued a consistent policy to alleviate the worst effects of war by allowing those whose

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[104] See Resolve 20, March Session of 1777 in which a Nancy Bailey was charged with "the offence of having on Man's Apparel and also of enlisting in the service of the United States by the name of Samuel Gay (or Gray) and of having received the sum of fifteen pounds ten shillings from this State."

[105] Resolve 78, March Session of 1777 and Resolve 115, March Session of 1777.

[106] The conditions for entry were spelled out in the resolve. The militia had to ask first for entry and be refused. Then entry could only be allowed if a judge approved it after information had been presented by the homeowner. See Resolve 214, March Session of 1777.

[107] Resolve 69, November Session of 1777.

affairs had been interrupted to conclude their business and support themselves. One hundred and twenty six resolves in this category related to a host of other subjects, most significantly probate matters and resolves that granted relief that was equitable in nature. Seven of these allowed persons to pass through the war zone, usually to leave the Commonwealth. Men, women and families obtained permission to depart for Halifax, Nova Scotia, Ireland and New York.[108] Forty-five resolves empowered administrators, executors or guardians to sell the real estate of deceased persons. Twenty-two of the forty-five empowered administrators to sell real estate. In all but two of these the widow was permitted to consummate the sale.[109] A preponderance of these were for matters in Suffolk and Middlesex counties, which were the two counties surrounding Boston. A number were undoubtedly occasioned by the Judge of Probate for Suffolk County leaving Massachusetts with probate documents in his possession. (In eight of these the widow was named as a joint administrator.) Twelve resolves involved requests to sell real estate for the support of minors.[110] When the reasons were given for the necessity of selling the real estate, they included only the payment of debts or the support of widows, heirs and minors.[111]

Those resolves involving petitions for equitable relief indicate a regularized process for collecting evidence from the parties before issuing resolves and a policy to

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[108] As to departures to Ireland see Resolve 11, March Session of 1777. As to departures for New York see Resolve 13, March Session of 1777. As to departures for Halifax see Resolve 7, August Session of 1777, Resolve 7, October Session of 1777, and Resolve 43, October Session of 1777. As to departures to Nova Scotia see Resolve 143, March Session of 1777.

[109] See for example Resolve 48, March Session of 1777.

[110] Resolve 157, March Session of 1777.

[111] Resolve 95, March Session of 1777 and Resolve 103, March Session of 1777.

allow parties to have a full and fair opportunity to litigate their disputes fully. Twenty-six resolves answered petitions for equitable relief. A number of these petitions received the remedy of an order to the other party to appear and show cause why the petition should not be granted. Those resolves that offered a rationale all cited extenuating circumstances, often overtly related to the war. Twenty were in reply to petitions for new trials, allowance of appeals, execution of judgments and completion of real estate transactions. These resolves demonstrate not a democratic tyranny, but rather a determination to allow legal proceedings to run their full and natural course so that parties could completely air their disputes before the courts. In three of the eleven petitions for new trials, the legislature requested the other party to appear and show cause why the petition should be granted.[112] Five resolves granted petitions so that the parties could have a full and fair hearing of their cases. The parties requesting these petitions had missed filing suits because of statutes of limitation,[113] been absent from the country or unable to produce evidence[114] or suffered default judgment because of their failure or inability to appear.[115] Only three of the eleven petitions do not reveal the rationale for granting the new trial.[116] Finally, one resolve granted the petition of the sister of Gov. Hutchinson to have his household effects surrendered to her.[117]

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[112] Resolve 44, March Session of 1777; Resolve 65, January Session of 1778; and Resolve 49, April Session of 1778.

[113] Resolve 113, March Session of 1777.

[114] Resolve 87, May Session of 1777 and Resolve 63, November Session of 1777.

[115] Resolve 17, October Session of 1777 and Resolve 13, January Session of 1778.

[116] Resolve 4, April Session of 1778; Resolve 177, May Session of 1778; Resolve 25, April Session of 1778.

[117] Resolve 49, January Session of 1778.

The legislature, again, allowed parties to litigate their disputes fully. Six petitions asked that an appeal be granted from a final judgment. Three times the legislature requested that the opposing party appear to show cause why the petition should not be granted.[118] In one cause it was allowed because the petitioning party had failed to appeal because of the war[119] and in two cases the right to an appeal was granted without any reason appearing in the resolve.[120]

In three cases Massachusetts signaled its willingness to pursue a reasonableness policy so that transactions intended to be consummated by parties would not be derailed by the interruptions of the war or the death of a party. The legislature allowed the execution of judgments to proceed and the completion of real estate transactions either because the war interrupted the proceedings[121] or because parties to contracts had died before the deeds to property could be delivered.[122] In two petitions involving admittance of wills to probate, the legislature asked that the adverse party appear and show cause why the will should not be admitted[123] and in the other case directed the will to be admitted despite the fact that only two witnesses had attested to the signature of the testator.[124] With these resolves and those granting new trials and others in the probate realm, the legislature simply exercised discretion always found somewhere in

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[118] Resolve 67, November Session of 1777; Resolve 143, April Session of 1778; Resolve 87, May Session of 1777.

[119] Resolve 141, October Session of 1777.

[120] Resolve 271, January Session of 1778 and Resolve 112, April Session of 1778.

[121] Resolve 50, May Session of 1777.

[122] Resolve 64, October Session of 1777 and Resolve 150, October Session of 1777.

[123] Resolve 30, January Session of 1778.

[124] Resolve 159, January Session of 1778.

government to effectuate policies that cared for citizens and allowed them to resolve their disputes fairly.

In sixty-five acts passed between May 1778 and December 1780 the legislature continued to be involved in fielding armies, but the shift in focus begun in 1777 to deal increasingly with issues at home quickened. The majority of legislation focused on the effects of war at home, management of finances, absentees' estates and the detention or prosecution of those dangerous to the state. The government was clearly reaching the limits of its ability to marshal resources for the war and for the first time had to apportion resources to care for sick and wounded soldiers.[125] The government moved to regulate further the militia[126] and to make desertion illegal.[127] In order to continue to provide food and clothing for some of its troops the government had to resort to more extreme measures. It established a lottery to clothe Massachusetts's soldiers in the Continental Army.[128] The superintendent of purchases of beef was also empowered to issue executions to treasurers of towns to compel them to provide beef,[129] and the government also authorized impressing teams of horses for the army's use.[130]

The legislature also directed that constitutional convention be elected. The right to elect its delegates was extended to all adult freemen residing in a town. The

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[125] Chapter 2, January Session of 1780.

[126] Chapter 21, January Session of 1780.

[127] Chapter 9,May Session of 1779.

[128] Chapter 15, January Session of 1780 and Chapter 28, January Session of 1780.

[129] Chapter 33, January Session of 1780.

[130] Chapter 44, January Session of 1780.

convention opened in September 1779 with representatives from 247 towns. It would finally conclude its proceedings in March of 1780 with a constitution largely drafted by John Adams. The constitution was submitted to the citizenry for debate. The convention in a subsequent gathering attended by barely one-fourth of the original representatives reviewed the replies from the towns and the objections that were offered. In June of 1780 this rump convention formally accepted the constitution despite the fact that a number of western counties did not support it.[131] The process that the convention used to ratify the constitution did little to gain the support of parties reluctant to accede to the constitution. The convention charged themselves to merely determine if two-thirds of the state approved of each clause. In the absence of clear direction from a number of towns, the convention proceeded to pronounce the constitution ratified. Virtually no towns protested the result however.[132]

The government continued its efforts to detain and prosecute those deemed dangerous to the state and to dispose of the estates of "absentees" who were in fact Loyalists who had fled from Massachusetts. This continued the policy of the legislature to protect the state from its enemies and to manage for the state those assets left behind by Loyalists for the support of Massachusetts's citizens. Laws set out procedures for the trials of those being held for treason[133] and continued over legislation from the previous session for "taking up and restraining those deemed dangerous to the state."[134] Also

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[131] Nevins 180-181, Main 182-183.

[132] Main 182, Leonard Richards, Shays's Rebellion (Philadelphia, Univ. of Penn. Press, 2002) 72-73.

[133] Chapter 9, May Session of 1778.

[134] Chapter 10, May Session of 1778 and Chapter 10, January Session of 1780.

those "notorious conspirators" against the government and liberties of inhabitants of Massachusetts Bay who were convicted of treason forfeited their estates.[135]

The legislature responsibly disposed of the absentees' estates in an orderly manner that safeguarded the estates, directed that debts be paid and finally ordered the sale of the estates pursuant to procedures that protected the rights of creditors first and that also ensured that British subjects would not be able to purchase their estates back through trickery. The estates were protected and managed so that outstanding debts were paid or recovered.[136] The procedures put into place provided for notice by publication that would be sufficient notice to absentees that their estates would be sold.[137] Finally as the sales began a law allowed creditors the first right to buy the absentees' or conspirators' estates to satisfy the debts owed them fully.[138] To prevent agents of British subjects from submitting clandestine claims, statutory procedures ensured that all claims presented were claims on behalf of citizens of the American states.[139]

The government continued to struggle with the issues caused by the war on the home front. Financing laws continued the struggle to pay for the war and manage the already existing debt.[140] Legislation also controlled wartime relations and contact with

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[135] Chapter 9, April Session of 1779 and Chapter 10, April Session of 1779.

[136] Chapter 12, May Session of 1778 and Chapter 50, January Session of 1780.

[137] Chapter 48, January Session of 1780 and Chapter 49, January Session of 1780.

[138] Chapter 52, January Session of 1780.

[139] Chapter 53, January Session of 1780.

[140] Chapter 11, May Session of 1779, Chapter 11, May Session of 1779, Chapter 4, January Session of 1780, Chapter 39, January Session of 1780 and Chapter 40, January Session of 1780. The legislature suspended specie payment of state debts until 1788 but the newly formed government under the constitution of 1780 reversed course and reinstituted specie payments on the debt as a sound money policy. See Jensen, The New Nation 307. The debt was liquidated on a scale of depreciation based upon the

the enemy. The legislature directed retaliation against British prisoners consonant with the mistreatment of Massachusetts's citizens held by British as prisoners.[141] Laws were passed to prevent commerce and illegal correspondence with "enemies of the United States."[142]

The legislature had to manage a society still in the throes of war. Its laws aimed to protect the citizenry, further the resolution of disputes and enforce order. Laws regulated the sale of goods at public auction in order to ensure that goods were not being sold at extortionate prices.[143] The penalties for crimes below treason and misprison of treason were increased.[144] The legislature also made available the writ audita querela which allowed judgment-debtors to plead that the enforcement of a judgment against them would be contrary to justice.[145] The legislature also postponed the court sessions of the supreme judicial court for the County of Berkshire "by reason of the exigencies of the times" and then re-established the court.[146] It altered the times for holding the supreme judicial court for Bristol.[147] Laws extended the time to take the oath of fidelity and

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market value of the notes at the time that they were issued. This responsible policy avoided the policies of Virginia which paid much of its debt by allowing payment in paper money that had been called in at one thousand to one. See Jensen, The New Nation 307.

Although Jensen is critical of Massachusetts's policy it would prove to be a policy supported by the federal government; it was a policy that honored those debts incurred to support the war effort.

[141] Chapter 23, January Session of 1780.

[142] Chapter 24, January Session of 1780 which amended by tightening Chapter 32, January Session of 1780.

[143] Chapter 25, January Session of 1780 which was an amended by Chapter 30, January Session of 1780.

[144] Chapter 51, January Session of 1780

[145] Chapter 47, January Session of 1780.

[146] Chapter 19, January Session of 1780 and 45, January Session of 1780.

[147] Chapter 46, January Session of 1780

allegiance[148] and pursuant to a congressional resolution made appeals available to congress in certain maritime cases.[149] Finally the legislature continued to grant the petitions seeking to reorganize the town and district structure by incorporating, erecting and forming new towns and annexing districts to towns.[150] These policies were reasonable and maximized the resources of Massachusetts to face the challenges caused by the war including the threat caused by enemies within the state.

Between May 1778 and December 1780 the legislature passed an astonishing 1,956 resolves, the vast majority of which were directly related to the war; the total percentage associated with the war effort, however, decreased from earlier periods and would decrease session by session during this period. The resolves during this period were consistent with the legislation. They indicate that the legislature continued to shift its attention from the immediate issues of war to a burgeoning crisis at home. The May session of 1778 involved 121 resolves, 94 percent of which were war related. By October of 1780 only 20 percent of the resolves were war related. Even as the total number of resolves increased the percentage that were war related continued to decline. The percentage of resolves that were war related decreased because the war had moved to the South, the Commonwealth was nearing a point of exhaustion, and demands for the

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[148] Chapter 8, April Session of 1779.

[149] Chapter 10, May Session of 1779.

[150] Chapter 11, January Session of 1780 incorporating a town; Chapter 13, January Session of 1780 forming a town. Chapter 14, January Session of 1780 annexing a place to a town. Chapter 18, January Session of 1780 annexing a place to a town. Chapter 20, January Session of 1780 forming a district. Chapter 27, January Session of 1780 forming a town. Chapter 29, January Session of 1780 annexing a place to a town. Chapter 1, January Session of 1780 erecting a town. Chapter 35, January Session of 1780 forming a town. Chapter 37, January Session of 1780 annexing a place to a town. Chapter 38, January Session of 1780 forming a town.

care of the wounded and surviving family members of dead soldiers increased. Those that were war related called upon towns to provide soldiers, directed that units be filled and provided all the material for war, ranked officers and directed the construction of armed ships.

Those resolves not dealing with the war effort itself indicate a continuing policy of providing support to those in need including widows, minors and heirs through the orderly disposition of the estates of the deceased. Again, the largest single number of these resolves involved probate matters in the two counties surrounding Boston, Middlesex and Suffolk counties. Eighty-eight involved the sale of real estate by executors, administrators or guardians out of the estates of deceased for the support of widows, minors and heirs.[151] The legislature also continued to allow passage through the war zone for those who wanted to leave the Commonwealth.[152] Thus the legislature continued to act, not surprisingly, as the centerpiece of a majoritarian government. In doing so, its policies of caring for those less fortunate or whose business was interrupted by the war was responsible governance carried out evenhandedly.

Those eighteen resolves granting petitions equitable in nature continued the policy of allowing parties to have a full litigation of disputes and completing transactions interrupted by the war while also allowing Loyalists not designated as conspirators to leave the Commonwealth. Eight involved petitions for new trials or appeals. Of the resolves granting new trials or appeals the legislature gave reasons in three of them.

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[151] As examples see Resolve 21, May Session of 1778; Resolve 34, January Session of 1779; Resolve 247, January Session of 1779; and Resolve 73, April Session of 1779.

[152] For passage to Nova Scotia see Resolve 139, November Session of 1779 and Resolve 50, December Session of 1779. For passage to New York see Resolve 2, December Session of 1779 and Resolve 8, March Session of 1780.

They included evidence being carried off by judges as they evacuated with the British,[153] inability to appear,[154] and absence occasioned by the occupation of Boston.[155] In the remaining five cases three appeals were allowed to be continued,[156] one suspended maritime action was reinstated[157] and only one new trial was granted without a reason stated in the resolve.[158]

In the ten resolves allowing parties to complete transactions or enter wills into probate the legislature continued its earlier policy to complete transactions for which the parties' intentions were clear. Half of these resolves offered a rationale for the actions. These included the death of parties who had contracted to sell property,[159] judges who had carried off records[160] and the destruction of documents.[161] In three of the remaining cases the legislature refused petitions because it did not have enough information. It requested more information before quieting title in petitioners[162] by requesting that the opposing party appear and show cause why the petition should not be granted. In only one resolve did the legislature evidently act inconsistently by admitting a will to probate

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[153] Resolve 134, November Session of 1779.

[154] Resolve 35, November Session of 1779.

[155] Resolve 222, January Session of 1779.

[156] Resolve 134, November Session of 1779 and Resolve 179, May Session of 1779.

[157] Resolve 104, May Session of 1778.

[158] Resolve 119, November Session of 1779.

[159] Resolve 12, October Session of 1778; Resolve 132, October Session of 1778; and Resolve 10, April Session of 1779.

[160] Resolve 156, October Session of 1779.

[161] Resolve 37, May Session of 1779 in which the legislature directed the production of a new note to replace one burned.

[162] Resolve 134, October Session of 1778; Resolve 262, January Session of 1779; and Resolve 78, May Session of 1779.

and in the course of doing so repealing a resolve that had earlier set aside a will.[163] Even this might have been legitimate based upon additional information contained in the second petition. Thus whether with resolves dealing with new trials or complete transactions the legislature exercised governmental discretion to further fair resolution of disputes and to allow its citizens to complete transactions interrupted by the war.

The legislature continued its policy of aiding those in need and marshaling the resources of the absentees' estates to provide for its citizens. As part of its efforts to assist citizens, resolves provided support for the families of dead soldiers, altered pay in light of the depreciation of wages and provided pensions.[164] These resolves included a grant to a family of support through the winter,[165] allowance to the selectmen of Dartmouth of the power to sell the property of a woman for her support[166] and even payment of the medical bills for a soldier who lost a thumb.[167] The legislature called for an accounting of absentees' estates[168] and the letting of the estates except those necessary for the support of wives and children of absentees[169] and that any leasing should not be done below market value.[170] This policy of protecting and supporting its citizens put a premium on freedom as evidenced by a resolve of a slave owner seeking the return of his

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[163] Resolve 181, May Session of 1779.

[164] As to pensions see examples at Resolve 45, December Session of 1779 and Resolve 18, March Session of 1780.

[165] Resolve 53, December Session of 1779.

[166] Resolve 270, January Session of 1779.

[167] Resolve 199, March Session of 1780.

[168] Resolve 150, October Session of 1778 and Resolve 165, May Session of 1779.

[169] Resolve 194, January Session of 1779 Resolve 120, April Session of 1779.

[170] Resolve 135, December Session of 1779.

slave. The legislature rejected his request and allowed the slave to choose whether to return or become free.[171] The legislature here was putting a premium on maximizing the return to the state of those estates abandoned by Loyalists. Even as it did so it used procedures to regularize the process and built in safeguards to care for those who depended upon the estates for their support.

Finally, the legislature continued to function as the agent of the people to foster republican institutions. After the rejection of the first proposed state constitution a resolve asked the towns whether they wanted a new constitution and if so, whether the representatives in the coming year could be empowered as a state convention to form a new constitution.[172] A further resolve appointed a commission to "select, abridge, alter, degent, and methodize the [laws of the Commonwealth], so as to make them consistent with the constitution, and intelligible to the common people."[173]

In 1781 the legislature focused its legislation on managing the financial burden created by the war and issues on the home front caused by a society that had endured a war on its soil. Of its forty-two pieces of legislation that year nine were related to finances. The legislature paid interest on bills of credit, suspended their use as bills of tender[174] and punished passing counterfeit bills of credit.[175] The legislature also made

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[171] Resolve 211, May Session of 1779.

[172] Resolve 203, January Session of 1779 and Resolve 91, October Session of 1779.

[173] Resolve 98, March Session of 1780.

[174] Chapter 7, Acts and Laws of Massachusetts 1781.

[175] Chapter 10, Acts and Laws of Massachusetts 1781.

efforts to solve its deficit by laying taxes[176] and duties[177] and also by depreciating the currency [178] and pressing the counties to raise money that they owed the state.[179] It granted congress "a permanent revenue" through an impost for the purpose of discharging the debts in "prosecuting the present war with Great Britain"[180] and passed a law supporting the establishment of a national bank.[181]

Laws began to re-invigorate commerce, repair some of the damage caused by the war, and facilitate quick and reasonable resolution of outstanding debts. The legislature allotted money to replace a burned church[182] and widen and amend the streets and squares of Charlestown in that part "recently burned."[183] It also moved to restore profitable commerce in ship stores by repealing laws that prohibited the exportation of provisions and masts and spars out of state.[184] Laws regulated a quicker mode of procedure in undisputed causes in the maritime courts[185] and provided a speedy method of recovering debts that was also less expensive for the creditor than the previous process.[186] Finally, the legislature extended the time for redemption of estates mortgaged

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[176] Chapters 16 and 28, Acts and Laws of Massachusetts 1781.

[177] Chapters 17 and 21, Acts and Laws of Massachusetts 1781.

[178] Chapter 18, Acts and Laws of Massachusetts 1781.

[179] Chapter 22, Acts and Laws of Massachusetts 1781.

[180] Chapter 37, Acts and Laws of Massachusetts 1781.

[181] Chapter 34, Acts and Laws of Massachusetts 1781.

[182] Chapter 13, Acts and Laws of Massachusetts 1781.

[183] Chapter 14, Acts and Laws of Massachusetts 1781.

[184] Chapter 27, Acts and Laws of Massachusetts 1781.

[185] Chapter 11, Acts and Laws of Massachusetts 1781.

[186] Chapter 36, Acts and Laws of Massachusetts 1781.

by conspirators or absentees' to January 1, 1783, most likely in the hope that some would redeem their estates for more than the dramatically reduced values that some creditors had paid.[187]

Laws regarding military matters only highlighted how fortuitous it was that fighting would end soon. Even as the legislature passed a law continuing a company of troops,[188] it also passed laws adjusting the pay of soldiers to try to compensate for the depreciating currency[189] and to apprehend "deserters from the Continental Army and from fleets and armies of . . . allies"[190] including French sailors "which has of late become very frequent."[191] Finally, three laws continued to support the orderly expansion of Massachusetts by altering the dividing line between towns and annexing two landowners and their estates to towns.[192]

In 1781 an increasing focus on resolving problems caused by the upheaval of war produced 791 resolves. The issues addressed included allowing real estate in estates to be sold in order to support the widows and children, making exceptions to the general rules for the liquidation of absentee estates in order to provide support for wives and children left behind and finally allowing people to leave or return to the Commonwealth as their allegiances dictated. Virtually none of the resolves related to the war effort itself. This may have been because the Board of War was taking on increasing responsibility,

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[187] Chapter 42, Acts and Laws of Massachusetts 1781.

[188] Chapter 4, Acts and Laws of Massachusetts 1781.

[189] Chapters 6 and 24, Acts and Laws of Massachusetts 1781.

[190] Chapter 23, Acts and Laws of Massachusetts 1781.

[191] Chapter 31, Acts and Laws of Massachusetts 1781.

[192] Chapters 5, 8 and 9, Acts and Laws of Massachusetts 1781.

but also because the war itself had swept to the South. It may also have been because as the war shifted southward the burden of supplying the material of war fell on southern states even for Massachusetts's soldiers.

The legislature continued its policy of providing for those least able to care for themselves by assisting in the completion of probate matters. Finally, 81 percent of the resolves involved executors and administrators or guardians selling real estate to support widows, children and heirs and even Indians.[193] Another forty-one resolves or 5 percent of the total allowed widows and children to keep a portion of absentees' estates for their support.[194] These virtually all pleaded extenuating circumstances about the plight of the wives and children living upon these estates following the directive of the legislature that these absentees' estates be sold.

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[193] Of the 640 resolves, 419 included sales by executors and administrators to support widows and heirs; 221 involved guardians selling to support children and Indians. Of those involving executors and administrators approximately 50 percent were in the counties of Suffolk and Middlesex. See, for example, Resolve 199, January Session of 1781 allowing sale to allow one heir to pay another; Resolve 225, January Session of 1781; Resolve 74, April Session of 1781; Resolve 27, May Session of 1781 allowing a man to sell one-sixth share for payment of debts and support of minors as they come of age; Resolve 267, October Session of 1781for sale of real estate for payment of taxes and remainder for the "benefit of the heir," and Resolve 284, October Session of 1781 allowing for sale of real estate with payment to heir when he reaches 21, Resolve 285, October Session of 1781 allowing reservation of some household furniture and permitting the sale of real estate.

Those involving sales by guardians for the support of minors include Resolve 11, January Session of 1781, Resolve 118, January Session of 1781, and Resolve 127, January Session of 1781. Those resolves involving the support of those incompetent include Resolve 7, April Session of 1781. Those for support of Indians include Resolve 35, April Session of 1781 and Resolve 103, May Session of 1781.

[194] These included Resolve 116, January Session of 1781 exonerating an agent for trespass; Resolve 109, January Session of 1781 allowing a sale of an estates but making the purchaser put up a bond to ensure payment of creditors that appear within one year; Resolve 226, January Session of 1781 referring dispute between agent and state over the title to the estate with regard to three claimants to a committee of three; Resolve 72, April Session of 1781 paying money to wife of absentee but if creditors claim more than granted sum then she will be paid in proportion to other creditors; Resolve 151, April Session of 1781 allowing wife her one-third share so long as mortgage is paid off; Resolve 181, April Session of 1781 providing support for widow out of sons-in-laws absentee estate; Resolve 5, May Session of 1781 providing support for slave out of absentee estate; Resolve 173, October Session of 1781 in which the legislature allowed the wife of an absentee to keep her husband's personal property including cows, grindstone, ploughs and farming utensils; and Resolve 224, October Session of 1781 in which support is provided for a Negro child.

Another thirty-eight resolves or approximately 5 percent of the total enabled people to live where they chose now that they could pass through the war zone, to complete transactions, to practice their professions or to litigate their disputes fully. In total these maximized peoples' freedom to live where they chose, have their wishes fulfilled and have the greatest opportunity for the rationale for their actions to be aired fully in a court of law. Sixteen resolves granted petitions for passage usually out of the Commonwealth to Nova Scotia or Halifax, with some returning to the Commonwealth.[195] Ten resolves authorized county officials to license petitioners as innkeepers, tavern keepers or sellers of "spirituous liquors" until the next session for granting licenses at the county court.[196] Five resolves permitted the delivery of deeds to grantees who had contracts for the conveyance of real estate.[197] Five resolves allowed new trials and one permitted an appeal.[198] These resolves in which the legislature exercised governmental

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[195] For passage to Nova Scotia, see Resolve 58, January Session of 1781 and Resolve 8, April Session of 1781. For passage to Nova Scotia and back, see Resolve 149, April Session of 1781. For passage to Halifax and back, see Resolve 74, May Session of 1781. See Resolve 275, October Session of 1781 for allowing a return to the Commonwealth. See Resolve 6, April Session of 1781 for allowing one to import personal property from New York.

[196] As to a house of public entertainment, see Resolve 21, April Session of 1781. As to a public house, see Resolve 77, April Session of 1781. As to a tavern, see Resolve 205, October Session of 1781. As to permission to sell liquor at his house if the selectmen of the town approve, see Resolve 91, April Session of 1781.

[197] See Resolve 16, January Session of 1781 concluding that there was evidence of a bond that one party agreed to convey to another. See Resolve 192, January Session of 1781 and Resolve 160, May Session of 1781 considering that a debt was created at the same time that a deed was conveyed. See Resolve 191, October Session of 1781conveying a deed noting that payment for the property was already made.

[198] See Resolve 200, January Session of 1781: a man was previously convicted of theft now has evidence of innocence. See Resolve 94, April Session of 1781 allowing a new trial after three years. See Resolve 107, May Session of 1781 in which the petitioner endured a default judgment. Resolves 19 and 34 of the May Session of 1781 allowed suits for lawless conduct. See Resolve 231, October Session of 1781 allowing all actions passed upon by default and were appealed from any inferior court before June 15, 1776 and not entered at the superior court to have their appeals reinstated.

discretion to grant new trials, petitions or appeals only continued the legislative use of judicial power that was consistent with republican majoritarian governments.

With hostilities over and an uneasy truce persisting as negotiations proceeded, the legislature of 1782 passed forty-eight pieces of legislation focusing on paying for the war, settling down society in the wake of the war, reorganizing the judiciary and passing new laws crafted by the committee appointed to revise the laws of the Commonwealth.

Those laws having to do with finances included a law that supported the establishment of a national bank while preventing the establishment of other banks and preventing passing of forged bank bills.[199] The legislature also appropriated a portion of the continental tax as security for a loan.[200] Finally, it also granted congress a permanent revenue in the form of a 5 percent ad valorum tax as impost on all goods. The legislature, however, reserved the right to provide the same amount of revenue in another way if it concluded there was a better way to fund the revenue.[201]

As part of its efforts to conclude the outstanding financial matters related to the war, the legislature passed laws to facilitate a "more speedy method" of recovering debts and for preventing the unnecessary costs of debt recovery.[202] It sought to bring to closure issues related to estates open for too long: one law directed appraisal of articles of

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[199] Chapter 10, January Session of 1782.

[200] Chapter 1, May Session of 1782.

[201] Chapter 19, May Session of 1782.

[202] Chapter 2, April Session of 1782.

personal estates to satisfy executions in collection of debts[203] and another compelled executors living outside the Commonwealth to settle their accounts.[204]

The state of Massachusetts also passed a series of laws to reestablish fully the rule of law within the Commonwealth. These laws appear extreme and possibly abusive except when seen in the context of a society struggling to restore order and normalcy in the wake of the war. The first of these was a law to suspend the privilege of the writ of habeas corpus for six months in order to apprehend those "judged by His Excellency and the Council to be Dangerous to the Peace and Well-being of this or any of the United States."[205] A statute to "direct and regulate the Process of Outlawry" set forth the terms that would merit a judgment of outlawry. These conditions included failure to appear before the supreme judicial court to face criminal indictments or failure to appear for trial after pleading to an indictment. The law called for the real estate of those outlawed to be held to compel their appearance and provided that a voluntary appearance reversed a judgment of outlawry.[206] Another law ordered the apprehension of those persons charged with crimes in other states.[207]

Massachusetts also began an effort to reshape society consistent with revolutionary concepts of republicanism. These first laws included laws against

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[203] Chapter 11, May Session of 1782.

[204] Chapter 8, October Session of 1782.

[205] Chapter 3, May Session of 1782. This may have been necessitated by what was referred to as "the late disturbance in the county of Hampshire" in a law that indemnified a number of persons from Hampshire County for costs that they incurred related to the "disturbance."

[206] Chapter 2, October Session of 1782.

[207] Chapter 14, October Session of 1782.

blasphemy[208] and profane cursing and swearing[209] and one to bring about a more "effectual observation of the Lord's Day."[210] The penalties for blasphemy included imprisonment not to exceed one year, pillory, whipping, sitting in the gallows or being bound to good behavior depending upon the judgment of the supreme judicial court. The penalties for profane cursing and swearing were similar. The law for making Sunday a day more devout included only fines for those who conducted business on the "Lord's Day."

Three tiers of courts modernized and centralized the Commonwealth's judicial processes. Three laws established a supreme judicial court within the Commonwealth,[211] a court of common pleas within each county,[212] and, finally, a law to establish a court of general session of the peace in each county.[213] These courts were part of a court structure that allowed for the orderly implementation of the legislature's statutes.

The legislature during 1782 passed 684 resolves that indicate that its primary work was, again, facilitating the support of widows, heirs, and minors through the sale of real estate in estates and guardianships and also completing the disposition of absentee estates. The resolves having to do with estates, guardianships and absentee estates comprised 78 percent of the resolves. Thus both the total number of resolves and the percentages having to do with estate administration, absentees' estates and guardianships

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[208] Chapter 9, May Session of 1782.

[209] Chapter 5, October Session of 1782.

[210] Chapter 6, October Session of 1782.

[211] Chapter 10, October Session of 1782.

[212] Chapter 13, May Session of 1782.

[213] Chapter 15, May Session of 1782.

declined from the previous year. In the remaining 22 percent of the resolves the legislature continued to allow citizens to pass in and out of the Commonwealth as their allegiances dictated and to make exceptions to the laws for those who would otherwise suffer because of difficulties caused by the war. Thus as the crisis began to abate so did governmental activity as measured by the number of resolves. Those resolves that the legislature did pass continued the legislature's predictable role, consistent with Massachusetts's constitution, to exercise discretion regardless of whether it might be judicial or executive in nature, to manage assets responsibly and care for its citizens.

The resolves comprising estate administration and guardianships facilitated the support of widows, heirs and minors out of the assets left in estates and guardianships. What is clear is that the legislature continued to apply consistently a set of rules for the use of these funds that distinguished those of the widows from those of minor children, setting off the widow's one-third from the children's share and making the proceeds available to the children when they reached majority.[214] Those having to do with guardianships demonstrate the same fidelity to a set of rules for the use of the assets and a policy to use the real estate in these guardianships for the support of minors and the mentally incompetent.[215] The rules required the funds to be used to support the minors and mentally incompetent.

Those resolves having to do with absentees' estates made exceptions to the general rules for the presentation of claims and the disposition of their estates. These exceptions allowed those who had some financial investment in certain estates to have an

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[214] See, for example, Resolve 337, January Session of 1782, Resolve 365, January Session of 1782, Resolve 666, April Session of 1782.

[215] See, for example, Resolve 354, January Session of 1782, Resolve 377, January Session of 1782.

opportunity to have their claim handled prior to those with no interest in the property.[216] This did not work to reduce the final sum realized by the state from the sales but only to acknowledge that some of the financial dealings were the kind that had not been accounted for by the rules formulated for handling absentees' estates and that not to acknowledge them would be an injustice to those involved.[217]

A number of people sought permission to pass out of and into the Commonwealth. These included four persons wishing to become citizens of Massachusetts and five resolves allowing passage to New York City, Halifax and Jamaica by those wishing to leave the Commonwealth and retire to British soil.[218] Among these were resolves allowing women and children to leave and in one case facilitating a request that a prisoner be included in a prisoner exchange so that he could return to the British in New York City.[219]

Another series of resolves indicate continued effort to work toward fair and equitable resolutions of disputes and problems. One general resolve directed county courts to delay actions that would distress debtors.[220] One resolve extended the right of redemption, and three resolves allowed wills to be probated that lacked one witness.[221]

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[216] Resolve 514, January Session of 1782.

[217] Resolve 606, April Session of 1782.

[218] Resolve 405, January Session of 1782; Resolve 356, January Session of 1782; and Resolve 478, January Session of 1782.

[219] As to participation in the prisoner exchange, see Resolve 590, April Session of 1782. As to returning to British controlled New York, see Resolve 593, April Session of 1782.

[220] Resolve 565, January Session of 1782.

[221] Resolve 518, January Session of 1782 and Resolve 594, April Session of 1782. As to extending time for redemption see Resolve 635, April Session of 1782.

The legislature also passed eight resolves granting new trials. This constituted an increase in this kind of resolve over previous years but still constituted only slightly more than 1 percent of the resolves. In many of these cases parties had clearly not had a full opportunity to litigate their dispute because of the upheaval caused by the war.[222] In none of the resolves granting a new trial was there any rationale offered other than the difficulties suffered by parties because of the war or the failure of counsel.

During 1783 the legislature continued its ongoing policies to manage the lingering problems left over from the war. These included responding to the crisis of upheaval in the western counties that resolves and laws of 1782 had begun to address. The legislature suspended the writ of habeas corpus for four more months and moved a number of trials to Hampshire County away from Berkshire County because it will "be more convenient and less expensive" and allowing another case to be transferred because "the court was prevented sitting" for the hearing.[223]

Resolution of the immediate post-war problems of deserters and prisoners was necessary. One law directed that deserters from the Continental Army be apprehended and turned over to Continental Army officials.[224] Another followed the recommendation of congress and directed the transporting of those held in jail who have "joined the

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[222] Resolve 500, January Session of 1782 in which lawyer failed to produce the paperwork in a timely manner to preserve his right of appeal. Resolve 650, April Session of 1782 in which a party was absent from the country and because of the absence suffered a default judgment.

[223] See Chapter 1, Acts and Laws of the Commonwealth of Massachusetts, January Session of 1783 as to suspending the writ of habeas corpus. As to moving trials and courts whose proceedings were interrupted, see Chapter 3, Acts and Laws of the Commonwealth of Massachusetts, January Session of 1783.

[224] As to apprehending deserters, see Chapter 21, Acts and Laws of the Commonwealth of Massachusetts, January Session of 1783.

enemy" of Massachusetts or the United States to some British soil.[225] The legislature even found it necessary to pass a law that provided for the appointment of constables in the event that they departed with the British.[226]

Massachusetts also worked with the congress on a number of other issues related to the war. The legislature followed congressional recommendations and established courts for the trial of felonies and piracies on the high seas.[227] It granted special powers to commissioners appointed by Massachusetts to resolve outstanding debts of Massachusetts owed to the United States.[228] Finally, a pair of laws granted to congress the impost tax that it sought to facilitate paying down the national debt.[229]

Between 1783 and 1787 the legislature settled down society in the wake of the Revolution. The legislature assisted executors and guardians so that they could liquidate estates and sell the real estate out of estates to support widows, minors and heirs. Resolves associated with the sale of absentee's estates and the real estate being sold out of estates largely came to an end by 1786. The legislature also worked to settle accounts between towns and counties and the Commonwealth associated with the war. This included abating fines imposed on towns and counties for failure to provide material, men and taxes during the war years and, on occasion, issuing writs of execution against

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[225] As returning prisoners and the disloyal, see Chapter 6, Acts and Laws of the Commonwealth of Massachusetts, May Session of 1783.

[226] Chapter 10, Acts and Laws of the Commonwealth of Massachusetts, May Session of 1783.

[227] Chapter 10, Acts and Laws of the Commonwealth of Massachusetts, January Session of 1783.

[228] Chapter 20, Acts and Laws of the Commonwealth of Massachusetts, January Session of 1783.

[229] Chapter 3, Acts and Laws of the Commonwealth of Massachusetts, October Session of 1783.

constables to force the collection of taxes. It also repealed laws necessary during the war such as those that regulated prices and provided for the detention of aliens. Finally, the legislature continued to readmit some citizens to the Commonwealth and allowed others to leave permanently. Most unsettling for many farmers and debtors was the crushing tax burden imposed by the legislature in its efforts to honor debts incurred in the course of waging the war.[230] The combination of taxes and more efficient mechanisms to speed the collection of private debts created a crisis that would erupt in western Massachusetts as Shays' Rebellion.

Massachusetts like other states was bearing the burden of paying debts that were properly national in nature. These debts included a military debt owed to soldiers for back pay. States, including Massachusetts, assumed this debt and began to pay their soldiers in the Continental Army directly.[231] Threats that such payments would not be credited against legitimate state debts when a full accounting was done by the Articles of Confederation government were ignored. Massachusetts was also paying on loan office debts. Import duties that all the states would not approve and state contributions that were inconsistent failed to meet even the interest on the loan office debt. States began assuming payments of interest and this escalated through pressure from creditors and those determined that the debts should be paid into a full-scale assumption of the

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[230] Massachusetts's western agrarian interests were not alone in their unease with state policies that supported currency deflation and specie payments for taxes. These policies were pursued in a number of states and advocated by the Articles of Confederation Congress. See Main 257-263.

[231] Many states, including Massachusetts, pursued a policy of taxation coupled with a refusal to repudiate their debt in large measure to relieve the strain on veterans who had never been paid and were being forced to sell their wage certificates at a fraction of their face value. Roger Clinton in New York, Roger Sherman in Connecticut, and James Madison in Virginia, when serving as governors, all lobbied for policies similar to Hancock's with regard to taxation and debt repudiation. See Nevins 516.

principal as well.[232] The collection of Massachusetts's portion of these debts precipitated a crisis; such a crisis should not have been unexpected because of the huge debt that Massachusetts was trying to honor. That it happened in Massachusetts made the realization that a truly national government was needed all the more stark.

Shays' Rebellion was a sign of weakness of the federal system that failed to impose a proper accounting and a system of payment for the debt. It was not caused by the failure of state governance.[233] The immediate causes of the rebellion were taxes, a

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[232] Jensen, The New Nation 388-398.

[233] The literature on Shay's Rebellion offers little support to those who wish to see Shays's Rebellion as a failure of state governance. In histories from immediately after the rebellion to recent studies seeking to revisit the causes of the rebellion, most historians have argued that the causes of Shays's Rebellion are related to regional or national factors or inherent policy differences between factions. Of those who portray the rebellion as an outgrowth of interest group politics, few lay the blame for the rebellion on the government of Massachusetts.

Histories of Shays's Rebellion through the nineteenth century were colored by strong nationalist motivations. Writing immediately after Shays's Rebellion in 1788, George Richards Minot argued in The History of the Insurrections in Massachusetts (New York: De Capo Press, 1971, 1788) that Daniel Shays and his followers were unjustified to rebel. The government of Massachusetts had pursued sound policies and what differences there were between the Shaysites and the commercial-creditor interests were not as pronounced as Shays portrayed them. Later, Nationalist school historians, writing in the late nineteenth century, came to the same approximate conclusion about Shay's Rebellion as Minot. John Fiske, in The Critical Period of American History, 1783-1789 (Boston: Houghton Mifflin, 1888), argued that Shays and his followers were shameful cowards. The rebellion was not about protecting fundamental liberties. It was about using force to achieve ends that should have been pursued through the political process. In neither case was the rebellion blamed on Massachusetts's government but also in neither case was the rebellion approached impartially.

Progressive and neo-Progressive historians, without the nationalist zeal of Minot and Fiske, found some justification for the rebellion but not within the context of arguments that damned state governance. Progressives and neo-Progressives portrayed the period prior the Constitution as one marked by interest group politics. Although their sympathies often lay with Shays and the western debtor class, they argued that the rebellion was the result of factional fighting in which each side had some claim to the better policy. They also factored into their analyses the larger issues necessitating a national government as underlying causes contributing to Shays's Rebellion. Even if one interest group may have been in the wrong, the nature of state government was not blamed. Robert East, "The Massachusetts Conservatives in the Critical Period, in The Era of the American Revolution," The Era of the American Revolution, ed. Richard B. Morris (New York, Harper & Row, 1939) argued that the rebellion grew out of an age old conflict between debtors and creditors and was caused by unfair policies of the creditor class. The conflict between these groups had existed prior to the Revolution and well after the Revolution. Marion Starkey in A Little Rebellion (New York: Knopf, 1955) argued that the rebellion was an outgrowth of rising tension between western debtor interests and eastern, urban commercial interests. The rebellion, which Starkey saw as just one of a series of eruptions between these two groups was ameliorated by Massachusetts's policies and the creation of a national government. Lee Nathaniel Newcomer in The Embattled Farmers: A Massachusetts Countryside in the American Revolution (New York: King's Crown Press, 1953) made a similar argument.

lack of specie and more effective mechanisms for the repayment of private debts.[234] Massachusetts, along with a number of other states, at the urging of the Continental Congress, had adopted a policy of fiscal reform that was rooted specie payment for

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Consensus historians argued that Shay's Rebellion was caused by a variety of factors--regional, economic and political--that resulted in a rebellion in which the goals of the rebels were limited and in which the impact of the rebellion was relatively small. The Consensus model posited that there was no fundamental class struggle as Progressives and neo-Progressives had argued. The basic causes of the rebellion were to be found in a Massachusetts's economy that was slower than most to recover after the war and Revolutionary ideology that was more focused on a local level such that the government had less control over the scope and emergence of dissent. Economic stagnation and vibrant tradition of rebellion fostered Shays's Rebellion. See Robert Freer, Shays's Rebellion (New York: Garland Publishing, 1958, 1988).

Later works such as David Szatmary, Shays' Rebellion (Amherst: Univ. of Mass. Press, 1980), Leonard L. Richards's Shays's Rebellion (Philadelphia: University of Pennsylvania Press, 2002) and Robert Gross's compilation of essays (Robert Gross, ed. In Debt to Shays: The Bicentennial of an Agrarian Rebellion (Charlottesville: Univ. of Virginia Press, 1986) are not easily categorized together in a school of thought. Szatmary, Richards and the essayists in Gross's collection have pursued a variety of approaches to explore the causes and consequences of Shays' Rebellion, and they have reached different conclusions. Szatmary concluded that Shays's Rebellion was part of a much larger regional economic shift then occurring in New England from a traditional society of subsistence farming to merchant capitalism. Events in Rhode Island and New Hampshire played a part, along with social and economic forces in Massachusetts to bring about Shays's Rebellion.

Richards reached a different conclusion that put the blame squarely on the Massachusetts government and the eastern establishment that controlled it. He argued that western Massachusetts, steeped in the ideology of the regulation movement, rebelled in 1786 because of a variety of economic and political grievances caused by the mercantile elite of eastern Massachusetts. The government, both before and after the Constitution of 1780, was a tool of the eastern mercantile elite. Western interests, including large and small landholders, had been excluded from the debate about what economic policies to pursue in the years leading up the rebellion. They had also been ignored in the drafting of the Constitution of 1780. Their opposition to it went unheeded by a constitutional convention that drafted the Constitution of 1780 and then judged whether towns and counties approved of it.

A number of essayists in Robert Gross's collection offer a determined defense of the government and commercial elite. Richard Buel argued that the government imposed the tax that precipitated the rebellion because of Congressional requisitions intended to pay the national debt. Thus, Massachusetts attempted to meet both its war related debts and the national debt. Stephen Patterson in his essay offers a defense of the eastern merchants by showing how they were hard pressed by British merchants that had returned to the Massachusetts market. Without any protection from aggressive British mercantile efforts that might have come from a national government, Massachusetts commercial interests moved swiftly to compete with British interests by expanding their offerings and extending lenient terms of credit. As the state's economic situation deteriorated they found themselves caught between western interests that wanted to disavow debts and British merchants with deeper pockets and the support of the British government eager to take over their business. In such a vice, their choice to pursue a hard money policy which was advocated by the Articles of Confederation Congress, was a reasonable policy. Finally, Jonathan Chu implicitly condemns one of the avowed causes of the rebellion by showing that the courts actually offered sanctuary for debtors with obligations to middling creditors. Wealthy creditors could endure the delays in collecting their debts through the courts that creditors of modest means could not. His essay shows that the courts were not the tool of the creditor class.

[234] Szatmary 37.

debts.[235] County conventions in Worcester and other rural counties met in 1781 and 1782 seeking redress from the state legislature for the increasing distress of rural citizens caused by Massachusetts's efforts to meet, what were truly, national debt obligations. The legislature responded with a grievance committee that sought to provide a systematic means to address grievances. Merely hearing the grievances though did nothing to alleviate the underlying pressure on rural interests; the problems only worsened. By 1786 a host of counties were swept by a wave of conventions within towns that collectively sought relief from the situation that debtors found themselves in.[236] Mob violence emerged in the wake of the conventions in Hampshire, Bristol, Middlesex counties, often preventing courts from sitting.[237] The interference with the operation of government culminated with a mob, led by Daniel Shays, that prevented the sitting of the supreme judicial court in September, 1786 in Springfield. This was followed in October by attempts by mobs to seize cannons at Dorchester Neck outside of Boston and more interruption of the operation of courts. The legislature responded with both resolve and conciliation. It suspended the writ of habeas corpus in November of 1786 for seven months, and it granted Governor Bowdoin the power to call up the militia to suppress the growing unrest.[238] Laws were also passed to prevent "routs, riots, and tumultuous assemblies" by calling for the arrest of those assembled in unarmed groups of thirty or armed groups of twelve if they did not disperse when warned by a constable or sheriff. The legislature also offered a hand of reconciliation by calling for the convening of the

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[235] Main 256-257.

[236] Minot 34-37, Starkey 18.

[237] Szatmary 80.

[238] Starkey 91.

general court to "considering those grievances, and all complaints whatever, and if possible, removing the cause of them."[239] The product of the general courts session to address the grievances offered a number of policies that addressed the grievances expressed in the county conventions. Unfortunately, the legislature's efforts were too little too late; they failed to deter the rising tide of violence that would ultimately culminate in the attack by Daniel Shays and 2,000 insurgents on the Springfield Armory in January 1787. An attack on the armory by so many who were led by former continental officers was a shock. The legislature responded again with determination to break the rebellion but also by passing a law allowing pardons for those involved in the rebellion who renewed allegiance to the government.

The legislature also continued its efforts to restructure Massachusetts's laws and political organization. It rewrote the laws affecting a large number of criminal offenses and the writs associated with them. New laws set down definitions and punishments for robbery, burglary, murder, manslaughter, rape, arson, adultery, polygamy, lewdness and a number of other offenses. The legislature also passed new laws that modernized the administration of prisons so that there would be a jail in each county; prisoners were to be properly cared for and debtors were to be separated from criminals.

Between 1783 and 1787 the legislature continued to pass resolves exercising the discretionary power in government that allowed parties new trials or appeals. Consistent with the previous resolves that allowed parties to reopen litigation the one enduring rationale was to allow parties a full and fair hearing on the merits of the dispute.

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[239] George E. Connor, A Model of the Politics of Insurrection: A Comparative Analysis of the Shays', Whiskey and Fries' Rebellions, dissertation, (Houston: University of Houston, 1989) 14.

The government of Massachusetts did virtually all that a government could do to aid the greater cause of winning the war and begin the task of formalizing principles of the Revolution in Massachusetts's society. It operated pursuant to the Massachusetts Constitution and consistent with principles of republican majoritarian governance to further the goals of the Revolution. The legislature acted reasonably and consistently to field armed troops, pay for the war, and ameliorate the worst effects of the war on its citizens. Widows, children, the poor, hungry, and wounded were cared for to the extent that the government of Massachusetts could reasonably do so. Assets such as absentees' estates were managed so as first to provide for those left behind and finally to dispose of them in an orderly manner to provide the funds to the state.

The government used its discretion reasonably to aid those caught either in the upheaval of war or whose circumstances merited exceptions from laws. New trials were a feature of this discretion. They were rarely granted, but grants of new trials recognized that during war parties had suffered default judgments because they could not appear or because documents or relevant witnesses were either destroyed or unavailable. The legislature worked to allow parties to have a full and fair opportunity to litigate their disputes fully. Other elements of discretion allowed those who had invested in absentees' estates to recover their investment before the property would be sold to disinterested investors or to allow those who would be hurt by the uniform application of a law a reasonable exception from enforcement that would be unfair.

The government did, of course, incur huge debts and the conduct of the militia challenged those who believed a militia could defeat Britain's professional army, but

these were not problems unique to the Massachusetts government. These were problems endemic to all the states and to the lack of resources that the states and congress faced. In the end, the assembly-dominated government of Massachusetts acted responsibly to arm troops, fund the war, and manage the upheaval of war and modernize the laws and political organization of Massachusetts's. Instead of republicanism "run amuck," Massachusetts seems a good example of a republican majoritarian state government that simply had an allocation of powers far different from modern expectations.

PART II

THE FEDERAL SYSTEM AND THE FEDERAL GOVERNMENT

CHAPTER I

THE CREATION OF A REPUBLICAN FEDERAL SYSTEM OF TWO DIFFERENT KINDS OF GOVERNMENTS

SECTION I

INTRODUCTION

The Constitution mandated not just the creation of a federal government but the creation of a federal system. This was the result of the Philadelphia convention in which the Founders chose to empower a central government and also to protect state republicanism. The creation of a central authority was the primary goal of the convention; the second goal was achieved by devising a revolutionary governmental system in which federal and state governments could coexist. The outcome was a federal structure that preserved the distinctive nature of comprehensively empowered states like Massachusetts while also empowering a revolutionary and powerful new federal government. The federal government was supreme, but only within a limited sphere of power that was defined and limited in the Constitution. State institutions retained all their powers not delegated to the federal government as well as their distinctive forms of republican government. The Framers established constitutional barriers that protected each from the other so that these two different kinds of governments could govern cooperatively within the federal system without either impairing the efficacy of the other. The result was a federal system that in its totality was republican in design. It included a

federal government empowered so that it could achieve national ends and yet would not destroy state governments. The federal system also guaranteed state governments that were republican in nature and served as independent centers of policy.

SECTION II

THE FEDERAL GOVERNMENT AS ONLY PART OF A REPUBLICAN FEDERAL SYSTEM

The Constitution's federal system embodied a revolutionary mix of two fundamentally different kinds of government: one structured to be broadly empowered and responsive to the popular will of the moment, the other a new limited government, largely unresponsive to transitory popular will, that would nevertheless govern supreme over national matters. Two fundamentally different kinds of government, rather than governments with just different concerns, would govern cooperatively within one federal system.

State constitutions embodied the central tenent of the Spirit of '76: the people rather than a king would rule. The process of drafting constitutions gave effect to this wish. Power was wrested from the king's machinery and vested in legislative institutions rooted in popular sovereignty. This shift in power was embodied in constitutions that fostered a mix of communal and individual rights. As the source of power changed the quantum of governmental power remained the same. (As a practical matter, though, the quantum of power of the new state governments actually increased because the entire

force of government that had previously been divided between England and the colonies came to rest in the new governments and because of the greater acquiescence of the citizens.) Rebel state governments then commanded the same breadth of power over their communities as the crown's government had exercised over the colonies. Such governments, like the British Parliament, were governments of inherent authority and were comprehensively empowered to regulate all of the issues of health, safety, and morals in their communities. The Revolution of 1776 thus changed the source of power of government but not the amount of power necessary in governments. With state constitutions ratified, governance entailed using the comprehensive power of a government of inherent authority for the people's benefit.[1]

Eleven years after the Revolution of 1776 the Constitution's Framers met in Independence Hall at the Federal Convention with a sense of urgency just as the first drafters had gathered within their states in 1776. The purpose of constitution-making, however, was completely different by 1787 than it had been in those first heady days of revolution. Their charge in Philadelphia was not to effect a revolution, but rather to preserve the Revolution. The Framers needed a new federal system that could cure the deficiencies in areas of national governance that threatened the integrity of the young nation while protecting republicanism at the state level. It was not that the Articles of Confederation had failed as much as it had produced its own obsolescence. It had been successful in binding the nascent states together, but by 1787 the challenges of drawing

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[1] The process of constitution drafting obviously did not go on in all the colonies. Three colonies, Massachusetts, Rhode Island and Connecticut retained their charters. For Rhode Island and Connecticut, which retained their charters, the revolution in the apportionment of power between executive and legislative powers that was reshaping governments in other colonies was not evidenced in new charters but did alter the conduct of government. See Allan Nevins, The American States During and After the Revolution, 1775-1789 (New York: MacMillian, 1924) 4 and as to constitution drafting generally 117-170.

the states together in a fashion that enabled a government to address national powers required a successor to the Articles of Confederation. The Framers created a new central government as part of a new federal system and rooted it in republican principles as much as they could without undermining state republicanism. The new federal government's power was supreme over a limited number of issues of national significance; however, even with control over military affairs and international relations and with powers to regulate interstate trade and lay taxes, the federal government was not supposed to be able to threaten the integrity of states as independent centers of policy. The Constitution was built upon pragmatic considerations that federal power could only be exerted within a defined and delineated realm.[2] Defining this area in which the federal government could govern and confining it to this realm was the central dialogue of the latter part of the convention.

The convention's work yielded a republican federal system that contained republican state governments and a counter-majoritarian federal government. Constitutional constraints ensured the continued separation of federal and state governments by limiting the ability of each government within the system to encroach upon the other. These constraints took two different forms. One was the simple delineation of powers that the federal government could exercise. Listing particular powers in and of itself, and therefore excluding some powers, acted as a restraint. The second was a series of specific prohibitions, half applicable to the states and the other half

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[2] The Anti-federalists were unconvinced that the Constitution provided sufficient protections for the states. The Bill of Rights addressed some of their concerns. See Cecelia M. Kenyon, The Antifederalists (Boston: Northeastern University Press, 1966) and Robert C. Palmer, "Liberties as Constitutional Provisions" in William E. Nelson and Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic (New York: Oceana Publications, Inc., 1987) 55-148.

applicable to the federal government, that kept the two kinds of governments from invading the realm of the other.

Resistant to popular will, the federal government's limited but, nevertheless, extensive powers were intended to be held in check so that no faction or section could use them to undermine state sovereignty. The federal government's structure enhanced the limitations. Three branches were fully empowered and each voiced the wishes of a different constituency. Elections and nominations were also varied in time so that the federal government would never act upon popular will as expressed at any one moment in time. Thus, divided power was the rule at the federal level; division among branches that at times competed with each other and at other times were dependent upon each other resulted in a federal government that would not invade the realm of state governance even though it was a stronger central government than the one under the Articles had been.

Thus, constitutional limitations prevented federal aggregation of power; the federal government's structure impeded efforts to encroach on state government; and finally, state governments were the beneficiaries of prohibitions within the federal system to check federal power. The result was a federal system that contained a powerful federal government capable of managing national affairs and republican state governments still comprehensively empowered despite the exceptions to their powers that created the federal government. The restraint of popular will on the national government preserved state republican institutions; the system reflected a republicanism still vital, not a conservative counter-revolution.

SECTION III

THE CHARACTER OF FEDERAL GOVERNANCE WITHIN THE FEDERAL SYSTEM

The federal government was a counter-majoritarian government of only limited and delegated powers designed to govern national matters. Although the Framers rooted the federal system in republicanism, the federal government's final design made it slow to respond or unresponsive to the whims of the citizenry. Yet it remained republican enough to merit supremacy over national concerns through the use of delegated powers.

The Constitution's limitations and separation of powers ensured the continued viability of state governments as significant centers of governance. Whereas at the state level legislatures had been the recipients of virtually unchecked power, divided authority and separation of powers were the rule at the federal level among fully empowered legislative, executive, and judicial branches. The Constitution divided power within the federal government among three co-equal branches while also limiting the powers of the federal government. This mechanism hemmed in the federal government and insulated state governments from federal interference.

The delegates' work at the convention produced then not just a federal government but also a reformulation of the federal system. A new federal system was what was truly needed because state and national governments had governed ineffectively over national matters during the Articles of Confederation period. The delegates' task at the convention was to shift authority over national matters to a newly empowered national government without crippling state governance. To empower the

national government the delegates rooted the federal government in republican principles as thoroughly as they could, limiting the application of republican principles only to the extent necessary to protect the integrity of the republican state governments. Far from being a reflection of a conservative reaction against republicanism, the Constitution was republican in intent because it divided and limited federal power in order to protect republican state governments.[3]

The duality of empowerments and limitations, very distinctive to the federal government, marked it as a revolutionary form of government very different from the state governments. It had to be to achieve the two seemingly irreconcilable goals of the constitutional convention. The first objective was to empower sufficiently the new national government so that it could deal effectively with national and interstate affairs. The second goal was to ensure the continued viability of the state governments as liberty-enhancing centers of governance.

The first goal was the only one clear to the delegates as the convention began. Madison's views echoed the sentiment of the delegates when he described himself as willing "to shrink from nothing which should be found essential to such a government as would provide for the safety, liberty, and happiness of the community. This being the end of all our deliberations, all the necessary means for attaining it must, however reluctantly, be submitted to."[4] This was the paramount goal, and in fact, the only clear objective as the convention began. Debt, rebellion, and the threat of mutinies all

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[3] See Robert C. Palmer, "Liberties as Constitutional Provisions" in William E. Nelson and Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic (New York: Oceana Publications, Inc., 1987).

[4] James Madison, Notes of Debates in the Federal Convention of 1787 contained within Charles Stansill, ed., Documents illustrative of the Formation of the Union of American States (Washington D.C.: Government printing Office, 1927) 130.

imperiled the integrity of the young nation.[5] By 1787 it was clear to all except a few stalwarts that the Articles of Confederation plan was no longer competent to handle national matters effectively, because it was part of a federal system that the states had outgrown. The impotence of the Articles of Confederation to handle international diplomacy and national, commercial and fiscal policy was the most evident sign that the governance structure was failing. As a result of the central government's weaknesses, all state governments and the republican principles that they embodied were threatened.[6] Some solution that entailed a more powerful central government had to be found to deal with financial and commercial matters, international relations, and national defense.

The Framers also wanted to empower a national government to check what had come to be seen as excesses at the state level. These excesses made proper vesting of national matters within a central government a necessity. The delegates acknowledged that state governance of matters wholly within the confines of a state might well "indirectly affect the whole"[7] and to the extent that these could be checked they should. This reduction in state powers was a lesser concern but a pressing one nonetheless. Again, Madison, saw, " . . . the necessity of providing more effectually for the security of private rights, and the steady dispensation of justice at the state level. Interferences with these were evils which had more perhaps than any thing else, produced this convention."[8]

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[5] Beard, 19-63; McDonald, E Pluribus Unum 227-259; Nevins, particularly Chapters XI and XIII.

[6] The stalwarts included men such as Arthur Lee and Patrick Henry whose intransigence owed as much to personal animosity toward some of those in the national camp as it did to concerns about an expanding national power. See in part Jack Rakove, Madision and the Creation of the American Republic (New York: Harper Collins, 1990) 23-29.

[7] Madison 231.

[8] Madison 162. Madison was not here criticizing republicanism as much as he was commenting about the issues that galvanized support for the convention. Madison also wrote in a similar vein to Jefferson

The proliferation of paper money statutes, ex post facto laws, and refusals to acquiesce in congressional requisitions were only three examples of intrastate matters that had national ramifications. These had been prominent issues, well publicized, that galvanized support for the convention and drew attention to the imbalance in the federal system.

Without national control over national matters, in part through limitations on republicanism at the state level, republicanism as a whole within the young nation was threatened. Almost unfettered power directed through state assemblies could in fact add to the insecurity of the nation as a whole. Thus, to the significant extent that state matters impacted the national government's control over national issues, republicanism actually was contributing to the crisis approaching quickly in 1787.

Empowering the national government to cure both national and intrastate problems necessitated an acknowledgement that the old federal system, in which the Articles of Confederation neither had national powers nor its powers derived from the people, had outlived its usefulness. This federal system had left many national powers within the realm of state governance and parceled to the congress only minimal authority. State control over a variety of national, international and interstate powers had not provided effective national governance; and the congress, with an inadequate mandate, simply lacked the authority and the power to manage national affairs.

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after the convention that "the evils issuing. . .[from the states] contributed more to that uneasiness which produced the convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects." Written to Jefferson shortly after the convention, this was part of his argument advocating a constitutional check on the laws of the states. His criticism was not a condemnation of anything as broad as state republicanism or the federal system, but only of certain kinds of state actions. See Rakove, James Madison 149. Note that Charles Pinckney cosponsored the motion in the convention to have an absolute legislative negative over state legislation. Pinckney advocated his position for reasons to protect the "national prerogatives," "acts of Congress" and "foreign treaties" from encroachment from the states. He does not mention matters wholly within the purview of state governance. Madison's argument that problems of state governance were equal to national matters in precipitating the convention was not by the votes of other delegates. The motion was soundly defeated seven states to two with two undecided.

This implicit acknowledgement by the delegates was not so much a condemnation of the Articles of Confederation as it was a recognition that the Articles had proven to be not a roadblock, but a bridge that had outlived its usefulness: a bridge that had been crossed by 1787 as the states had grown more interdependent. The bonds holding the states together when John Dickinson drafted the Articles of Confederation were largely rooted in a desire to defeat a common enemy and related to the common cause of winning independence. As such the states' individual independence remained a paramount concern when matters unrelated to fending off the British were raised. In 1776 the states had too little experience acting in unison to trust the kind of government that had become necessary a few years later. The Articles of Confederation reflected the singularity of bonds holding the states together in the way that state sovereignty was clearly paramount to national power. Yet, the eleven years between independence and the convention had brought the states much closer together. Common bonds—ideological, commercial, military, and cultural—pointed to a common destiny as they faced challenges that affected states as a whole. The Articles of Confederation and the cooperation during the war had provided a sufficient framework and history to establish trust so that the states could collectively proceed to a more mature structure of federal governance consist with strengthened bonds between them.

Accepting the need for a stronger central government was a sea change for those at the convention. Fears of disunion were inconsequential in 1781 relative to the fear of a strong central government; by 1787, however, ineffectual central authority forced the Framers to enhance the powers of a central government. Detractors were concerned about creating a government separate from the people that would have the power to act at

variance from what the people wanted. Such arguments obviously carried a great deal of weight and had proven persuasive in 1781 to defeat Dickinson's draft of a strong central government for the Articles of Confederation. After watching debts mount, mutinies narrowly averted, and rebellions bloodily suppressed, a sizeable majority realized that without a stronger national government the freedom won in the Revolution was not paired with a government structure that could preserve it.

The solution was to create a more powerful central government within a new federal system. The states, which had been vested with national powers during the Articles of Confederation period, would have certain powers taken from their jurisdiction and vested in a new national government. The federal government would be entrusted to wield these powers for the citizens in their national capacity, itself a new creation. Even though new regulatory powers were to be created to enforce the rebalancing of power, the larger effect was to create a true federal system to take the place of what had been effectively a treaty organization among sovereign states; power would be delegated to the national government over matters that had previously rested in the hands of state governments. The reordering of the federation, and in particular the empowerment of the central authority, necessitated a major restructuring of the underpinnings of the national government.

If the national government was to be more powerful, it would have to be more republican, because power vested in institutions such as parliament or a king that lacked popular sanction would ultimately be used to enslave the people. Liberty required that power be rooted in the people; power necessitated sanction by the people to ensure liberty. Consistent with republican ideology, the federal government would have to be as

republican as it could be made to utilize effectively the powers that had to be vested at the national level while remaining liberty-enhancing. The old congress under the Articles of Confederation did not merit being entrusted with significant national powers because it was not republican enough: it was too distanced from the people and not based on proportional representation. The Framers had to design a new government based upon republican principles to utilize the powers over national matters. This new government had to be based ultimately upon popular will to justify use of more extensive powers.

The second goal of the convention, seemingly at odds with the first, was to preserve the liberty-enhancing state governments as significant centers of governance even as particular powers were lost to a national government. This second goal, in fact the protection of a value and a limitation on the first, became a significant objective in the course of the drafting as the new federal powers began to come into focus. It was not present at the beginning of the convention, but emerged as debate proceeded. The extent of federal power occasioned a concern that the federal government would overwhelm state governments that were the protectors of liberty and the most important centers of public policy. The goal of designing a more powerful central government ran into the core value of protecting majoritarian state governments. How to create a powerful national government that would not precipitate the destruction of state governments was a vexing question that would occasion the greatest debate and shape the dialogue in the convention. All of the delegates except George Read and Alexander Hamilton took this question very seriously because they could not seriously consider doing away with their

states or making them subordinate governmental entities like counties.[9] Their states embodied the form and character of liberty they associated with the revolution. They fostered and protected liberty even if at times it was crude and tumultuous. Unease with some state practices exacerbated worries and did contribute to the need for the convention, but the Framers would never argue to do away with the states or even to weaken their structure as governments of inherent authority. They would draft to preserve and refine republicanism within a system of enhanced federal power that would also preserve the states.

True unfettered republican government, without consideration of the states, would mean vesting broad power in a majoritarian national government with direct popular sanction. Yet actually to have done this would necessarily reduce the role of the states to mere corporate bodies rather than distinctive political entities. It would require all authority to be vested directly in the federal legislature, and the removal of states as independent repositories of the people's will. This was simply impossible. The states, after all, were the fundamental polities in the republic.

What the delegates found was that to preserve state governance, republicanism at the national level had to be restricted. Just as republicanism at the state level had to be limited to allow for strong national governance, so republicanism at the federal level had

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[9] Madison 164 as to George Read and, as to Hamilton, pages 215 and 220. Read is the only delegate recorded as having the opinion that the states should be entirely subsumed within a new national government.

Hamilton's position was that the states should have their sovereignty taken away; they would remain as only "subordinate authorities" without any sovereignty or power to govern over "commerce, revenue or agriculture." They would remain as only "corporations for local purposes." Concerns over drawing together a nation so large under one government and an unwillingness to alarm the citizens obviated against doing away with them entirely. As to Hamilton, see also, Clinton Rossiter, The Grand Convention, (New York: W.W. Norton, 1966) 191 and 193.

to be limited to allow for vigorous state governance. Republicanism on the national level had to accommodate republicanism at the state level. Multiple fault lines among the states revealed the different ways in which the states feared that they would be subsumed in a truly republican government if checks were not put into place for their protection. Small states feared the power of large states' population; northern and southern states argued over slavery; states on the eastern seaboard clashed with those on the interior; those with ports might dictate the commerce of those that needed to export their goods through ports. The divisions were numerous and reflected, in the aggregate, concerns that a majoritarian government--a truly republican one-- might be tyrannous to some of the states. Majority rule simply could not be placed on as broad a footing as they might have wished because doing so would have granted the central government power that would prove destructive of state governments.[10] Thus, the Framers tempered republicanism and the power of the federal government precisely to protect republicanism at the state level. The whole process furthered a republican federal system, and was not a conservative reaction against republicanism.

The vexing issue would be the design of the federal government. The intent to create a federal system to replace a federation would lead to far more revolutionary thinking about the nature of governmental power and the structures required to contain such power than any of the delegates could have imagined as they gathered in Philadelphia.

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[10] Robert C. Palmer, "Liberties as Constitutional Provisions" in William E. Nelson and Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic (New York: Oceana Publications, Inc., 1987) 55-148

On May 14, 1787, the first day of the convention, the delegates found no consensus about how to modify federal power; in fact all of the delegates had not even made their way to Philadelphia. The debate did not begin until May 25 when the last tardy delegates from four states arrived and took their seats within Independence Hall. During the next four months, delegates, usually forty-five in number, met daily in secret session to flesh out a blueprint for a new republican federal system and a radically new national government. The delegates drafted the Constitution not in a linear fashion of drafting each article in turn but in a broad context of debating empowerments and limitations. The debate was highly structured, though, as the framers methodically worked through various drafts and produced increasingly detailed models as they sculpted the federal system in more and more precise fashion. Even as the broadest contours of the debate found the delegates working out the federal system in greater specificity, they nevertheless revisited larger issues repeatedly, usually to ensure a proper balance between state and federal power.

The debate was joined in earnest on the 25th of May 1787 as the delegates began searching for a consensus regarding the nature of the problems plaguing the young nation and the structural formulation to solve the deficiencies of the Articles of Confederation. They began by discussing the problems of governance that had brought them to Philadelphia. They agreed that these were federalist in nature-- both on the national and state levels-- although the national problems were paramount. They included worries about rebellion, debt, state dissension, and violated treaties; they also agreed about the necessity of addressing issues of national commerce, a taxing authority, and national

defense.[11] These were the most significant issues that had drawn them to Philadelphia and were all emblematic, in general, of the impotence of the Articles of Confederation congress (even though there may not have been much that any central government could have done about a number of these issues). The delegates envisioned the new central government in light of the Articles' weaknesses; they wanted a government sanctioned by the people with the power to handle national issues and compel obedience. It had to be able to secure the nation against foreign invasion, interstate disputes or "seditions in particular states;"[12] it had to provide the benefits of nationhood which included a productive impost, protectionist commercial regulation, the fostering of commerce, and defense against "incroachments."[13] Finally, it had to be paramount to the state constitutions.[14] The irrelevance of the existing congress and the failings of central governance, though, had no monopoly on the Framer's criticisms.

They also thought state governments "had a full share in the motives which produced the present Convention."[15] State governance was relevant to the extent that the "multiplicity . . . mutability . . . and injustice" of state laws "indirectly affect the whole."[16] Some of these laws included ex post facto laws, laws that rebuffed congressional requisitions,[17] and debtor relief statutes relying on paper money.[18] In

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[11] Madison 115 and 121.

[12] Madison 115.

[13] Madison 115.

[14] Madison 115.

[15] Madison 231.

[16] Madison 231.

[17] Madison 227 and 310: New Jersey expressly refused to comply with a constitutional requisition as had Connecticut.

addition to passing laws that increased instability within the states or refusing to participate in national governance, various states had also actively interfered in national issues by entering into treaties with foreign powers or each other[19] and commencing wars with the Indians.[20] They raised troops in time of peace[21] and passed laws violating the law of nations.[22] Concerns regarding the states were not the primary concerns that had necessitated a convention, but they were significant nonetheless. This was obvious from the manner in which complaints about the states emerged during the debates. The delegates raised national concerns of tax, treaty, commerce and the like on the first real day of debate and proposed at least two plans of government to solve these issues; the shortcomings of the states were not first raised for more than three weeks until June 19th and came out intermittently thereafter.

Failings on both the state and national levels were evidence that, as Edmund Randolph put it, " . . . radical changes in the system of the Union were necessary."[23] The solution to the inadequacies of the federation was to place authority over national matters in a new central government and root national powers in a powerful republican central government. Empowering a national government and addressing those state issues that "prevail within the States individually" which "affect the whole" signaled their

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[18] Madison 115.

[19] Madison 228.

[20] Madison 228.

[21] Madison 228.

[22] Madison 115 and 228.

[23] Madison 698. Madison also spoke of the need to reform the federal system rather than any one government in a letter to Edmund Pendelton dated February 24, 1787. He said that some alteration in the

determination to construct a federal system.[24] The beneficiary of the removal of national powers from the state realm would be a new national government. Thus the work of the convention was not simply to create and empower a federal government; rather, it was to create a federal system out of a federation of states.[25]

The delegates began working from first principles as they began to formulate a new government and a federal system. Assuming as they did the need for a more powerful central government, the delegates proposed reforms "the basis of which . . . must be the republican principle."[26] Power and republicanism would be inextricably rather than tangentially linked in the new government's design: for the government to be more powerful it would have to be more republican.[27] Power required popular sanction and reaffirmation to ensure that it was being used wisely for the people's benefit. In essence, for the government to be more powerful it would have to be more republican because there was a greater danger that the government would become tyrannous if it was not more directly rooted in the people.

The Framers' affirmation of republicanism in the design of the federal government was consistent with their long-held faith in republicanism. At the convention, in the broader context, the Framers' self-imposed task was to rescue a robust republicanism that was creating problems and thus ensure its survival. Even if no advocate of radical republicanism, Hamilton's hyperbolic statement had a core of truth in

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Confederacy was almost inevitable because "The present System neither has nor deserves advocates." See Rakove 62.

[24] Madison 231.

[25] Madison 649.

[26] Madison 116, 214 and 698.

it when he said that the work of the convention would be "deciding forever the fate of republican government."[28] The limited character of the Articles of Confederation, which left too much power over national matters to the states, made the future of republicanism within the United States unclear. Few doubted that state governance and therefore republicanism remained an experiment that stood markedly less chance of success if national concerns could not be resolved. The issue was whether they could find a governmental formulation sufficiently republican that could manage national matters but not overwhelm the states.

The delegates offered republican models of government in which to vest enhanced national power. Edmund Randolph and Charles Pinkney proposed plans of national governments on the third day of the convention that offered the possibility of governing effectively over national matters. Both were republican in nature. These revealed their broadest assumptions about their solutions and the extent to which they still adhered to republicanism. Randolph presented his plan to the Convention for debate; Pinkney's was used by the Committee of Detail although not presented to the Committee of the Whole.[29] According to Robert Yates the Pinkney plan was "grounded on the same principles as the [Randolph] resolutions." [30]

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[27] Madison 243.

[28] Madison 282.

[29] Madison 119.

[30] Madison 119. Among James Wilson's papers was a synopsis of what may well be Pinckney's plan. Wilson entitled the document "Second Draft of Constitution." The document contains an overview of a republican central government. See the text of the document at Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution, vol. 1 (Madison: The State Historical Society of Wisconsin, 1976) 245-247.

The Randolph Plan called for a government rooted in republican principles that would be more powerful than the Articles of Confederation government.[31] His plan was the first effort to express the principles upon which the delegates ought to proceed. The national legislature would be based upon popular sovereignty and broadly empowered to legislate over national matters. The first house of the legislature would be popularly elected; the members of the second branch would be elected by the first branch out of candidates nominated by the state legislatures. Rights of suffrage would be according to proportional representation, a benchmark of republicanism. Legislative power would extend over only national matters. The national legislature would have the power to legislate "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[32] It would also be able to "negative all laws passed by the several states contravening in the opinion of the National legislature the articles of Union."[33] It would thus have the power to control national matters by passing laws regarding national issues and preventing the states from doing so. Randolph was erring on the side of the national government; he feared that the greater likelihood remained state intrusion into areas of national governance.

The executive, bolstered by a council of revision, would be elected by the legislature as was the case in most thoroughly republican state governments. It would have the authority to "execute the National Laws" plus those executive rights vested in

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[31] Madison 116 as to the remedy being found within the context of republican principles.

[32] Madison 117 and 129.

[33] Madison 117 and 129.

the congress under the Articles of Confederation.[34] He would have a fixed salary and not be eligible for re-election.

The executive and legislative branches would be complemented by a strong judiciary with inferior courts appointed by the national legislature and an amorphous jurisdiction over national matters.[35] The jurisdiction of the courts would ensure that the courts would have judicial power over piracies, captures, cases involving foreigners, the national revenue, and impeachment of national officers.[36] Consistent with Randolph's fear that the greater danger in the federal system was state intrusion into federal power, the courts were also given the power over "questions that may involve the national peace and harmony."[37] If in fact the federal courts' jurisdiction was rooted in this principal then cases of significance to the national government would be litigated in national courts.[38]

The proposed government was at once more powerful and more republican than the Articles of Confederation. Randolph's plan would vest federal power in a congress "rest[ing] on the solid foundation of the people themselves" that would govern national matters in the course of passing federal legislation or negating state legislation.[39] Its powers were those Randolph thought necessary to cure defects of the congress under the

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[34] Madison 117.

[35] Madison 118.

[36] Madison 118.

[37] Madison 118.

[38] Randolph's proposal regarding the federal court jurisdiction was a principle rather than an actual grant of jurisdiction. Such a grant that was this amorphous would have made deciding cases such as Fletcher v. Peck easy and would have enabled the federal government to address the growing issue of slavery even in the 1820s.

[39] Madison 127.

Confederation.[40] Both the executive and judicial branches were ultimately proposed to rest upon popular sanction as well. The president would be appointed by the legislature, and the judiciary would serve "during good behavior" with the inferior tribunals having been "chosen" by the legislature. This was no proposal for a government to supersede state government but rather one that would be the master of national issues. Randolph called for its power to be limited to matters "in which the States are incompetent" or that "involve the national peace and harmony."[41]

His proposed grants of power to the national legislature and the judiciary tried to exclude governance over state matters. They ensured that national matters would be governed by a national government. Yet, as a harbinger of the debate to come, some questioned the "vagueness of the term 'incompetent' " while others asked not for semantic clarification but for the intent behind the proposed plan. Their fear was that the design of the federal government might actually be intended to encroach on state governance of matters not of federal or a national nature. Some delegates worried that "indefinite powers" would give the federal government "an inroad on the state jurisdictions." In fact the dissenting delegates' worries were justified. Maybe not immediately but in time Randolph's proposed government would have encroached on state governance. Yet Randolph assured the other delegates "that he was entirely opposed to such an inroad" and that no consideration "could ever change his determination" on this point. The questioning delegates though had made their point: the

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[40] Madison 115 for the defects of the Confederation that Randolph enumerated. Randolph's sixth resolution outlining the powers of the congress, detailed powers that would cure these defects.

[41] Madison 129 and 118. Also, Randolph made clear that these were not specific plans but only "general propositions." See Madison 128.

states would have to be protected within the redesigned system.[42] They did not question his principles of resting the government upon republicanism, but they did question the proposed structure that would have made the government majoritarian and given it vague powers. Their points would be the issues that structured the rest of the debate. The initial design was majoritarian republican and was countered by dedication to protection of state republicanism.

Having served its purpose of provoking the delegates to question their assumptions about governance, federalism, and the extent to which the new government could be made republican, the delegates then began a detailed review of Randolph's plan that transformed into the methodical drafting of a new federal system and a new government. Most significantly this was done within the framework of Randolph's plan. That plan called for empowering a higher government founded in republicanism and with balanced state and federal interests. The delegates had also implicitly rejected any plan with imprecise federal powers that could threaten the states: state governance and republicanism at the state level must be protected.

Solving the conundrum of how to preserve state republicanism while empowering a republican national government animated the debate. As the debate proceeded, new notions of limiting government seemed increasingly viable as a solution. This emphasis on limitations was a new strategy for achieving freedom under a central republican government that emerged not as an abstract deduction, but as a pragmatic protection of state republican governments that were structured on the strategy of empowerment. The delegates would implicitly conclude that balancing federal against state powers was one of the problems of Randolph's plan. In time they would discard this notion of the

[42] Madison 130.

discretionary balancing of state and federal powers in favor of defining and categorizing delegated powers at the national level. The emerging government at the national level, with its more precise empowerments and limitations, would govern over national matters without infringing on republicanism at the state level. Creating this new type of government to govern cooperatively with state governments in a reordered republican federal system was the solution that allowed two levels of republican government to coexist as policy centers.

SECTION IV

THE LEGISLATIVE BRANCH

The legislative branch embodied in a bicameral congress was to be the center of the national government and would be grounded upon popular sovereignty. Its members would be popularly elected in numbers governed by proportional representation. Popular sovereignty was at the heart of Randolph's proposal and would survive in the design of the house, even if not in the senate. As the convention began, even as there was disagreement over whether representation would be based upon monetary contributions or free inhabitants, there was an overriding determination that "equality of suffrage [among states] established by the Articles of Confederation ought not to prevail in the national Legislature and that an equitable ratio of representation ought to be substituted."[43] The majority of the people would thus be able to determine issues free

[43] Madison 116 and 122-123. Randolph proposed a proportional right of suffrage in the national legislature according to either quotas of contribution or the number of free inhabitants. Agreement on the

from the power of a minority of states to veto majority will. Proportional representation addressed the most prominent problem of the Articles that had created a non-republican government. As the debate matured, delegates sought and gained concessions to the most thoroughly conceivable republican legislature that would also ensure the protection of state governance. This theme would emerge in the drafting of the senate provisions and to a lesser extent in the precision of the procedure for reapportioning representation.

The various proposals fostered republicanism by the unique nature of the national legislature's mix of empowerments and limitations. These empowerments allowed the national legislature to carry out its appointed task of legislating over certain national matters, and yet limitations ensured that it remained out of the realm of state governance. The specificity and rigidity of both the empowerments and limitations marked the national legislature as being part of a limited government of delegated powers, very different from governments of inherent authority at the state level.

A combination of philosophical reasons supported by pragmatic considerations led the delegates to advocate consistently for an election by the people for at least the first branch. The house was to be the "grand depository of the democratic principle of the Govt."[44] Although some advocated an election by the state legislatures, modeled on the Articles, largely because of fear of an "excess of democracy," [45] Mason, Wilson, and Madison rejected that conservative approach and advocated an election by the people to increase republicanism as compared to the Articles. Wilson and Madison contended "strenuously for drawing the most numerous branch of the Legislature immediately from

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quoted resolution was forestalled only by the delegates' unwillingness to press the Delaware contingent to vote on it. Delaware's commission prevented its delegates from altering the rule of suffrage.

[44] Madison 125.

the people." [46] Their primary reason was to foster the "sympathy between the people and their rulers and officers" which was "essential to every plan of free Government." [47] "Whatever inconvenience may attend the democratic principle. . . it is the only security for the rights of the people." [48]

The delegates argued that republican principles were the most effective means to empower the government and cure the flaws of the federal system while maintaining republicanism. The notions of power and popular sanction were central to their thinking. One necessarily required the other. Wilson said that he wished for "vigor in the Government but he wished the vigorous authority to flow immediately from the legitimate source of all authority" who were the people.[49] Mason agreed, saying that for the new government to operate on the people it must be drawn from them. [50] For it to operate effectively a popular election would secure the best representatives and would insulate the national government from the state governments. [51] "All interference between the general and local Government should be obviated as much as possible."[52]

The delegates also allocated power within the federal system to a republican-designed national government to limit the excesses of state governance that, if left

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[45] Madison 125.

[46] Madison 126.

[47] Madison 126.

[48] Madison 161.

[49] Madison 160.

[50] Madison 161.

[51] Madison 161.

[52] Madison 126.

unchecked, threatened republican governance throughout the nation. Madison, who recorded his own thoughts in detail on this subject, argued to apply republican principles, not dispense with republican governance: "it was incumbent on us then to try this remedy ["enlarging the sphere" of the community], and with that view to frame a republican system on such a scale & in such a form as will controul all the evils which have been experienced." [53] The evils he was referring to were those remedied by "providing more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these were evils which had more perhaps than any thing else, produced this convention."[54] Madison's view that abuses entirely within the states were as significant as any other issue in precipitating the convention was not shared by other delegates. Madison's means of rectifying abuses entirely within the states, that were nonetheless effecting the national community as a whole, was typical of the way the delegates began to formulate solutions in the convention. His was a call for empowered majority governance throughout the nation as an effort to check the control that individual states exercised as minorities to disrupt national governance: a political check rather than an institutional or judicial check. Rather than changing course and becoming much more conservative, Madison was typical of the delegates in that he continued to design governmental solutions based upon republican principles to solve society's problems and was not yet prepared to propose institutional limitations.

Building upon the consensus that republicanism must underlay the legislative branch, the Founders relied upon republican principles to flesh out congress's

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[53] Madison 163. Madison was arguing for as broad an election as possible to diffuse interests and prevent control of governmental power by any one group, faction, or section.

institutional form and its procedures for filling and maintaining its chamber. Congress was to be constituted in two houses to prevent "legislative despotism."[55] A division of the legislative power would prevent the legislative tyranny possible in a unicameral legislature. "[Legislative authority] can only be restrained by dividing it within itself." [56] This thinking was consistent with the notions of republicanism that underlay all but one of the state constitutions, even though that principle had effectively been subordinated to empowerment of majority will.[57] Now though the checking became earnest. Legislative power must be broadly rooted in the people but ought to have an upper house acting as a counterweight to the lower house. This upper house, embodying "the Senatorial part" of society, should exhibit "the most wisdom, experience, and virtue."[58] Over time, as the value of protecting republican state governments necessitated institutional form, the senate's purpose would be transformed from one notion consistent with the original state governments to another that proved to be essential to preservation of state republican governments: from a balancing of interests within a polity to the protection of state republican governments.[59]

As to its size, the lower house was to be large in order to protect private rights better and prevent the oppression of minorities or the tyranny of the minority. Because

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[54] Madison 162.

[55] Madison 213.

[56] Madison 213.

[57] See Merrill D. Peterson, ed., Thomas Jefferson (New York: The Library of America, 1984) 244-245, referring to pages from Jefferson's Notes on the State of Virginia. Jefferson said in his Notes that the "purpose of establishing different houses of legislation is to introduce the influence of different interests or different principles."

[58] Wood 210; Maryland Constitution Section XV.

"the source of influence must . . . be stronger in small rather than large bodies of men," a larger body would prevent an oppressive minority from controlling the legislative power.[60] As an example of the power that a minority could wield, Wilson pointed out that the Impost was "defeated not by any of the larger states in the Union" [61] but rather by a small state in whose small chamber a minority was able to defeat the wishes of a majority. The number of representatives finally derived from a compromise between the financial cost of maintaining the chamber and a proper number to ensure that they might "possess enough of the confidence of the people" and "bring with them all the local information which would be frequently wanted."[62] The number decided upon was sixty-five; but some delegates, Madison and Gerry among them, wanted an even larger number to foster the chamber's republican spirit.[63]

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[59] Originally the senates were to be the repositories of an elite that was meant to add wisdom, virtue and intelligence to the governments. This would both complement and check the popularly elected houses.

[60] Madison 212.

[61] Madison 212.

[62] Madison 349.

[63] Madison 349: Gerry wanted to increase their number to minimize corruption; also see Madison 349: Madison wanted to double the size of the assembly to link the people with their representatives more closely.

The delegates determined the percentage necessary to form a quorum to conduct business based upon republican principles. At first, they thought that in each house a bare majority would be sufficient to constitute a quorum to conduct business. A bare majority would prevent minorities near the capitol from controlling the business of the legislature. It was argued in rebuttal that allowing a bare majority would give power to small groups who could prevent business being done by staying away. See Madison 515. To prevent small groups from controlling the majority, they allowed the house to compel the attendance of absent members. See Madison 516. All this was done to ensure that a majority conducted business without being held hostage by a minority.

Even the question of calling for the yeas and neas that would be recorded in a journal was determined using republican principles. The journal was to inform the people what the representatives were doing. See Madison 520. They agreed on twenty percent concurrence as a compromise between small states that wanted any member to be able to call for the yeas and neas and those that thought the record of the yeas and neas would mislead the voters and flood the journals. See Madison 518.

The upper chamber would be the senate. The senate's purpose was to be the institutional embodiment of "coolness," "steadiness" and wisdom. "Consist[ing] of the most distinguished characters,"[64] it would "proceed with more coolness, with more system and with more wisdom than the popular branch" in the course of "check[ing] the turbulence and follies of democracy in our Governments."[65] Smaller in size and intended to be more deliberative, it was to provide a steadying influence on the more tumultuous lower house of the legislature. Agreement on the temper and character of the senate could not, however, mask a disagreement over whether the senators should most directly represent the people or the States. Both sides advocated republican concerns: a more republican central government or protection of the republican governments of the states.

There was initial agreement in principle that the entire national legislature—the upper and lower chambers of the assembly--was going to be governed by proportional representation.[66] The implication, accepted by many delegates at first, was that some states might not have a senator, because if the senate's membership was to be small and governed by proportional representation, some states with too few citizens might not merit a senator. Thus, many of the delegates at first balked when presented with supporting a nomination by the state legislatures on 31 May,[67] because nominations by the state legislatures meant that every state would most likely have a senator and thus that the principle of proportional representation would be surrendered.[68] Yet the delegates

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[64] Madison 168.

[65] Madison 128 and 279.

[66] Madison 123.

[67] Madison 129.

also voted against an election of senators by the first branch. Many delegates opposed what the results of a system rooted in proportional representation might produce: some states would not have an immediate advocate in the senate. As Madison put it, "a chasm [was] left in this part of the plan."[69]

The delegates had quickly discovered the tension between fostering republicanism at the national level and protecting republicanism at the state level. The fear that one delegate voiced was that in the search for the structure of a senate that would be proportional in representation state interests were being insufficiently protected in the course of "taking so many powers out of the hands of the States as was proposed."[70] That fear was particularly insightful at this point because the debate was still operating in the context of the Randolph plan of a majoritarian national government. As Butler put it, he "apprehended that the taking of so many powers out of the hand of the states as was proposed tended to destroy all that balance and security of interests among the states which it was necessary to preserve."[71] Others advanced ominous predictions if an equality of states was not maintained in the senate. Ellsworth posited that without state "co-operation it would be impossible to support a republican government over so great an extent of Country."[72] Martin foresaw a tyranny in congress if proportional representation were allowed to govern the seats in the senate as well as the house: Virginia, Massachusetts and Pennsylvania would have a controlling vote and turn the government

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[68] Madison 128.

[69] Madison 129.

[70] Madison 127 and 181.

[71] Madison 127.

[72] Madison 275-6.

to their advantage.[73] The opposition to proportional representation in the senate was based on notions of republican government that led some delegates to feel that small states must have a right of defense against a combination of large states. We are, after all "partly national; partly federal"[74] and only the states can deliver the "greatest happiness."[75]

Nevertheless, leading men at the convention, Madison and Wilson most ardently, argued for proportional representation in the congress's upper house.[76] "We ought to proceed by abstracting as much as possible from the idea of state government" and adhere to a system of proportional representation in the senate.[77] An equality of states in the senate ". . . is a species . . . of tyranny, [in] that the smaller number governs the greater."[78] States were, after all, composed of men; therefore, the rights of men should be respected first to ensure liberty.[79] As Hamilton pointed out, equality was a matter of power among the states; liberty was for individuals.[80]

Madison argued that, if the small states wanted a government "armed with the powers necessary to secure their liberties, and to enforce obedience on the larger members as well as on themselves," it was a mistake to insist on equality of the states.

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[73] Madison 288-9.

[74] Madison 304.

[75] Madison 316.

[76] Madison 128; See the vote at 129.

[77] Madison 276.

[78] Madison 308.

[79] Madison 301.

[80] Madison 301.

Such an equality of states would prevent a "proper superstructure to be raised."[81] Failure to place vigor in the national government would invite dissension in all the states and prove "fatal to the internal liberty of all." A failure to vest more power in a national government vitally rooted in republicanism would lead to the death of republicanism.[82]

The senate according to Madison and Wilson should be based upon proportional representation and be a small body in order to operate with calmness and wisdom.[83] The crux of the issue for them was that, if the body was elected directly by the states and each state had at least one senator, proportional representation would necessarily be surrendered: the body would be too large to deliberate calmly and dispassionately on the actions of the lower house. [84] Providing each state with one senator would force a compromise on proportional representation which was "inadmissible and evidently unjust"[85] because it was anti-republican. Their position was not one based upon hostility to the states, but rather upon fidelity to republicanism. They wanted to foster republicanism at the national level through the most extensive application of proportional representation possible.

Those advocating proportional representation for the senate lost the debate because the value of protecting republican state governance trumped many of the delegates' avowed wish to establish a purely republican government on a national scale. The delegates compromised on the representation in the second or upper house of the

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[81] Madison 379.

[82] Madison 300.

[83] Madison 128.

[84] Madison 170.

national legislature because they wanted a republican federal system in which both federal and state governments were secure centers of policy formulation for the people. Republicanism at the federal level had to be compromised for the sake of preserving republicanism at the state level. The result evidenced a desire by the majority of the delegates that the states must be accorded some right within the federal system to "defend themselves against the encroachments of the National Government."[86] After all, because the states were "indispensable,"[87] gaining their support and maintaining "due harmoney between the two governments"[88] were essential to the success of the new federal system. Republicanism at the state level was a value that overrode their wish to further republicanism at the national level.

Thus, the compromise, known as the great compromise, that produced a lower house based upon proportional representation and the upper house based upon equality of the states, was evidence of a clash of republicanisms: one applied on a national scale and the other applied to a federal system, a clash made necessary by the delegates' overriding wish to protect republican state governments. In a national system in which proportional representation in both houses ruled, the vote of each person would have the same weight and the people would be fully and fairly represented. On the other hand, Patterson and advocates from the small states argued that there should be republicanism on a federal level in which there would be an equality of votes for the states. The fear of each side was shaped by their overarching belief in republicanism. The republican nationalists

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[85] Madison 169.

[86] Madison 173.

[87] Madison 170.

[88] Madison 168.

feared that a minority of people in a few small states would impede the will of the majority. The republican federalists believed that deserting equal representation among the states would lead to a tyranny of the majority in which the small states "would be swallowed up" in a tyranny of the majority[89] that would destroy the states that preserved republican liberty.[90]

Republican principles undergirded the decisions made in the convention regarding who could serve in congress and who could vote in the federal elections. Proposals to prevent those with "unsettled accounts" from serving in the Congress and to allow congress to expel members with a bare majority vote failed because they would open the door to abuse by the government in unjustly excluding some from serving in office. Regardless that some congressmen might act in their own personal interest it was better and more consistent with popular sovereignty, usually to allow the people to decide whether the congressman ought to continue to serve or not.[91] Members could be expelled, but only by a two-thirds vote, a threshold high enough to ensure that there was broad agreement that a member had to be removed. In this way no small faction might hinder the process of expelling a member by holding the proceedings hostage by either voting for or withholding its vote.[92]

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[89] Madison 183.

[90] Madison 184 and re-proposed at 297.

[91] Madison 459, 462 and 464.

[92] Madison 517. Expelling members was "too important to be exercised by a bare majority of a quorum and in emergencies of faction might be dangerously abused."

Constitutional restrictions on those who could vote for members of the house were also voted aside for reasons based upon republicanism.[93] The result was that participation in federal elections varied from state to state but was left to the control of the states, so that the varied versions of state republicanism would continue to be reflected in the house. Proposals were put forward to restrict the right to vote to freeholders to protect property interests against the multitudes and as a means to set a standard for qualification not dependent on the states. Franklin, Ghorum and Mason argued successfully that restricting the right to vote to freeholders would lead to tyranny and unjustly deprive some who paid a share of the taxes from voting.[94] The "right of suffrage is one of the fundamental articles of republican government and ought not to be left to be regulated by the Legislature."[95] Even though Madison believed that "the freeholders of the country would be the safest depositories of republican liberty," he acknowledged that most states already allowed more than freeholders to vote and there was no complaint as to the elections that the mechanics participate in as opposed to those in which only the freeholders vote.[96] ". . . Every man having evidence of attachment to and permanent common interest with the society ought to share in all its rights and privileges."[97]

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[93] Madison 487. Even the time, place, and manner of federal elections were left to the state to decide with the federal government having the ability to preempt state regulations. Madison wanted the national legislature to determine the regulations for federal elections because he feared that the states would design regulations to hinder the federal government's operation. See Madison 509-511.

[94] Madison 488.

[95] Madison 489.

[96] Madison 491.

[97] Madison 489.

Senators and representatives would serve terms and receive pay commensurate with the republican nature of the government. Senators were to serve seven year terms in order to erect "a stable and firm Government organized in the republican form . . ."[98] Representatives' terms of two years coupled with the longer senate terms, eventually pared down to six years, would provide "that stability which was every where called for, and which the enemies of the republican form allege to be inconsistent with its nature."[99] Pay would likewise be determined using republican principles. In the struggle between having the states or the national government pay salaries, they erred on the side of the national government to foster the independence of the congress. Although concerns over corruption if the houses were to determine their own salary were considered, it was ultimately deemed better to free the congress from the purse strings of the state governments and thereby vest in the federal government a greater degree of independence.[100] This independence, although designed to free the federal government from control by the states, actually served indirectly to enhance the republican character of the federal government by making compensation an issue resolved directly between voters in federal elections and federal officeholders. Provision by provision, the delegates were cobbling together a system that empowered an independent central government while preserving the state governments and ensuring that the different

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[98] Madison 197.

[99] Madison 196.

[100] Madison 286, 545 for the senate; See Madison 192 for the house. The delegates determined that the terms of representatives should be either two or three years in light of the fact that one year would be consumed in traveling. This travel had its advantages. It would allow the representatives to be knowledgeable about other states and allow them to mix with the people. See Madison 192 and 256. It was determined that they should be paid out of the national treasury so that the states could not control them. See Madison 194. "Those who pay are the master of those who are paid." See Madison 258 and 285.

versions of republicanism in the states would continue to influence, but not control, the central government: overall, a thoroughly republican-federal system.

The rule for reapportioning representation by census was also republican in intent and the precision required by many delegates in laying out the rules for reapportionment was necessary to ensure that future reapportionments would be equitable. Without a defined procedure to make "it the duty of the Legislature to do what was right [when it was time to reapportion seats] & not leaving it at liberty to do or not do it," future legislatures might design a system of reapportionment that would deny some states their fair share of representation.[101] This subordination of the states could not be allowed to happen because "what relates to suffrage is . . . a fundamental article of Republican Govts."[102] It was too important a question to leave to future legislatures.[103]

Because protection of states was one goal of the debate, questions of sectional and regional balance played into the discussion about exactly how the census would be calculated. Advocates for using wealth, property, free inhabitants or all inhabitants as a measuring device for representation had their say as tensions rose. Advocates from the South pressed for using the number of inhabitants so that their slaves would be counted and because they thought their immigrant populations would lead them to have a higher population than the North in time.[104] They bolstered their arguments for including slaves by arguing that a reapportionment based upon wealth should be blind to its production:

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[101] Madison 353.

[102] Madison 353-354.

[103] Madison noted prominently in his notes a minority who thought it too important an issue for a procedure to be laid out that would bind future legislatures. This minority included Gouverneur Morris, James Wilson and Roger Sherman.

the wealth generated by slaves was "as productive & valuable as that of a freeman in Massachusetts."[105] Northerners countered these arguments with two of their own. First, it was inconsistent for Southerners to argue, as they had in 1783, that for taxation purposes only three fifths of slaves be counted but now that representation was at issue they wanted them counted fully.[106] Secondly, it offended the sensibilities of some northern delegates, including Gouverneur Morris and James Wilson, that the slaves were not being classified clearly as either citizens or property. As Wilson asked rhetorically, "Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? Then why is not other property admitted into the computation?"[107]

At an impasse, the delegates embraced Wilson's call that these "difficulties . . . must be overruled by the necessity of compromise."[108] Morris tried to tether direct taxation and representation together. Although such a compromise was inconsistent with Southern wishes and Northern wishes and sensibilities, both sides agreed on the three fifths calculation which dated from the April 1783 tax apportionment from the earlier congress. [109] A measure of wealth was dropped from the equation. Direct taxes and reapportionment would be based on the census count of free inhabitants and three fifths of the slaves.

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[104] Madison 352, 359 and 361 as to the contention that southern population was outpacing the north's.

[105] Madison 354.

[106] Madison 354.

[107] Madison 361.

[108] Madison 360.

[109] Madison 363.

More significant though than the nature of the disagreement over how to calculate the voting populations for the reapportionment of representatives was the delegates' agreement that protection of state interests required the delegates to define in the Constitution how representation would be reapportioned in the future. This guaranteed that the house would continue to be a true voice of the people.[110]

From the outset, the delegates wanted a powerful federal government with the power to legislate over national matters. They nevertheless remained wary of creating a government that would intrude on state governance. Randolph's early proposal to vest power in the federal government over all matters for which the states were "individually incompetent" only begged the question as to what "incompetent" meant and led Madison to suggest a specific enumeration of the powers of the new government.[111] After the delegates agreed to the great compromise that granted both notions of republicanism some accord, the delegates followed Madison's suggestion and delineated what powers the congress would have at its disposal.[112] This drafting was mostly done in committee, but the delegates voted on each of the powers enumerated in Article I in the Committee of the Whole, and thus revealed why they selected those powers that they did.

The delegates could vest sufficient powers in the national government to legislate over national matters once they had established a government that would be sufficiently republican.[113] Beyond simply shifting certain powers to the new federal government, the

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[110] Madison 359-360.

[111] Madison 129.

[112] Madison 130.

delegates apportioned the powers to the house or the senate based upon which competing notion of republicanism, one more national, the other more federal, was more appropriate to govern the power in question. The powers given to congress ensured its power over national matters, but also revealed a nuanced appreciation of the ways that republicanism required the powers to be modulated to guarantee national supremacy and also to protect majoritarian governance.

The first method of modulating federal power was to limit it to a list of powers, and thus to establish the federal government as a government of limited and delegated powers. A list of powers as is contained in Article I, section 8 was of course an empowerment but also a limitation. Included among congress's powers were specific rights to lay and collect taxes, declare war, regulate commerce and provide for an army, navy and the calling forth of a trained militia. Other powers with these constituted the list of powers granted to congress in Article 1, Section 8. Laid out with specificity and buttressed by the grant of power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," the congress did indeed come to wield an awesome array of powers over national and international issues. The manner of laying out the powers with specificity empowered the federal government by removing from doubt the question of whether the federal government had authority to govern the issues listed in Article I, Section 8. Debate over the power now vested in congress would be limited to the scope that congress had under its specified powers rather than whether the issue was simply more national than local. The Constitution limits congressional power

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[113] Madison 574 and 718. Having established a government sufficiently republican to merit entrustment with adequate powers, Mason advocated the inclusion of the power to impose sumptuary laws. His reasons for including these were thoroughly republican: he wanted to foster virtue, economy, and frugality. His proposal was thankfully voted down.

by listing those powers that congress can exercise. Such a list specifying and thus limiting the legislative branch would be inconceivable at the state level, where state governments, by virtue of being fully empowered, could legislate on almost any issue relative to the health, safety, or morals of state citizens.[114] Exceptions from state legislative authority in state constitutions were few and only structural safeguards to maintain republicanism. Congress, on the other hand, found its powers detailed in a list, leaving little implication but that absence from the list meant a complete absence of authority to legislate. Wilson made precisely this point in defending the Constitution in the course of the ratification debates, arguing that the federal government could not become despotic because its powers were limited to those listed in Article I, Section 8. Although this limitation was not as strict as that in the Articles of Confederation where congressional authority was limited to those powers not *expressly* delegated, it was still a remarkably different formulation of legislative power than that found at the state level.[115]

The second method was to parcel carefully out powers to the most appropriate branch of government both to ensure national supremacy and to protect state governments. The debate over the power to tax and the ability to muster the state militias

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[114] Massachusetts was the only state with a state constitution that even listed the legislative powers. The list found in Chapter 1, Article III of the Massachusetts's Constitution of 1790, however, was a general description of those powers contained within the purview of legislative power. It is consistent with the general assumption underlying state governments that they were fully empowered. As one example of an item on the list was the power given to the legislature to enact laws: " . . . full power and authority are hereby given and granted to the said general court from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof . . . ."

[115] He made this argument for the first time in his speech to a gathering in the Pennsylvania State House Yard on October 6, 1787. His speech was widely reprinted and his ideas were borrowed extensively by other advocates of the Constitution. As to the speech and the significance of his arguments in the debate

for national defense highlight the effort to vest powers consistent with the underlying republican character of the government. At Madison's urging the house alone was given the power to originate money bills because the senate was too distanced from the people to propose taxation.[116] In fact the argument against allowing the senate to initiate taxation was the same used against allowing the Articles of Confederation government to tax: neither body was elected by the people and only the representatives of the people ought properly to be laying taxes.[117] Opponents countered that the power of originating money bills solely in the house gave the house the power to control the deliberations of the senate by placing conditions in the bills sent to the senate. The upper house needed more power than simply accepting or rejecting the money bills sent to it by the house.[118] The final compromise allowed the house to originate all money bills, but the Senate received the right to propose amendments.[119]

The delegates, after granting the federal legislative branch specific empowerments, placed a series of restrictions on the state and federal government to protect the federal system. These restrictions would emerge in Article I, sections 9 and 10.[120] Article I, section 9 protected the state governments from federal government

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over whether to ratify the Constitution see Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution, vol. I (Madison: The State Historical Society of Wisconsin, 1976) 26 and vol. XIII 337.

[116] Madison 503. Madison wanted proportional representation linked to the origination of money bills. Unless the house alone could originate money bills, Madison promised to oppose equality of representation of states in the senate.

[117] Madison 529.

[118] Madison 530.

[119] Madison 693 and 671. The final support of the small states was only gained on this point after a further compromise that allowed the small states greater influence in the election of the president. See the footnote at 693 referencing the note at 671.

[120] Palmer 117-137.

intrusion that would have otherwise crippled the states as independent centers of governance. Exceptions to power were federalism protections to ensure the continued viability of state governments. They included protection from economic interference, political intrusion, and institutional co-option. Economic protections included ironclad prohibitions against the levy of export taxes, the laying of direct taxes unless in proportion to the census, preferences for any port or state with beneficial maritime regulations, and interference with the importation of slaves until 1808. States were also protected from intrusive mechanisms that might have been used to stifle dissent. The federal government could not pass bills of attainder or ex post facto laws and the writ of habeas corpus could not be suspended unless the country was enduring a rebellion or invasion. Finally, Article I, section 9 also insulated the states from having other institutional protections defeated through unlawful expenditures or the establishment of monarchical positions.

Article I, Section 10 included protections for the federal government from state policies that would have interfered with matters within the direct purview of the federal government. The overarching purpose here was to prevent the states from interfering in matters that were critical to the national government. There were two kinds of protections. The first were a set of prohibitions that prevented states from undertaking diplomatic, financial, or legislative actions that would have disrupted operation of the federal government. These prohibitions included entering into treaties, alliances or confederations, granting letters of marque or reprisal, emitting bills of credit, or passing bills of attainder, ex post facto laws or laws that impaired the obligations of contracts. The second set of protections for the federal government allowed states to undertake

economic policy or defensive military steps so long as congress consented. Thus states could not lay imposts on imports or exports or keep troops in time of peace unless congress approved. Such steps allowed states to pursue policies more in keeping with a fully sovereign state but only if such policies did not interfere with the operation of the federal government.[121]

The delegates also limited states laying export taxes that would be used, as Madison noted, as "exactions" against non-commercial states but even a limited export tax was only approved on condition that a federal export tax be prohibited.[122] Even if it would prove a good source of income and seemed politically viable in light of the fact that imports could be taxed, some delegates feared that a federal tax on exports would be used for sectional advantage.[123] Simply removing from federal power the ability to tax exports did not resolve the matter. Some protection was needed for those non-

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[121] Most of the provisions of Article I, Section 10 do not have extensive debate noted in Madison's Notes to evidence why they were included. The provision prohibiting bills of credit, though, does have some debate that is insightful and that buttresses the thesis that Article I, Section 9 was intended to prevent the states from using powers that might destabilize the federal system. A proposal that the legislature be given power to make laws "in all cases which may concern the common interests of the Union; but not to interfere with the Government of their individual states in any matters of internal police which respect the Government of such states only . . . ." was opposed because it did not grant to the legislature power over cases in which the "Citizens of other states may be affected" by the acts of one state. Examples where citizens of other states might be affected by the acts of one state legislating entirely over matters solely concerning state interest included "paper money and other tricks." See Madison 389.

The delegates' antagonism toward bills of credit did not stop with the states' power to issue them. The delegates removed the power over emitting bills of credit from the federal legislature's list of powers. Bills of credit were simply too dangerous a tool to be left in the hands of legislators even if emergencies might require them and even if they had served a useful purpose during the Revolutionary War. They had proven a "mischief" and would be unnecessary if the government had the right to use its credit to borrow. For the removal from the federal government of the power to emit bills on the credit of the United States see Madison 555-557. Delegates debated whether to remove this power from the federal government entirely or whether to limit it in some way such as simply prohibiting making the bills tender. The vote to remove this power altered the then existing version of the Constitution as seen at Madison 475. The final version continued to lack a provision giving congress the power to emit bills of credit in the borrowing clause of Article I, section 8.

[122] Madison 554-555, 587 and 631.

[123] A federal export tax on cotton, for example, could have been used by congress effectively to end slavery.

commercial states that would be left at the mercy of their seaboard neighbors who would control their exports. The solution to this problem was to prevent states from laying taxes on exports more than the support of their inspection laws required and to allow congress an oversight of all such laws.[124] Thus the Framers forestalled the harm on national commerce and the federal system that might result from federal and state export taxes.

Even the constitutional power vested in the federal government to protect the nation through the militias was calibrated in a way to ensure the protection of state governments. The purpose again was to create a powerful federal government, but only one within a federal system that ensured the continued viability of state governance. The federal government would indeed have the power in times of crisis to call forth and command the militias, but the states would maintain significant control over the militias in times of peace.[125] The delegates agreed that the federal government needed to exercise control over the militias in times of war and that some federal control in peacetime was necessary to ensure their preparedness. As Madison said, "The discipline of the militia is evidently a national concern, and ought to be provided for in the national convention."[126] How to achieve that end without having the federal government intrude on state authority in a way that might result in a threat to the states required permitting the states to appoint the officers and train the militia and for the federal government to control the militias

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[124] See Article I, Section 10, clause 2.

[125] There remained a fear of standing armies that made the creation of a federal army unacceptable to the delegates. See Madison 564 and 568. As to the constitutional power to call forth the militia see Article I, Section 8, clause 15.

[126] Madison 601 and 602. Madison argued that as the states became more consolidated they would "neglect" their militias even more. See Madison 600-601.

only when "employed in the service of the United States . . ."[127] These compromises were necessary to assuage the fears of some that the federal government's proposed control over the militias amounted to an intrusion on state authority that would threaten state governance.

Republicanism was at the heart of the new federal legislature. The first impulse was born of an overarching desire to implement republican solutions to the problems that occasioned the convention. This impulse was moderated by the important value of preserving republican state governance. The delegates realized that the initial impulse was antithetical to preserving the states so they compromised on the degree of republicanism at the national level. The two forms of republicanism, one at the national level and one at the state level, would have to be woven together in a system that ensured the survival of the states as important centers of governance. How to do this animated the debate about the federal legislature. In the end, the delegates achieved their goal. The new congress would be endowed with new and more extensive powers than the Articles of Confederation congress because it rested upon a nuanced balance of popular sovereignty for the people in one chamber and equality of the states in the other. Both forms of republicanism, one at the national level and one at the state level, were recognized in the institutional form and, because its foundation was more firmly rooted in republican principles, it merited greater empowerment. Throughout, the design gave the central government the powers to carry out the necessary tasks for a new national government to accomplish so that the federal system and significantly, republicanism,

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[127] Madison 600-601.

could survive. Yet, even with these additional powers the states and their preservation were never far from the first concerns of the delegates. The very nature of the congress's powers spoke to this. Although its powers were listed to clarify that the powers were in fact the congress's to wield, the very nature of listing the powers protected the states from congress overstepping its bounds. (Of course, some delegates feared that congress could overstep its bounds or exercise its enumerated powers destructively. These concerns were only answered with the first ten amendments.) Also, denials of powers in Articles I, sections 9 and 10 further cemented the relationship between federal and state governments. The federal government would lack certain powers that might threaten state governance, and conversely the states lost some powers that might have infringed upon federal legislative powers and thus weakened the federal system. Rather than overtly antagonistic to states and republicanism, the delegates, because of their faith in republicanism and their devotion to the states, devised a distinctive legislative branch to enhance central powers while protecting the liberty enhancing governments at the state level.

SECTION V

THE EXECUTIVE BRANCH

The delegates designed an executive for the national government that would be a vigorous executive for a large republic, but with safeguards to ensure that the executive would not threaten the states and state republicanism. Negotiating between national

republicanism and state preservation animated the debate on the executive just as it had with the legislative branch. The delegates wished initially for an executive branch of the federal government that would be energetic and powerful. Yet, in the midst of the effort to endow the executive with "energy," the delegates found that fulfilling a vision of national republicanism ran against the important value of preserving state republicanism. Protecting state republicanism was so important that the delegates turned away from empowering the executive because they could not adequately ensure the continued viability of the states if the executive were only empowered. The delegates instead turned to creating a method of election that would further the value of protecting state republicanism. In the course of drafting the means of election, the delegates addressed the appointment and removal powers and the executive's right to check the legislative branch. Throughout, the delegates sought to add an executive to the federal government that would be vigorous but that was still adequately constrained that it would not threaten state governance.

The delegates' struggle to find a satisfactory means of filling the executive office was rooted in their concern that an executive sufficiently strong to implement the legislative acts over so large a country might become the agent of some states or state interests. If the delegates failed to separate the executive from partisan interests adequately, the president would be able to harness national powers to destroy state republicanism. They thus designed an executive with "energy," but not one that could become "monarchical" or tyrannous: anti-republican. Here again, as in the drafting of the legislative branch, the delegates had to reconcile national republicanism with varied state republicanism.

The delegates first broached the subject of the executive on the fourth day of the convention and found agreement relatively quickly over the general character of the executive, how many persons should fill the executive office and what powers should be vested in the executive office. They agreed that the executive office ought to be one endowed with "vigor," "energy," "dispatch," and "responsibility."[128] They also agreed that, as long as the executive was not entrusted with powers too extensive, such as those to make war and peace, it should be vested in a single person. Concerns over the power of the executive and thus how many ought to fill the executive office were resolved at Madison's urging with a short debate defining executive power. The delegates concluded relatively quickly that the executive should have powers only to "carry into effect the national laws," make appointments as directed by the legislature and carry out other powers as delegated by the legislature. Having assuaged the concerns of some that a single executive might prove monarchical by having powers too extensive, the delegates agreed that a unity of the executive was appropriate.

Yet even the short debate over the character of the executive revealed that the delegates had well developed and differing views on the proper role of the executive in relation to the legislature, with some calling for the executive to be "independent" of the legislature as "a safeguard against tyranny"[129] while others argued that an "independence of the Executive from the supreme Legislature was. . . the very essence of tyranny."[130] Pursuing this debate to its conclusion was not possible only days into the convention, because at the time the character and powers of the legislature, and of the senate in

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[128] Madison 132.

[129] Madison 132-133.

particular, had yet to be resolved. Yet the delegates were destined to revisit the issues surrounding the executive and in fact once the senate was rooted in principles indirectly supportive of republicanism the delegates returned to the executive with clarified arguments on July 17th.

Both groups of delegates advocated their position anew because they wished to ensure that the executive was made independent of interests that they feared would manipulate the executive to the detriment of some states. Yet a common goal did little to temper their disagreement about the best way to protect state interests. Distrust of executive power that had yet to be constrained within a system that protected state governance dictated the ensuing debate.

Some argued that the executive had to be chosen by the people so that it could be a check on the legislature.[131] This notion of checking was a nascent idea that checks could keep the legislature from overrunning the constitutional bounds that limited the federal government and protected the states. Wilson advocated an election by the people as the best means to secure "persons whose merit have general notoriety," and who have "distinguished character and continental reputation."[132] This process would allow the president to stand for the people's liberty against the legislature.[133] If the legislature elected the executive, the executive would be the result of cabal and intrigue.[134]

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[130] Madison 134.

[131] Madison 397-8, 408.

[132] Madison 392.

[133] Madison 398, 411 and 413.

[134] Madison 135, 136-137 and 392.

Although many state executives were selected by their legislatures, many delegates applying the lessons of state republicanism to the creation of the national government reached the conclusion that the national legislature should not select the president. After all, the legislature that might choose the president at the national level was not one composed of the people from any one state. It would be composed of many state interests, and certain states would have a disproportionate influence. Thus the reluctance to have the executive dependent upon the legislature was rooted in a distrust of allowing some states to have a greater say in the election of the president than others. The fear was that the legislature would become both "the executor and the maker of the laws" and be beholden to some states or regions.[135]

Others, however, were confident that an election by the assembly was the better means to fill the executive's seat. This process would ensure that the executive, as in all the states, was dependent on the assembly. As Roger Sherman put it, he was for "making him absolutely dependent on the legislature, as it was the will of that which was to be executed."[136] The people were simply not "sufficiently informed" and "too easily led" to be entrusted with such a decision.[137] They would most likely vote for some man from their own state and thus give the populous states an advantage in the executive's election.[138]

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[135] Madison 397.

[136] Madison 134.

[137] Madison 413.

[138] Madison 392 and 411. It was argued in rebuttal at 410 that a large election would defeat the advantages of the large states.

The problem was that many delegates were not comfortable with a truly national election for the president. Republicanism, after all, was not a virtue in a vacuum and distrust emerged in the debate over the executive as delegates found themselves being asked to trust a national voting populace to elect a chief executive that each of their states would find acceptable. Trust had grown between the states to such an extent that the Articles of Confederation had outlived its usefulness, but there was not the breadth of faith that would allow delegates of South Carolina to trust Massachusetts's populace to vote for a president acceptable to South Carolinians, particularly if, as the delegates wanted, the executive was to be powerful.

With the debate unresolved, fears that the people were too easily led and would choose local candidates and concerns that a legislative appointment would not allow a sufficient separation of powers all invited reconsideration of another option.[139] The move toward a third option gained momentum as the delegates assigned the president weightier responsibilities and the lower house of the assembly was given the power to impeach the president.[140] While a direct election clearly failed to garner enough support among the delegates, it likewise became obvious that the president could not be chosen by the legislature if they wanted to ensure his independence.[141]

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[139] At one point the option of having only the senate—appointed by the states—choose the president was considered. This option of having just one branch of the assembly nominate the executive lost support as the president and senate became linked in treaty powers and impeachment and with the wariness that the senate, as a possible source of aristocratic influence, might impede an impartial election of the executive. See Madison 621.

[140] The president's additional powers included a role in treaties, appointments and a qualified veto.

[141] In votes on June 2, July 17, 25, and 26 the delegates voted for an election by the legislature. Electors were supported for the first time on July 19 and after intervening votes in favor of an election by the legislature, again on September 4 after the work of the Committee of Eleven.

The delegates returned to a plan for the election of the executive by electors. Offered once before at the convention, a plan to have the executive chosen by electors had foundered on whether the electors were to be chosen by the states or the people at large.[142] The plan failed initially because it looked unnecessarily complicated without offering any real solution to the problems of either popular election or legislative election.

Yet as the delegates fine-tuned a plan reliant upon electors it began to coalesce and gain support as an effective means to ensure the relative independence of the executive both from the national legislature and from an election by the people at large.[143] The delegates had found a complex mixture of reliance on the people and the preservation of states that they had woven together to ensure a powerful executive that would not threaten state governance. The state legislatures would appoint electors who in turn would vote for the president.[144] Electors would be required to nominate at lease one candidate from a state other than their own, to lessen the ability of the large states to control the election. In the event that no candidate garnered a majority at that point the representatives, voting as states, would elect a president. [145]

The delegates further demonstrated their commitment to an executive rooted in republican principles when they considered the terms upon which the president would be

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[142] Madison 412. Having electors elect the president was first mentioned by King. Madison supported an election of the electors by the people at 451. Gerry supported an election of electors by the state executives. See Madison 413. Ellsworth offered a plan for the electors to be appointed by the state legislatures. See Madison 414. Electors elected by the people was defeated at 612.

[143] Madison 660-663.

[144] Their independence was ensured by having them paid out of the national treasury and having them vote in their states. See Madison 422 and Article II, Section 1, clause 2.

[145] Madison 673. Article II, section 1, clause 3.

removable. An executive's ability to stand independent of and check the legislative branch seemed necessary to protect state republicanism. An early suggestion that the president be "made removeable by the National Legislature on the request of a majority of the legislatures of the states" was rejected because it was anti-republican and would make the executive "the mere creature of the legislature" which was a "violation of the fundamental principle of good government."[146] Arguments against allowing removal of the president at the will of the legislature were rooted in a desire to protect state republicanism. If legislative election of the executive was worrisome to some, opening the door to intrigue and possibly giving minorities the power to stop the removal of a corrupt president was contrary to republican principles.

The delegates instead favored removal by impeachment on conviction for maladministration, malpractice, neglect of duty and corruption.[147] Setting this standard for removal would advance the good behavior of the executive in accord with republican government and also establish a standard by which to judge the executive's actions rather than simply to rely upon the legislature's judgment. [148]

The delegates deemed the senate the branch that "could be trusted" with trials of impeachment. The supreme court was too few in number and thus could be corrupted;

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[146] Madison 141-142. Madison noted that Wilson and Mason joined him in opposing Dickensen's proposal to make the executive removeable by the legislature after a majority of the state legislatures requested it. Dickensen's proposal was deemed to be anti-republican because it would "enable a minority of the people to prevent the removal of an officer who had rendered himself justly criminal in the eyes of the majority." See Madison 142.

[147] Madison 417. The delegates substituted "other high crimes and misdemesnors" in place of "maladministration." See Madison 691. This was an effort to ensure that the executive's independence would not be compromised by too low a threshold for impeachment. Impeachment for "maladministration" would be the "equivalent to tenure during the pleasure of the Senate." See Madison 691.

[148] Madison 417.

the house's involvement ran the risk of tyranny:[149] a tyranny of the majority that some delegates feared would allow more populous states to bend the executive office to their will. The senate, though, was a natural choice in light of the fear that many had that the executive could become ruinous to the states. The senate, the embodiment of states, which were the bodies ultimately requiring protection from an overzealous executive, would determine finally whether the executive had in fact committed impeachable offenses.

The delegates even calibrated the executive's role in a power to revise and veto laws to continue the protection of republican government. Over the objection of those who continued to oppose any executive check on the legislative branch, the delegates crafted a mechanism for the executive to have a qualified check of the legislative branch. Making the executive independent of the legislature was necessary according to Madison for "the preservation of Republican Govt" in order to prevent "tyrannical laws" . . . being made "that may be executed in a tyrannical way."[150] Even if an absolute check was deemed anti-republican, a majority of delegates continued to support some form of an executive check on the legislature. At first the suggestion was to join the judges with the executive in the revisionary power in the form of a council of revision. Adding the weight of the judges to the executive was thought necessary in order to bolster the executive in a stand against the national assembly. The executive, by himself, was too weak to stand against the legislature; adding the judges would aid in "rendering the executive competent to its own defense which arose from the nature of republican

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[149] Madison 691.

[150] Madison 397.

government."[151] Ultimately, though, such a proposal was voted down because it was deemed to be an improper union of the judicial and the executive branches and inappropriate for the judges to appear to be "judges of the policy of public measures." Judges "ought to be able to expound the law as it . . . came before them, free from the bias of having participated in its formation." [152]

The delegates finally decided to vest in the executive a qualified veto because the delegates felt that the executive must have a means of self-defense or the "Legislature can at any moment sink it into non-existence."[153] Madison proposed that the executive have a negative on laws conditioned upon the support of a "proper proportion of each branch."[154] This compromise would overcome the republican objection to the executive having an absolute negative and still provide the executive a means to prevent mischievous legislation. The delegates determined that the proportion of the national assembly that could overrule an executive veto should be two-thirds of each branch of the assembly.[155]

Thus the delegates created a powerful executive that would carry out the laws for a large republic without threatening state governments. The executive's independence from congress was necessitated by the delegates' wish that the executive be powerful and that state republicanism be protected.[156] If the executive were to be linked too closely to

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[151] Madison 165.

[152] Madison 426 and 551.

[153] Madison 147.

[154] Madison 149.

[155] Madison 152.

the legislature a tyrannical majority of the legislature might become both the maker and implementer of the laws. Having determined that a vigorous executive was necessary for the new federal government, the ever-present need to protect state governance shaped the contours of the president's election, removal and veto powers. No president would be the creature of any state or group of states because his election was removed from immediate state interests that might try to control him; the threshold for his removal was defined and deliberately set high so that the president would not court favor to remain in office. The delegates vested the final decision on his removal with the senate so that the very entities that might be most threatened by the executive would be the ultimate arbiters of whether he was removed from office. The president's veto power was the final element in ensuring the executive's independence and thus republicanism's security. The power gave the executive leverage to resist laws threatening to draw the executive into the legislature's orbit. "Without such a self-defense the Legislature can at any moment sink it into non-existence."[157]

SECTION VI

THE JUDICIAL BRANCH

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[156] George Mason, near the end of the convention on September 7, proposed a Council of State to advise the president. He suggested that it be composed of two members from each of the North, South, and West. The members of the council would be appointed by either congress or the states. This would have added an institution attendant to the presidency ensuring that state interests were considered within the executive branch. Madison noted his own support and that of Franklin for Mason's proposal. It was, however, defeated by a vote of eight to three. See Madison 687.

[157] Madison 147.

The Framers also created a judicial branch designed to further the distinctive task assigned to the federal government but only within the context of a governance structure that would not threaten state republicanism unduly. It would be a third coordinate branch of the federal government shaped by the goal of creating a powerful central government and the value of protecting state republicanism. It was stronger than judiciaries at the state level in order to fulfill sufficiently its role within the new federal government and also because it had to preserve the constitutional boundaries placed on federal power. Federal judicial officeholders would resolve interstate disputes and judge the constitutionality of federal laws and those state laws that possibly infringed on federal supremacy.

The delegates broached the subject of the judiciary and its proper role within the federal system on the sixth day of the Convention after they had discussed the executive and legislative branches. The delegates agreed almost without opposition that the judiciary would be a strong third branch of the federal government. The delegates intended for the judges to check the legislature by being the expositor of the laws with the attendant "power of deciding on their Constitutionality" and possibly also by sitting in a council of revision to bolster the executive.[158] They entertained placing the judges with the executive in a council of revision because the delegates wished that the executive be one of wisdom and "firmness."[159] If he was to be elected by the legislature, as many wished, his ability to stand against the will of the legislature might well require the support of the judiciary. A number of delegates weighed in against including the

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[158] Madison 147.

[159] Madison 165.

judiciary in a council of revision. They argued that it was simply unwise to make the judicial officers "judges of the policy of public measure" rather than judges of the constitutionality of the laws.[160] As Rufus King said, they "ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation."[161]

In time the argument that it was unwise to vest an absolute negative in the executive or in an executive council of revision joined the earlier doubts that the judges were misplaced in a council of revision.[162] The eventual election of the president by electors rather than the legislature greatly lessened the threat of legislative domination of the executive, and freed the president from the need of judicial support to stand against legislative encroachments. Delegates also decided that an absolute negative in the president invited intrigue because he would be tempted to bargain with the legislature not to use his veto.[163] This decision undercut the entire rationale for the envisioned council of revision. Finally, with the executive having his own base of power and not needing the judges to bolster the executive check on the legislature, the argument that the judges were more properly expositors of the Constitution carried the day. "And as to the Constitutionality of laws, that point will come before the Judges in their proper official character."[164]

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[160] Madison 147.

[161] Madison 147.

[162] See the debate and votes at Madison 428-429 and the earlier doubts on page 147.

[163] Madison 148.

[164] Madison 426.

As part of the judiciary's role to provide a powerful judicial arm to the federal government and also to check encroachments by either the federal or state governments into the other's realm, the judges were expected to exercise the power of judicial review.[165] This power allows a court to review outcomes of the legislative process. Judicial review included a power to review not only national laws but also state laws that fell within the cases and controversies over which the judiciary was given authority. Although judicial review was not debated directly at the convention, the delegates were determined from the first to have a check on the legislative branch that involved the judiciary. The only debate was whether the judiciary should be involved in one checking mechanism or two: in a council of revision and in court or only in court.[166] The delegates' opinions about the role of the courts in reviewing legislative acts emerged in the course of their debate about the council of revision.

A number of delegates clearly supported judicial review, and, as will appear in a later chapter, the early supreme court had six members who had been at the convention who all utilized the power of judicial review.[167] A judicial role in the check on the legislative branch was originally conceived as part of the executive function through a

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[165] On judicial review see Madison 147, 604, 625 (Madison assumes it) and 717. In the course of debating exportation laws Madison says that "there will be the same security as in other cases. The jurisdiction of the Supreme Court must be the source of redress." See Madison 717.

[166] Madison 426. Martin summarized this nicely.

[167] These six were John Rutledge, James Wilson, John Blair, Jr., James Iredell, William Paterson and Oliver Ellsworth.

The first prominent use of judicial review by the supreme court was in Marbury v. Madison, 5 U.S. 137, 1803. This, however, was not the first use of judicial review by the Court. See Hayburn's Case 2 Dallas 409, 1792. Unfortunately Marshall's opinion does not clearly enunciate the historical justification and antecedents for the power that he asserts that the court has. Certainly part of the problem in proving that the federal courts were intended to have judicial review is that the delegates did not debate the fundamental functional power of any branch. It was assumed that the legislative branch would legislate,

council of revision, but it was ultimately deemed inappropriate to attach such a council to the presidency. The initial effort to have a council of revision was quashed by a motion from Elbridge Gerry supported by Rufus King that the judicial department not be included in a council of revision because its proper role was not as policymakers but as expositors of the law. They had "by their exposition of the laws, . . . a power of deciding on their Constitutionality."[168] This central feature of Gerry's motion—that the judiciary stand alone as the arbiter of the Constitution–went uncontested in the convention in that debate and the delegates proceeded to vest the executive with its own check of the legislative branch that did not include the judiciary. The later agreement that the president would be elected by electors rather than nominated by the legislature obviated any need of a presidential council to stand ground against the legislature. Nevertheless, James Wilson pressed again on July 21 for a council of revision that would include the judiciary. In the course of arguing over Wilson's motion, Madison, Gerry, Strong, Martin, Ghorum, Rutledge and Mason all spoke of the judges in the same vein as the "expositors of the law."[169] Mason, Martin and Gerry all spoke of the judiciary as having a "negative on the laws" as part of their power. Thus the defeat of the council of revision only seemed to cement the place of the judiciary as an independent third branch with the

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that the executive branch would execute the laws and that the judicial branch would hear cases, with the expected outcome that it might find that some did not comport with the Constitution.

[168] Madison 147. The issue was reconsidered two days later as a result of a motion from James Wilson to include the judiciary in the council of revision. Although the motion was voted down Wilson and Madison's arguments in favor of a judicial role in a council of revision rest upon an assumption that the legislative and judicial branches should be separate and that the judicial branch should have some power to check the legislative branch.

[169] Martin said that ". . . as to the Constitutionality of laws, that point will come before the Judges in their proper official character. Mason sanctions a further use of the judges than merely "in their expository capacity. . . ." He notes they could declare an "unconstitutional law void." For these and the other arguments see Madison 424-429.

power to be the arbiter of the Constitution with the power to review and exercise a negative on the laws.[170]

The method of appointment ensured that the judges would not become creatures of any state or state interests that might dominate the national legislature. This independence ultimately ensured the protection of state governance and the vigor of federal governance by insulating the expositors of the Constitution from the manipulation of factions trying to control the federal government. Many delegates at first favored a direct appointment by the legislature or the executive, who would be appointed by the legislature. Calls for this directly republican method though met too many objections because state governments might ultimately be compromised unless sufficient checks were put into place to protect state republicanism. A number of delegates argued that "Intrigue, partiality, and concealment were the necessary consequences" of legislative appointment.[171] The legislators lacked knowledge of the proper qualifications and were likely to make decisions based upon factors other than the true merit of the candidates.[172] Executive appointment alone came in for an equal amount of criticism. It was "leaning too much toward Monarchy."[173] The executive "lacked the requisite knowledge of

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But also note the opinions of Mercer and Dickenson at Madison 548-549 that "the Judges as expositors of the Constitution should [not] have authority to declare a law void."

[170] Madison did not note the opinions of Hamilton in the debate on this issue. Hamilton and John Jay both argued in The Federalist that the power of judicial review was inherent in the power of the federal courts. See Madison, Hamilton and Jay, Federalist Nos. 78-82 436-461.

[171] Madison 153.

[172] Madison 198.

[173] Madison 153.

characters" and might try to "gain over the larger States" with a preference for their citizens as appointees.[174]

Following the advice of Elbridge Gerry, that "The appointment of the judges like every other part of the Constitution should be so modeled as to give satisfaction both to the people and to the States," the delegates finally proposed having the executive appoint the judges with the advice and consent of the senate.[175] The executive would be more likely to select fit justices, and the senate concurrence would signal the support of a majority of the states.[176] This compromise was a means to gain the assent of both the people, who were the source of power, and the states. [177] Thus the president was to speak for the larger interests of the people, but this power could only be exercised with the consent of a majority of the states: two notions of republicanism within the convention, one at the national level and one at the state level had to be reconciled with each other.

The Framers also ensured that the federal courts under Article III had a secure jurisdiction over nine categories of cases and controversies. This list was comparable in purpose and function to the list of powers for congress in Article I, section 8. Article

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[174] Madison 402.

[175] Madison 431 and 400. There were a number of proposals that included the basic features of presidential appointment with the concurrence of the senate. One was a proposal that Madison supported that the executive appoint the judges with two-thirds of the senate able to veto. See Madison 430.

Executive appointment of judges was part of a sufficiently republican method and was used in a variety of states including Pennsylvania, Maryland, and Delaware. Section XLVIII of the Maryland Constitution of 1776; Section 20 of the Pennsylvania Constitution of 1776; and Article 12 of the Delaware Constitution of 1776. In North Carolina, Virginia, New Jersey and South Carolina, however, the assemblies appointed some or all of the judges. In North Carolina the general assembly appointed justices of the supreme court. See Section XIII of the North Carolina Constitution of 1776. In Virginia the general assembly appointed the judges above those at the county level. See Section 13 of the Virginia Constitution of 1776. In New Jersey and South Carolina the assemblies appointed all the judges. See Section XII of the New Jersey Constitution of 1776 and Section XX of the South Carolina Constitution of 1776.

[176] Madison 430.

[177] Madison 431.

III's grant of a self-executing jurisdiction ensured the jurisdiction; jurisdictional power flows primarily from the words of the Constitution itself rather than from a later congressional grant of power. The Constitution commands in section 2 of Article III that the "judicial power shall extend to . . ." nine categories of cases that spanned matters over which there might be national and interstate disputes. This grant not only empowered the federal courts, but also served to limit the federal courts to only specific cases and controversies. The jurisdiction strengthened the federal judiciary by preventing congress from denying cases to the federal courts in the way that state legislatures had prevented state courts from trying certain cases.

Limiting the categories of cases to a laundry list both further ensured that these cases would be heard in federal courts and also protected republican state governance by ensuring that the federal courts would not come to hear other cases that more properly litigated within the state courts. Here again, the delegates furthered the paramount task of empowering the federal government by granting to the federal courts significant cases and controversies, while also protecting state republicanism by having the courts limited to only certain categories of cases and controversies.

The delegates disagreed over the degree to which the federal judiciary and thus the federal government would be empowered through the creation of lower federal courts. The issue was an important one because it struck directly at the intersection of the empowerment of the federal government and the protection of state governments. Lower federal courts were an important component of a national government. Madison argued that state courts were inadequate to guard national interests.[178] Madison, Wilson and

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[178] Madison 391.

Dickinson argued that the federal courts ought to be commensurate with the other branches in scope; that admiralty cases and those involving foreigners ought wholly to be litigated in the courts of the national government; and that inferior courts widely dispersed would prevent meritorious appeals because the expense to reach the federal court would be prohibitive.[179] These arguments all spoke to the overriding goal of the convention: empower a national government sufficiently powerful to manage national affairs. With a supreme court but without a court system, a minority of delegates felt that the federal government would be handicapped at its inception.

Despite these arguments those who argued against mandating the creation of lower federal courts in the Constitution prevailed. Their arguments hinged upon the protection of the states: they argued that lower federal courts would prove an unnecessary intrusion in state governance. Those against creating lower federal courts argued that enforcement of powers shifted to the federal government ought to be left to be litigated in state tribunals first with an appeal to the federal court if the parties chose. As one delegate put it, the "right of appeal to the supreme national tribunal is sufficient to secure the national rights & uniformity of Judgements."[180] They argued that creating inferior tribunals was an infringement of state jurisdictions[181] and that, furthermore, the lower federal courts would be very expensive. Although the framers defeated the provision for inferior courts, a motion by Madison and Wilson saved the inferior courts with a clause

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[179] Madison 158.

[180] Madison 157.

[181] Madison 157.

that congress could create lower courts if it saw fit to do so.[182] More than the outcome, the debate itself signaled the delegates' serious treatment of handling the tension between empowering the federal government and protecting state governance. The manner in which the debate over lower federal courts was resolved indicated the delegates' determination to protect state governments and the distinctive republicanism found at the state level.

The federal judiciary joined the legislative and executive branches as the third coordinate branch of the federal government. The delegates designed Article III to empower a strong federal judiciary that would review federal laws to protect the states and state laws and to protect the federal government pursuant to a constitutionally mandated list of jurisdictions. Its judges would be an independent check on the legislative branch complete with a secure jurisdiction and the power of judicial review. Yet the delegates calibrated the nature of Article III power to ensure the continued viability of state republicanism. The list of their jurisdictions both empowered the federal courts and limited them. The delegates designed the means of appointment so that the states would have a check on the president's nominated judges. Finally, the drive for directly mandated lower federal courts had failed precisely because of the concerns that a lower federal court system would intrude on state governance.

SECTION VII

CONCLUSION

[182] Madison, Notes 158.

The prevailing literature on the Constitution portrays a convention that was shaped by cultural conservatism and doubts about both republicanism and states. Gordon Wood and Jack Rakove, two Pulitzer Prize winning historians, argue that the Founders had grown disenchanted with the republican governments at the state level by 1787. The convention then produced a counter-revolution of sorts, directed by an elite, that attempted to restrain the excesses of democracy embodied by state governments. The Constitution is for them the product of lessons learned by the Founders as they grew increasingly less sanguine about the principles of 1776 and republicanism in particular. Yet the debate simply does not bear this out.

The delegates created a federal system with the Constitution, rather than simply a national government. The system was composed of a new national government of limited and delegated powers that joined pre-existing state governments of inherent authority. The system as a whole was republican by design. Rooting the national government in republicanism was a necessity because this was the only effective means to ensure control over its increased powers. Yet the delegates did not entrust increased power to a government even though thoroughly republican in design precisely because of the "impropriety of delegating such extensive trust to one body of men . . . ." They were lead to the "necessity of a different organization" because it was "obviously impracticable to . . . provide for the interest and safety of all . . ." and "to secure all rights of independent sovereignty to each State . . . ."[183] The value of protecting state republicanism militated against the initial goal of creating a traditional republican central government and required a new formulation of power; it necessitated a balancing of

national and state republicanism in the design of the system and in the calibration of federal powers. When the delegates backed away from the republican formulation at the national level, they acted contrary to their initial impulses and not out of conservatism or fear or distrust of republicanism, but only to preserve republicanism at the state level. The mechanisms of checks and balances built into the federal government to preserve state governance were counter-majoritarian at the national level, but only to the degree the delegates thought necessary to prevent the federal government from impinging upon republican state governance.

The delegates empowered national executive, legislative and judicial branches in such a manner that the national government would be able to govern effectively over "the power of making war, peace and treaties, that of levying money and regulating commerce . . . ." These were the national concerns that were not being sufficiently managed under the Articles of Confederation. Dissatisfaction with the handling of these matters had led to the convention. The congress was an assembly for a government of limited and delegated powers designed to govern supreme over national matters without infringing on state governance. Based upon a nuanced balancing of national and state republican principles, the lower house represented the people directly and its upper house embodied the voice of the states. Its list of powers outlined in Article I, Section 8 entrusted the legislative branch with extensive powers, but only those that the delegates agreed to entrust to the legislature. Powers not on the list were not within the scope of congress unless they could be narrowly construed as a concomitant power by virtue of the necessary and proper clause, which was itself both an empowerment and a limitation.

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[183] Madison 712-713. These quotes are drawn from the letter that accompanied the Constitution when circulated to the states. The letter was agreed to by the delegates paragraph by paragraph. It did not

The mechanisms for filling the house and periodic reapportionment were also designed with the twin goals of national empowerment and state preservation in mind. Finally, a series of denials of power were outlined in Article I, Sections 9 and 10. The delegates placed these in the Constitution in an evolving process to ensure that the federal system would be protected from infringments by either the national government or the state governments.

The executive was also a result of the overriding desire to empower sufficiently the national government to deal with national matters without compromising republican state governance. The president was intended to be vigorous because of the unique requirements of governing so large a republic, yet the delegates had to calibrate his powers to ensure that he would neither prove a tool of any interest group nor become tyrannical. He would, for example, be the commander in chief but only over forces that the states maintained and officered and that congress called up and bankrolled. He was also entrusted with a qualified veto over legislative votes and resolutions so that he could stop ill-considered or unjust legislation. Even this power, though, developed within the context of federalism concerns. His election and removal also echoed the twin concerns of republican empowerment of the central government and protection of state republicanism. He was elected in a manner that was uniquely designed to avoid making him the pawn of either the people or the states.

The judiciary was the third and final branch of the national government, again distinctive for its unique combination of empowerments and limitations that marked it as a part of a government of limited and delegated powers. It bore the unique characteristics of a judiciary that was to bear its responsibility as the judicial arm of a government to

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engender debate. See the notes about the letter on page 712 and the text of the letter on page 713.

govern supreme over national matters: its judges were to be entrusted with the power of judicial review; they had a secure tenure and would be guaranteed jurisdiction over a range of cases and controversies. Yet the delegates limited the cases and controversies that the federal judges could hear to only national matters and balked at a direct mandate for the creation of lower federal courts. The value of protecting state governments was as critical to their deliberations on the judiciary as it had been when crafting the legislative and executive branches.

CHAPTER II

THE RATIFICATION DEBATES

At the conclusion of the Philadelphia Convention, supporters and opponents of the Constitution entered into a national debate whether to ratify the Constitution. Their arguments ultimately addressed those participating in the state ratifying conventions that each state convened to vote on the Constitution. Delegates chosen by the citizens decided whether their state would join in the ratification of the Constitution; nine states needed to assent for the Constitution to become operative.[1] Federalists and Anti-federalists worked in an increasingly partisan atmosphere to rally support for their nominees to the conventions and then to convince undecided delegates. The struggle for ratification was thus a national affair, but it was waged state by state, convention by convention. National figures published their pieces to a wide audience in newspapers, pamphlets, broadsides, and magazines. Local patriots, although less well organized, found ample opportunities to air their positions as they offered support to one side or the other.[2]

That part of the debate that focused on the judiciary revealed how both Federalists and Anti-federalists shared an understanding that the Constitution embodied a new federal system with a federal government of delegated powers. It would be a government different in nature rather than just different in concerns from state governments. The federal judiciary, mirroring the government of which it was to be a part, would be one of

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[1] Article VIII, Clause 1 of the United States Constitution.

[2] On the general nature of the publications see Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution (Madison: The State Historical Society of Wisconsin, 1976) preface, xvii-xxii.

limited and delegated powers: powerful within its realm but limited in scope by particularized delegations of power. Its central features were a constitutionalized, self-executing jurisdiction, the power of judicial review, and secure judgeships.[3] It would be a judiciary uniquely suited to a government of limited and delegated powers, and because it would be part of a government fundamentally different from state governments, it would predictably be empowered differently. Thus, the advocates and detractors of the Constitution exchanged pointed broadsides about the future of governments and republicanism within the context of arguments that assumed that ratification would constitutionalize the federal government's powers and thus make them rigid. Anti-federalists argued that there were insufficient limits on federal power in the proposed Constitution. Federalists defended the powers as necessary and the protections as sufficient.

The broad context of the debate was federalist in nature, each side arguing that a different quantum of power should be vested in the federal government as opposed to the state governments. The debate highlighted the fundamentally different perspectives of the Federalist and Anti-federalists about what the future held if the Constitution were ratified. The Anti-federalists charged that the Constitution erred too far on the side of consolidation and would be governed by an aristocracy.[4] They feared that the federal government, with its awesome delegated powers, would overwhelm the states. With the states reduced to corporate bodies, the general government would rule unchecked and

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[3] To say that certain features of the federal system or its governments were "constitutionalized" means that the features were cemented into the rigid structure of the Constitution and thus removed from alteration except by amendment.

[4] For good examples see Richard Henry Lee at Jensen, vol. XIV, 366 and Federal Farmer at Jensen, vol. XIV, 19-25.

would prove tyrannical.[5] The Constitution created too much government to allow the states to survive and inadequate protections to ensure republican governance once they were gone.[6]

The Federalists replied that the Constitution was the solution to the turmoil of the Confederation era.[7] It would not usurp state power because its powers were limited and delegated. It could only exercise those powers specifically granted to it and no others. Federal powers had been modulated and limited to ensure that the states--the bedrocks of liberty--would not be destroyed and would in fact prosper under the new system.[8] Furthermore, the Federalists argued, the federal government contained the necessary powers and liberty protections to govern effectively and protect republicanism.[9]

Yet in the midst of a sharp divergence of opinion about the future of republicanism based upon the amount of power that should be entrusted to a national government, the debate also revealed a broad general agreement about the nature of the proposed federal government and the federal system. Thus, although the two sides

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[5] For a good example see the Brutus pieces at Jensen, vol. XVI, 120 and 173, and Jensen, vol. XV, pages 328, 431-435 and 512.

[6] For a general overview of Anti-federalist thought see Cecelia M. Kenyon, The Antifederalists (1966, Boston: Northeastern University Press, 1985) introduction, xxi-cxxiii; Gordon Wood, The Creation of the American Republic, 1776-1787 (New York: W. W. Norton, 1969) 519-523 and; Jackson Turner Main, Antifederalists: Critics of the Constitution (Chapel Hill: University of North Carolina Press, 1961).

[7] For two good examples see Federalist no. 22 at Jensen, vol. XIV, 436; Federalist no. 37 at Jensen, vol. XV, 353; and Wilson's argument at Jensen, vol. XIV, 347.

[8] Wilson actually argued that the state governments would be elevated in importance because the federal government depended upon state governments to provide representatives, electors, and senators. See Jensen, vol. 2, 170 and 448-453. Their continued existence was critical to republican government according to Wilson in order to govern a country so large. See Jensen, Vol. II, 341. Also, see near the conclusion of Federalist no. 44 the argument that the states would "have an essential agency in giving effect to the federal Constitution." Jensen, Vol. XV, 474.

[9] For overview of Federalist position see Wood 508-513.

disagreed about what would transpire if the Constitution were ratified, they were fundamentally in agreement about the character of the governments within the proposed system. This agreement actually sharpened and focused the debate. Anti-federalist opposition was that much more determined because the nature of the proposed government, which they feared could destroy republicanism, would be constitutionalized at ratification. Federalists, because they agreed that the federal government, and therefore its branches, would rest upon limited and delegated powers, had to defend a system that was constitutionalizing the boundaries between the state and federal governments.[10]

In the course of advocating the Constitution, the Federalists offered two complimentary arguments. The first was put forward by James Wilson in a series of public and private speeches in the weeks and months after the Convention. Wilson argued that the federal system contained two fundamentally different kinds of governments that were empowered differently. As to the federal government, the nature of the specific empowerments set in place limitations that constrained its power such that it would not usurp state governance. He argued that the federal system depended upon viable state governments and that it contained sufficient checks on the limited federal government to ensure the continued prosperity of republicanism. His speech to a public gathering in the Pennsylvania State House Yard on October 6, 1787 was the first major

[10] It seems that the nature of the debate over the Constitution in which the Anti-federalists were convinced that the government being empowered by the Constitution had within it the power and means to destroy state republicanism fostered the divisive first generation of politics in which neither party accepted the legitimacy of the other. See Hofstadter for tracing the notions of illegitimacy in the seeds of party formation but not this far back. Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840 (Berkeley: University of California Press, 1969). Also see Ralph Ketcham, Presidents Above Party: The First American Presidency, 1789-1829 (Chapel Hill: University of North Carolina Press, 1984).

exposition of this argument about the Constitution and his position would be borrowed and repeated extensively.[11]

Hamilton, Madison and Jay best articulated the other part of the Federalist position in The Federalist. They argued that the federal government was a sufficiently republican government to be entrusted with its powers and that it contained enough power to govern in a liberty-enhancing manner. Their focus was on the federal government itself rather than the federal system or state governance. Their argument offered comfort to those concerned that the new national government was not sufficiently republican and would prove a tyrannical creation. The Anti-federalists argued that the Constitution would lead to the elimination of states as important governments and thus leave the central government as a tyrannical holdover. The Federalist responded to the second part of the Anti-federalist argument by emphasizing the republican nature of the central government. Because The Federalist was designed to handle the Anti-federalists' prophesies rather than the immediate situation, Wilson's argument remained the central Federalist position.[12]

The Federalists, led by Wilson, presented a novel conceptualization of what had been achieved at the convention. Wilson argued that the state and federal governments and their constitutions were fundamentally different in nature. As Wilson put it when

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[11] His speech was widely reprinted and his ideas, even if not acknowledged, were borrowed extensively by other advocates of the Constitution. As to the significance of Wilson's argument see commentary Jensen, vol. I, 26 and vol. XIII, 337. Wilson's argument was central to the Federalist defense of the Constitution. He fleshed out many of his ideas during the Pennsylvania ratifying convention which debated the Constitution from December 20-November 15, 1787 and ultimately ratified it. See Jensen, vol. II. It is not that Wilson's described something that had not been achieved at the convention. It is rather that he was the first to enunciate this overarching conceptualization about the nature of the achievement. As the previous chapter shows, the federal government was born of accommodations and compromises in the course of fusing two different strains of republicanism together within the federal system.

[12] Paul S. White, The false hypothesis of The Federalist Papers, master's thesis, (Houston: University of Houston Department of History, 1995).

explaining how the constitutions reflected the governments they empowered, ". . . [In the case of state constitutions] . . . every thing which is not reserved is given, but in the [case of the federal Constitution] the reverse of the proposition prevails, and every thing which is not given, is reserved."[13] The nature of each government resulting from each constitution was obvious: the state governments were fully empowered, rooted as they were in the general grants of power in state constitutions; the federal government was limited because its power was rooted in the "limited constitution" of 1787.[14] As Madison put it, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."[15] The distinctive empowerment of the federal government led to the first hallmark feature of the federal judiciary.

The Constitution mandated that the federal courts have a secure, constitutionalized jurisdiction that would ensure to the federal courts the power to adjudicate certain cases and controversies. The cases and controversies of Article III, Section 2, listed with some specificity, served as both an empowerment and a limitation: empowering the federal courts to hear those cases and controversies listed, but limiting the federal courts and thus the federal government to adjudicating only those matters

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[13] Jensen, vol. II, 167-168 and 470.

[14] See Federalist no. 78 in James Madison, Alexander Hamilton and John Jay, The Federalist (1788, New York: Penguin Putnam Books, 1987) 438.

[15] Federalist no. 45 at Jensen, vol. XV, 479. Wilson's conceptualization was woven into the Federalist Papers' argument. See, as an example of this, the argument for a narrow textual analysis of powers in Article I, section 8 in Federalist no. 41. See Jensen, vol. XV, 425. Wilson's conceptualization is also inherent in the analysis of the necessary and proper clause that Madison offers in Federalist no. 44. See Jensen, vol. XV, 473. Hamilton in Federalist no. 82, when discussing the concurrent jurisdiction of state courts, says, " . . . The states will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head." [Hamilton's italics] For this quote see Madison, Hamilton and Jay, 458.

detailed in the list.[16] Such a jurisdictional structure was unique and essential to a government of limited and delegated powers.

The Federalists' discussions of the jurisdiction assumed that, if the Constitution was ratified, the constitutional power vested in the federal courts carried with it the jurisdictional power to hear the cases in Article III, Section 2. The language of Article III justifies the Federalists' assumption. Article III grants power in a bifurcated way. Each of Article III, Sections 1 and 2 begins with a grant of "judicial Power," first in Section 1, to the courts and then, in Section 2, of the jurisdiction. The implication of the language is clear: the Framers understood that federal courts must have both judicial power and jurisdiction over the cases listed. One without the other would leave the judiciary emasculated; both were to be empowered from the Constitution itself.[17] When discussing the jurisdiction, the Federalists never acknowledged that the jurisdiction was Congress's to vest or that the list could be selectively vested by congress. Either or both of these

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[16] See the nine heads or categories of cases and controversies in Article III, Section 2, clause 1.

[17] This is a matter of some debate among legal scholars. Most scholars would not agree that the jurisdiction was constitutionalized at ratification. For a slightly dated but excellent summation of arguments still largely prevailing see Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," Stanford Law Review 36 (1984) 201. Some argue that congress has the power to pick and choose the cases that the federal courts can entertain from the list of cases and controversies in Article III. See Akhil Reed Amar, "The Two-Tiered Structure of The Judiciary Act of 1789," University of Pennsylvania Law Review 138 (1990) 1499. Others have argued that all the heads of jurisdiction listed in Article III, Section 2 must be within the cognizance of federal courts except trivial exceptions. See Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction," University of Virginia Law Review 132 (1984) 741.

Although congress's power is bifurcated and granted by the Constitution in the same manner as the federal courts' power is, no one disputes that the power of congress to utilize Article II, Section 8 comes from the Constitution itself and is not dependent upon the other branches for its efficacy. For many though, the power of congress to make "exceptions and regulations" to the federal courts' appellate jurisdiction confuses the matter. As evidence of confusion in this area see Leonard Ratner, "Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction," Villanova Law Review 27 (1982) 929.

For a brief period of time in the 1980s there were various attempts within congress to remove from the federal courts jurisdiction over certain matters. These included efforts to remove cases from the courts' jurisdiction having to do with school prayer, bussing, abortion, and flag burning. As to the congressional assertion of power to control the federal courts' jurisdiction see Baucus & Kay, "The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress," Villanova Law Review 27 (1982) 988.

would have been nice argumentative plums to throw to the Anti-federalists to appease them and show that popular control of the courts' jurisdiction was not being surrendered at ratification. They never did this. Their arguments, when justifying Article III, always explained the necessity of all the cases and controversies being within the realm of the federal government. As James Wilson said in defense of the jurisdiction, " . . . any thing done in convention must remain unalterable, but by the power of the citizens of the United States at large."[18] For them, defending the list of cases and controversies was the same as defending the power of the federal courts. To ratify the Constitution was to constitutionalize the jurisdiction of the federal courts.

The Federalists justified the items listed in Article III, Section 2 as necessary for the federal courts to fulfill their role within the powerful but limited federal government.[19] They defended them as a package as neither "going too far" or of "an indefinite meaning."[20] The jurisdiction contained "nothing but what is proper to be annexed to the general government."[21] They would assist the government in achieving its designed role of resolving interstate disputes, furthering national interests, and checking the other branches so that republican governance would not be threatened.[22]

The Federalist manner of outlining what the court system should be after ratification was consistent with a constitutionalized jurisdiction. All of the heads of

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[18] Jensen, vol. II, 521.

[19] In Federalist no. 80, Hamilton calls the heads of jurisdiction the "proper objects" that ensured the "proper extent of the federal judicature." See Madison, Hamilton and Jay, 445. Also see Jensen, vol. VIII, 233, 512 and 684, and vol. IX, 866.

[20] Jensen, vol. II, 517.

[21] Jensen, vol. II, 520.

[22] This argument as to these significant policy reasons is best enunciated in The Federalist. See Federalist no. 50 at Jensen, vol. XVI, 29 and Federalist no. 80 in Madison, Hamilton and Jay, 445.

jurisdiction were to be made available in the federal courts in a system of concurrent jurisdictions so that citizens of a state or subjects of a foreign country could bring their suit in either a state court or a federal court.[23] Within the federal government, at least the supreme court and, if congress chose to create them, lower federal courts would hear federal cases. Focusing on the significance for the federal government of providing an opportunity for parties to litigate national matters in a federal court, Wilson again stressed the significance of the cases and controversies that the delegates selected to place in Article III, Section 2, "[The objects of the federal jurisdiction] are extended beyond the bounds or power of every particular state, and therefore must be proper objects of the general government. I do not recollect any instance where a case can come before the judiciary of the United States, that could possibly be determined by a particular state except one [that being where citizens of the same state claim lands under the grant of different states] . . .wherefore there would be great impropriety in having it determined by either."[24] Both Wilson and Hamilton offered detailed defenses of each of the heads of jurisdiction, and showed how each category was a matter of national significance that should be handled by the national government's judiciary.[25] To justify the heads of jurisdiction in Article III as necessary to achieve limited purposes was to defend the federal courts in playing a part in a consolidated government of indefinite powers.

Federalist arguments assumed that Article III jurisdiction would be constitutionalized; the jurisdictions are rooted in the Constitution itself and therefore

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[23] Jensen, vol. II, 518-519. See more generally Wilson's speech at Jensen, vol. II, 515-521. Wilson envisioned a system of concurrent jurisdiction in which litigants could bring their cases falling within the list of Article III cases and controversies in either a state court or a federal court.

[24] Jensen, vol. II, 517-520.

[25] Jensen, vol. II, 517-520 and Federalist No. 80 at Hamilton, Madison and Jay, 445.

shielded from the manipulation by the other branches. This security buttresses the theory that the judiciary was to be equal in power and independent of the legislative or executive branches. By constitutionalizing the jurisdiction the Framers ensured a powerful third branch of the federal government that could fulfill its designed role. The Framers did this by rooting the power of federal courts and federal jurisdiction in the Constitution itself. Article III, mirroring the grants of power of Articles I and II, is self-executing, with power for the judiciary flowing from the words of the Constitution. Articles I, II and III each begin with a grant of power not dependent upon any other source for authority: Article I begins "All legislative powers herein granted shall be vested in a Congress . . . .;" Article II begins "The executive power shall be vested in a President . . . ;" and correspondingly Article III begins, "The judicial power of the United States shall be vested . . ." in courts of the United States. Thus each branch's power is singularly granted by the Constitution itself and is not dependent upon any other wellspring of authority to be operative.[26]

They moderated this mandate of jurisdictional power only slightly by allowing congress to make "such Exceptions" and "Regulations" to the federal courts' appellate jurisdiction.[27] Exactly why they did this is not specifically addressed at the constitutional

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[26] Madison explained the importance of separation of powers in Federalist nos. 47-51. His was not a textual explanation but rather a discourse on the ineffectiveness of constitutional barriers absent governmental structures that took personal motives into account. He explained that separation of powers was ensured not by barriers only written into constitutions but rather by creating governmental institutions that made use of governmental power and the personal motives of members of each branch. See also Jensen, vol. XV, 514-515. Brutus, a critic said, " . . . the judicial and executive derive their authority from the same source; that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controulable by the other, they are altogether independent of each other."

[27] I use the term 'federal courts' here in the general sense of meaning the supreme court and what lower federal courts congress would create. Article III, Section 2, clause 2 actually says that the exceptions and regulations are to the appellate jurisdiction of the supreme court. This is so because Article III only mandates the creation of the supreme court. Lower federal courts are left in the discretion of congress to

convention or in the ratification debates, but tantalizing bits of evidence indicate that they intended to allow congress a distributive power to limit appeals in some cases so that litigants would not have to endure endless appeals to increasingly distant courts.[28] Congressional power over the appellate jurisdiction was not intended to deny the federal courts cases of national significance. As Hamilton said, "The evident aim of the plan of the convention is that all the causes of the specified classes, shall for weighty public reasons receive their original or final determination in the courts of the union."[29] The exceptions that might be made from this pursuant to the exceptions and regulations clause, according to Hamilton, would be "partial inconveniences" that might arise from implementing the system.[30] Congress's power reached only as far as to limit from the federal courts those cases falling within the heads of jurisdiction that, for example, might be resolved to the general government's satisfaction at the state level. "Regulations" of the appellate jurisdiction might include such procedural matters as in which cases it would be permissible to appeal issues of law and fact. Beyond these limited occasions congress did not have power over the federal court's jurisdiction.[31]

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create pursuant to Article III, Section 1. Two kinds of cases, those involving ambassadors and those in which a state was a party, were too volatile to be trusted to any court less than the supreme court; therefore, these cases were allocated directly to the supreme court. Other cases and controversies would be subject to the exceptions and regulations that congress would impose on the appellate jurisdiction.

[28] For the thoughts of Madison and Wilson on the subject while at the convention see James Madison Notes of Debates in the Federal Convention of 1787 contained within Charles Stansill, ed., Documents Illustrative of the Formation of the Union of American States (Washington D.C.: Government Printing Office, 1927) 158.

[29] See Federalist no. 82 at Madison, Hamilton and Jay, 460. See also Oliver Ellsworth at Jensen, vol. XIV, 401 writing under the pseudonym Landholder: All the cases of the appellate jurisdiction "may in the first instance be had in the state courts and those trials be final except in cases of great magnitude." Ellsworth envisioned a court system similar to the one described by Wilson. Federal cases, according to Ellsworth, could be parceled to state courts first before allowing an appeal to the federal court system. See also Roger Sherman's comments at Jensen, vol. XIV, 388.

[30] See Federalist No. 82 at Madison, Hamilton and Jay, 450.

The Federalists argued that the federal jurisdiction was a central feature of the federal government, coextensive with federal legislative and executive power. Federalist arguments about the judiciary were noteworthy for their focus on the distinctive list of cases and controversies that the courts could entertain and also for assuming that the jurisdiction would be available to the federal courts at ratification subject only to minor exceptions permitted under the exceptions and regulations clause. Such a jurisdictional structure that defined the heads of jurisdiction and that would be constitutionalized at ratification was evidence that the federal government was a government of limited and delegated powers.

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[31] Jensen, vol. VIII, 684 and also Wilson's comments about foreign subjects at Jensen, vol. XIV, 519-520. The clearest example that Wilson intended all the cases of national significance to be litigated before federal courts involves foreign subjects. Cases involving foreign subjects fall within the last head of jurisdiction of Article III's jurisdictional list. These cases are clearly within those that the Constitution gives congress some power to effect because these cases are those within the appellate jurisdiction. The Constitution says that over these cases within the appellate jurisdiction congress may make "exceptions" and "regulations" to the appellate jurisdiction of the supreme court. Whether these words extend so far that congress might totally deny the federal courts jurisdiction over a category of cases and controversies is a matter of debate among legal scholars. Akhil Reed Amar argues that congress can completely deny from the federal courts any of the cases and controversies in the latter six heads of jurisdiction including the one Wilson here spoke of. See Akhil Reed Amar, "The Two-Tiered Structure of The Judiciary Act of 1789," Univ. of Pennsylvania Law Review, 138 (1990) 1499.

Wilson says that it was "thought proper to give the citizens of foreign states full opportunity for justice in the general courts, and this they have by its appellate jurisdiction." The reason for giving foreigners access to the federal courts was to "preserve peace with foreign nations." Wilson makes no mention of the power of congress to deny these cases to the federal courts. Congress could, however, restrict the appellate jurisdiction. What these restrictions would mean is a matter of conjecture. To make the "restrictions" consistent with Wilson's argument would limit the restrictions to those that continued to ensure a judicial resolution of claims regarding foreign subjects that maximized the reach of federal law and treaties even if this were done at the state level. To suggest that the restrictions might allow Congress to prevent any foreign subjects to sue in a federal court is inconsistent with Wilson's words and his reasoning.

See also Hugh Williamson at Jensen, vol. XVI, 202-204 as to the exceptions and regulations clause. He says that ". . . appeals . . . will never be permitted for trifling sums or under trivial pretenses . . ." Finally, also see Jensen, vol. XIV, 388 where Roger Sherman says that appeals will be limited to cases that cannot be entrusted to state courts. Thus the cases that congress would except from the appellate jurisdiction would only be those insignificant to the national government that might either consume excessive judicial resources or invite expensive appeals.

See also Jensen, vol. XVI, 440 arguing that the exceptions and regulations clause would be used to prevent oppressive and abusive appeals. Madison commented to Washington that inferior federal courts would have a final jurisdiction in some of the cases that Mason complained of in order to prevent the evils of rich litigants dragging poor ones long distances to courts. See Jensen, vol. XIII, 408. Finally on this point see Jensen, vol. XIII, 553.

The Federalists also argued that the federal judiciary would wield the power of judicial review. Born of this new kind of government at the federal level and the need to preserve state republicanism were credence and clarity for the ill-defined notions that a constitution might trump statutory law.[32] In Wilson's mind the federal Constitution occasioned a rethinking of how a constitution related to government because, contrary to the way that state constitutions broadly empowered state governments, the federal Constitution specifically empowered and therefore defined and limited governmental power. For Wilson, the very nature of the Constitution in which "particular powers of government [are] being defined" made it "paramount to the power of the legislature, acting under that Constitution."[33] This was an entirely new and radical formulation of how constitutions limited actions of a government.[34]

Federalists, Wilson in particular, then had to explain how the Constitution would be validated as superior to statutory law. To "keep the legislature within its prescribed bounds . . ." was the challenge; the Federalist answer of Wilson and Hamilton was "the interposition of the judicial department," as Hamilton said to "declare all acts contrary to the manifest tenor of the constitution void."[35] The judges would be asked to assume a

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[32] For these ill-defined notions see Wood, 273-278.

[33] Jensen, vol. II, 450.

[34] That the federal courts had the power of judicial review is stated by Hamilton in the Federalist no. 78 and then is assumed in Federalist nos. 80 and 81 See Madison, Hamilton and Jay, 438, 446 and 450. Such a conceptualization was, however, radical. Hamilton states in Federalist no. 78 that "There is no position which depends on clearer principles than that every act of a *delegated authority*, contrary to the tenor of the commission under which it is exercised, is void."[italics added] What made judicial review under the federal government an inherent power of the courts was that the legislature was operating as a "delegated authority." State governments, as we have seen, were not delegated authorities. Their power was inherent in them. Constitutions codified the empowerment of the legislatures; they did not delegate, and therefore, limit power.

[35] Jensen, vol. II, 451 and 517. See also Federalist no. 78 at Madison, Hamilton and Jay, 436.

central role in measuring legislative acts against the Constitution and declaring those contravening the Constitution unconstitutional.[36] This role included the review of state legislation that might impinge upon federal sovereignty or federal legislation that was a violation of the Constitution.[37]

At the state level, however, mechanisms to check the legislature by reference to the state constitutions were still frowned upon even as federal judges were intended to exercise judicial review to check the federal legislature or state legislature from stepping outside of their boundaries in the federal system. Federalist support for judicial review was not a blanket endorsement that all constitutions should be thought of as superior to statutory law (although later this idea of a constitution as a means to reign in a legislature would filter back to the states) but rather only a result of how the Constitution related to the federal government. Madison, for one, understood this distinction between the federal Constitution and state constitutions. At the same time that he wrote to Jefferson and advocated a check on the legislature for the federal government, he also criticized judicial review at the state level.[38] The notion that a check on the legislature would be

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[36] For more assertions that the federal courts had the power of judicial review see Jensen, vol. XIII, 424, vol. XV, 278, vol. XVI, 8, and Federalist no. 73 at Jensen, vol. XVI, 451.

[37] That the federal courts were expected to review state court decisions also see Federalist no. 50 at Jensen, vol. XVI, 503 and Federalist no. 69 at Jensen, vol. XVI, 390-391.

[38] Madison saw a difference between checking the legislature at the national level and the legislatures at the state level that was rooted in the structure of federal system and the vigilance of the state legislatures. In the course of explaining how the governments were empowered differently in Federalist no. 44, Madison said, ". . . that as every such [unconstitutional] act of the [national legislature], will be an invasion of the rights of the [state legislatures] . . ." state governments would be more vigilant to protect their power. The reason that every unconstitutional act of the national legislature would be an invasion of state governance was that the federal government was a government of limited and delegated powers. State governments were empowered differently and therefore the concept of judicial review had less credence. He made this comment about checking the national legislature in the course of explaining the limited powers of the central government. See Jensen, vol. XV, 473 and the essay more generally.

At the federal level, Madison supported a check on state legislative power by the federal government and supported a role for the judiciary in a revisionary power that would check the national

acceptable at the federal level and not the state level, which Madison justifies in part based on the different ways the governments are empowered, was simply evidence of how fundamentally different the federal Constitution and the federal government were from state constitutions and state governments.[39] Judicial review in Madison's Virginia for example was rare and controversial.[40] When the courts did rule that an action of the legislature was unconstitutional, it was done as a mechanism to invite the legislature to reconsider a law. The fundamental difference in judicial review at the state level and at the federal level derived from the fact that the governments were empowered differently. The federal government was limited and thus required the courts to measure legislative actions against the limits defined in the Constitution. Because the state constitutions empowered government generally, violations were much less likely and when they did occur they would be less explicit because they were more likely to be abridgements of general principles of law rather than explicit usurpations of power.[41] Thus, the judicial

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legislature. See Jack Rakove, ed., James Madison (New York: The Library of America, 1999) 148 and Federalist no. 51 at Jensen, vol. XVI, 43-44. See Madison 165-166.

Where Madison differed from Hamilton was in support for the ability of the judiciary to declare an act of the legislature void and unconstitutional. Madison thought that the judges should be involved in an executive council to address questionable laws so that the judiciary would not be put in the position of asserting its superiority over the legislature by declaring legislative acts unconstitutional. In 1788, Madison commented upon Jefferson's Draft of a Constitution for the State of Virginia, saying that, with respect to ". . . .State Constitutions & indeed the Federal one also . . . this [allowing "Judges to set aside the law"] makes the Judiciary Department paramount in fact to the Legislatures, which was never intended and can never by proper." See Rakove 417.

[39] See Federalist no. 32 at Madison, Hamilton and Jay 220-222.

[40] Jensen, vol. IX, 797-798 and notes.

[41] Jensen, vol. X, 1,197. Possible violations of Virginia's constitution were described as violations of general principles protected in the Virginia Bill of Rights, and yet not even all the violations had been objected to by the judiciary according to Edmund Pendleton. His examples drawn from Section 8 were of the 1776 Virginia Bill of Rights. His example of an abridgement of the Bill of Rights that the judiciary did not stop was the bill of attainder passed by the Virginia legislature against pirate Josiah Phillips. The Virginia Bill of Rights did not prohibit bills of attainder. It only outlined the rights of those accused of crimes among the other social contract rights in the Bill of Rights. Nonetheless, a bill of attainder would be an infringement of those rights in Section 8 of the Virginia Bill of Rights. See the Note about Phillips at

review that the federal courts would have was a prudential innovation required for structural reasons, not an evolutionary development or a conservative reaction.

It was not only a secure jurisdiction and judicial review that distinguished the federal courts as part of a fundamentally different government.[42] Federal judges, as Wilson described them, would be "independent;" their independence from the legislature would be secure because they would ". . . not [be] obliged to look to every session [of congress] for a continuance of their salaries . . ." and they would have a life tenure.[43] This was probably the least controversial of the three components of the federal judiciary. It required the least advocacy by the Federalists and received very little criticism by the Anti-federalists. Nevertheless, the Federalists thought it significant that the federal judges would be free from interference with either their salary or tenure. The judges' independence would free them from having to seek favor for reappointment or meddling with their salaries. It would ensure, as Hamilton noted in Federalist no. 78, the "complete

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Jensen, vol. IX, 1,004. See also Jensen, vol. X, 1,219 and 1,346 where Patrick Henry says that the Virginia courts are "liable" to declare an act of the legislature unconstitutional if it violates the Bill of Rights.

[42] Traditionally historians have seen the emergence of notions of constitutional preeminence as the outgrowth of popular frustration with governments in which there was no effective way to check ill-conceived or unconstitutional laws other than to elect new representatives. In the traditional historiography citizens were frustrated with state republican governments and reconceptualized their constitutions to make them paramount to the power of the legislatures. See Wood 273-304. According to this argument, republicanism was being curbed during the Constitution's drafting and therefore judicial review was an anti-republican mechanism that checked the legislature (and the president) through measurement of its acts against the superior law of the Constitution.

Yet, in fact, the notion of a government of limited and delegated powers preceded the emergence of well-formulated arguments of constitutional preeminence. Having conceived of a radically different governmental structure to protect republicanism at the convention, the Framers then came to an understanding that under a system governed by a Constitution that granted only limited powers, the Constitution would have to assume a new paramount role with respect to the legislature because, by its very design, it was limiting the legislature. Notions of constitutional preeminence were not the outgrowth of disaffection with republicanism, but rather a necessary outgrowth of the effort to protect republicanism within the new federal system. Later, the conceptualization of the Constitution as paramount law would filter back to the state governments and reshape how state constitutions were viewed.

[43] As to salary see Federalist no. 79 and Jensen, vol. II, 451 and 517. As to tenure see Federalist no. 78 at Madison, Hamilton and Jay 438.

independence of the courts of justice [which] is peculiarly essential in a limited constitution." This relative insulation of the judges from legislative interference was noteworthy for the degree to which it established the judiciary as a bulwark against legislative encroachments and thus protected the states and the federal system. Their independence would also enable the judges to protect minority rights of classes of citizens targeted by unjust or impartial laws. Their tenure during good behavior and continued salaries protected them from legislative manipulation and gave the judges a secure place within a co-equal branch of the federal government.

The Federalists envisioned a judicial branch that would be one of the three co-equal branches of the federal government. It would have the distinguishing features of a judiciary that was part of a government of limited and delegated powers. It would have a self-executing, constitutionalized jurisdiction that both empowered and limited the federal judiciary so that it could entertain those certain cases listed in Article III, Section 2. Its judges would have a security in tenure and salary and the power of judicial review. These three central features of the federal judiciary were distinctive to it because it was operating as part of a government of only limited and delegated powers.

Unfortunately for the Anti-federalists their appeals lacked the cohesiveness of Federalist advocacy because their arguments were largely piecemeal critiques and rebuttals. Federalists had the initiative and Anti-federalists had to fight the momentum to ratify the Constitution that resulted from simply completing the draft of the Constitution. Anti-federalists also had to overcome the sense of immediacy and urgency that the Federalists wove into their appeal. Even if imperfect, Federalists pressed for the

Constitution because it was the best available option to the outdated Confederacy and it was supported by so many prominent men who had been at the convention. Anti-federalists could only press their case by pointing out flaws in the proposed system and pleading for public support for amendments or another constitutional convention, all the while doing their best to parade the arguments of those few in Philadelphia who had refused to endorse the Constitution.

Yet, even if their overarching argument against Article III and the Constitution was not as well organized as the Federalists', the Anti-federalists clearly understood that the proposed government was supposed to be one of limited and delegated powers. Nevertheless, from the Anti-federalist perspective, the Constitution lacked sufficient protections to merit being entrusted with the powers it was proposed to wield. Wilson's argument was mere sophistry to many of them and The Federalist essays were unpersuasive.[44] All the federal government had to do was utilize the powers actually delegated in the Constitution and state governments could be destroyed.[45] Criticisms of the federal judiciary were typical of Anti-federalist critiques of the Constitution in that they made the point unceasingly that the powers delegated in the Constitution were dangerous enough. The federal judiciary, like the federal government as a whole, would be too powerful to remain liberty enhancing once it was empowered. Its constitutionalized jurisdiction, power of judicial review, and independent judiciary all would play a part in destroying state governance. The federal courts would be part of a frightful creation that would overwhelm state governments and prove tyrannical. They

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[44] Jensen, vol. XIII, 337-338 in the notes. Many Anti-federalists rejected Wilson's position out of hand.

[45] For nice examples of persuasive Anti-federalist rebuttals of Wilson's argument see Jensen, vol. XIII, 457, 524 and vol. XIV, 303.

agreed with the Federalists on the nature of the government that was proposed, but they disagreed profoundly about whether it merited being entrusted with so much power.

Both the overarching character of the Anti-federalist critique of the judiciary and those instances in which they directly addressed the unique features of Article III indicate that they believed the proposed judiciary was part of a government of limited and delegated powers. Their attacks came in two kinds and were often as notable for what they did not say as for what they did. Anti-federalists made a series of five arguments that demonstrated to their satisfaction that the judiciary as proposed would prove to be oppressive. They offered amendments to Article III to demonstrate that Article III really could be improved and made more liberty-enhancing. The amendments demonstrated their belief that their complaints about Article III, particularly the breadth found in its jurisdictions, had to be cured before ratification. Once empowered the federal courts would operate outside of congressional power to modify the jurisdiction.

The five interrelated predictions about what would transpire if the Article III courts were empowered all assumed, in the aggregate, that the courts' jurisdiction, secure tenure and pay, and a power of judicial review would be secured upon ratification. In virtually none of the Anti-federalist critiques is there mention that congress could vest federal jurisdiction or that the courts could be controlled by congress through interrupting pay or tenure once Article III was ratified. Furthermore, their arguments assumed that the federal courts would use the power of judicial review.

The most often made Anti-federalist predictions posited a future without any meaningful role for juries in civil cases. Anti-federalists argued that Article III did not

protect the trial by jury for civil actions.[46] Furthermore, even in those civil cases that would have a jury trial, Article III further crippled the ancient right of a trial by jury because the appeal would allow the federal courts to review both law and fact.[47] Secondly, the Anti-federalists argued that the federal courts would become the province of the wealthy and powerful because litigants would have to travel long distances to the federal courts.[48] The rich would simply appeal judgments they disliked to increasingly distant courts until their adversary found it too expensive to respond. Finally, these previous arguments supported even more dire predictions that the future would see the end of meaningful state governance. Anti-federalists argued that the federal judiciary would swallow all the state judicial power;[49] other Anti-federalists predicted, more

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[46] Jensen, vol. XIII, 481, 307, 405 and 461; vol. XIV, 482, 13, 40-41, 103, 82, 165, 103-105 and 127; vol. XV, 27; and vol. XVI, 445 (as to civil and criminal cases) and 53. This criticism was at times extended so far as to claim that because the factual determinations of juries were not secured the trial by jury in the community of peers was not protected. The Federalist response was to say that jury trials were not expressly protected because the states had no common practice about what cases merited jury trials. There was no way to reconcile all the different state practices. See Wilson's comments at Jensen, vol. II, 168-169. Wilson said that congress by "regulation" would resolve this issue by deciding what practices to preserve jury trials should prevail in the federal courts. See Wilson's comments at Jensen, vol. II, 576-577. Yet, the Constitution did protect jury trials in criminal cases and the practices were probably just as diverse in the criminal realm.

[47] Jensen, vol. XIII, 167, 239-240 and 509; vol. XIV, 482, 40-41 and 290; and vol. XV, 27. The Federalists responded by arguing that the appellate review of law and fact was necessary to preserve the traditional bounds of review allowed in maritime and equity cases. Jensen, vol. X, 1,399-1,400. The problem was that this Federalist rebuttal was really non-responsive. See George Mason's reply at Jensen, vol. X, 1,404. It only begged the question why the appeal of law and fact was not limited to maritime cases. Further weakening the Federalist response was the fact that even the supreme court was allowed a review of law and fact in Article III. See Article III, Section 2, clause 2. This buttressed the Anti-federalist argument that appeals as to law and fact had not really been intended to be limited to admiralty and equity cases at the convention. Anti-federalists made this point. See Jensen, vol. II, 194-196 and 632-633.

[48] Jensen, vol. XIII, 482, 239-240, 349 and 346; vol. XIV, 26 and 114-115; vol. XVI, 281, 262 and 153. Federalists replied that a range of lower federal courts would be created to facilitate federal judicial authority. These courts would be accessible to the parties. Furthermore, certain cases would have their final determination in the lower courts to prevent abusive appeals. Jensen, vol. IX, 872.

[49] Jensen, vol. XIII, 295, 330, 349, 461 and 415; and vol. XIV, 40. Federalists responded to this objection as well as the objection that the states would be overwhelmed by pointing out that the cases and controversies assigned to the federal courts were defined and limited to what was necessary for the federal

generally, that the federal judicial powers would, with other delegated powers within the Constitution, be used to overwhelm the states.[50]

In the course of these predictions the Anti-federalists revealed their understanding of Article III and its power. Only infrequently did the Anti-federalists touch directly on federal jurisdiction. Most often their arguments assumed that the jurisdiction would be vested at ratification. When they did address the jurisdiction they spoke of the jurisdiction as being decided at ratification and beyond the power of congress to alter. In the course of commenting on Article III, Anti-federalists never discussed Article III courts as dependant upon congress to vest their jurisdiction. This belief occasioned both their prophesies of doom for state governance and led to the amendments that the Anti-federalists offered to correct Article III. To have believed otherwise was to accept that congress would distribute the jurisdiction in a way that damaged state governments over the objections of the states represented in the senate. Such a result, given the composition of the senate, was obviously unlikely. Their conceptualization of Article III was clear: there would be no power in congress to pick and choose from the list of jurisdictions in a way to maximize the power of state governments. The issue was being decided in the ratification debates. The Anti-federalists assumed that the list of cases and controversies in Article III was not a list to be chosen from at some later date, but rather the extent of judicial authority to which the courts would have access to once the Constitution was ratified.

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government to achieve its purposes. See Federalist No. 80 and Wilson's defense of the jurisdictions at Jensen, vol. II, 517-520.

[50] Jensen, vol. XIII, 167 and 531-532; vol. XIV, 29, 36 and 345; and vol. XV, 29-30 and 264-265.

Typical of those pieces that assumed that the jurisdiction would vest at ratification were the letters of the Federal Farmer.[51] Part of his argument was that the judiciary was destined to play a part in a consolidated government. The author questioned the propriety of granting to the federal courts a number of the heads of jurisdiction that involve the states as litigants or involve citizens of different states. In the course of his critique he says, "the powers of the federal judiciary are extended (among other things) to . . ." the heads of jurisdiction in which the states may be a party and to suits between citizens of different states. He goes on to clarify that the federal jurisdiction over these cases will be concurrent with state courts:

> . . . and as there are no words to exclude these [state courts] of their jurisdiction in these cases, they will have a concurrent jurisdiction with the inferior federal courts in them; and, therefore, if the new constitution be adopted without any amendment in this respect, all those numerous actions, . . . may also be brought in the federal courts.

He goes on to discuss the power of congress in Article III but describes it only as a power to see "that the courts may be so organized . . . as to make the obtaining of justice in them tolerably easy."[52] Revealingly, there is no discussion of a power of congress to vest the jurisdiction.

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[51] Jensen, vol. XIII, 40. The Federal Farmer letters were widely published and some of the better Anti-federalist argumentation. See Jensen, vol. XIII, 14 for the circulation and authorship debate.

[52] The Federal Farmer's criticisms of other heads of jurisdiction reveal the same underlying assumption. Virtually all of those discussions of how the federal judiciary would play a part in a consolidated government, which are noted in the footnote 45 above, have the same underlying assumption.

Other Anti-federalist pieces attacked the jurisdiction directly as an integral part of a government that would overwhelm state governments. Typical of these Anti-federalist broadsides were the Brutus pieces in which the author sought to demonstrate that the federal government would become a consolidated government. Brutus objected to the power of Article III judges because they were truly beyond the reach of the legislature:

> . . . [T]his system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering judges independent which in the British constitution, means no more than that they hold their places during good behavior, and have fixed salaries; they have made the judges independent, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them and *they cannot be controuled by the laws of the legislature.*[53] [italics added]

Brutus thus objected to judges having a secure tenure and a protected jurisdiction that was beyond the reach of congress. Once ratified, the Constitution empowered independent judges with a secure jurisdiction. Thus, the Anti-federalists disagreed with the Federalists on the propriety of such powers being vested in the federal government but they understood that the Article III proposal included an independent judiciary with a self-executing jurisdiction.

Patrick Henry's analysis of Article III jurisdiction was also typical of those Anti-federalists who touched on the jurisdiction directly. He made his point in the course of arguing against Article III power over jury trials in civil cases. He had objected to the

[53] Jensen, vol. XVI, 431-432. See also Jensen, vol. XIII, pages 412-415 and 524-528.

lack of protection of trial by jury in civil cases. When told by Madison that the issue could be addressed in congress through the exceptions and regulations clause, Henry said that:

> . . . Congress cannot, by any act of theirs, alter this jurisdiction as established. It appears to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution . . . . When Congress by virtue of this sweeping clause, will organize these Courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void.[54]

Although directly addressing the power of congress to regulate appeals in jury trials, Henry revealed his belief that the power of congress over Article III was very limited indeed and did not extend to the ability to alter the scope of judicial power laid out in Article III. Congress could only "organize" the courts. Theirs was not a power to vest or to choose which jurisdictions to impart to federal courts.

Most Anti-federalist commentary on the independence of the judiciary reveals that they thought the judiciary would have secure tenure and salary. From the Federalist perspective, this security was necessary to insulate the federal judiciary from the other branches and state interference. Anti-federalists, however, viewed this as another part of a consolidated government. The judges would be so independent that they were beyond the reach of popular control and therefore would play a part in a consolidated

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[54] Jensen, vol. X, 1,420-1,421. See also Mason's speech at Jensen, vol. X, 1,448 in which he fends off criticism that the states are subject to a federal court jurisdiction that will diminish their importance. He argues that the states will be subject to federal jurisdiction: "It is fixed in the Constitution that they shall become parties."

government. A minority of Anti-federalists, however, came to a different conclusion. They argued less persuasively that the judges were not independent enough. Their lack of true independence made them available to be drawn into a consolidated government with the legislative or executive branches.[55] As the Federal Republican said, "The determination of property will . . . be lodged, with persons, whom, if corrupted, no dependence on the people will oblige to be just."[56] Others such as Brutus pointed to the error of giving them tenure during good behavior. Brutus argued that, in the absence of the institution of some council that could correct judicial errors, giving the judges such a secure tenure only elevated their power above that of the legislature.[57] Some even argued that the salary provision made the judges susceptible to bribery, presumably because congress could increase their pay to achieve its ends.[58]

Anti-federalists only rarely addressed the power of judicial review, but those who did argued that the federal judiciary would have the power of judicial review. They used the specter of judicial review to bolster arguments that the federal government would prove tyrannical. This power would allow the judges to assist the federal government in overwhelming the states. It also showed the degree to which the federal government itself was not republican. Most prominently, Patrick Henry, George Mason and an author

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[55] See Jensen, vol. XIV, 371. Richard Henry Lee suggested that an amendment be drafted to ensure "the complete independence of the judges." The Dissent of the Minority of the Pennsylvania Convention proposed that a constitutional council be added to the executive so that the senate would be relieved from constant attendance and the "judges be made completely independent." They argued that the judges were dependent upon the legislature for their salaries and might be offered multiple offices. See Jensen, vol. XV, 30 and also vol. XIII, 265 arguing that the judges would owe favors to the senate and the president for their nomination.

[56] Jensen, vol. XIV, 268.

[57] Jensen, vol. XVI, 431.

[58] See Jensen, vol. XVI, 240 for a satirical piece about judges' "pecuniary dependence."

writing under the pseudonym Brutus all portrayed the power of judicial review as another in the arsenal of the federal government's powers that would be used by an anti-republican government to destroy state governance.

Henry argued that the federal courts would be bound to strike down a law of congress that attempted to limit the power of the federal courts to hear appeals as to only law. Madison had argued that the damage that was being done to the right of a trial by jury because of Article III's appellate jurisdiction as to law and fact could be remedied by congress.[59] They might use their power to make exceptions and regulations to the appellate jurisdiction and limit appeals to only law. Henry replied that Madison's reading of the Constitution seemed dubious. Henry said that ". . . Congress . . . cannot depart from the Constitution; and their laws in opposition to the Constitution would be void . . . the Federal Judges, if they spoke the sentiments of independent men, would declare their prohibition [the congressional prohibition on appeals as to facts] nugatory and void."[60] What the Constitution decrees are to be powers of federal courts will remain so because of constitutional authority and no power of congress can change that. If they tried, their law would be unconstitutional and would be struck down.

Mason's assertions that the courts would have the power of judicial review were made, like Henry's, to strengthen arguments that the Constitution was setting in place a consolidated government. While there is no evidence that they did not believe that the federal courts would exercise judicial review, Mason and Henry made full rhetorical use of the argument to put the Federalists on the defensive. In Mason's case, Edmund Randolph and Mason had argued about the power of congress to pay the debt accrued

[59] Jensen, vol. X., 1,419.

[60] Jensen, vol. X, 1,420.

during the Articles of Confederation era. Mason responded to Randolph's assertion that congress might "pay off creditors with less than the nominal sum" owed by arguing that such a law would be an ex post facto law that would be struck down by the federal courts. He said that, "When this matter comes before the Federal Judiciary, they must determine according to the Constitution . . . . Will it not be the duty of the Federal Court to say that such laws are prohibited? . . . . As an express power is given to the Federal Court, to take cognizance of such controversies [suits involving the United States], and to declare null all ex post facto laws, I think Gentlemen must see there is a danger, and that it ought to be guarded against."[61] In other words, the federal courts, by virtue of express powers of jurisdictional authority were to hear the cases involving the debt of the United States and they would have the power to declare acts of the national legislature unconstitutional. Federalist responses to Mason's argument did not contradict the power of the court. They argued that his understanding of the ex post facto provision and the debt issue were flawed.

Finally, the Brutus pieces, which were recognized as some of the most competent Anti-federalist essays, assailed the federal courts for tending toward a consolidated government.[62] Among the powers that Brutus ascribed to the federal judiciary was a power to trump the national legislature through the power of judicial review.[63] This would be used along with the other elements that ensured the independency of the judiciary to "extend the power of the general government, as much as possible, to the

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[61] Jensen, vol. X, 1,361 and 1,448.

[62] Jensen, vol. XIII, 411; vol. XV, 110; and vol. XVI, 431.

[63] Jensen, vol. XVI, 73 and 433-434; vol. XV, 514.

diminution, and finally to the destruction of . . . the states."[64] Among those powers that the federal judiciary would have at its disposal to assault state governance would be judicial review: "the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature."[65]

Anti-federalists also offered amendments to Article III to cure its perceived deficiencies. Apart from the content of the amendments, the fact that they offered amendments indicates that they believed that the issue of federal judicial authority was being decided at ratification. These amendments were usually offered in concert with others that would remedy the powers assigned to the legislative branch. The fact that these branches were both the target of amendments is further proof that the Anti-federalists viewed both as being empowered in the same manner from the Constitution itself. The major amendments to the judiciary that came out of the Virginia and Pennsylvania ratifying conventions sought to limit the scope of federal jurisdiction, prevent lower federal courts other than admiralty courts, and limit the scope of appeals in non-admiralty cases.[66] Significantly, both major amendments to alter the federal court jurisdiction replicated the Article III structure of listing jurisdictions. This replication,

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[64] Jensen, vol. XVI, 72 and the Brutus XI essay at Jensen, vol. XV, 512.

[65] Jensen, vol. XVI, 73.

[66] Jensen, vol. X, 1,549-50 and 1,555. The jurisdictional amendment removed from Article III, Section 2 the jurisdiction over cases "arising under this Constitution" and the "laws of the United States." The power of congress to create lower federal courts was limited to only admiralty courts. Also the appellate review was limited to issues of law, and not facts for non-admiralty cases.

The Dissent of the Minority in Pennsylvania offered a less polished jurisdictional amendment. It, like the one in Virginia, would have narrowed the scope of federal jurisdiction. See Jensen, vol. II, 598-599 and 624-625.

again, is evidence that their intent was not to alter the fundamental nature of the federal government's limited empowerment. Rather, they only wanted to ensure that its powers would be adequately defined so that a consolidated government would not arise from its empowerments.[67]

Although Anti-federalist essays predicted a consolidated government in which the trial by jury, the independence of state courts and state governments generally would be destroyed, they understood that the proposed system was one of delegated powers that would govern national matters. They disagreed with the Federalists about the degree to which its limits would prove to be safe barriers behind which state governments could survive and thrive. They foresaw a future in which the federal government would make use of its delegated powers in concert to overwhelm the states.

Consistent with the shared understanding of Federalists and Anti-federalists that the proposed government would be fundamentally different in its power rather than simply a larger version of state governments, the debate was federalist in nature. The nature of the proposed government was not at issue, only how much power should be entrusted to it relative to the barriers that would insulate state governance from its powers. Anti-federalists and Federalists agreed on the basic terms of the federal judiciary. It would be a judiciary with a self-executing jurisdiction; its judges would have a tenure and pay that made them markedly independent; and the judges would have the power of judicial review.

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[67] There were also minor amendments to Article III that sought to ensure jury trials and to insulate further the judges from manipulation through changes in their salaries. See, respectively, Jensen, vol. X, 1,457; and vol. X, 820, 1,514 and 1,556. There was even an amendment that another court be created that states could appeal to for redress if they thought that either the federal legislature had passed unconstitutional laws or the federal judiciary had claimed jurisdiction not properly within its sphere. See Jensen, vol. X, 1,644-45.

Federalists believed that the jurisdiction would be constitutionalized at ratification. This is why their defenses of the jurisdiction never hinged on the power of congress to choose only certain cases from the list of Article III, section 2 to vest in the federal courts. Had congress had such discretion, it would have appeased the Anti-federalists and disarmed them of one of their most potent arguments, but the Federalists never made such an argument. They did not discuss congress having a power to vest the jurisdiction. They simply defended the jurisdiction as the minimal necessary to reach beyond state concerns so that the federal government would have an effective judicial arm as it governed over national matters.

Anti-federalists condemned Article III, with its jurisdiction, in its entirety. The very fact that the Anti-federalists argued that the jurisdiction as proposed would prove oppressive is evidence of their belief that the jurisdiction was self-executing. Negative evidence aside, the fact that the Anti-federalists argued that the federal judiciary, as proposed, would overwhelm the state courts indicates that they believed in a self-executing jurisdiction. The only reasonable framework for making this argument assumes that the jurisdiction of the courts would be constitutionalized at the ratification of the Constitution. The only other way that the jurisdiction could be harmful to the state courts would have been through congressional action after ratification and such action would require state-appointed senators to work directly against their state interests. Considering the implausibility of having the senate work to destroy state judiciaries, Anti-federalists believed that the proposed jurisdiction would be self-executing and that therefore the damage would be done at ratification.

Both Federalists and Anti-federalists understood that the federal courts would have secure judgeships and the power of judicial review, although Anti-federalist pieces were less consistent on the independence of the judges. Most often secure pay and tenure and the power of judicial review were assumed in the course of their arguments. Both sides appreciated the differences between the proposed federal government and pre-existing state governments. The debate was not whether these elements existed but rather the merits of placing such distinctive features in the proposed federal government. The Federalists argued that such powers were necessary for the judicial branch to rise to the level of one of the three co-equal branches. Anti-federalists saw instead more features of a consolidated government. The judges could utilize their powers pursuant to Article III to aid the ruinous plans of a tyrannical central government.

CHAPTER III

THE FIRST JUDICIARY ACT: POLICY DECISIONS WITHIN A CONSTITUTIONAL FRAMEWORK

SECTION I

A THEORY, THE PROBLEM, AND THE SCOPE OF THE CURRENT DEBATE

When James Madison took his seat in the house of representatives on March 4, 1789 it was unclear whether the "greatest exertion of human understanding" would go down in history as an act of divine provenance or as a failed experiment.[1] He could reflect upon the hard-fought struggle to ratify the new Constitution. Despite Washington's assurance in February of 1788 that the Constitution was "so little liable to well founded objections," objections there had been.[2] The ratification movement had started off smoothly enough since the first five states to consider the Constitution had ratified it convincingly. In Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut Federalists had found only minor opposition to the new federal government.[3]

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[1] John Adams, away on diplomatic assignment at the time of the Convention, said that the Constitution "if not the greatest exertion of human understanding . . . was the greatest single effort of national deliberation that the world has ever seen." Madison referred to divine intervention in Federalist no. 37 as "a finger of that almighty hand which has so frequently extended to our relief in the critical stages of the Revolution." Jefferson referred to the participants in the convention as "an assembly of demigods." See Jensen, Merrill, ed., The Documentary History of the Ratification of the Constitution (Madison, WI: The State Historical Society of Wisconsin) vol. XV 348.

[2] Washington to Layfayette on February 7, 1788. See John Rhodehamel, ed., George Washington (New York: The Library of America, 1997) 668.

[3] Delaware ratified the Constitution unanimously on Dec. 6, 1787; Pennsylvania ratified the Constitution on December 12, 1787, by a vote of 46-23; New Jersey ratified the Constitution on Dec. 16, 1787.

The growing momentum stalled in Massachusetts, however, and the debate there as well as in succeeding states culminated in a bruising ratification fight in which six of the remaining states ratified the Constitution by only the slimmest of margins and one overwhelmingly rejected it.[4] The narrow victories in Virginia and Massachusetts, two states necessary for the viability of the Union, had been gained only with the grudging compromise that there would be amendments.[5] In fact, as the speaker climbed the rostrum to gavel the first congress to order, two states had yet to join the union. North Carolina's Federalists promised a determined drive in the spring of 1789 to rescind their state's rejection and Rhode Island—little, recalcitrant Rhode Island, which had not even sent delegates to Philadelphia—had yet even to hold a convention. At least with North Carolina on board twelve states participating together in the Constitution would hopefully "form a more perfect Union."[6]

Tempering the excitement of the Federalists as the gavel sounded was the reality that the government remained to be fleshed out. The Constitution was, after all, only a blueprint for governance; the details would be filled in with precedent-setting decisions

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unanimously; Georgia voted unanimously in favor on December 31, 1787; and Connecticut ratified the Constitution on January 9, 1788, by a vote 128-40.

[4] Massachusetts voted in favor of ratification on February 5, 1788, by a vote of 187-168; Maryland voted for ratification on April 6, 1788, by a vote of 63-11; South Carolina voted on May 23 to ratify the Constitution by a vote of 149-46; on June 21, 1788, New Hampshire was the ninth state to ratify the Constitution by a vote of 57-46; Virginia followed suit and voted for ratification on June 25, 1788, by a vote of 89-79; and on July 26 New York ratified the Constitution by a vote of 30-27.

North Carolina, after initially rejecting the Constitution in July of 1788, voted to join the union on November 21, 1789; and Rhode Island joined belatedly on May 28, 1790.

[5] See Virginia's proposed amendments at Jensen, vol. X, 1,551-1,556. For Jensen's explanation about how these amendments were drafted see Jensen, vol. X, 1,512.

New York was also critical for the viability of the union. It was the geographic link between New England and the middle states, held the capital in New York City and was a major commercial hub. The eighty-five Federalist essays had been published in New York between October of 1787 and May of 1788 to help sway the public and delegates to the ratifying convention to support the Constitution.

[6] Preamble to the United States Constitution.

and a host of legislation. These first weeks and months would, as a practical matter, go a long way toward determining whether the government would in fact be constructed consistent with Federalist sympathies. Certainly the judiciary would be at the center of the debates to come in the First Congress. Complicating the difficult task of fleshing out the new government was a determined opposition composed mainly of Anti-federalists. Rather than chastened after defeat in the state conventions, opponents of the Constitution, adamant that the federal government would be a tyrannical government, began to form loyalties as they coalesced around prominent men.[7] Federalists too began to join together in what would prove to be the seeds of party. There were no parties yet; but with both sides pressing for support and convinced that the other was an illegitimate inheritor of the revolutionary ideals, divisiveness was actually solidifying rather than fading away. In this increasingly politicized environment, the house of representatives met on August 29, 1789 to create lower federal courts and allocate federal jurisdiction in the Judiciary Act of 1789.

The Constitution itself determined the contours of the debate. The judiciary had been elevated to one of the three co-equal branches of the federal government. The judiciary was supposed to be a self-executing branch of the federal government along with the legislative and executive branches. The Constitution commands the

[7] For a general understanding of the formation of parties and the notion that only alliances as a precursor to organizations that proposed candidates were forming around the time of First Congress see Chambers, Political Parties in a New Nation (1963); Joseph Charles, The Origins of the American Party System (New York: Harper & Row, 1961); Richard R. Beeman, The Old Dominion and the New Nation, 1788-1801 (Lexington, KY: University Press of Kentucky, 1972); John F. Hoadley, Origins of American Political Parties, 1789-1803 (Lexington, KY: University Press of Kentucky, 1986); Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840 (Berkeley, University of California Press, 1969); Joyce Appleby, Inheriting the Revolution: The First Generation of Americans (Cambridge: Belknap Press, 2000); and Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic (New Haven: Yale University Press, 2001).

empowerment of each branch in the first section of each of its first three articles with language that commanded the creation of the respective branch. Article I says that "all legislative power herein granted *shall be vested* . . . ."[8] Article II says that "the executive power *shall be vested* . . . ."[9] Article III completes the symmetry by empowering the judiciary with the command that "the judicial power of the United States *shall be vested* . . ." thus making it the third coordinate branch of the federal government.[10] The words were mandatory and removed any discretion: each branch of the federal government derives its power from the Constitution itself rather than from empowerment through another branch. Each command among the first three articles mandating vestment of power is self-executing: the force of the command comes only from the Constitution and does not depend upon other branches to have effect.

Article III mandates federal jurisdiction over a defined and limited set of cases and controversies. This clarity was central to the empowerment of the judiciary and consistent with the judiciary being part of a government of limited and delegated powers. Defined mandates ensured that the federal courts would have a protected jurisdiction so that they could fulfill their designated role of being an effective judicial arm of the central government.[11] The Constitution delineates the extent of the jurisdictions in Article III,

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[8] Article I, Section 1.

[9] Article II, Section 1.

[10] Article III, Section 1.

[11] The Constitutional Convention was precipitated in part by the need to enforce treaties and the law of nations, "check the quarrels between the states," and support commercial regulations. To these grievances listed by Edmund Randolph, Madison added that there was a need to provide ". . . more effectually for the security of private rights and the steady dispensation of Justice." The judicial branch also served the purpose of checking the other branches within the federal government. This significant purpose had not been envisioned when Randolph and Madison detailed the problems of the Confederation. See James Madison, Notes of Debates in the Federal Convention of 1787 contained within Charles Stansill, ed.,

Section 2: "The judicial Power *shall extend* to . . ." nine categories of cases and controversies.[12] This command ensured that the federal courts, empowered with "the judicial power of the United States," would have jurisdiction over such an array of cases that their power could have the expected result of providing an effective judicial arm for the federal government.[13] As experiences at the state level and under the Articles had shown, courts without secure jurisdictions, and therefore cases, were weak institutions.

Constitutional empowerments directly to Article III courts were not the only source of power at play as the federal judiciary was created. Article III also grants to congress a twofold role in the creation of a federal court system. Congress was, first, to organize a court system by choosing what inferior federal courts, if any, to "create."[14] Secondly, congress had a distributive role with regard to federal jurisdiction to decide where among the federal courts it created to place federal jurisdiction. This role derived

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Documents Illustrative of the Formation of the Union of American States (Washington D.C.: Government Printing Office, 1927) 115-116 and 162 and James Madison, Alexander Hamilton and John Jay, The Federalist (1788, New York: Penguin Putnam Books 1987), Federalist no. 22, 182. Also see, Madison, Hamilton and Jay, Federalist no. 78, 438 and Federalist No. 80, 445.

[12] These are listed in Article III, Section 2: 1. "all Cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"; 2. "all Cases affecting Ambassadors, other public Ministers and Consuls"; 3. "all Cases of admiralty and maritime Jurisdiction"; 4. "Controversies to which the United States shall be a Party"; 5. "Controversies between two or more States"; 6. "Controversies between a State and Citizens of another State"; 7. "Controversies between Citizens of Different States"; 8. "Controversies between Citizens of the same state claiming Lands under Grants of different States, and"; 9. "Controversies between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[13] For an argument defending vesting those heads of jurisdiction in national courts because they are important for national purposes, see James Wilson's speech at Merrill Jensen, ed., The Documentary History of the Ratification of the Constitution (Madison, WI: The State Historical Society of Wisconsin, 1976), vol. II, 517-520. See also Madison, Alexander Hamilton and John Jay, Federalist no. 80, 445.

[14] Article III, Section 1 reads in relevant part, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

from its power to make "exceptions" and "regulations" to the jurisdiction of the lower federal courts that it created. [15]

Congress utilized these powers in the course of crafting the Judiciary Act of 1789. In using its powers congress acted within its designated realm as the legislative branch of a government of limited and delegated powers. It acted pursuant to express empowerments to implement a constitutionally sound system of lower courts with a constitutionally acceptable distribution of federal jurisdiction. Debate arose because the Constitution permits a range of acceptable options about whether federal jurisdiction will be entrusted to a combination of federal and state courts or only to federal courts and also how the jurisdiction should be parceled to these courts. The final product of the debate, the Judiciary Act of 1789, allocated Article III jurisdictions in a constitutionally acceptable manner to extend the reach of federal law as deeply into society as possible within the constraints placed upon the federal government by the Constitution. To achieve the desired goal of extending the reach of federal law as greatly as possible and remain within the constitutionally defined limits, the drafters opted to allow state courts to try some significant types of cases falling within the categories listed in Article III, Section 2. Congress, for example, denied the federal courts cognizance of suits at common law in which the United States sued and the amount in dispute was less than one hundred dollars.[16] The Judiciary Act also denied the federal courts jurisdiction over

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[15] Article III, Section 2, clause 2 reads, "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

[16] Section 9, Judiciary Act of 1789.

diversity cases in which the amount in dispute was less than five hundred dollars.[17] These two categories were in a class that congress concluded were better handled in state courts that were bound by the supremacy clause to uphold the Constitution, federal laws, and treaties.

Scholars have been unable to reconcile notions of a self-executing jurisdiction of a government of limited and delegated powers with the Judiciary Act of 1789 and the jurisdictional structure organized by congress. The seeming incompatibility of a theory that makes congressional action seem unnecessary and the Judiciary Act, in which congress seems to be choosing what jurisdictions to vest, has puzzled scholars.[18] As scholars have revisited constitutional theory or questioned the constitutionality of the Judiciary Act, they have consistently misunderstood the role congress played in creating lower federal courts and in parceling out federal jurisdiction.

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[17] Section 11, Judiciary Act of 1789. Diversity cases are those in which the parties are from different states.

[18] Only a decided minority of legal scholars believe that Article III jurisdiction was self-executing. In the most widely used textbook on the subject of federal jurisdiction Paul Bator et al. state that "The judiciary article of the Constitution was not self-executing, and the first Congress in its twentieth enactment accordingly passed "An act to establish the Judicial Courts of the United States", approved September 24, 1789." See Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin and David L. Shapiro, The Federal Courts and the Federal System, 3rd ed., (New York: Foundation Press, 1988) 3. Bator's statement here is simply question-begging in light of the fact that the Constitution gives to congress a power in Article III, Section 1 to "create" federal courts. One might just as well argue that the Judiciary Act of 1789 was nothing but the exercise of a constitutional power not in dispute and not enlightening at all upon the question of whether the jurisdiction was self-executing or not.

Congress had a range of options that it could choose from in creating lower federal courts. Congress would have been acting in accord with Article III if it created no federal courts at all. This would have left the supreme court, mandated by the Constitution to exist, acting as the only federal court. Secondly, congress had a range of options as to the parceling out of federal jurisdiction that, while necessarily affected by the nature of the lower court system created, was a power separate from the power to create lower federal courts.

The relevant question is whether congress exercised a power in passing the Judiciary Act to control federal jurisdiction in accord with its own policy decisions or whether in the Judiciary Act it parceled out jurisdiction in accord with constitutional dictates that the jurisdiction "shall extend" to the Article III, Section 2 cases. The existence of a court system in and of itself is not instructive.

Academic attempts to solve the conundrum of whether federal jurisdiction was self-executing have resulted in a completely polarized debate about Article III power. Some have argued that congress had no policy options when it came to parceling out federal jurisdiction. Robert N. Clinton, for instance, argues that congress must parcel out to the federal courts jurisdiction over every case within the scope of Article III through either original or appellate jurisdiction "excluding, possibly, only those cases that congress deemed to be so trivial that they would pose an unnecessary burden on both the federal judiciary and on the parties forced to litigate in federal courts."[19]

Others have argued that congress had a broad power over the allocation of Article III jurisdictions, with the power wholly to deny the federal courts jurisdiction over some of the cases and controversies listed in Article III. Akhil Reed Amar thus argues that federal jurisdiction must encompass all cases involving federal questions (those cases in the first head of jurisdiction), admiralty, and public ambassadors and "may--but need not--extend to cases in the six other, party-defined, jurisdictional categories."[20] Amar believes that congress had the power to deny the federal courts access to six of the nine heads of jurisdiction listed in Article III.

Scholars have come to fundamentally different conclusions about the power inherent in Article III and the power of congress with regard to the jurisdiction. The Clinton position argues that the "shall" language in Article III denies congress any discretion over which of the federal jurisdictions to grant to the federal courts; the Amar

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[19] Robert Clinton, "A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III," University of Pennsylvania Law Review 132 (1984) 741. For Clinton's thesis see page 750.

[20] Akhil Reed Amar, "Article III and the Judiciary Act of 1789, The Two-Tiered Structure of The Judiciary Act of 1789," University of Pennsylvania Law Review 138 (1990) 1,499 and 1,504.

position denies both the full force of separation of powers and the constitutional command that the federal jurisdiction "shall" extend to the cases listed in Article III. Clinton denies that the Constitution allows for a range of policy options;[21] Amar denies that the judicial branch has a self-executing jurisdiction that would make it a truly co-equal branch of government.[22]

The Clinton approach fails both historical and textual scrutiny. The Clinton view, first of all, can not explain the debate over the Judiciary Act; according to Clinton's

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[21] Clinton's position would lead to a judiciary act that apportioned all federal jurisdiction necessarily to federal courts. Part of the difficulty here for Clinton's position is that he did not cast his net wide enough in studying the antecedents of Article III. What little commentary there is about the allocation of federal jurisdiction indicates that it might have been vested with state courts concurrently. Wilson, Madison and others envisioned a jurisdictional structure in which federal jurisdiction was concurrent in the state court system also. In light of this, the relevant question becomes not what *courts* must the federal jurisdiction be extended to but rather what obligation did congress manifest in the Judiciary Act to extend federal *jurisdiction* as extensively as possible to state and federal courts. If in fact they did this which I am arguing they did, they acted through the Judiciary Act of 1789 uniquely consistent with the compulsory language of Article III.

[22] Amar's position is farther off the mark than Clinton's. While he correctly notes the distinction between the first three heads of jurisdiction and the latter six, he races to a conclusion in derogation of the Framers' intent that countenances congressional control of significant federal jurisdictions so that the reach of the Constitution, federal law, and treaties would be weakened. The Framers, as I argue, considered practical matters in parceling out federal jurisdiction in 1789 so that federal jurisdiction and therefore the Constitution, federal law, and treaties would have as broad a reach as could be achieved. They sought to give as great a reach as possible to the Constitution, federal law and treaties in accordance with the constitutional command that empowering the judicial branch is compulsory. Amar's position would allow congress to strip jurisdiction from the federal courts and leave state courts to decide all cases in the latter six heads of jurisdiction even if this lessened the reach of the Constitution, federal laws and treaties.

The centerpiece of Amar's two-tiered thesis, which he says "all modern scholars of federal jurisdiction and constitutional law must engage upon pain of slaying straw," is a portion of Story's opinion in Martin v. Hunter's Lessee in which he comments upon the latter six heads of jurisdiction. See Amar 1503, footnote 9. Story said,

> A different policy might well be adopted in reference to the second class of cases; . . . they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply. It is also worthy of remark, that congress seems, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject matter, in the second, it is made materially to depend upon the value of controversy.

Amar argues that this passage is "concerned with the limits of congressional power to strip jurisdiction from federal courts." This statement is correct but does not lead to Amar's conclusion that the effective reach of the Constitution, federal laws, and treaties can constitutionally be compromised through the use of congressional power to deny federal court's jurisdiction over the second tier of cases. The Judiciary Act did deny federal courts some cases within the second tier but only with an eye to maximize the effective reach of the Constitution, federal laws and treaties. Amar's conclusion sanctions the opposite result, which is contrary to the Framers' intent and the result achieved through the Judiciary Act of 1789.

position congress had only an "allocative authority" that would be used in the creation of lower federal courts.[23] There was only one thing to do: parcel out all federal jurisdiction to the federal courts, except for a few "trivial cases."[24] Yet congress did debate a range of policy options, and the debate itself evidences an absence of the unanimity that Clinton's argument implies should have existed. The Clinton view also leads inexorably to the position that the Judiciary Act and, incidentally, all subsequent jurisdiction legislation, are unconstitutional because none of them have granted all of the jurisdiction in Article III to the federal courts with the exception only of these minor cases.[25]

Most damaging to Clinton's view is that it is not in accord with the text of the Constitution. Article III simply does not mandate the allocation of all Article III federal jurisdiction to the federal courts. The Constitution mandated that federal judicial power:

> Shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to *all* Cases affecting Ambassadors, other public Ministers and Consuls;--to *all* cases of admiralty and maritime jurisdiction;--to Controversies to which the United State shall be a Party;--to Controversies between two or more States;--between Citizens of the same State claiming Lands under the Grants of

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[23] Clinton 753.

[24] Clinton 750. Clinton argues that the truest intention of the Framers was that there be no "congressional power over the scope of federal jurisdiction of the entire federal judiciary." He argues that this exception as to trivial cases was "constructively engrafted" onto the Constitution during the ratification process. See footnote 18 at page 750.

[25] See current version at 28 U.S.C. 1976 which contains exceptions to the federal courts' jurisdiction throughout its sections.

> different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[26]

The word "all" is used selectively in the list of jurisdictions. "All" is used with the first three heads of jurisdiction which have to do with federal law, public ministers and admiralty cases. "All," however, is not used in reference to the latter six heads of jurisdiction.[27] The presence of "all" for some jurisdictions and its absence from others is evidence of the drafters' intent that every case falling within the first three heads was to be parceled out to the federal courts and that not all, but some, of the latter jurisdictions had to be allocated to the federal courts. In short, the drafters intended for congress to allocate all cases having to do directly with federal issues, public ministers, and admiralty to the federal courts and for congress to allocate some, but not necessarily all, cases having to do with the latter party-defined jurisdictions to the federal courts.[28] Clinton's

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[26] Article III, Section 2, clause 1 with the italics added.

[27] This distinction between the first three heads of jurisdiction, modified by "all," and the latter six jurisdiction that lack the word "all" was first discussed in an analysis of Article III jurisdiction written by Supreme Court Justice Joseph Story in Martin v. Hunter's Lessee at 14 U.S. (1 Wheat.) 304 (1816).

Other parts of Story's discussion suggest a conclusion other than the one Amar has reached. After a discussion that the Constitution rests upon three co-equal branches, Story also says that,

> In this, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. If the language is imperative as to one part, it is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others.

Story goes on to conclude that the Founders contemplated appellate jurisdiction being vested in state courts as well as federal courts because the appellate jurisdiction is not confined to Article III courts, and because the supremacy clause binds state judges also. See pages 308-309 of the opinion.

[28] The presence of the 'exceptions and regulations' clause further weakens Clinton's argument. One conceivable constitutional court structure would have been for federal jurisdiction to be parceled out to the state courts with cases appealable to the supreme court. The 'exceptions and regulations' clause in Article III, Section 2, clause 2 allows congress to make 'exceptions' to the supreme court's appellate jurisdiction.

position, by which congress must parcel all federal jurisdiction out to federal courts, reads "all" into the latter six and thus is unsupportable because it is simply atextual. His argument ignores the important textual distinctions between the first three subject matter jurisdictions and the last six, party defined, jurisdictions.

Amar pursues an approach fundamentally different that avoids many of the pitfalls of arguing that congress had to parcel out all of Article III jurisdictions to the federal courts. Clinton argues that congress had virtually no options in parceling out federal jurisdiction; Amar recognizes correctly that Article III gave congress choices to make, and that it was not required to parcel out all of Article III jurisdiction to federal courts. In attempting to define the bounds within which congress operated in empowering lower federal courts and allocating jurisdiction, Amar makes use of the distinction between jurisdictions denoted by "all" and those jurisdictions not denoted by "all." Amar distinguishes between these two different jurisdictional categories and concludes that congress may deny to the federal courts jurisdiction over all cases in which the United States is a party or in which a state is a party.[29] These include the latter six heads of jurisdiction. Thus Amar argues that congress has the power to deny to the federal courts jurisdiction of six of the nine heads of jurisdiction.

Amar's argument, though it avoids the shortcomings of the Clinton approach, fails to offer a reading of the text consistent with the history of Article III and the Constitution. Amar correctly argues that the "shall vest" language at the beginning of the

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Thus one possible constitutional plan would have been for federal jurisdiction to be parceled out to the state courts and then for congress to prevent some matters, although not entire categories, from being appealed to the supreme court.

[29] Congressional power to control federal jurisdiction derives from its powers to create lower federal courts, to make exceptions to the supreme court's appellate jurisdiction, and to make all laws necessary and proper for putting the judicial power into effect. See respectively United States Constitution Article III, Section 1; Article III, Section 2, clause 2; and Article I, Section 8, clause 18.

first three Articles "establish[es] three equal and co-ordinate branches of [the] federal government, each of which derives its power not from the other branches, but from the Constitution itself."[30] Yet in virtually the next breath Amar reads the Constitution to allow congress to violate the integrity of the judicial branch by denying to all federal courts jurisdiction over cases in which the United States or a state was a party.

Amar argues that the two tiers of jurisdiction in Article III (the first tier being the first three jurisdictions and the second tier being the latter six jurisdictions) do not require the same degree of imperativeness in allocation. His reading of the text is unpersuasive because it is not in agreement with the history of the Judiciary Act, which was itself drafted by many of those at the Constitutional Convention. Amar argues that the division of jurisdictions in the menu of Article III, between the first three and the latter six, was because the first three were designed to be allocated entirely to the federal courts and the latter six were merely permissive.[31] Amar thus reads "all" to mean all and the absence of "all" to mean possibly none.

Amar attempts to bolster his conclusion that congress may choose not to vest any of the latter six jurisdictions by arguing that the latter six jurisdictions "might concern only trivial subjects" and "were deemed less important" by the drafters.[32] The fact is, however, that they were not considered less important by the drafters and though they

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[30] Akhil Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," Boston University Law Review 58 (1985) 211.

[31] Amar states that "the implication of the text, while perhaps not unambiguous, is strong: although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all cases in the last six. The choice concerning the precise scope of federal jurisdiction in the latter set of cases seems to be given to Congress--an implication confirmed by the 'exceptions and regulations' and the 'necessary and proper' clauses." See Amar, "A Neo-Federalist View of Article III," 208.

[32] See Amar, "A Neo-Federalist View of Article III," 208.

might concern some trivial subjects they also necessarily included significant subjects designed to be cognizable in the federal courts.[33] Among these latter six jurisdictions that Amar argues were trivial are diversity cases, cases in which the United States is a party, and cases in which a State is a party. To minimize these cases such that they might not even be cognizable in the federal courts trivializes categories of cases that precipitated the Constitutional Convention and that were intended to be handled by the federal government.[34] The history of the development of the national judiciary into a third branch was in large part to allow the federal government to try matters respecting the United States in its own courts and to resolve conflicts between the states be they between citizens of different states or cases in which a state would be a party. Cases in the latter six jurisdictional categories were vital to the operation of the federal judiciary so that it could fulfill its appointed role.

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[33] Amar claims that "diversity jurisdiction cases implicate true federal questions with far less regularity that most serious students of federal jurisdiction—from the 1780s to the 1980s—have viewed diversity as the least essential category of federal jurisdiction." See Amar, "Article III and the Judiciary Act of 1789" 1,508. Yet proponents of the federal jurisdiction as necessary and proper for the federal government do not draw the distinction that Amar does. Diversity is listed among the necessary reasons for the national judiciary. See previous chapter footnotes 18-24 citing Hamilton, Wilson, Ellsworth and others who did not draw the distinction that Amar does. The fact that diversity cases have historically raised fewer true federal question issues is irrelevant. The diversity cases were significant to the Framers regardless of the frequency with which they raised federal question issues. In fact, their infrequency is an indication that diversity jurisdiction is serving its purpose of diminishing conflict among the states.

[34] In Federalist No. 80, Hamilton calls the heads of jurisdiction the "proper objects" that ensured the "proper extent of the federal judicature." See Madison, Hamilton and Jay 445. Hamilton would disagree with Amar. Hamilton argued that diversity jurisdiction and controversies to which a state may be a party are "not less essential to the peace of the Union than that which has just been examined [the first three heads of jurisdiction]." He goes on to say that cases involving the states as a party must be in a national tribunal to secure the privileges and immunities to citizens. "To secure the full effect of so fundamental a provision against all evasions and subterfuge . . . " it is necessary that the trial of such matters be secured in the national tribunal. See Hamilton, Madison and Jay 446-447. See Wilson's defense of the heads of jurisdiction as necessary for the national judiciary. He makes no distinction between the first three and the latter six heads of jurisdiction, at Jensen, vol. II, 517-520. Also see Jensen, vol. VIII, 233, 512 and 684 and vol. IX, 866.

Amar's argument thus offers a reading of the text uninformed by history. Amar, although purporting to support separation of powers, grants to Congress the power to remove from the federal courts cases that were important and intended to be in the federal courts. Amar thus sanctions violation of separation of powers and advances a model in which congress wields power over a central feature of the federal judiciary.

Thus far scholars have failed to offer a convincing theory that can account for the apparent contradictions between the Article III empowerments and the Judiciary Act of 1789. Theories to this point either distort the text or the history. Whether text or history is distorted, the result leads to misconceptions about the character of the federal government. The Clinton approach denies that congress could have play a role in shaping the federal courts as it parceled out federal jurisdiction; the Amar approach argues that congress had powers over the federal courts that it was never intended to wield; Amar's model is strikingly similar to the powers that assemblies enjoyed at the state level.

SECTION II

RECONCILING THE JUDICIARY ACT AND A SELF-EXECUTING JURISDICTION

Congress created the court system and jurisdictional structure within a constitutional framework determined by constitutional empowerments and limitations. These empowerments and limitations, distinctive to the federal government, distinguished it as a government of limited and delegated powers. Congress undertook the issue of creating federal courts because the Constitution ordains the establishment of

the supreme court,[35] and congress is given the power to "constitute tribunals inferior to the supreme court."[36] congress debated allocating jurisdiction because the Constitution also rests in congressional hands power over deciding how to parcel jurisdiction out to those courts that would adjudicate federal matters. Article III's blueprint for jurisdictions that "shall be vested" does not require all of each kind of case and controversy be adjudicated as a federal matter. Congress has an implied power to choose which of those cases and controversies from the latter six head of jurisdiction shall be finally decided in the federal courts. The Constitution also gives to congress power to limit appeals and make regulations governing appeals for some of the cases and controversies.[37]

Congress assumed that the Constitution mandated federal jurisdiction. Thus congress in allocating jurisdiction had to follow the Constitution, rather than its own whim in disregard of the Constitution. Its limitations in parceling out the jurisdiction marked congress as a legislative branch within a government of limited and delegated powers. Both of the plans debated in congress, the Judiciary Act of 1789 and the Courts of Admiralty Plan, which called for the creation of only the supreme court and federal courts of admiralty, gave effect to a full range of Article III power. The difference lay in how Article III power would be accessed: the Judiciary Act called for a system of federal courts accessible through original jurisdiction, whereas the Courts of Admiralty Plan called for a system in which federal jurisdiction, except for admiralty claims, would be

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[35] Article III, Section 1.

[36] Article III, Section 1.

[37] Article III, Section 2, clause 2.

accessible generally only through appeals from state courts to the supreme court.[38] In this latter plan the state courts would be the primary triers of federal matters and Article III was satisfied by providing for appeals from the states' highest tribunals to the supreme court.

The congressional debate over the Judiciary Act, both in the nature of the debate and in the court structure created, highlighted the profound differences between the federal and state governments. Congressional debate on the Judiciary Act was not the action of an assembly like those in the states, in which the assembly held the fundamental powers of a government of inherent authority. The Constitution animated congress's debate to create a court system and parcel out jurisdiction. Congress fulfilled its role within a federal government of limited and delegated powers to assist in the creation of a coordinate branch of the federal government. Congress made policy decisions about the lower court system within a range of constitutionally acceptable options, all of which gave effect to the higher law of the Constitution.

In August of 1789 Congress began a sophisticated and contentious debate over the degree to which the federal government would be empowered through a court system of its own. Congressmen viewed courts as the hands and arms of government; with courts a government could reach down into society and impose its law and will on citizens within states. Without a system of lower federal courts, states and state courts would play a

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[38] I say "generally" here because we do not know what exceptions and regulations would have been placed on the Courts of Admiralty Plan in its final form. The final form of the Judiciary Act included some exceptions to the appellate jurisdiction. Congressman Livermore, during the debate over the two plans, indicated that the Courts of Admiralty Plan would have "some regulations respecting appeals" if he had his way. See Philip B. Kurland and Ralph Lerner, eds., The Founder's Constitution, 5 vols., (Chicago: University of Chicago Press, 1987), vol. IV, 146. This cite and those that follow as footnotes to the debate are referring to the committee records in the house of representatives of that committee that considered whether to approve a resolution that the lower federal courts be limited to admiralty cases. The debate is transcribed and appears on pages 149-161 of vol. IV of Kurland and Lerner.

more central role in the lives of people and thus state governments would retain an important element of power and independence within the new federal system.

Federalists were flush with success after ratification of the Constitution, but a series of battles remained to empower the federal government in a manner consistent with their vision. The difficulty for the Federalists and the boon for those sympathetic to the Anti-federalists' position was that the federal courts had to be created in an institution that invariably requires compromise: the congress. Even though political parties did not yet exist, sides were drawn and camps formed. Debate commenced with the power of the federal courts and thus, to some extent, the relationship between state and federal power hung in the balance.

Those who debated the enactment of bills for lower federal courts assumed that Article III jurisdiction was self-executing and that the federal judiciary, because it was part of the federal government, would operate powerfully, but only within its limited and delegated realm. Congress enacted legislation on the lower federal courts and federal jurisdiction, even though it was assumed that the jurisdiction was self-executing, because congress had the opportunity to choose a court and jurisdictional structure from the range of constitutionally acceptable options. The debate in congress over a judiciary plan gave effect to the policy arguments regarding the creation of a federal court system of original jurisdiction or one primarily accessible only through appellate jurisdiction.

Congressmen assumed that Article III jurisdiction was self-executing. They debated the allocation of the federal jurisdictions among courts, not whether to vest jurisdiction. Both sides of the debate assumed that all of the jurisdiction had to be given effect in some court that would enforce the Constitution, federal laws and treaties. A

congress that thought that Article III heads of jurisdictions were theirs to vest would have treated Article III jurisdictions as a menu of possibilities and would have debated the propriety of each jurisdiction and then, perhaps, would have wholly denied some. This did not happen; there was no wide ranging debate on which of the Article III heads of jurisdiction to vest. The debate involved discussion over a relatively narrow range of options compared to the discussion one would expect if the jurisdiction was congress's to vest instead of allocate. Their actual discussion was appropriate for the allocation of jurisdiction within a government of limited and delegated powers for which the judicial power was vested by the Constitution and defined and limited by the Constitution.

The consequences for the balance between the federal and state governments that would result from partitioning or allocating different elements of the federal judicial power to certain courts were at the heart of the debate. The failure to create lower federal courts or only federal admiralty courts would have left state courts as the primary courts handling and applying federal law.[39] The concern was that even if the more numerous state courts could be easily reached, they would not handle cases involving federal law in the best interests of the federal government. Some state courts had an ignominious history of favoring their own citizens in treaty and maritime cases.[40] These aside, diversity cases and matters dealing with foreign officials might not be handled impartially. Advocates of the Courts of Admiralty Plan argued against the history of bias in treaty and maritime cases by arguing that state courts would follow the supremacy clause and apply federal

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[39] Kurland and Lerner 145: See comments of Congressman Livermore; Kurland and Lerner 148: see comment of Congressman Jackson.

[40] Kurland and Lerner 150 and Madison's comments at Kurland and Lerner 153. He refers to "the embarrassments which characterized our former situation."

law as needed.[41] If, however, lower federal courts were created there would be a greater reach of federal power consistent with the reach of federal legislative and executive power because there would be more federal courts.[42] These courts would also apply federal law more consistently.[43] If no lower federal courts were created litigants would have easy access to a court, albeit a state court, to pursue their federal claim, but it might well be a forum that favored its own citizens and ignored the supremacy clause. Litigants would have to appeal all the way to the supreme court before they could have a court other than a state court hear their claim and possibly vindicate a federal right. The problem, though, was that the creation of lower federal courts required the advocates of the Judiciary Act to argue against their republican heritage and unbridled power of popular sovereignty through state legislatures.[44] They were forced to argue that the Constitution, created in part to preserve republicanism at the state level, would be best served by having federal rather than state courts hear federal claims.

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[41] Kurland and Lerner 146. Livermore defends the Courts of Admiralty Plan by emphasizing the comprehensive nature of federal jurisdiction under its plan of jurisdictional allocation by saying that "an appeal must lie in every case" to the supreme court. See also Jackson's comments at Kurland and Lerner 148 and 153.

[42] Kurland and Lerner 149 for comments of Benson and Sedgwick. Madison at Kurland and Lerner 152-153 makes the same point that some of the federal and state legislative powers are concurrent. See also Smith's comments at Kurland and Lerner 154.

[43] Kurland and Lerner 146; See Kurland and Lerner 150-151 for Ames's comments; Kurland and Lerner 149-150 for Sedgwick's comments; Kurland and Lerner 154 for Sherman's comments; and Kurland and Lerner 157 for Vining's comments.

[44] Kurland and Lerner 149. The advocates of the Judiciary Act reconciled their advocacy of the Judiciary Act and their support for republicanism by arguing that the problem of dual sovereignty was part of the Constitution and thus compulsory for congress to accept as it fleshed out the judicial arm of the federal government. These are difficulties that arise out of the Constitution and are not the house's to debate. See Benson at Kurland and Lerner 149. He says, "The gentlemen suppose that two sovereign and independent authorities can never by exercised over the same territory; but this is not the business of the committee; they could not get rid of these difficulties by retrenching their powers; they must carry the constitution into effect." See also Sedgwick's comments at Kurland and Lerner, 149 and Smith's comments at Kurland and Lerner 154.

Advocates of the Judiciary Act assumed that the Constitution mandated a court structure in which federal cases would be cognizable in federal courts either through original or appellate jurisdiction. Working under this assumption, they advocated a court system that would ensure that the federal government would have a strong judicial arm that would be sufficiently empowered to handle cases dealing with federal law, diversity cases, treaties, and foreign officials, and that could check the legislative and executive branches of the federal government.[45] The Judiciary Act called for the creation of a full federal court structure that met the constitutional requirements laid out in Article III, Section 2 by allowing litigants to initiate cases dealing with federal law, treaties, foreign officials, and diversity cases in federal courts.

Those opposing the passage of the Judiciary Act did not advocate giving effect to less than all of the constitutionally required jurisdiction. Their plan, the Courts of Admiralty Plan, called for the creation of the supreme court and federal admiralty courts. They found constitutional and prudential concerns that supported their position and protected state interests. They were wary of a federal judiciary, and thus of a federal government, that would prove too powerful.[46] The Courts of Admiralty Plan, like the Judiciary Act, met the constitutional requirements of Article III, Section 2 by allowing

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[45] It was inherent in their arguments that congress needed to create courts and allocate jurisdiction so that the federal judiciary would be commensurate with the federal legislative and executive branches. See Smith at Kurland and Lerner 147, Sedgwick at Kurland and Lerner 149-150, Ames at Kurland and Lerner, 150-151and Madison at Kurland and Lerner 152-153. See the supporting arguments offered during the Ratification Debates at Jensen, vol. VIII, 233, 512 and 684, and vol. II, 517-520 where Wilson defends the jurisdiction as that which is necessary for the federal judiciary so that it can fulfill its role within the central government. See also Federalist No. 80, Hamilton calls the heads of jurisdiction the "proper objects" that ensured the "proper extent of the federal judicature." See Madison, Hamilton and Jay 445. Even advocates of the Courts of Admiralty Plan conceded that the Constitution had been established to police the boundaries between federal and state governments and to check the other branches. See Kurland and Lerner 151-152 as to Stone.

[46] See Kurland and Lerner 148 and 153 as to Jackson; Kurland and Lerner 151, 152 as to Stone.

state courts to adjudicate federal matters with a right of appeal from the states' highest tribunal to the supreme court.[47] Their plan in no way advocated giving effect to less than all of the Article III jurisdiction. They simply sought to rest the vast majority of the Article III jurisdictions in state courts and thus turn state courts into the courts of first instance through which federal cases would begin being litigated. But all of the different jurisdictions could find their way into a federal court, the supreme court.

All parties in the debate assumed that Article III jurisdiction was self-executing and that congress had to create a court system vested with a constitutionally acceptable jurisdictional structure. Those backing the Courts of Admiralty Plan simply differed from the majority on where the Article III jurisdiction should rest. They preferred a system in which federal cases, except for admiralty cases, would reach federal courts only after being fully litigated in state court systems.

The advocates of the Judiciary Act argued that the Constitution required the creation of lower federal courts vested with a constitutionally acceptable jurisdictional structure. The advocates relied on the first sentence of Article III to show that congress was compelled to give effect to Article III jurisdiction in only Article III lower courts of congress's creation.[48] "The judicial power of the United States *shall be vested in one Supreme Court, and in such inferior courts* as the congress may from time to time ordain or establish." [italics added] For them, the constitutional words themselves dictated that the judicial power could reside only in the supreme court and lower federal courts, not in

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[47] Kurland and Lerner 145 for Livermore's comments; and Kurland and Lerner 152 as to Stone's.

[48] Kurland and Lerner 147 for Smith; and Kurland and Lerner 151 for Ames; and Kurland and Lerner 157 as to Stone who acknowledges that this is the position of the advocates of the Judiciary Act and then argues against it.

state courts. Congress could not rest federal judicial power with state courts and was required to create lower federal courts. Thus Congressman Smith argued that this clause offers "a latitude of expression empowering congress to institute such a number of inferior courts . . . as may appear requisite. But that congress must establish some inferior courts is beyond a doubt . . . ."[49] The words "shall be vested" left "no discretion to Congress to parcel out the judicial power of the Union to state judicatures . . . ."[50] Smith said that,

> [The Constitution gives] no discretion, then in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme court and the inferior courts of the United States. It is further declared [by the Constitution] that the judicial power of the United States shall extend to all cases of a particular description . . . . If the judicial power of the United States extended to those specified cases, it follows indisputably that the tribunals of the United States must likewise extend to them.[51]

Congressman Smith thought that if congress were to give effect to federal judicial power through lower courts it could do so only in federal courts.

Congressman Gerry similarly thought that the Constitution required congress to create lower federal courts. State courts could not handle federal matters, and failure to create lower federal courts would leave no avenue of appeal to the supreme court for

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[49] Kurland and Lerner 155.

[50] Kurland and Lerner 155.

[51] Kurland and Lerner 155.

many Article III heads of jurisdiction.[52] Not only were the words of the Constitution a bar to parceling out federal jurisdiction to state courts, but, as Gerry also thought, federal jurisdiction could not be rested in state courts because the tenure and salaries of state judges were incompatible with that required for judges of an Article III nature.[53] Gerry so much believed that the jurisdiction was self-executing that he believed that the supreme court would exercise judicial review to secure its jurisdiction:

> We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequences. Gentlemen say they are willing to establish Courts of Admiralty; but what is to become of the other cases to which the continental jurisdiction is extended by the constitution? When we have established the courts as they propose, have fixed their salaries, and the Supreme Executive has appointed the Judges, they will be independent, and no power can remove them; they will be beyond the reach of the Executive or Legislative powers of this Government; they will be unassailable by the State Legislatures; nothing can affect them but the united voice of America and that only by a change of Government. They will, in this elevated and independent situation attend to their duty—their honor and every sacred tie oblige them. Will they not attend to the constitution as well as our laws? The constitution will undoubtedly be their first rule; and so far as your laws conform to that, they will attend to them, but no further. Would they then be confined by your laws within a less jurisdiction than they were authorized to take by the constitution?

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[52] Kurland and Lerner 160.

[53] Kurland and Lerner 160.

> You must admit them to be inferior courts; and the constitution positively says, that the Judicial power of the United States shall be so vested. They would then inquire what were the Judicial powers of the Union, and undertake the exercise thereof notwithstanding any Legislative declaration to the contrary; consequently their system would be a nullity, at least, which attempted to restrict the jurisdiction of inferior courts.[54]

Gerry's was an even more rigid interpretation of the Constitution's empowerments.

Some congressmen supporting the Judiciary Act argued that the constitutional words compelled not just a system of lower federal courts but the court structure embodied in the Judiciary Act or something substantially similar.[55] They simply denied the full range of policy options permissible within the constitutional framework set out in Article III. Congress could not debate effectuating Article III courts. The Constitution had already mandated the solution; any problems inherent in the Judiciary Act were constitutional problems and beyond the ability of congress to address by statute. This argument assumed that lower federal courts were compelled and thus is related to Smith's earlier constitutional arguments. It is nonetheless slightly different because of its rigidity. It revealed just how limited some members of congress viewed their role in effectuating Article III courts. Both Benson and Gerry argued that their role was simply to give effect to the Constitution: its required lower federal courts and jurisdiction alike. Benson said, "It is not to the election of the Legislature of the United States whether we adopt or not a

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[54] Kurland and Lerner 160.

[55] Kurland and Lerner 149 for Benson's comments.

judicial system like the one before us; the words in the constitution are plain and full, and must be carried into operation."[56]

Other congressmen argued that the Courts of Admiralty Plan was just as constitutional as the Judiciary Act. They argued that congress should practice restraint in creating lower federal courts,[57] and that the Constitution, far from requiring the creation of lower federal courts, gave congress the power to allocate Article III jurisdiction to state courts. They focused on the "may" language in Article III, Section 1.[58] "The judicial power of the United States shall be vested in the Supreme Court and *in such inferior courts as the Congress may from time to time ordain and establish.*" [italics added] Congressman Jackson, as was typical of those who argued this position, said, "The word 'may' is not positive, and it remains with Congress to determine what inferior jurisdictions are necessary, there is no obligation to establish them."[59] Jackson's goal in making this argument was not to limit the jurisdiction of the federal judiciary but rather to make it reachable on appellate rather than original jurisdiction. Jackson believed "that the State courts would answer every judiciary purpose."[60] Congressman Stone made a similar argument. He said that "Congress may establish such inferior [federal] courts

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[56] Kurland and Lerner 149.

[57] Kurland and Lerner 148, 151 and 158 for comments of Jackson. Jackson was willing to enlarge the jurisdiction of the lower federal courts "if our government requires it." The courts might have their jurisdiction expanded to include revenue laws also. See also Kurland and Lerner 148. Stone said, "It appears to me that the present Government originated in *necessity*, and it ought not to be carried farther than *necessity* will justify." [Stone's emphasis]

[58] Kurland and Lerner 148, 151-152 and 157. Stone argued that the words "ordain and establish" go to more than mere formation of courts but rather to the jurisdiction, modification of tribunals and control of appeals. It is not that the judicial power shall be exercised over all the cases and controversies but that the judicial power shall extend to all the cases and controversies.

[59] Kurland and Lerner 148.

[60] Kurland and Lerner 148.

when they think proper."[61] Stone argued further that the Constitution gave the states concurrent jurisdiction with the federal courts and that therefore "if they give them concurrent jurisdiction, they have the power of giving them complete [jurisdiction] . . . ."[62]

They argued that the very reason Congress was not compelled to create lower federal courts was that the Constitution envisioned the possibility of Article III jurisdictions being allocated to state courts. Congressman Stone said that except for the supreme court's original jurisdiction "I apprehend in every thing also the State courts might have had complete and adequate jurisdiction. . . ."[63] They argued that empowering state courts with federal jurisdiction would not cut off appeals to the supreme court. Appeals would simply lie from the state's highest tribunal to the supreme court.[64] The clause referring to the supreme court's appellate review makes no reference to the appeal having to come from a lower federal court.[65] Lastly, they argued that federal interests would be protected either through state court respect of the supremacy clause or through supreme court review of state court decisions. Congressman Jackson made both of these arguments. He stated that the federal government did in fact have the power to execute its own laws through the supremacy clause. If that failed, Jackson asked rhetorically,

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[61] Kurland and Lerner 151.

[62] Kurland and Lerner 152.

[63] Kurland and Lerner 151.

[64] Kurland and Lerner 145 and 146. Both Livermore and Smith agreed that as Smith said, "If the State courts are to take cognizance of those causes which, by the constitution, are declared to belong to the judicial courts of the United States, an appeal must lie in every case to the latter . . . To deny such an appeal would be to frustrate the most important objects of the Federal Government and would obstruct its operations."

[65] See Article III, Section 2, clause 2.

"But does there not remain the appellate jurisdiction of the supreme court to control [the state courts], and bring them into reason?"[66]

Both sides, even though they differed on whether Article III language enabled congress to grant Article III trials to state courts, assumed that a full range of Article III jurisdictions had to be parceled out to federal courts. The debate was not over whether to parcel the jurisdiction out or what parts to parcel out, but whether to make the jurisdictions original or only appellate. Those arguing for the Judiciary Act thought that the Constitution required federal jurisdictions to be given effect to and to be given effect in both state courts and federal courts. Those pushing for the Courts of Admiralty Plan wanted a full system of federal jurisdiction to be enacted; they wanted federal jurisdiction, except for admiralty jurisdiction, to be parceled out to state courts, the judgments of which would be subject to appeal to the supreme court. The effects would be very different for the federal system, but neither side sought to limit the reach of Article III jurisdictions.

Advocates of the Judiciary Act also argued that lower federal courts had to be created because federal judicial power could only be vested in courts with judges of an Article III nature: judges who have fixed salaries and serve during good behavior. Granting the federal judicial power to state judges would be an unconstitutional grant of Article III jurisdiction to non-Article III judges. Congressmen Ames, Madison, Gerry and Smith made this argument.[67] They differed among themselves, though, on the effect

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[66] Kurland and Lerner 153.

[67] Kurland and Lerner 150-151 for Ames; Kurland and Lerner 153 as to Madison; Kurland and Lerner 160 for Gerry; and Kurland and Lerner 147 for Smith.

that granting Article III jurisdiction would have on state judges. Madison thought that granting Article III jurisdiction to state courts would endow state judges with the privileges of Article III judges.[68] He argued that the grant to state courts of federal judicial power would likewise usurp the federal executive power of appointment by granting to state judges life tenure and fixed salaries. The power of appointment was vested with the executive and thus granting state courts federal judicial power would be unconstitutional.

Ames, Smith, and Gerry viewed the problem somewhat differently. They did not believe that granting federal judicial power to state courts would transform state judges into federal judges, but they nevertheless agreed with Madison that the different nature of judgeships prevented the allocation of federal jurisdiction to state courts.[69] Coupled with their belief that only federal judges could try cases within Article III jurisdictions, they believed that congress could not grant Article III jurisdiction to state courts. Ames argued that federal courts were necessary to try "offenses against statutes of the United States, and actions, the cognizance whereof is created de novo, are exclusively of federal jurisdiction; that no persons should act as judges to try them, except such as may be commissioned agreeably to the constitution . . . ."[70] Smith argued that federal jurisdiction could not be granted to courts with judges of a non-Article III nature because the

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[68] Kurland and Lerner 153.

[69] Kurland and Lerner 150-151. Ames argued that cases and controversies could not be tried by state judges because they are not commissioned and salaried as federal judges. If they were, they would become federal judges. Gerry at Kurland and Lerner 160 raised the objection that some state courts are prohibited from taking cognizance of, as he describes them, "foreign matters." See also Smith at Kurland and Lerner 147 with an argument similar to that of Ames.

[70] Kurland and Lerner 150.

Constitution mandated that federal judicial power be vested only in federal courts; that federal courts must have federal judges and that federal judges must hold office during good behavior and without diminution in salary. In conclusion, he asked rhetorically, "Does not, then the constitution, in the plainest and most unequivocal language, preclude us from allotting any part of the Judicial authority of the Union to the State judicature?"[71]

Advocates of the Courts of Admiralty Plan argued that the Constitution did not prevent resting federal jurisdiction in courts with judges of a non-Article III nature. Congressman Jackson argued that because the Constitution gives to congress a de facto power to have federal cases tried in state courts by not mandating the creation of lower federal courts, there must be no constitutional prohibition against granting federal jurisdiction to courts with judges of a non-Article III nature.[72] He viewed the qualifications of Article III judges as only applying to judges in those courts created by congress.[73] More frequently, though, advocates of the Courts of Admiralty Plan ignored criticisms about the status of state judges handling federal jurisdictions. The status of the state court judges was simply irrelevant because the supremacy clause, "surpassing in power any State law," forced state judges to abide by federal law, even if they did not have the protection of federal judges.[74] If they did not abide by the supremacy clause then, as Jackson said, they would forfeit their oaths.[75]

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[71] Kurland and Lerner 147.

[72] Kurland and Lerner 148.

[73] Kurland and Lerner 153-154 in which Jackson cites Sections 11 and 25 of the Judiciary Act as proof that concurrent jurisdictions were planned for and thus that state courts, with judges of a non-Article III nature, would handle federal matters.

[74] Kurland and Lerner 153.

[75] Kurland and Lerner 153.

The debate over the constitutionality of granting Article III jurisdiction to courts with judges of a non-Article III nature was a debate over policy within a constitutional framework. It was born of a Constitution that defined and limited the federal government and its branches through empowerments and limitations. Article III allowed congress a range of options about how to allocate the jurisdiction that the federal courts were empowered to handle. Both sides assumed that Article III jurisdictions were self-executing and that congress must empower courts, either federal or state, or some combination of the two to hear a full range of Article III cases. Advocates of the Judiciary Act felt that the Constitution compelled lower federal courts and prevented allocation of jurisdiction to courts with state judges. Advocates of the Courts of Admiralty Plan argued that the Constitution permitted congress to allocate federal jurisdiction to state courts and permitted congress to allocate federal jurisdiction to courts with judges of a non-Article III nature. In light of the constitutional command that the jurisdiction must be allocated, congressmen differed only over where to rest the jurisdiction. Advocates of the Judiciary Act wanted a federal government more fully empowered within its delegated realm, a federal government with a full system of federal courts that would vigorously enforce federal law. Those supporting the Courts of Admiralty Plan fought to limit empowerment of the federal government so that a degree of judicial power would remain with the states. They, like those supporting the Judiciary Act, advocated a court system that would abide by the constitutional dictate that the federal jurisdiction had to be given effect. Their plan, though, would create a less fully empowered federal government in which the state courts operated as the primary

enforcers of federal law and in which much of the Article III jurisdiction would only have been appellate.

Advocates of both the Judiciary Act and the Courts of Admiralty Plan also made overt policy arguments in support of their positions. The advocates of the Judiciary Act argued for the Judiciary Act in order to empower the judiciary sufficiently. They argued that a fully empowered judiciary was important to ensure the enforcement of federal laws. The federal judiciary was also necessary to ensure that the United States could try offenses committed against it in its courts. Lastly, some argued for the Judiciary Act so that the judiciary would have the power to match the powerful legislative and executive branches. These were common sense arguments that more than likely just fell on deaf ears. The congressmen who backed the Courts of Admiralty Plan simply did not accept the assumptions that underlay federalist arguments.

Congressmen Ames and Sedgwick argued that leaving the enforcement of congressional legislation to state courts and state judges would weaken the federal government. State courts would not enforce federal laws.[76] The federal government needed a broadly empowered federal judiciary to ensure the enforcement of its laws.[77] State judges would favor state interests because federal law was foreign to them. Congressman Sedgwick pointed out that state courts had failed to uphold the federal interest in admiralty cases and had failed to abide by the treaties with Britain in the post-Revolutionary era.[78] Congressman Ames also argued that only a strong judiciary act

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[76] Kurland and Lerner 149-150.

[77] Kurland and Lerner 150.

[78] Kurland and Lerner 150. "State after State, Legislature after Legislature, made laws and regulations in positive opposition to the treaty [with Great Britain]; and the State Judiciaries could not, or did not, decide contrary to their State ordinances."

would give the federal government the necessary power to ensure the enforcement of its laws. Ames said that the "branches of the judicial power of the United States are the admiralty jurisdiction, the criminal jurisdiction, cognizance of certain common law cases and of such as be given by the statutes of Congress."[79] Ames did not here argue that congress could vest the federal court's jurisdiction. Rather, he delineated the areas of law that gave rise to the federal judiciary's right to decide a case. In particular, the Ames language in the last clause referring to the statutes of congress referred to the "arising under" jurisdiction. He argued that only federal judges in federal courts could be trusted to try causes born of federal law.[80]

For some congressmen, the core rationale for creating lower federal courts was to allow the nation to try offenses committed against it in its own courts. Congressman Smith, for example, argued that this was the core rationale for having courts of admiralty in the Courts of Admiralty Plan. Yet he argued that this sound rationale supported the creation of more fully empowered district courts that could try and protect purely federal interests such as the breaches on land of revenue laws.[81] Smith thought this perfectly consistent with the practice under the Articles of Confederation; that practice was to protect the federal interests in Admiralty by trying the cases in a federal court.[82]

A judiciary as broadly empowered as the legislative and executive branches would ensure that the purposes of the federal government could be achieved.

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[79] Kurland and Lerner 150.

[80] Kurland and Lerner 150.

[81] Kurland and Lerner 147.

[82] Kurland and Lerner 147.

Congressmen Smith and Madison made this argument most directly. Madison pointed out that the legislative and executive powers under the Constitution were considerably more expansive than under the Articles of Confederation and that the judiciary needed to be also.[83] Those opposing the Judiciary Act argued that it would create concurrent jurisdictions in the states. Madison pointed out that this was not necessarily a problem.[84] Concurrent jurisdictions between the state and federal legislative powers were acceptable. Smith argued further that concurrent jurisdictions had operated in the states successfully, as in the collection of state, county, and corporation taxes against the same person.[85] They both argued that the Judiciary Act's creation of concurrent jurisdictions in the states was not necessarily a problem and that, in fact, this creation was unavoidable.

Congressmen who made prudential arguments in support of the Judiciary Act followed the constitutional dictate to give effect to Article III jurisdiction. Their plan, as their prudential arguments indicate, sought the creation of a federal judiciary and thus a federal government more fully empowered within its delegated realm, but nevertheless within the limits of the constitutional demarcations consistent with a government of limited and delegated powers. They wanted to give effect to Article III jurisdiction in a federal court system that would more vigorously enforce federal law than the opposition thought necessary.

Advocates of the Courts of Admiralty Plan also made policy arguments in support of their position. Their view had the state at its center and therefore they found

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[83] Kurland and Lerner 152-153. Also see arguments of Smith at Kurland and Lerner 153.

[84] Kurland and Lerner 153. Others, including Benson and Sedgwick at, respectively, Kurland and Lerner 149 and 150, also argued that the Constitution created a system of dual sovereignty.

[85] Kurland and Lerner 147.

arguments about the necessity of performing functions at the federal level unpersuasive. Their goal was to protect state interests and ensure that individuals would not be inconvenienced. Their overarching desire was to create a constitutionally acceptable court system that would only minimally intrude on state affairs. They felt that the Judiciary Act would prove to be too expensive and that a system of concurrent federal and state court jurisdictions would prove burdensome. They also felt that any lower federal court should be created only if it was absolutely necessary.

Congressmen supporting the Courts of Admiralty Plan argued that the creation of concurrent jurisdictions, by empowering lower federal courts, would prove inconvenient and ultimately oppressive. Livermore argued that lower federal courts were unnecessary because the union had been supported for over a decade without them.[86] The establishment of concurrent jurisdictions would leave parties "worried and distressed more than is necessary for the plain and simple administration of justice."[87] Burke also thought that concurrent federal and state jurisdictions would prove unappealing to the public. He foresaw the possibility that people would be harassed by dual court systems commanding people to be witnesses and jurors, plausibly at the same time and in different places.[88]

Those backing the Courts of Admiralty Plan had a preference for state court litigation and thought a much higher burden ought to be placed on the congressmen

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[86] Kurland and Lerner 145. Livermore argued that thirteen judges and their courthouses would be too expensive. Also, the two sets of courts would prove burdensome and inconvenient to the populace. Congressman Smith responded that there was little additional expense to allow admiralty courts to have a broader jurisdiction. See his arguments at Kurland and Lerner 146.

[87] Kurland and Lerner 145-146.

[88] Kurland and Lerner 152, but Burke grudgingly admitted that "he had turned himself about to find some way to extricate himself from this measure; but which ever way he turned, the constitution still stared him in the face, and he confessed he saw no way to avoid the evil." See Kurland and Lerner 153.

seeking to justify federal courts. They argued that any federal courts that were created should be absolutely necessary to the protection of a purely federal interest. They thought that the courts could be justified only if the matter they were to cover was wholly federal, in which state and federal interests were wholly incompatible, or in which states had proven hostile to general interests.[89] The only federal matter that they thought met this test was admiralty. There is no indication that they sought to deny the empowerment of other federal jurisdictions. They simply wanted the cases and controversies in Article III jurisdiction to be litigated at the state court level first and then made appealable to the supreme court.

The advocates of the Courts of Admiralty Plan were willing to accept a more broadly empowered federal judiciary if that proved necessary. Their difference with the opposition was not over whether to vest jurisdiction at all or whether to vest certain jurisdictions, but rather that as much of federal jurisdiction should be accessible only through appeals from the state highest tribunals to the supreme court until a time when state courts proved ineffective in handling original jurisdiction. Jackson was willing to vote for a more expansive court system if the federal government eventually required it. He thought it plausible that the federal government would also immediately need revenue courts.[90] Stone was willing to be convinced of the need for a more expansive system of courts than the Courts of Admiralty. His premise, though, was that any court system for

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[89] They only wanted to parcel out jurisdiction and create lower federal courts based on what was absolutely necessary. See Livermore at Kurland and Lerner 145, Jackson at Kurland and Lerner 148, and Stone at Kurland and Lerner 151. Livermore at page 146 summarized the test. Admiralty was the only type of case governed by a law that was entirely national, the law of nations. It was the only case in which congress had not had justice done to its claims and finally, the state and federal interests were incompatible.

[90] Kurland and Lerner 148.

the federal system should "originate in necessity" and go no farther.[91] If the debate had been about vesting jurisdiction, the detractors would have been very unlikely to consent to a later expansion of federal courts handling material that state courts had failed to handle properly.

Prudential arguments highlight the fundamental difference between the two sides. Federalists thought of empowering the federal government primarily and those opposing them thought first about protecting state interests. Federalists thought it imperative to empower sufficiently the federal judiciary so that it could provide a forum for trying offenses against the federal government and ensure the enforcement of federal law. Those advocating the Courts of Admiralty Plan sought to enact a minimal system of federal courts that would still be constitutionally acceptable and yet protect state interests as much as possible. They were concerned that a full system of federal courts would prove at best inconvenient and expensive, and at worst oppressive.

Limited evidence from the senate, which framed the Judiciary Act before the house debated it, indicates that the senators also argued the proper allocation of federal jurisdiction, rather than debating whether to vest the jurisdiction. Such a debate indicates that the senate as well as the house envisioned their role as a limited one. They were to allocate jurisdiction that was defined and limited by the Constitution to courts whose power and jurisdiction were rooted in the Constitution. As such they were operating not as a fully empowered government but rather as a legislature of a government of limited

[91] Kurland and Lerner 151.

and delegated powers. The sparse evidence from the senate debate indicates that the senate operated in the same mode as the house did.

Senator Maclay, a supporter of the Judiciary Act, believed that Article III jurisdiction was self-executing and that the Courts of Admiralty Plan, like the Judiciary Act, granted a full constitutional range of federal jurisdictions. The difference between the two as Maclay indicates is over whether federal jurisdiction should be primarily original or appellate. Maclay noted that

> The Bill for settling the new Judiciary was taken up . . . . But now Mr. Lee brought forward a motion nearly in the Words of the Virginia amendment, Viz. that The Jurisdiction of the Federal Courts should be confined, to cases of admiralty and Maritime Jurisdiction . . . . The Effect of the Motion was to exclude the Federal Jurisdiction, from each of the States, except in admiralty and maritime Cases. But the Constitution expressly extended it to all cases in law and equity under the Constitution the Laws of the united States, Treaties made or to be made &ca. . . . . These must be executed by the federal Judiciary.[92]

Maclay's comment indicates that he objected to Lee's amendment because he believed that the self-executing nature of Article III jurisdiction mandated the creation of lower federal courts in which those jurisdictions could be given effect. Maclay's comment also indicated that he believed that the Courts of Admiralty Plan limited the lower federal courts to admiralty and maritime cases but did not restrict other federal jurisdiction. According to Maclay, the Admiralty plan limited lower federal courts to

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[92] Linda Grant De Pauw, ed., Documentary History of the First Federal Congress, 1789-1791, vol. 9, (Baltimore: Johns Hopkins University Press) 91.

admiralty and maritime cases and sought to restrict federal encroachment in the states. Maclay understood the Admiralty plan as advocating that the federal jurisdiction would be limited only within each state as opposed to not existing at all. Thus the jurisdiction would still exist as would be constitutionally mandated and would be exercised through appeal outside of the state to the supreme court.

Senator Butler's notes also indicate that the Courts of Admiralty Plan did in fact intend for all jurisdictions to be given effect and that what was really being debated was whether federal jurisdiction would be appellate or original jurisdiction. Butler clearly understood that the creation of the courts of admiralty did not fail to allocate other federal jurisdictions but rather only restricted them to the appellate jurisdiction to the supreme court.

> Perhaps some Gentlemen will tell me that my objections extend to destroy all Centricaling [sic] power in the General Judiciary-I answer No-I would give them Appellate Jurisdiction in all Cases, And Original in Admiralty or Maritime Cases And in whatever related to the Collection of the Revenue of General Government--Everything beyond this will on trial be found delusive . . . . The Seldomer the Main Spring is Exerted to its utmost power in the longer will it retain original Strength.[93]

The arguments put forward on both sides during the debate demonstrate that the arguments were over federalism concerns. Both sides assumed that all jurisdiction of Article III had to be given effect. The force that drove the advocates of the Judiciary Act

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[93] De Pauw, vol. 9, 113.

was the potential weakness of the federal government that would result from its inability to enforce its laws. A weak system of federal courts would cause the flaws of the Articles of Confederation to re-emerge. The advocates of a more limited federal power feared the intrusion on state power of a federal judiciary with fully empowered lower courts. They thought such courts were simply unnecessary in light of the supremacy clause and that appeals would be allowed to the supreme court. The debate was over whether federal jurisdiction would be accessible originally or only after exhaustive appeals through the state system. The question was not over the extent of federal judicial power that would be enacted, but rather over the federalism implications that would result from having either a system of original federal jurisdiction or one of mainly appellate federal jurisdiction.

Congress ended debate on August 31 and voted the Judiciary Act into law.

SECTION III

THE CONSTITUTION, ARTICLE III, AND THE JUDICIARY ACT

Congressional passage of the Judiciary Act was the action of a legislature within a government of co-equal branches, each with limited and delegated powers. Even though congress debated the court system to be created, the debate proceeded within a framework determined by the Constitution's empowerments and limitations. Congress exercised designated powers to create a lower court system and to allocate the jurisdiction. It adhered to the constitutional dictates that vested the jurisdiction in federal judicial power. As such, congress, both in terms of the debate over the law and in terms

of the power allocated to the federal courts, conducted itself as part of a government of limited and delegated powers.

The Judiciary Act established a constitutionally acceptable court system and jurisdictional structure from the range of options permitted by the Constitution. The list of cases and controversies within the jurisdiction are themselves emblematic of a government of limited and delegated powers because they both empower the courts to hear those cases and also limit the courts to only those cases. The Judiciary Act of 1789 carried the constitutional empowerments and limitations governing the judiciary into its jurisdictional allocation. By doing so the court system began its operation, as the Constitution commands, as a judicial arm of a government of limited and delegated powers. Congress followed the constitutional dictates to parcel out Article III jurisdiction by allocating federal jurisdiction to the supreme court and to a congressionally created lower federal court system. In doing so, congress exercised its power to create lower federal courts and abided by the constitutional mandate to activate Article III jurisdictions.

Congress created the court system and jurisdictional structure within a constitutional framework determined by constitutional empowerments and limitations. Congress followed Article I, section 8 provisions, and Article III mandates and limitations in empowering the lower federal courts. The court system and jurisdictional structure that congress created was a constitutionally acceptable option. It was a rational, well thought out plan that gave effect to a full range of Article III jurisdiction with the ultimate design being to maximize the reach of the Constitution, federal law, and treaties.

Central to those Article III provisions that congress followed was that the jurisdiction was self-executing. The Constitution mandates that the judicial power "shall extend" to nine kinds of cases and controversies. This mandate empowered the federal courts, along with secure judgeships and fixed salaries, so that the federal courts could fulfill their role as a coordinate branch of the federal government along with the executive and legislative branches. This was the role intended for the federal courts in the constitutional plan, a plan embodied in the Constitution that also mandated that "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." and also that the "executive Power shall be vested in a President of the United States of America." Neither of these latter two constitutional commands that empower the legislative and executive branches have ever been held to require action by other branches to give them force. They are constitutional commands; they are self-executing: they derive their force from the Constitution itself. In the same way, the Constitution gives force to the judicial branch and its jurisdiction: "The judicial power of the United States shall be vested . . ." and "The judicial power shall extend . . . ." The Constitution then, and not legislation, is the source of the federal courts' jurisdictional power. The First Congress understood the nature of these commands and extended to the federal courts a range of jurisdictions comporting with the "shall" language of Article III. By operating pursuant to these constitutional commands it was operating as part of a government of limited and delegated powers.

In parceling out the jurisdiction, congress had a range of jurisdictional structures from which to choose, each of which would satisfy the Article III commands that the jurisdictions be given effect. The Constitution commands that the judicial power of the

United States "shall," meaning "must," extend to a number of different kinds of cases. Congress must allocate to the federal courts jurisdiction over all those cases falling within the first three jurisdictional categories that include cases involving federal matters, foreign officials, and admiralty issues. Congress must do this because the operative word "all" qualifies each of the first three categories, effectively denying congress the ability to deny the federal courts jurisdiction over any of those cases. As to the last six, party defined categories, congress may exercise its discretion, and allocate to the federal courts less jurisdiction than that encompassing every case falling within each of those categories. Because the word "all" does not qualify any of the latter six party defined categories, congress can decide which of the cases falling within each of the latter six categories it wishes to vest, but it must vest some substantive portion of each category in the federal courts. The absence of "all" does not permit congress to deny the jurisdictions; it only permits congress to vest less than every case to the federal courts involving aliens, interstate disputes, and cases in which the United States is a party.

The Framers intended for congress to allocate to the federal courts substantive jurisdiction within each of the latter six categories in order for the federal courts to achieve their designed aim as an arm of the federal government and as an arbiter of interstate conflicts. Far from inconsequential matters, interstate conflicts, matters in which the United States would be a party, and cases involving aliens were important subjects designed to be litigable in the federal courts.[94] These were important elements in

[94] See footnotes 18-28 in the previous chapter citing Hamilton, Wilson, Madison and others that the jurisdiction was intended to be constitutionalized and that the heads of jurisdiction were necessary and proper for the federal government so that it could try offenses against the general government, manage interstate disputes and check the other branches.

establishing the federal judiciary as an independent branch of a government of limited and delegated powers.

The Judiciary Act, in addition to the history and text of Article III, offers important clues about congressional control over Article III, the nature of an independent judiciary and, ultimately, the nature of the federal government. The Judiciary Act created a court system and jurisdictional structure with the overriding intent to maximize the reach of the Constitution, federal laws and treaties in a world in which litigants would be severely inconvenienced by travel to distant federal courts. The Judiciary Act does not evidence a congressional intent to deny the latter six jurisdictions; in fact, congress gave to the federal courts substantial jurisdiction over diversity cases and cases in which the United States would be a party. The jurisdiction from Article III that congress parceled out and the jurisdiction that congress did not parcel out are consistent with congressional intent to maximize the practical force of federal law, treaties and the Constitution, so that as many people as possible actually had their cases finally decided either in a federal court or in a state court acting pursuant to the supremacy clause. Congressional denial to the federal courts of jurisdiction was done not to weaken the federal courts, but rather to strengthen the practical effect of the Constitution, federal laws and treaties. Congress was facing the realities of 1789: a world in which laws, like the Judiciary Act, could be on the books but have little force for many litigants.

Congress allocated to the federal courts jurisdiction within the first three heads of jurisdiction such that either all of a head of jurisdiction was granted to the federal courts or enough that the party with a federal interest could have his case ultimately decided in a

federal court. Thus either the entire head of jurisdiction was granted to the federal courts or enough so that the federal courts, not state courts, would be the ultimate arbiters. The federal courts were allocated jurisdiction over "all civil causes of admiralty and maritime jurisdiction."[95] The Judiciary Act granted the supreme court jurisdiction over "all . . . suits or proceedings against ambassadors, other public ministers, or their domestics, or domestic servants."[96] This grant coupled with supreme court jurisdiction that was concurrent with the states ensured that federal courts would have final review of cases involving ambassadors if the ambassador sought it.[97] The distinction between suits brought by ambassadors and those against ambassadors was designed to give these foreign emissaries their choice of forums based upon whether they were a plaintiff or a defendant. If they were bringing suit they could pick either a federal or a state forum; if they were being sued the case had to be tried in the supreme court. This arrangement made ambassadors susceptible to suit in the United States but sought to minimize the burden they might face if sued. A similar arrangement applied for consuls and vice-consuls, altered only to accommodate the fact that consuls and vice-consuls were dispersed throughout the country. The Judiciary Act allowed consuls and vice-consuls the convenience of stopping their legal fight in a state court if they won but ensured that they could always have a federal court decide their matter if they lost in a state court. This system conserved judicial resources, eased burdens of travel on parties, and gave practical effect to federal law. Finally, the Judiciary Act granted the supreme court

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[95] Section 9 of the Judiciary Act of 1789.

[96] Section 13 of the Judiciary Act of 1789.

[97] Section 13, Judiciary Act of 1789.

jurisdiction over all cases in which a state supreme court had ruled against the Constitution, treaty or federal law.[98] This ensured that no case involving a federal right would both lose at the state level and fail to be vindicated by a federal court. No ruling in a state court against the validity of the Constitution, treaty or federal law would stand without a hearing in a federal court.

The fact remains, though, that congress did not parcel out all of the jurisdiction of Article III out to the federal courts. Congress denied the federal courts cognizance of suits at common law in which the United States sued and the amount in dispute was less than $100.[99] The Judiciary Act also denied the federal courts jurisdiction of suits where the "suit is between a Citizen of the State where the suit is brought, and a Citizen of another State" and the amount in controversy was less than $500.[100] Thus congress did not grant all of the jurisdiction in the latter six jurisdictions, but it did grant substantial elements of it.

A number of policy considerations lead congress to parcel jurisdictions in the latter six categories in the manner that it did. The policy choices that congress made were supported by sound constitutional arguments designed to give as great an effect as possible to the Constitution, federal laws and treaties. The $100 limit imposed on cases in which the United States was a party actually made federal power stronger rather than weaker. The $500 jurisdictional floor for many civil matters seems to have been implemented to ensure the most accessible and efficient justice for a group of claimants

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[98] Section 25, Judiciary Act of 1789.

[99] Section 9, Judiciary Act of 1789.

[100] Section 11, Judiciary Act of 1789.

for whom it was judged best to have a preference for state court litigation. Paterson's notes about the jurisdictional limits lend credence to this position. He noted that:

> Sum of 500 D[ollar]s.small enough—General Intercourse—
>
> No Complaint as to the Admin. of Justice—2.Sheriffs.
>
> Dep[osition]s.—but how as to the Pl[ainti]ff. Concurrent Jurisdns.—
>
> Pervade the Union—
>
> More Satisfn. to the Parties—The Farmers in the New England States not worth more than 1000Ds. on Average---[101]

Thus parties, such as New England farmers, would be best served by litigating their disputes at the state court level if the amount in dispute were less than $500.

Far from merely an intrusion upon the federal jurisdiction, the limit may have actually been what congress thought would best ensure justice for claims that fell under the $500 limit. The farmers referred to in Paterson's notes, for example, were destined to have a difficult time litigating their cases within a federal court system without jurisdictional floors. If they entered a federal court they would be concerned that the rich or persistent plaintiff could rapidly appeal the matter enough times to exhaust the poor farmer financially or simply make the lawsuit impractical to pursue by having it appealed to a federal court that could be hundreds of miles away. A good example of this kind of suit might be one for fifty dollars. If this was to be cognizable in a federal court, then the poor farmer would get his day in federal court but only if he traveled great distances. Even if victorious, however, the matter could be appealed to a more distant court which made defending his rights both financially prohibitive and too time consuming.

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[101] De Pauw, vol. 9, 481.

This interpretation of the jurisdictional limits assumes a number of things. First of all, it assumes that Paterson and others, in an effort to provide adequately for justice assumed that the state courts could be trusted to try some federal matters. Paterson apparently thought so; he noted that there is "No complaint as to the Admin. of Justice" and that there will be "More Satisfn. to the Parties."[102] Paterson might also have been attempting to respond substantively to the concern that a full system of federal courts offered an unfair advantage to the rich because the rich could exhaust the poor by pursuing endless appeals. Concerns about the advantages of rich parties surfaced in a number of states and were in fact one of the most common criticisms of Article III during the Ratification Debates.[103] The Dissent of the Minority of the Convention from Pennsylvania included the following,

> At the same time we regret the intolerable delay, the enormous expenses and infinite vexation to which the people of this country will be exposed from the voluminous proceedings of the courts of this civil law, and especially from the appellate jurisdiction, by means of which a man may be drawn from the utmost boundaries of this extensive country to the seat of the supreme court of the nation to contend, perhaps with a wealthy and powerful adversary. The consequences of this establishment will be an absolute confirmation of the power of aristocratical influence in the courts of justice.[104]

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[102] De Pauw, vol. 9, 481.

[103] Jensen, vol. XIII, 482, 239-240, 349 and 346; vol. XIV, 26 and 114-115; vol. XVI, 281, 262 and 153. Federalists replied that a range of lower federal courts would be created to facilitate federal judicial authority. These courts would be accessible to the parties. Furthermore, certain cases would have their final determination in the lower courts to prevent abusive appeals. See Jensen, vol. IX, 872.

[104] Jensen, vol. II, 80.

A similar concern was expressed during the Georgia ratifying debate:

> Countenancing the greatest injustice to be lawfully, nay constitutionally, committed by the rich against their brave fellow citizens whose only misfortune is to be, perhaps, not so rich as they, by dragging their lawsuits of any denomination and of any sum, however small, if they choose, before the GRAND TRIBUNAL OF APPEAL to which the poor will be unable to follow . . . on account of the great expenses.[105]

Thus congress might have been limiting the jurisdiction of federal courts in an effort to make justice for the common man more available.

In making exceptions in the manner that they did, congress compromised a federal court structure with full Article III jurisdiction in favor of relying on the supremacy clause. Among the most prominent type of case that this kind of rationale would address would be British creditors suing to recover their debts in reliance upon treaty provisions. Without the jurisdictional limit there would be large numbers of cases that would never be pursued because of the expense and time involved in travel to a circuit court. Of those cases that were litigated in a circuit court a number of these might never be appealed because of the expense of time and money. Thus in the end, though "all" cases and controversies in the Article III heads of jurisdiction would be cognizable in a federal court in theory, a large number of cases might in fact never reach a federal court because they were too distant and time-consuming to reach. British creditors who

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[105] Jensen, vol. III, 241-242.

wanted a quick and certain disposition of their cases through the actual application of the treaty provision would never have their rights vindicated. By placing the monetary limits on cases rooted in disputes governed by treaties, congress actually enhanced the application of the treaty provisions. Federal law and the treaties would have the fullest reach possible.

For the academic debates among legal scholars the lesson is the same as it is for historians. Deduction from the Constitution and the larger historical development as the blueprint was fleshed out shed the most light on exactly what the Framers intended for the federal system. Lawyers, just like the historians, have failed to appreciate fully the distinctive nature of the early federal system. Current legal scholarship too often either pays scant attention to the history, as in the case of Amar, or too little attention to the text, as in the case of Clinton. The result of modern scholarship on the Constitution, for lawyer has well as for historians, has been to fail to glean the distinctive nature of the early federal system. This failure, as the legal debate indicates, has profound consequences as lawyers attempt to come to grips with the first principles of the Constitution. The full import of the actions of congress in creating lower federal courts and allocating jurisdiction indicates that the federal courts were part of a unique government that was operating pursuant to limited and delegated powers. congressional action and the terms of the Judiciary Act indicate more forcefully than even Clinton posited that the jurisdictional command was compulsory and thus congress gave as full a practical reach to Article III jurisdiction as they could. Those, like Amar, who have come to view congressional power as including the vesting of federal jurisdiction have failed to appreciate the uniquely empowered federal government and the underlying history that so

compellingly supports the notion that the federal courts were designed from inception to be a powerful judicial arm of the federal government with all nine heads of jurisdiction designed to be enforced. Others, like Clinton, have failed to glean the larger historical development because they have focused too little on the text of the Constitution and the larger historical record that indicates that the Framers intended for the federal government to be a fundamentally different kind of government from state governments.

The congress of 1789 believed that the government of which it was a part and which it was fleshing out with the Judiciary Act of 1789, was fundamentally different from state governments: that the federal government was a government of limited and delegated powers that would govern along with state governments of inherent authority. Congress assumed that the federal courts would operate consistently, within their realm by having secure judgeships and a secured, constitutionalized jurisdiction. Congressmen believed that they had to give effect to the Constitution and assist in the creation of a federal judiciary with secure judgeships and jurisdiction. Difficulty arose because constitutional indefiniteness allowed for a range of acceptable options. Congress debated the issue of where to rest this jurisdiction with the winning side favoring allocation to a federal court system. The final product followed the constitutional mandates to allocate all of the jurisdictions that Article III commands to be exercised entirely in the federal courts and substantial elements of the latter six party defined jurisdictions. The federal government was still intended as a limited government of only delegated powers and would operate as such.

CHAPTER IV

ADJUDICATION WITHIN A FEDERAL SYSTEM:

THE EARLY SUPREME COURT

SECTION I

INTRODUCTION

As the supreme court opened its first session in February 1790 in the basement of the New York Merchants Exchange there was little in the way of its drab surroundings to suggest that this was the institutional voice for one of the three branches of a national government. Even though its six justices were a distinguished group, lead by John Jay and James Wilson,[1] the court seemed to have fulfilled Hamilton's prediction that it would be "the weakest of the three departments of power."[2] Only four of the six appointees were in attendance; there were no cases to hear; and the court adjourned after only seven

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[1] The first justices were John Jay as Chief Justice and Associate Justices John Blair, William Cushing, John Rutledge, Robert Harrison, and James Wilson. Harrison resigned before the Court had its first session in February of 1790. James Iredell replaced Harrison and began his service during the August term of 1790. Rutledge did not attend either the February or August terms of 1790. He resigned his appointment in March of 1791 to become the chief justice of the South Carolina court of common pleas. He received a second appointment to the supreme court in 1795 to take the place of the retiring John Jay as chief justice. Rutledge was not confirmed by the senate, however, because of his vocal opposition to the Jay Treaty. See minutes of the supreme court at pages 171-181 of Marcus and Perry, eds., Documentary History of the Supreme Court of the United States, 1789-1800, 5 vols. (Knopf: New York, 1985). See biographical notes at Marcus and Perry, vol. 1, 17.

[2] See Hamilton in Federalist no. 78 in Isaac Kramnick, ed., The Federalist Papers (New York: Penguin Putnam Books, 1987) 437.

days.[3] The first session was no anomaly; the court's docket would remain virtually empty for its first years.[4] Most of the work that the justices did do was occupied as trial judges in circuit courts that brought with it the arduous chore of traveling their circuits six months out of the year through, as James Iredell described it, "so much barren land."[5] Yet, for all the drudgery and the drab surroundings, the supreme court and lower federal courts were indeed the third coordinate branch of the federal government. How the judges of the federal courts conducted their business would speak as powerfully as the acts of congress or the actions of the president about the character of the new federal government.

Both their rulings and the reasoning that supported them indicate that the federal courts were in fact operating within a government of limited and delegated powers. The federal courts accessed constitutional grants of authority refined by congressional directives as the powerful judicial arm of the federal government. In addition to bolstering the federal government in its governance over national matters, the courts filled their designated role as part of a federal government that managed interstate disputes. The courts adhered to constitutional and congressional limits on their jurisdiction and on the substantive law available to them to decide cases. These limitations served the important federal purpose of insulating the federal government and its judicial arm from state governance and local majority will.

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[3] I am actually referring to the second day of the first session. The very first day of the first session was truly anticlimactic. With only three justices in attendance on that first auspicious day, the court had to be adjourned because there was not even a quorum of the justices present to conduct business.

[4] See Marcus and Perry, vol. 1, 483-493. There were no cases filed with the Supreme Court in 179, and only two in 1791.

[5] Marcus and Perry, vol. 2, 65-66.

Federal court adjudication also highlighted the differences in the scope and nature of state and federal power because federal courts had constitutional and statutory directives to use state judicial power for some cases and federal judicial power for other cases. Federal courts handled these two settings differently because the governments of which the judicial powers were a part were fundamentally different in nature. Federal and state judicial power differed both in the nature of their jurisdictions, or power to hear cases, and in the law that could be used to resolve cases.

When federal judges utilized federal judicial powers they adjudicated as part of a federal government of limited and delegated powers only. Jurisdiction and substantive law used pursuant to federal judicial power differed from that used pursuant to state judicial power. Article III of the Constitution mandates federal court jurisdiction. This mandate serves as a limitation on federal power by preventing federal courts from trying cases not on the list. The mandate also ensures that all categories of cases and controversies on the list can be tried in the federal court system. The list thus both empowers federal courts to hear cases and also limits possible efforts to expand the reach of the federal courts. Federal judges using federal judicial power resolved cases using only the Constitution, federal law, and bodies of law to which they had access pursuant to statutory directive. Federal courts did not have a general access to general principles to decide cases in the way that state courts did because the Constitution, creating only a limited government, does not grant such a power to the federal courts.

When directed to operate as a direct substitute for state courts pursuant to constitutional and statutory authority, federal judges adjudicated as if they were part of fully empowered governments of inherent authority; in essence, they adjudicated as state

courts would. They adhered to state jurisdictional principles and relied upon bodies of law that normally only state courts could properly access. Exercising state court powers, federal judges used applicable federal law, state law, and general principles of law to resolve cases. The federal courts treated state and federal judicial power differently because of the different nature of the state and federal governments.

The federal courts not only adjudicated within a distinctive federal system with two different kinds of government, they expressly said that they were doing so. Thus, in both substance and rhetoric, the federal courts fulfilled their designated role and bolstered a federal system that enabled the federal government to govern over the national matters better left to a limited national government while fostering and protecting republicanism.

The historiography on the early federal courts fails to account for the different jurisdictional settings in which the courts adjudicated. It, also, does not offer an overall analysis of the early adjudication of the federal courts; there is no attempt to glean what overarching principles governed the operation of the federal courts and how these relate to the larger structure of the Constitution. The focus has been on specific areas of interest such as federal common law crimes and the Tenth Amendment with very little attention to the courts' operation within the broader context of constitutional or statutory guidelines. The results of studying these specific areas has been a failure to appreciate that the federal courts adjudicated pursuant to constitutional dictates that delineated a number of adjudicatory settings for federal litigation. In following these constitutional directives the courts were operating within a government of delegated powers.[6]

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[6] Robert C. Palmer, Liberties as Constitutional Provisions, in William E. Nelson and Robert C. Palmer, Liberty and Community: Constitution and Rights in the Early American Republic (New York: Oceana Publications, Inc., 1987) and Robert C. Palmer, "The Federal Common Law of Crime," Law and History Review 4 (1986): 267.

SECTION II

CONGRESSIONAL POWER PRIOR TO THE CONSTITUTION

The federal courts handled those cases related to state and federal power prior to the Constitution by adjudicating in a different framework of empowerments than the courts had under the Constitution of 1787. In analyzing congressional power prior to the Constitution, the supreme court construed national power narrowly. It maintained that the basis of national power that congress exercised prior to the Constitution of 1787 was derived from the states by implication and the dire situation in which the newly formed states found themselves during the revolution. The states were sovereign states that retained powers to govern their internal matters and powers over many elements of external sovereignty. Justice Paterson [7] stood alone on the court in this area of adjudication; he held that congressional power was preeminent and both more extensive and more firmly rooted in authority from the people themselves than the other justices found.

The court's manner of reaching these conclusions indicated that it was adjudicating as part of a government of delegated powers within a federal system. The court understood its role within the Constitution's federal system and distinguished the Constitution's structuring of power from both the earlier Articles of Confederation and state governments. The court was powerful within its delegated realm and thus practiced

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[7] William Paterson had been appointed and confirmed in 1793 to take the place of Thomas Johnson who had resigned. See biographical note at Marcus and Perry, vol. 1, 82.

judicial review, but it adhered to federal law and constitutionally and legislatively designed jurisdictional limits. Judicial review was conducted without recourse to general principles to reach conclusions.

The justices, except for Paterson, relied upon express constitutional and statutory provisions and document-derived principles to reach their conclusions.[8] This reliance was consistent with a government of limited power that had to rely on specific grants of authority to access bodies of law. Justice Paterson, again, was alone on the court in accessing general principles of law to decide issues. He was alone in finding that the federal courts had a more general and extensive power to access the general principles of law that were found within governments of inherent authority.

ADMIRALTY LAW DURING THE CONFEDERATION ERA

A number of the supreme court's early cases were rooted in litigation that began before the Constitution. These cases gave the court the opportunity, as it sifted through the rights of parties rooted in the preceding era, to expound upon the nature of state sovereignty and national power during the Articles of Confederation period. The supreme court in Penhallow v. Doane's Administrators,[9] Justice Paterson

[8] A document-derived principle is a principle gleaned from the governing statutes or the Constitution that is used by the court to help resolve an issue that the statutes or the Constitution does not directly address. Document-derived principles are narrowly deduced and rest upon the statutes and Constitution and will necessarily be consistent with the fundamental assumptions underlying the government. These principles are not general principles. General principles are inherent in the law and expressions of the fundamental concepts upon which the relevant government is based.

[9] 3 U.S. (3 Dall.) 54, 95 (1795).

notwithstanding, viewed state governments as sovereign entities, preeminent prior to the Constitution. Congressional power prior to the Constitution was based on the exigencies of the time and limited to waging war concurrently with the states. The justices, once again except for Paterson, exercised federal judicial powers consistent with a government of limited and delegated powers in the course of reviewing the case. They based their jurisdiction on the Constitution and the Judiciary Act of 1789 and they based their opinions on the Constitution, federal law and the Judiciary Act. In so doing they indicated that they viewed themselves as operating within a government of limited and delegated powers.[10]

The supreme court in Penhallow v. Doane's Administrators unanimously upheld a ruling by the Articles of Confederation's court of appeals that awarded damages to the

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[10] The federal courts required parties to plead to the jurisdiction of the court by demonstrating that the facts warranted the court taking cognizance of the suit. If proper jurisdiction was not evidenced in the pleadings then they could not litigate in federal courts. See Shedden v. Custis (21 Fed. Cas. 1218 (1793)) which shed light on the federal courts' pleading requirements. Requiring the parties to plead to the jurisdiction supported the federal government remaining a government of limited and delegated powers. The circuit court, with Jay and Iredell presiding, held that the jurisdiction must appear on the face of the pleadings or the parties could not litigate in federal court. This requirement was, Jay said "on account of a difference of the general and state governments, which should be kept separate, and each left to do the business properly belonging to it." Iredell, speaking not of governments now but of jurisdictions, explained that in courts of general jurisdiction, meaning state courts, "exceptions to the jurisdiction must be pleaded; but in [courts of limited jurisdiction] . . . the plaintiff must entitle himself to sue there."

In Shedden a French citizen won a judgment in a federal district court, but he had failed in his pleadings to state his citizenship and, therefore, demonstrate that the federal trial court had jurisdiction. The defendant appealed the judgment and asked that the judgment be set aside because of the plaintiff's failure to demonstrate clearly that the trial court had jurisdiction. The circuit court, with Jay and Iredell presiding, ruled for the defendant, holding that the pleadings must demonstrate the jurisdiction of the court before which the parties appeared because the federal government was a limited government. Regardless of whether the defendant had been aware of the faulty pleadings during the trial, the fact remained that the pleadings had failed to establish the jurisdiction of the trial court. As a practical matter such a ruling proved limited federal court jurisdiction. Cases that might well merit being in federal court could not be handled if poorly pleaded. The rule, however, showed how seriously the courts wanted to enforce the limitations on the federal courts because it ensured that no cases of improper jurisdiction would be litigated in a federal court. This requirement ultimately served to protect the realm of state governance from federal intrusion.

The federal courts also rigorously enforced congressional provisions that mandated an amount that had to be involved in the controversy before the case could be litigated in federal court. The amounts that parties alleged were in dispute were jurisdictional requirements set out in the Judiciary Act of 1789. See Hulsecamp. v. Teel at 12 Fed. Cas. 868 (1796).

surviving owners of the Susanna, a ship that had been wrongfully captured in 1777 off the coast of New Hampshire. The Susanna had been condemned as a prize in a New Hampshire prize court.[11] The New Hampshire court and similar courts in other states had been established pursuant to congressional resolutions of November 1775 and March 1776 calling for the establishment of prize courts and the commissioning of privateers.[12] The pre-Articles congress established an appeals process so that those disputing the rulings of the state prize courts could appeal to congress or those appointed by congress to handle these appeals.[13] New Hampshire complied with the congressional resolutions to the extent that it formed prize courts and allowed appeals. New Hampshire, contrary to the congressional resolutions, nevertheless, allowed appeals to congress only after the appellants had exhausted appeals within the New Hampshire judicial system.[14] The congressional resolution had sought to have the states allow appeals from the prize courts directly to congress, presumably to have a quick and consistent resolution to claims regarding privateering and captures.

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[11] 3 U.S. (3 Dall.) 54, 60 (1795). John Penhallow and ten other men owned the M'Clary, the privateer, that captured the Susanna. The Susanna was owned by Elisha Doane, Isaiah Doane and James Shepherd.

[12] See 3 U.S. (3 Dall.) 54, 55-56 (1795) for the congressional resolutions calling for privateers and the establishment of the prize courts.

[13] 3 U.S. (3 Dall.) 54, 56 (1795). The congressional resolution called for the trials of captures to be in prize courts within the states. Section 6 of the congressional resolve of November 1775 said, "That in all cases an appeal shall be allowed to the congress . . ." or their appointees. Congress appointed five of its members to hear the appeals. This is noted at 3 U.S. (3 Dall.) 54, 60 (1795).

[14] 3 U.S. (3 Dall.) 54, 60 (1795). The New Hampshire resolution's state rationale for requiring an appeal within New Hampshire was that the congressional resolution had only required an appeal in captures made by those "commissioned from the congress, or from such person or persons as shall for that purpose appointed, in some one of the United Colonies." New Hampshire provided an appeal in the case when the capture was made by "such . . .vessel in the service of the united colonies, and of a particular colony, or person *together* . . . ." [italics added] The court gave no weight to arguments attempting to rely upon this distinction.

The owners of the Susanna, residents of Massachusetts, protested the capture in the local prize court in New Hampshire and lost. With their ship and its cargo due to be sold, they then tried to appeal the ruling directly to congress but were denied an appeal by the courts of New Hampshire because such an appeal was "contrary to the law of the state."[15] Forced to follow the New Hampshire process for appeals, the owners of the Susanna appealed to the superior court of New Hampshire and again lost. That defeat forced them to endure the sale of their ship, cargo and tackle at public auction with the proceeds delivered to Penhallow, his other owners, and the privateer's crew. Owners of the Susanna then petitioned the pre-Articles congress to hear their appeal. In October of 1778 a standing committee appointed by the congress to hear such appeals determined that it had jurisdiction over the matter, but did not act upon the appeal because the court of appeals called for by the Articles of Confederation was being created and would prove a better forum for such cases. Finally in 1783, the Articles of Confederation court of appeals heard the matter and overturned the state court condemnation. Penhallow and his fellow owners, however, refused to abide by the ruling. There the matter sat until the Constitution was ratified. In a final effort to have their rights vindicated, the owners of the Susanna brought an action in one of the new federal courts. The federal district court and, subsequently, the circuit court reaffirmed the court of appeals' ruling that the capture had been unlawful and reaffirmed the award of damages plus interest for the sixteen intervening years.[16] Penhallow appealed the circuit court ruling to the supreme court.

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[15] See 3 U.S. (3 Dall.) 54, 60 (1795), quoting from Justice Paterson's summary of the facts.

The justices, though unanimous in affirming the circuit court ruling, had different conceptualizations of state and congressional power before the Articles of Confederation. Justices Blair, Cushing, and Iredell worked from a federalism perspective. They viewed state power as the first and most basic power; congressional power prior to the Articles of Confederation was limited and derivative from state power. Congress had had a right to wage war, but it was a concurrent power with the states. The pre-Articles congress's right to wage war and thus to establish the court of appeals was more tenuous to these justices than to Paterson, yet all agreed that the court of appeals was a valid exercise of congressional authority and that its ruling ought to be respected. Furthermore, they found a statutory basis for holding that the federal courts did indeed have jurisdiction to hear the cause of action to have the court of appeals ruling enforced.

Iredell's opinion exhibited a measured reliance on principles of federalism and federal statutes. He concluded that the powers of congress before the Articles of Confederation were only derived from the people through the states.[17] He felt that the powers that congressional authority rested upon were a combination of express grants and "indefinite authority, suited to the unknown exigencies that might arise."[18] Congressional power was not supreme; it was naturally derived from the political situation but was tenuously based and was rooted most fundamentally in authority from the more basic state powers. The nature of the power that congress had was as a representative of

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[16] The circuit court issued its ruling in 1794. It found in favor of the owners of the Susanna for £11,555, which included the sum from the sale at auction back in October of 1778 plus interest over the intervening sixteen years. The circuit found that this equaled $38,518.00. See 3 U.S. (3 Dall.) 54, 60 (1795).

[17] 3 U.S. (3 Dall.) 54, 95 (1795).

[18] 3 U.S. (3 Dall.) 54, 91 (1795).

external sovereignty either to wage war, concurrently with the states,[19] or to conclude treaties.[20] Iredell assumed that matters relating to prizes were incidental to external sovereignty and therefore that congress was possessed of the power to deal with this situation even before the Articles of Confederation.[21] Thus congress had the power to handle prize matters, but only as a result of a shared authority with the states in external matters.

Iredell relied on section 9 of the Judiciary Act that allocated exclusive and original jurisdiction in admiralty matters to the district courts of the United States.[22] Iredell also concluded that the district court of New Hampshire had jurisdiction over the cause of action to have the court of appeals ruling enforced. Furthermore, he concluded that the new federal courts could well uphold the ruling of the old court of appeals based on the respect that foreign courts give to each other's admiralty rulings from the law of nations.[23]

Iredell, having concluded that the pre-Articles congress had the authority to create the court of appeals and that the current federal system had jurisdiction, turned aside procedural challenges to the court of appeals ruling. These challenges were based upon the death of a party and the failure to follow the congressional resolutions in bringing the appeal to the court of appeals. Although the Judiciary Act of 1789 did not expressly apply to procedural challenges attacking the court of appeals ruling, Iredell nevertheless

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[19] See Ware v. Hylton at 3 U.S. (3 Dall.) 199 (1796).

[20] 3 U.S. (3 Dall.) 54, 91 (1795).

[21] 3 U.S. (3 Dall.) 54, 91 (1795).

[22] 3 U.S. (3 Dall.) 54, 97 (1795).

[23] 3 U.S. (3 Dall.) 54, 97 (1795).

reasoned consistently with the relevant sections, sections 22 and 31, of the Judiciary Act to govern his handling of these challenges. This reliance was in sharp contrast to Justice Paterson who answered these challenges wholly based on general principles without relying upon any legislation as a guide. Iredell's use of the Judiciary Act absent other guiding principles indicates that he viewed his authority as narrowly rooted in the Constitution and congressional legislation.

Section 22 only allowed a narrow range of issues to be appealed because it specified the means of appeal as a writ of error. Iredell adhered to the principles of section 22 when he refused to allow the ruling to be attacked collaterally. The court of appeals ruling had been issued shortly after Doane's death but before the administrators of his estate had been called upon to act on behalf of the estate. Iredell concluded that the proper mode of raising this objection was with a hearing before the district court and that raising the issue at this point was improper. This respect for lower court rulings was gleaned from section 22 which utilized a writ of error as the mechanism for appeals to the supreme court. Iredell also supported his conclusion by relying on the principles of section 31 to hold that the defendants had failed to avail themselves of a previous opportunity to raise the issue of Doane's death.[24] Iredell said that the administrators had failed to plead the fact of Doane's death and were now prevented from arguing it consistent with section 31 of the Judiciary Act.[25]

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[24] 3 U.S. (3 Dall.) 54, 101 (1795).

[25] Section 31 of the Judiciary Act committed executors and administrators to defend the suits of their principles if the cause of action survived: "That where any suit shall be depending in any court of the United States, and either or the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly; . . . ."

Iredell also enunciated other reasons that buttressed his conclusion but these served to protect the court of appeals ruling from being collaterally attacked. Consistent with section 21, Iredell refused to reverse the court of appeals ruling even if there had been an error of fact. He said that "if we cannot reverse a decree even of a district or circuit court for any error in fact, we have no ground to set aside the solemn and final decree of a court that has expired, for such an error."[26] He further rejected the argument that the court of appeals ruling should be overturned because it was not appealed to that court in compliance with the applicable congressional resolutions. Iredell relied upon res judicata to deny review of a judgment rendered by a court that had "final and exclusive jurisdiction" of the case. He said that the court of appeals was the highest tribunal of the prior government and that its judgment should be respected.[27]

Justice Blair, like Iredell, wrote an opinion that relied upon principles of federalism rather than general principles. He reached his decision using statutes and derived principles of federalism. Blair's opinion addressed two points of jurisdiction: whether the New Hampshire federal district court had jurisdiction to hear the cause of action being appealed to the supreme court and whether the court of appeals had jurisdiction over the original suit after the Susanna was seized.[28]

Blair concluded that the federal district courts did indeed have jurisdiction over the question of whether a capture was a valid prize or not.[29] This conclusion derived from section 9 of the Judiciary Act and had been recently addressed in the case of Glasse

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[26] 3 U.S. (3 Dall.) 54, 102 (1795).

[27] 3 U.S. (3 Dall.) 54, 104 (1795).

[28] 3 U.S. (3 Dall.) 54, 108-109 (1795).

[29] 3 U.S. (3 Dall.) 54, 108 (1795).

v. Betsey. [30] The court in Glasse v. Betsey had heard arguments that the question of prize or no prize was really a determination of piracy that required suit in the circuit courts under section 11 of the Judiciary Act. This jurisdictional challenge was turned away; the court concluded that the issue of whether a capture was lawfully a prize or not was indeed part of the admiralty jurisdiction and, therefore, properly within the jurisdiction allocated to the district courts under the Judiciary Act. Circuit court jurisdiction thus did not preclude district court action.

Blair, moreover, reaffirmed his conclusion that congressional power before the Constitution was a state-derived, war-related power that justified the congressional resolutions dealing with captures. He reached this conclusion while analyzing the congressional authority to establish the court of appeals. Blair argued that pre-constitutional congress had the authority to establish the court of appeals based on the circumstances that the states found themselves in during the war. The pre-Articles congress exercised an implied authority to field an army and to outfit a navy[31] and inherent in the right to control of such force was the right to sanction or annul captures.[32] The states and the people effectively sanctioned this indefinite power to wage war by assenting to it.[33] Thus the congressional resolutions properly establishing the prize courts and the court of appeals was an outgrowth of an implied congressional authority to wage

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[30] 3 U.S. (3 Dall.) 6 (1794). The federal courts had already confronted this issue in 1792 in the case of Jennings v. Carson. Judge Peters, sitting on the District Court of Pennsylvania ruled that American admiralty courts had the full powers of admiralty courts under the law of nations. He concluded that this power included the power to determine on the validity of prizes. See 13 Fed. Cas. 540 (1792).

[31] 3 U.S. (3 Dall.) 54, 111 (1795).

[32] 3 U.S. (3 Dall.) 54, 112 (1795).

[33] 3 U.S. (3 Dall.) 54, 111 (1795).

war. The court had no objections to broad implied congressional powers prior to the United States Constitution which set firm bounds to such implications.

Blair, having upheld the congressional resolutions creating the court of appeals, held that the congressional resolutions could not be overturned by New Hampshire law. Thus, as weakly based as the power may have been, congressional action coupled with New Hampshire consent gave the congressional resolutions greater force than state law.[34] The congressional resolutions seemed to lack both force and imperativeness because they were recommendatory; yet Blair thought the New Hampshire laws contradicting the congressionally designed jurisdiction of the court of appeals were nevertheless void because they conflicted with the resolutions that the states, including New Hampshire, had approved. [35] Even as sovereign entities states could still be held to their commitments to the other states.

Justice Cushing, like Blair and Iredell, also argued that the states were ultimately sovereign except for the "powers delegated to Congress, being such as were, 'proper and necessary' to carry on, unitedly, the common defense in the open war . . . ."[36] Cushing, though he commented on the powers of congress, argued that the matter had been decided previously by a court that was the court of last resort at that time. He found that the court of appeals had jurisdiction over the matter and that, since the court was the final appeals court in the case, a relitigation of the matter was precluded by res judicata.[37] Thus his approach, like Blair and Iredell, was to adjudicate within the framework of

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[34] 3 U.S. (3 Dall.) 54, 113 (1795).

[35] 3 U.S. (3 Dall.) 54, 113 (1795).

[36] 3 U.S. (3 Dall.) 54, 117 (1795).

[37] 3 U.S. (3 Dall.) 54, 116 (1795).

empowerments and principles of federalism applicable to the government in power at the time.

Paterson formed his opinion from a general principles rather than a delegated powers approach. It stands in stark contrast to those of the other three justices. It highlighted him as the sole nationalist on the court; he viewed national powers as preeminent even during the revolutionary era. Justice Paterson stood alone on the court in holding that congressional, and thus national power, was supreme prior to the Constitution. Justices Iredell, Cushing and Blair held to a view that the states were the preeminent sources of power, and that congressional power was more limited and tenuously derived prior to the Articles of Confederation. The other justices respected congressional power as only the outgrowth of the need to wage war or conclude the war with a treaty. Paterson treated congressional power as if it were expressly granted from the people irrespective of the states, and he implied that the states did not have the right to wage war.[38] He stated that "Congress was supreme from the nature of the situation at the time. There was one war and one sovereign will to conduct it. The people formed one great political body of which Congress was the directing principle and soul."[39] Paterson's assertion that congress had the sole right of waging war and the overly broad

[38] 3 U.S. (3 Dall.) 54, 80 (1795). Patterson said, "Congress was the general, supreme, and controlling council of the nation . . . to determine what their powers were we must enquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government; Congress conducted all military operations by land and sea . . . . In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace . . . . Disastrous would have been the issue of the contest, if the states, separately, had exercised the powers of war."

[39] 3 U.S. (3 Dall.) 54, 81 (1795).

language in which this assertion appeared puts him in a minority of one[40] on the court regarding the relative powers of state and congressional power prior to the Constitution.

Paterson relied upon general principles to conclude that congress had the authority to establish the court of appeals because congress had the sole right of waging war and because prize courts were incident to this power.[41] Patterson reached this conclusion as he addressed the issue of whether congress had the authority to create a tribunal with appellate review before the ratification of the Articles of Confederation. Paterson also concluded that the issue of New Hampshire's ability to dissent from the congressional resolutions creating the court of appeals was precluded by her actions within the confederacy. She had acted in concert with a majority of other states to bind all the states and therefore she must abide by the will of a majority of the states in this matter.

Paterson also easily overcame the challenge to the jurisdiction of the New Hampshire federal district court based on principles of fairness. Paterson found that there was no other place to bring the suit because the court of appeals and the government under which it had operated had ceased to exist. He respected the admiralty jurisdiction of the district court, but he resolved the jurisdiction question in favor of those bringing suit as a matter of simple justice rather than relying on section. 9 of the Judiciary Act or the law of nations. He said that "though [justice] may sleep for a while, [she] will

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[40] Iredell disagreed. See 3 U.S. (3 Dall.) 54, 92 (1795). Blair and Cushing's views were not clear. Chase and Iredell would expressly hold that the states did have a right to wage war in Ware v. Hylton, as an outgrowth of their sovereign power. See 3 U.S. (3 Dall.) 199 (1796). It is almost certain that Wilson agreed.

[41] 3 U.S. (3 Dall.) 54, 81 (1795).

eventually awake and must be satisfied."[42] Thus the justices concluded unanimously in favor of Penhallow even as one justice offered a different rationale for his concurrence.

In Penhallow the supreme court exercised judicial review to pass judgment on the validity of a state law and pre-constitutional congressional resolutions. The court left little doubt that it would continue to review the laws of states they considered sovereign before the Constitution. The justices wielded the power of a stronger government. Before the Articles of Confederation congressional powers were derived from the states by implication. When, however, powers were allocated to the central authority by the states, as with the institution of prize courts, the states were bound by the terms of the congressional resolutions inviting their action. The justices formed their opinions in a distinctive way that indicates that they were part of a government that was not only stronger, but also more limited. They based their conclusions on the Constitution and the Judiciary Act, and they concluded that state power was preeminent prior to the Articles of Confederation. Paterson was the sole exception. He showed a willingness to rely on non-statutory bases to resolve issues as a court of a more broadly empowered government might, and he reached different conclusions from the other justices about the powers of the states and congress in the pre-Articles era. Thus, all the justices except Paterson analyzed the nature of the empowerments and relationship between states and the central government in the period prior to the Constitution in order to frame their opinions. Paterson was alone on the court in utilizing an adjudicatory framework that broadly empowered the supreme court without finding limitations in the nature of federalism that prevailed before the Constitution.

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[42] 3 U.S. (3 Dall.) 54, 86 (1795).

THE SUPREMACY CLAUSE AND PRE-EXISTING STATE LAW

In Ware v. Hylton,[43] the supreme court measured two actions of a sovereign state against each other: Virginia's act of debt sequestration in 1777 and its later ratification of the Constitution. The court commented upon the nature of state sovereignty prior to the Constitution and the nature of the union entered into under the new federal system of the Constitution. The court held to a federal perspective in Ware v. Hylton since the justices discussed the relative powers of the states and congress to control debt sequestration. The court recognized Virginia's power to pass a debt sequestration law prior to the Articles of Confederation and said this was an act of an independent sovereign nation. The court, however, ultimately held that the Virginia debt sequestration law had become unconstitutional pursuant to the supremacy clause, because it conflicted with the Treaty of Paris. This was consistent with the court's nature of adjudication in which the justices, except for Paterson, analyzed the nature of the empowerments and limitations of the federal system that framed the litigation.

The court comported itself as part of a government that was fundamentally different from state governments. The court felt empowered to consider the validity of the Virginia debt sequestration statute that it ultimately found unconstitutional. It reached its conclusion using statutes and treaties rather than general principles. As in

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[43] 3 U.S. (3 Dall.) 199 (1796).

Penhallow v. Doane's Administrators, Justice Paterson stood apart from the other justices. He adjudicated as if the federal government were a fully empowered government and he concluded that the state governments, prior to the Constitution, were agents of central authority rather than sovereign states. Thus, both in his willingness to utilize general principles to reach conclusions and in the substance of his opinions he adjudicated as if the federal government were a fully empowered government. Once again, he was alone in this matter.

The basis of the lawsuit in Ware v. Hylton was an undisputed debt from July 1774 of approximately £2,976 that Daniel Hylton & Co. and Francis Eppes owed to the British merchants Joseph Farrel and William Jones.[44] The debt was not paid prior to the start of hostilities and was therefore outstanding in October of 1777 when the state of Virginia passed an act to sequester British debts. The case was actually a dispute over the sum paid into the Virginia treasury pursuant to the debt sequestration statute. The remainder of the debt unaffected by the state statute was not in dispute. The statute's preamble stated that it was "an act for sequestering British property, enabling those indebted to British subjects to pay off such debts . . . ."[45] Hylton and Eppes availed themselves of the statute in April of 1780 and paid into the Virginia treasury a portion of their debt in dollars equal to £933.[46] Over three years later, however, in the Treaty of Paris, signed in 1783, the British were granted the right to sue and collect debts owed to them at the onset

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[44] 3 U.S. (3 Dall.) 199 (1796). The debt was evidenced by a penal bond signed by the debtors that was dated July 7, 1774.

[45] 3 U.S. (3 Dall.) 199, 199-200 (1796).. Also at 3 U.S. (3 Dall.) 199, 200 (1796) is a copy of the certificate Hylton and Eppes got from the loan office indicating that they had paid a portion of the debt into the Virginia treasury.

[46] 3 U.S. (3 Dall.) 199, 200 and 221 (1796).

of hostilities.[47] Jones's estate, represented by Joseph Ware, filed suit in the federal circuit court of Virginia to collect the debt. The circuit court's justices, including Iredell, ruled against him. They concluded that the Virginia statute had discharged the debt and that the Treaty of Paris did not revive it.[48] The supreme court overturned the circuit court's judgment and thus validated the claim of Jones's administrators that the debt was still owed to them.

Justice Chase[49] held that Virginia had the full power of an independent sovereign nation with which to pass its sequestration law. He discounted arguments that Virginia's law should be stricken because it conflicted with the law of nations. Chase said that at the time of the passage of the law Virginia was a sovereign state and thus free to adopt or reject the law of nations.[50] Chase held that Virginia had a right to confiscate debts during the war because it had a right to make war. This rebutted the contention that the sole power of war was in congress and thus that Virginia had no right to confiscate debts during congressional prosecution of the war. Chase held that both congress and Virginia possessed the right and power to make war.[51] Congressional power was the result of the

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[47] Various provisions of the treaty are recited at 3 U.S. (3 Dall.) 199, 238-239 (1796).. Article IV of the Treaty sated, "It is agreed that 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."

[48] Iredell did not vote in the opinion but he read his reasons for holding as he did in the circuit court. His opinion is at 3 U.S. (3 Dall.) 199, 256-281 (1796).

[49] Samuel Chase was appointed to the supreme court in January of 1796. He occupied the seat previously held by John Blair. Blair resigned because of ill health. See Marcus and Perry, vol. 1, 17 as to Chase's background.

[50] 3 U.S. (3 Dall.) 199, 224 (1796).

[51] 3 U.S. (3 Dall.) 199, 232 (1796).

situation that the states faced and was derived from the people through the state legislatures.[52]

Chase then proceeded to find the Virginia sequestration law unconstitutional because, pursuant to the supremacy clause, it conflicted with the Treaty of Paris. Chase applied a textually based, non-interpretative method in his reading of the treaty. He focused first and primarily on the words of the document to discern a meaning and secondly on "probable or rational conjectures" drawn from the document as a whole which embody "a sense . . . which is agreeable to common use."[53] The issue of what weight to give the Treaty of Paris hinged on the power of congress to enter into a treaty that would bind the states. Chase held that both under the Articles of Confederation and the Constitution Virginia had surrendered her power of making treaties to congress.[54] Chase felt that congress had rather broad powers in this area both under the Articles of Confederation and the Constitution. Chase held that Virginia had granted away its power of treaty making to congress in Article 9 of the Articles and that "This grant has no restriction nor is there any limitation on the power in any part of the federation."[55] This broad assertion of congressional power probably flowed from Chase's view that congress possessed the great rights of external sovereignty as early as 1777 and that the states possessed the powers of internal sovereignty.[56] Finally, the Constitution, which Virginia

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[52] 3 U.S. (3 Dall.) 199, 231 (1796).

[53] 3 U.S. (3 Dall.) 199, 240 (1796).

[54] 3 U.S. (3 Dall.) 199, 236 (1796).

[55] 3 U.S. (3 Dall.) 199, 236 (1796).

[56] 3 U.S. (3 Dall.) 199, 232 (1796). Chase thus drew a distinction between external and internal sovereignty as to treaty making power that was not inconsistent in his mind with the power of a sovereign state to make war.

had ratified, extended to the federal judiciary jurisdiction over "Treaties, made, or which shall be made" and the supremacy clause, as Chase noted, was "retrospective."[57] Therefore, Virginia had authorized congress to negotiate the Treaty of Paris on its behalf prior to the Constitution and in ratifying the Constitution had sanctioned the treaty as superior to its debt sequestration law.

Wilson and Cushing relied upon the Constitution to reach their conclusion that the Treaty of Paris had invalidated the state sequestration law. He analyzed the treaty provisions and held that they overruled the Virginia state law.[58] He did not question the power of Virginia to pass the sequestration law, but, unfortunately for the defendants, he did not find that they had vested rights to relief from the debt.[59] Wilson also concluded that Virginia had the power to pass the debt sequestration law in 1777, but he argued that the treaty annulled the sequestration.[60] Like Cushing he based his opinion upon the Constitution. His analysis of the Virginia law differed from Chase's and Iredell's in that he did not analyze the law in relation to the power to make war. After the passage of the Constitution, Wilson asserted that Virginia "retains her sovereignty and independence as a state, except in the instances of express delegation to the federal government."[61] Contrary to Chase and Iredell, he carried this argument as far as to argue that Virginia

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[57] See Article III, Section 2, clause 1 in which the federal courts are given jurisdiction over treaties already concluded and those that will be concluded. This was in contrast to the other heads of jurisdiction that are all prospective. Chase's reference to the supremacy clause 3 U.S. (3 Dall.) 199, 237 (1796). Article III, Section 2, clause 1 also makes reference to "Treaties made, or which shall be made . . ." as being "the Supreme Law of the Land."

[58] 3 U.S. (3 Dall.) 199, 282 (1796).

[59] 3 U.S. (3 Dall.) 199, 281 (1796).

[60] 3 U.S. (3 Dall.) 199, 281 (1796).

[61] 3 U.S. (3 Dall.) 199, 281 (1796).

retained the power to pass a debt sequestration law in a future war.[62] Chase and Iredell almost certainly disagreed with this conclusion because they viewed Virginia's law as an outgrowth of the power to make war that congress and the states shared concurrently in 1777 but that Virginia had surrendered when it ratified the Constitution. Wilson's argument forced him to argue that the states maintained a concurrent power to wage war even after the ratification of the Constitution despite Article 1, Section 8 which gave to Congress the power to declare war.[63]

Iredell's dissent was a brief synopsis of his opinion at the circuit level where he had analyzed the nature of federalism preceding the Constitution and after its passage. He concluded that the debt could not now be collected. He relied upon the Constitution and principles of federalism to reach his decision. He, like Chase, analyzed Virginia's power of sovereignty in 1777 with a view towards determining Virginia's power to pass a sequestration law. Iredell concluded that Virginia was sovereign in 1777 and could legitimately pass the sequestration law.[64] Iredell departed from his fellow justices in then concluding that the Virginia law had annulled the debt and created only a claim under the law of nations by Great Britain against the United States. He thus argued that the actions of the debtor-defendants with regard to the debt sequestration law created an amorphous right in them that could not be divested by subsequent legislative actions. The treaty,

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[62] 3 U.S. (3 Dall.) 199, 281 (1796).

[63] This seems a tenable position in light of the distinction drawn in the Constitution between declaring war and engaging in war. Congress is given power to declare war in Article I, Section 8, clause 11. The states maintained a power concurrent with the federal government to wage war. See Article I, Section 10, clause 3.

[64] 3 U.S. (3 Dall.) 199, 270 (1796).

while valid, simply did not apply because there was no debt left to collect and the treaty did not specifically revive debts that had been sequestered by the sovereign states.[65]

Paterson, as opposed to the other justices on the court, approached the issue from his view of broader federal power and of the court's power under the Constitution. He discussed general principles of justice under the law of nations to support his holding; he clearly did not feel limited only to the Constitution, derived principles, statutes and treaties. Paterson ultimately held the Virginia sequestration void as against the Treaty of Paris[66] as did the other justices, but he never recognized Virginia's power to have passed the law in the first place; and he only commented on the law disparagingly pursuant to the law of nations. "Confiscation of debts is considered a disreputable thing among civilized nations . . ."[67] "I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments in consequence of national quarrels and hostilities."[68] His discussion of the treaty was an analysis only of whether the treaty applied to all creditors.[69] Paterson did not even grace

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[65] 3 U.S. (3 Dall.) 199, 271 (1796). In fact Oliver Ellsworth had already answered Iredell's objections four years earlier in the case of Hamilton et al. v. Eaton. The issue was the same one: one party sought to avoid a suit of a British creditor for a debt from 1776 by arguing that a state sequestration act had effectively annulled the debt. Ellsworth concluded that the Treaty of Paris trumped the state law and that the Treaty did not have to revive the debt for it to still be valid and owing after the treaty. Ellsworth said that debt was created by the contract and existed until all the terms of the contract were performed. All the confiscation act did was to alter the remedy for relief. The treaty annulled the confiscation act and the rights of the defendant to discharge of the debt pursuant to the confiscation act. See 11 Fed. Cas. 336 (1792).

[66] 3 U.S. (3 Dall.) 199, 256 (1796).

[67] 3 U.S. (3 Dall.) 199, 255 (1796).

[68] 3 U.S. (3 Dall.) 199, 255 (1796).

[69] 3 U.S. (3 Dall.) 199, 254 (1796).

his opinion with a discussion of a law passed by what the other justices respected as a sovereign state. Paterson was thus untroubled by the limits on federal power or the nature of the federal system during the pre-constitutional period. Thus, he distinguished himself again as the only justice on the court that did not find that the empowerments and limitations inherent in the governments in place at the time imposed limits on the court's powers in weighing the various arguments.

In Penhallow and Ware the supreme court analyzed its adjudicatory framework in the course of issuing its rulings. This analysis included an assessment of the powers of the relevant governments in place at the time and the limits imposed upon the ability of the court to enforce rights effected by the nature of federalism prior to the Constitution. The court viewed the states prior to the Articles of Confederation as sovereign governments bound in a confederacy of necessity. Congressional power was a tenuously derived external sovereignty that existed as a result of the circumstances during the war or powers that were delegated to it by the states. The court, in fact, concluded that congress did not even exercise external sovereignty alone. An element of this external sovereignty, the power to wage war, was held concurrently with the states. The court did recognize that the Articles of Confederation congress had held the sole right to represent the states in the negotiation of treaties. Paterson alone viewed congressional power more broadly and gave little hint that delegations of power to congress necessitated a recognition that the stated had reserved powers. He held that congress had the sole right of waging war and thought that in analyzing the effect of the Treaty of Paris, the power of Virginia to pass a sequestration law did not merit being weighed against the treaty.

By avoiding general principles the court indicated that it was operating as part of a powerful but limited government that was markedly different in character from the state governments. The justices under the new Constitution felt competent to review and void the laws of sovereign states. In striking down laws of New Hampshire and Virginia, the court relied only on applicable treaties and statutes. The court did not rely upon the general principles to decide cases that state courts did; the justices thus thought that the federal government was not as fully empowered as state governments. Justice Paterson alone operated within a looser adjudicatory fashion in which he used general principles in ways that would indicate a more fully empowered government.

The supreme court described the states in the pre-Articles era as sovereign states that delegated certain powers to congress, but retained the powers of sovereign nations. Their ratification of the Constitution signified that a set of powers was being delegated to a national government that would control certain aspects of national matters, such as war and peace. The new government was thus more powerful in its delegated areas, but less powerful in not gaining spheres of activity by mere implication or by exigent situations.

SECTION III

MANAGEMENT OF THE FEDERAL SYSTEM

In a number of cases having to do with the nature and extent of federal power under the Constitution, the supreme court concluded that it was operating under a federal

system that imposed defined empowerments and limitations on the federal government. These cases brought into focus the character of the federal system under the Constitution. At times the cases implicated state governance directly and, therefore, clarified the extent of federal power with regard to the states as defined by the Constitution. In other cases, the justices explored the empowerments and limitations within the federal government as branches came into conflict. In these latter cases, the implications for state power were more attenuated but nevertheless significant, because a failure of separation of powers at the national level would allow the central government to threaten the states. The justices therefore addressed issues at the very heart of the Constitution's federal system and highlighted their views on the nature of the federal system and, specifically, the character of the federal government.

The justices maintained the boundaries within the federal system consistently by holding federal executive, legislative, and judicial branches within their constitutionally delegated realms. The court asserted its constitutionally designed supremacy over judicial matters but when using this power rested its conclusions only on constitutionally and legislatively designed barriers and narrowly derived federalism principles. Thus, both in the substance of their rulings and in the character of their arguments they adjudicated as part of a government whose powers were supreme over delegated matters but limited within the boundaries set by the Constitution. The tension of empowerment within limitations ensured that the province of state governance negotiated in the Constitution would not be infringed.

SEPARATION OF POWERS

In Hayburn's Case,[70] three circuits courts, with five justices of the supreme court sitting upon them, held an act of congress unconstitutional because it violated the separation of powers delineated in the Constitution. In so doing the federal courts asserted their equal power as against congress by voiding a law. At the same time they recognized the limits of their power by relying solely upon the Constitution to support their ruling.

The matter came before the circuit courts in Hayburn's Case following the passage of a law by congress stipulating that federal circuit courts oversee certification of war pensioners.[71] The law called for the justices of the circuit courts to certify pensioners and then for those determinations to be subject to review by congress and the Secretary of War.[72] Three circuit courts ruled that the law was unconstitutional. Attorney General Randolph then petitioned the supreme court to compel a lower court to follow the congressional statute and determine the validity of William Hayburn's petition to be placed on the rolls of war pensioners. The court did not act upon the Attorney General's request immediately [73] and never did issue an opinion because, while it held the motion

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[70] 2 U.S. (2 Dall.) 409 (1792).

[71] 2 U.S. (2 Dall.) 409 (1792); Congress passed the law on March 23, 1791. See 2 U.S. (2 Dall.) 409 (1792).

[72] 2 U.S. (2 Dall.) 409 (1792).

[73] The supreme court refused to act upon Randolph's first plea for the court to hear the case because, as Randolph conceded, his petition was made "without an application from any particular person, but with a view to procure the execution of an act of Congress . . . ." The court finally "took the matter under

under advisement, congress passed a second law that "provided, in another way, for the relief of pensioners."[74] Nevertheless, the three circuit courts, with Chief Justice Jay and Associate Justices Cushing, Wilson, Blair, and Iredell sitting on them all had held that the law was unconstitutional before Randolph petitioned the supreme court to decide Hayburn's claim.[75]

The circuit courts of Pennsylvania, North Carolina, and New York all concluded that the law violated separation of powers. As the North Carolina circuit court said, "That the legislative, executive and judicial departments, are each formed in a separate and independent manner, and that the ultimate basis of each is the constitution only within the limits of which each department can alone justify any act of authority."[76] Explicit in that opinion and in those of the other circuits was the notion that only the Constitution, not necessity, desirability or opportuneness, conveyed the authority under which each branch operated and that authority was circumscribed by the Constitution. As the Pennsylvania court said, "[The people] have placed their judicial power not in

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advisement" after Randolph changed tactics and argued that the petition was "on behalf of Hayburn . . . a party interested."

The refusal to hear the initial plea is consistent with the operation of a government of limited and delegated powers. The court refused initially because it concluded that the matter as first presented by Randolph to the court was not properly a "Case" as the Justices understood that word under Article III, Section 2 and, therefore, that they were not empowered to hear and rule upon Hayburn's petition. The Constitution only empowers the Justices to hear certain "Cases" and "Controversies" listed in Article III, Section 2. The court has held that to be a case under the Constitution there must be a live dispute so that their opinion will not be an advisory one. Initially, the attorney general's petition was asking for only an advisory opinion and would therefore not fall within the court's jurisdiction. Only after raising a true dispute involving an interested party did the court take the matter up.

[74] 2 U.S. (2 Dall.) 409 (1792).

[75] The circuit courts of Pennsylvania and North Carolina refused to abide by the law; the circuit court of New York denied that the law bound them to participate but agreed, as non-judicial officers, to certify pensioners. See 2 U.S. (2 Dall.) 410 (1792) at footnote 2.

[76] See 2 U.S. (2 Dall.) 410 (1792) at footnote 2. The North Carolina court was composed of Iredell and District Judge Sitgreaves.

Congress but in 'courts.' " [77] This was an obvious reference, found in the other opinions as well, to the Article III, Section 1 vesting clause for the federal judiciary. Similar clauses in Article I and Article II vested legislative and executive powers in congress and the president. The clauses also proved a limitation that reinforced the separation of powers and made it the "duty of each [branch] to abstain from and to oppose, encroachments on either."[78] The Constitution vested judicial power, not executive power, in the courts. With finality the Pennsylvania circuit court struck the law down saying that because the ". . . business directed by the act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States."[79] The circuit court of North Carolina was only slightly less blunt, since it left some avenue for argument about whether the subject of the act was of a judicial nature or not.[80] Justice Iredell and his district court cohort stated that they would be bound by the Constitution not the mandates of congress. It was the courts' responsibility to ensure that the federal courts and, implicitly, their subject matter met Constitutional muster. The Court said that ultimately it would not be governed by congressional action but rather by the Constitution. The court said:

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[77] See 2 U.S. (2 Dall.) 410 (1792) at footnote 2. The Pennsylvania court was composed of Wilson, Blair and District Judge Peters.

[78] See 2 U.S. (2 Dall.) 410 (1792) at footnote 2.

[79] See 2 U.S. (2 Dall.) 410 (1792) at footnote 2. The New York circuit court composed of Justices Jay and Cushing and District Judge Duane also said that, ". . . the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially . . . ." Jay, Cushing and Duane, nevertheless, struggled mightily to reconcile their roles and congress's directive. They construed the act, implausibly, as appointing them as commissioners in a non-judicial capacity. They offered to act in a non-judicial capacity as commissioners in the same courtroom but only at times when the circuit court was adjourned.

[80] See 2 U.S. (2 Dall.) 410 (1792) at footnote 2.

> . . . that courts [as envisioned by Congress with the pensioner's act] cannot be warranted, as we conceive, by virtue of that part of the constitution delegating judicial power.[81]

The courts' invalidation of congressional legislation in Hayburn's Case in 1792 signified a federal court operating in a markedly different fashion from state courts, where judicial review had been neither frequently used nor so confidently asserted. It further highlighted a court following constitutional limitations on its own power and enforcing limitations on the power of the executive and legislative branches. The circuit courts clarified the reach of legislative power and in so doing protected the federal judiciary from legislative and executive encroachment.

THE CONSTITUTIONAL OBLIGATIONS OF THE STATES

In Chisholm v. Georgia[82] the supreme court grappled with the politically volatile issue of whether states were subject to being sued by citizens of other states. The case pitted the words of the Constitution, which seemed to obligate states to endure suits by citizens of other states,[83] against the power and dignity of the states. The crisis created by

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[81] See 2 U.S. (2 Dall.) 410 (1792) at footnote 2.

[82] 2 U.S. (2 Dall.) 419 (1793).

[83] Article III, Section 2 states that the federal judicial power extends to cases "between states and citizens of another state."

the spectre of states being subject to suit by citizens of other suits was only heightened by the specific claim in Chisholm which, if vindicated, would invite a torrent of litigation against states seeking huge delinquent debts dating from the Revolution. Thus, the implications of the decision for the Constitution's federal system were profound and the justices understood that their opinion would have far-reaching consequences.[84] The controversy was born of a simple fact resulting from the war: numerous creditors were still owed, in some cases, hundreds of thousands of dollars by states for sums loaned during the Revolutionary War.[85] Yet, in tackling the issue, the justices operated as part of a government of delegated powers and adhered to the constitutionally designed empowerments and limitations codified in the Constitution. They followed constitutional grants of power and adhered to constitutional parameters and legislatively designed limits to find that federal judicial power encompassed cases between a state and a citizen of another state whether the state was a plaintiff or defendant.[86] Their conclusion indicated that the federal government was empowered within its designated realm to the full extent outlined in the Constitution. The court's opinions, both majority and dissent, were textually derived either from the Constitution or the Judiciary Act.

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[84] Chisholm claimed that he was owed approximately $500,000.00. An earlier lawsuit seeking $200,000.00 from the state of Maryland had been settled out of court. See Van Stophorst v. Maryland cited at 2 U.S. (2 Dall.) 401 (1791) and discussed at Marcus and Perry, vol. 5, 7-56. Iredell cites Van Stophorst at 2 U.S. (2 Dall.) 429 to the effect that the issue of state sovereign immunity and the consequences had already been presented to the court in the course of the Van Stophorst dispute. Waiting in the wings pending the outcome of Chisholm's suit was the Indiana Company litigation that had been filed in 1793 and later matured into a $1,000,000.00 claim against Virginia pursued in Hollingsworth v. Virginia 3 U.S. (3 Dall.) 378 (1798).

[85] For a general overview of the case see Mathis, "Chisholm v. Georgia: Background and Settlement," Journal of American History 54 (1967): 19. Also see Julius Goebel, Jr., History of the Supreme Court of the United States, Antecedents and Beginnings: The Supreme Court to 1801 (New York: Knopf, 1971) 726. The dispute involved a claim for the value of goods supplied to Georgia during the Revolutionary War.

[86] The court's ruling lead to the Eleventh Amendment.

Justices Blair, Cushing, Jay, and Wilson relied upon the Constitution, the Judiciary Act and principles of federalism to conclude that the supreme court had jurisdiction to hear a suit brought by the citizen of one state against another state. Though all four justices found that the jurisdiction existed, the manner in which they reached their decisions both in style and method of argumentation was markedly different.

Blair and Cushing wrote opinions that were marked by brevity and simplicity and focused very narrowly on the Constitution. They were strict textualists who based their opinions on the Constitution through resort to the plain meaning and, in the case of Blair, expressly disdained resort to extra-Constitutional sources. The constitutionally dictated balance of power between the states and the federal government was mandatory regardless of its convenience. Alterations in this balance were left to the people through the political process. Their failure even to refer to the Judiciary Act in answering the question of jurisdiction indicated that they thought that the jurisdiction was self-executing, did not require additional statutory authority.

Blair delivered a short, textually-based opinion in which he disdained the broader addressments of Wilson and Jay. "The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of [the Constitution] it is obligatory upon every member of the union."[87] Relying on the words of the Constitution, Blair thought that the case was clearly covered by the grant of "judicial authority to controversies between a state and citizens of another state" and thus that the suit was a valid exercise of jurisdictional power granted to

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[87] 2 U.S. (2 Dall.) 419, 450 (1793).

the supreme court. He dispensed with the argument that a state could sue but not be sued with recourse to the plain meaning of the clause that granted the supreme court original jurisdiction in cases in which a state was a party.[88] He concluded that "party" includes defendants and plaintiffs.[89] Lastly, Blair held that the jurisdiction existed even if congress had not granted a mode to ensure execution of the court's order.[90] Enforcing the court's ruling was an issue properly left to the other branches of government.[91]

Justice Cushing, like Blair, offered a short opinion in which he relied on the words of the Constitution in holding that the supreme court had jurisdiction of the suit. Cushing did not offer any analysis that would imply that general jurisprudence or political considerations had a bearing on the resolution of the problem. The words of the Constitution were supreme. Cushing though did go farther than Blair in that he discussed a possible purpose for the jurisdictional grant. Suits of this nature were essentially interstate conflicts that were best resolved by an impartial tribunal in order to lessen conflicts between the states.[92]

Cushing argued that his job was to apply the Constitution and that whether the branches liked it or not that they were bound by it until it was amended.[93] Cushing thought that the broader political question about whether the majority's position would

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[88] 2 U.S. (2 Dall.) 419, 450 (1793).

[89] 2 U.S. (2 Dall.) 419, 451 (1793).

[90] 2 U.S. (2 Dall.) 419, 452 (1793).

[91] 2 U.S. (2 Dall.) 419, 452 (1793).

[92] 2 U.S. (2 Dall.) 419, 467-468 (1793).

[93] 2 U.S. (2 Dall.) 419, 468 and 469 (1793). Cushing says that, "If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment. But while it remains, all offices legislative, executive , and judicial . . . are bound by oath to support it."

unnecessarily abridge state sovereignty and subordinate the states to the federal government was a matter of political and not judicial concern.[94] His task was to apply the Constitution free from his personal judgment about the merits of allowing a state to be sued, because the transfer of powers from the states to the federal government effected by the people was for the greater good of the whole union.

Justice Wilson also relied upon textual and textually-derived policy arguments in upholding the jurisdiction of the supreme court. Wilson utilized constitutional language and principles of federalism to conclude that the nature of the sovereignty claimed by Georgia to further its claim of sovereign immunity did not comport with the degree of sovereignty that the states had under the Constitution. Sovereignty remained in the people and they had acquiesced to the Constitution and therefore made Georgia amenable to being sued by the citizens of another state pursuant to Article III, Section 2. Wilson reached this conclusion only after a lengthy analysis of sovereignty designed to demonstrate that his conclusion accorded with fundamental principles. He analyzed sovereignty in general terms and explored what sovereignty meant in the absence of popular will and also what it meant in feudal models of governance that lacked popular sanction. He concluded that Georgia could not claim to be sovereign as an English government might because Georgia was based on a republican form of government in which ultimate power resided in the people.[95] Wilson acknowledged that Georgia was sovereign in one sense of the word because its power rested upon popular sanction. Furthermore, the Constitution's choice of words, specifically, "citizen" rather than

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[94] 2 U.S. (2 Dall.) 419, 468 (1793).

[95] 2 U.S. (2 Dall.) 419, 457 (1793).

"subjects" strengthened Georgia's claim that it was not immediately beholden to the federal government.

Georgia's claim to sovereignty and therefore immunity from suit ultimately failed, however, because the degree of sovereignty that would allow a state to avoid its obligations is not to be found in the Constitution.[96] Wilson concluded that the people, and not the state of Georgia, retained the power of sovereignty with regard to the Union and that therefore Georgia could not claim a degree of independence greater than that granted by her citizens who had ratified and bound Georgia to the Constitution.[97] Under the Constitution, the people were the repository of ultimate power, and thus no state government could claim to be truly sovereign, to be beyond the reach of the federal courts that were sanctioned to hear cases under the Constitution.[98] Wilson said that many people mistakenly believed that the states rather than the people were the "first great object in the Union." In fact, the people were sovereign and to believe otherwise was "not politically correct."[99]

Wilson then further bolstered his constitutional arguments with "arguments a fortiori" from the "laws and practices of different states and kingdoms" that demonstrated that his conclusion was consistent with general practices.[100] He discussed the ability to sue the sovereign in Spain, Prussia, Greece, and England. He concluded that in all these countries including England the courts entertained suits between citizens and their rulers.

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[96] 2 U.S. (2 Dall.) 419, 456 (1793).

[97] 2 U.S. (2 Dall.) 419, 457 (1793).

[98] 2 U.S. (2 Dall.) 419, 458 (1793).

[99] 2 U.S. (2 Dall.) 419, 462 (1793).

[100] 2 U.S. (2 Dall.) 419, 459 (1793).

In England, even though in theory the king could only be sued with his consent, in practice either by mandatory or precatory judgments the subjects sued the king freely.[101] Even a truly sovereign government could be a defendant.

Wilson finally analyzed the Constitution and concluded that the words of the document were unambiguous: the Constitution granted the federal courts jurisdiction over a suit between a state and a citizen of another state. He reiterated that the people surrendered an element of their sovereignty to create the national government and that they vested the Constitution with the judicial power to decide the case at hand.[102] Wilson supported this belief with an argument concerning the general nature of the constitutional powers and then with a textual based policy argument. Wilson believed that the states were subject equally to the jurisdiction of the Constitution's legislative, executive, and judicial authority. Article I, Section 10 allowed congress to act upon the states with regard to state impost or duties and because "such [state] laws [are] subject to the revision and control of the Congress"[103] a judicial power must surely exist capable of aiding in the enforcement of congressional legislation and to "insure domestic tranquility."[104] Wilson further argued that the jurisdiction of the court was necessarily implied from the obligation of contracts clause which he said would have no purpose if states were to be immune from lawsuits.[105] To drive the point home and refute any suggestion that a state might be amenable to federal court jurisdiction but not be a

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[101] 2 U.S. (2 Dall.) 419, 460 (1793).

[102] 2 U.S. (2 Dall.) 419, 464 (1793).

[103] 2 U.S. (2 Dall.) 419, 464 (1793).

[104] 2 U.S. (2 Dall.) 419, 465 (1793).

[105] 2 U.S. (2 Dall.) 419, 465 (1793).

defendant, Wilson cited Article III, Section 2's head of jurisdiction that extends the judicial power to controversies between two states.[106]

He bolstered his constitutional rationale with analysis of natural law to demonstrate that the outcome was a legitimate one. His exploration of these fundamental principles of law was not a resort to abstract authority but followed a direct mandate of Section 14 of the Judiciary Act which commanded the use of principles in issuing writs to give effect to the jurisdiction. Section 14 said that the courts could issue writs "agreeable to the principles and usages of law." Wilson thus proceeded to demonstrate that "principles of general jurisprudence" and the "laws and practice of particular states and kingdoms" provided arguments that bolstered his textually based conclusions.[107] These were justifications for his opinion that demonstrated that the outcome was consistent with larger natural law principles.[108] Ultimately Wilson's opinion rested upon textual and textually derived policy arguments.

This more expansive explanation that Wilson offered was also the teaching function of the court in evidence. The highest achievement for the accomplished lawyer in Wilson's era was to demonstrate the connection between natural law and positive legal precepts. The lawyer should be versed in natural philosophy because from natural law flowed the positive law embodied in constitutions and codes. In his opinion Wilson was attempting to demonstrate that the legalities upon which his decision rested were a

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[106] 2 U.S. (2 Dall.) 419, 466 (1793).

[107] 2 U.S. (2 Dall.) 419, 453 (1793).

[108] For an explanation of why Wilson and, Jay to a lesser extent, offered such far-ranging opinions see Robert A. Ferguson, Law and Letters in American Culture (Cambridge: Harvard University Press, 1984) 59-84. See Ferguson's discussion of Wilson and the cultural milieu in which the lawyer, versed in literature and natural philosophy, seemed well placed to shape and focus literary and philosophical pursuits through the law. Wilson also believed that the court had a teaching function in a new nation.

legitimate, and even virtuous, product of the natural law. Such discussion had the practical effect to make the court's action seem reasonable. Absent such preaching the court might well have been perceived to be arrogant and dismissive of state power and dignity.

Wilson's opinion, even if much longer and seemingly filled with extraneous material, rested carefully upon textual arguments only bolstered with arguments from political theory and natural law. Much of Wilson's opinion was written to show the preeminence of the people rather than the states in determining the allocation of power in the republic and that the balance of popular sovereignty in our republic was such that Georgia could not claim a sovereignty that would allow her to be beyond suit. The people created the states and ratified the Constitution. Thus no state could have the kind of truly independent sovereignty that Georgia claimed.[109]

Jay, like Wilson, wrote a longer opinion that touched on matters beyond the Constitution; but ultimately he rested his opinion on a textual analysis of Article III's grant of judicial authority. He held that this authority extended to cases in which the state might be either a plaintiff or a defendant, since "controversies" includes cases "between two or more states."[110] He supported his opinion with an analysis of the distinctive nature of state sovereignty in the United States. Jay concluded that the differing nature of the sovereign powers in England and the states made analogies between the two invalid.[111] The answer lay solely in understanding the nature of state sovereignty that

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[109] 2 U.S. (2 Dall.) 419, 463-465 (1793).

[110] 2 U.S. (2 Dall.) 419, 476 (1793).

[111] 2 U.S. (2 Dall.) 419, 471-472 (1793).

existed in the United States. In the United States power flowed from the people. The people created their state governments and surrendered parts of their sovereignty to create the federal government and in so doing bound the states to the Constitution.[112] He further concluded that the general nature of the judicial system made insulating a state from suit difficult to justify because concepts of "equal footing in a court of justice" allowed a citizen to sue a corporation, or one state to sue another before the supreme court.[113] States were not truly sovereign to the extent that this implied freedom from all obligations because they were created by the people and had been subordinated by the people to the federal government. Jay found that the Constitution did indeed grant jurisdiction to the supreme court through the Article III, Section 2 grant of judicial authority over "controversies between a state and citizens of another state" in order to reduce interstate friction of having a state decide a claim to which it was a party.[114]

Iredell, the one dissenting justice, utilized the Judiciary Act and constitutional provisions to conclude that Chisholm could not sue Georgia before the supreme court. He viewed the Constitution and the Judiciary Act as imposing limits within which the court's jurisdiction and thus its power must be confined. His argument rested upon the notion that congress did not provide a procedural mechanism in the Judiciary Act to facilitate suing a state in federal court and that, therefore, the suit could not be prosecuted. Even if his opinion proved unpersuasive to his fellow justices, his method of

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[112] 2 U.S. (2 Dall.) 419, 471 (1793).

[113] 2 U.S. (2 Dall.) 419, 472 and 473 (1793).

[114] 2 U.S. (2 Dall.) 419, 477 (1793).

addressing the matter showed that he was a justice who worked within the relevant legislation and constitutional provisions to apply the law.

Iredell did not even disagree that the Constitution made states amenable to being sued by citizens of other states. He did argue, however, that the congressional allocation of jurisdiction to the court was too limited to encompass this case.[115] The relevant section of the Judiciary Act for Iredell was section 14.[116] Section 14 gave the supreme court the power to issue writs in order to exercise its authority, but only those writs that were "agreeable to the principles and usages of law."[117] Iredell concluded that the supreme court could not issue writs to reach this case since the governing body under which the operative phrase ought to be judged, English common law, did not allow individuals to sue the government.

His conclusion rested upon a plausible, even if ultimately unpersuasive, reading of the Judiciary Act's other relevant provision. Section 13 granted the supreme court "exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." Where the other justices found in section 13 the jurisdictional allocation that made Georgia amenable to suit Iredell found confirmation that states were only

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[115] Although Iredell did not make the argument explicitly, his argument almost necessary rests upon the fact that suits between states and citizens of other states falls within the latter six heads of jurisdiction in Article III, Section 2 that congress had options over in parceling out to the federal courts. By virtue of the fact that the "judicial power" of Article III is not extended to all suits like that in Chisholm v. Georgia, congress could constitutionally have declined to allocate to the federal courts the jurisdiction over such a matter. The answer to the question of whether congress parceled the jurisdiction would be found in the Judiciary Act. That is, in fact, where Iredell looked to resolve the matter.

[116] 2 U.S. (2 Dall.) 419, 433-434 (1793).

[117] See Section 14 of the Judiciary Act of 1789.

contemplated as plaintiffs and not defendants. Each time parties to a conceivable suit are listed in section 13 "state" is listed first as plaintiffs would be in a lawsuit. Thus, section 14 limited jurisdiction and section 13 was drafted in a way to be consistent with the limitation.

In Chisholm v. Georgia the supreme court relied upon textual arguments and principles of federalism to hold that federal jurisdiction encompassed a suit between a state and a citizen of another state. Its conclusion was rooted in an analysis of the powers under the Constitution. In so doing it acted as a court within a government of limited and delegated powers. It concluded that the suit in question fell within those matters delegated to the federal government and thus the suit could proceed. Four justices expressly found that Georgia could be sued by a citizen of another state; they argued from the express words of Article III, Section 2. Cushing and Blair were the strictest of textualists: they relied solely on the document and offered little or no logical rationale why it should be so. Wilson and Jay based their opinions on the words but offered broader opinions that explained why such a suit was compatible with more general notions of state sovereignty within the federal system. The one dissenting justice analyzed the Constitution and Judiciary Act and concluded that congress had not allocated the jurisdiction to the courts to include such a suit. His reading of the Constitution was plausible even if his use of the Judiciary Act seems questionable. Nevertheless, he relied upon the Constitution and Judiciary Act to reach his decision. Certainly there was sentiment--Cushing expressly mentioned it--that the court's opinion would be controversial, yet the justices acted in accordance with the governing

documents and, as Cushing recommended, left any remedial actions to the political process.

THE NUANCED BOUNDARIES OF FEDERAL JURISDICTION

In Wiscart v. Dauchy [118] the supreme court analyzed the Constitution and the Judiciary Act to define the limits of federal jurisdiction. Both the manner of its analysis and the substance of the ruling indicate that the court was operating as part of a government not fully empowered. The justices, in their reasoned review of the Constitution and enabling legislation, revealed their adherence to the constitutionally designed limits placed upon federal authority. The majority concluded that congress had placed a statutory limitation on its appellate jurisdiction. The court held that congress had eliminated its power to review the facts in admiralty-maritime cases of a civil nature (as opposed to criminal admiralty and maritime cases) and equity cases pursuant to the exceptions and regulations power that congress is given in Article III.[119] The court relied upon constitutional language and the Judiciary Act to reach its conclusions.

The case reached the supreme court after Wiscart was found to have fraudulently conveyed all his real and personal estate to avoid the debt payment he was ordered to

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[118] 3 U.S. (3 Dall.) 322 (1796).

[119] In Article III, Section 2, clause 1 the Constitution delineates the nine heads of jurisdiction to which federal power shall extend. In the next clause it says, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

make judicially. The circuit court took the matter up on the equity side. It set aside Wiscart's conveyances and awarded Dauchy enforcement of his winning judgment so that he could secure payment of the debt from Wiscart's property. Wiscart appealed to the supreme court. His appeal asked the supreme court to review the facts as well as the law that the circuit court relied upon to reach its decision.[120]

Justice Ellsworth presented the opinion of the court that the conclusions of fact that circuit courts found either in admiralty and maritime, or equity cases (an equity case was here at issue) could not be reviewed by the supreme court [121] because congress had used its power pursuant to the exceptions and regulations clause to limit appeals in such cases to matters of law only. The court had to accept the factual conclusions of the circuit court. The Constitution granted to the court "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[122] Ellsworth concluded that the court must rely upon the exceptions and regulations promulgated by congress respecting the nature of the appellate jurisdiction.[123] Ellsworth found those exceptions and regulations codified in the 21st and 22nd sections of the Judiciary Act.[124]

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[120] The federal courts relied upon parties to plead the facts necessary to prove the courts' jurisdiction in the first place. The court would not make an independent determination absent the parties' pleadings.

[121] 3 U.S. (3 Dall.) 322, 324 (1796).

[122] See Article III, Section 2.

[123] 3 U.S. (3 Dall.) 322, 327 (1796).

[124] Section 21 and 22 of the Judiciary Act said in relevant part:
Section 21: "That from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district . . . ."
Section 22: "That final decrees and judgments in civil actions in a district court . . . may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated

The justices did disagree over the exceptions congress had in fact made. Section 21 allowed appeals from admiralty and maritime cases. Section 22 allowed writs of error in equity and civil actions. The ambiguity over what process governed criminal matters led to the difference between majority and dissent. Ellsworth, writing for the majority, thought that the sections contrasted civil and criminal cases and thus references to civil actions in section 22 meant that those appealing civil action which included civil admiralty or equity cases could pursue only a writ of error (which allowed for only a review of law) and not an appeal (which allowed for a review of law and fact) to the supreme court. Thus those appealing civil admiralty or equity cases could challenge conclusions of fact only once in the federal system: in the circuit court.[125] Ellsworth concluded that all non-criminal judgments were to be reviewed in the supreme court only by writ of error. Thus the findings of fact in circuit courts would be conclusive before the supreme court for civil matters. Under Ellsworth's interpretation admiralty and maritime cases of a criminal nature would be governed by section 21 and its more expansive appeals process. In effect, the word 'criminal' was read into section 21.

Justice Wilson disagreed with Ellsworth over the distinction between sections 21 and 22. He argued that the sections distinguished admiralty and maritime suits in section 21 from equity suits in section 22.[126] If this were correct, the more expansive appeal

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transcript of the record, an assignment of errors, and prayer for reversal . . . . 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 by appeal from a district court . . . be re-examined and reversed or affirmed in the Supreme Court . . . ."

[125] 3 U.S. (3 Dall.) 322, 329 (1796). Ellsworth defended this as a reasonable handling of these cases. The parties had an opportunity to try their case. "But surely it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied."

[126] 3 U.S. (3 Dall.) 322, 325 (1796).

process would govern admiralty and maritime cases and the less expansive writ of error process would govern equity suits, which included civil matters. His interpretation seemed to explain the categories of cases in the two sections without having to read in clarifying language as Ellsworth did, but it raised a problem of its own.

Under Wilson's reading of the Judiciary Act there was no provision in the act for the supreme court to review admiralty and maritime cases, and yet the Constitution expressly extends the supreme court appellate jurisdiction to such cases. (Section 21 only allowed for appeals of admiralty and maritime cases from the district courts to the circuit courts.) Wilson's answer was that supreme court authority to hear appeals of admiralty and maritime cases flowed directly from the Constitution itself and was not dependent upon congressional action: the power was self-executing.[127] The process, not having been limited by congress pursuant to its exceptions and regulations power, was available to the court, presumably according to the normal usages of writs. Thus Ellsworth concluded that congress had forbidden the supreme court to review the facts in equity or civil maritime cases and Wilson concluded that congress had made no provision for supreme court review of maritime cases at all.

The implication for the parties was clear. The supreme court would not review the facts of the case and without that Dauchy would be able to collect his money.[128] The implications for supreme court adjudication were slightly less clear. The court had divided on how to interpret important constitutional provisions and had gleaned different

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[127] 3 U.S. (3 Dall.) 322, 325 (1796). Wilson said, "Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision."

[128] 3 U.S. (3 Dall.) 322, 330 (1796).

interpretations of what cases the Judiciary Act had attempted to cover. Yet the divisions on the court about the supreme court's appellate jurisdiction and the interpretation of the exceptions and regulations clause masked a more basic agreement of the court.

In Wiscart v. Dauchy the supreme court interpreted the Constitution and the Judiciary Act to conclude that the supreme court had to abide by an express statutory directive governing the exercise of a portion of its *appellate* jurisdiction *if* congress provided statutory directive addressing that portion of its appellate jurisdiction. Both the majority opinion and the dissent revealed justices adjudicating as part of a government of limited powers; they derived their power from documents and not from abstract justice or tradition. Both the majority and the dissent relied upon the Constitution to reach their different conclusions. Both their readings are plausible. On the issue of whether the Constitution was self-executing, the dissent concluded that the appellate jurisdiction was self-executing and the majority did not expressly disagree with this point. There was no apparent disagreement about the fundamental empowerment of the courts; both sides implicitly agreed that limits to the court's jurisdiction were found in the Constitution. The majority thought those limits had been further clarified by congress pursuant to an acknowledged congressional constitutional power to make exceptions and regulations to the court's appellate jurisdiction. The dissent did not disagree with this conclusion. Wilson only thought that Congress had not provided for one category of cases in the Judiciary Act's applicable section on the appellate jurisdiction. Thus, both the majority and the dissent agreed that the courts were operating pursuant to constitutional commands

and that their power was both found in and limited by the Constitution, not in jurisprudence or tradition.

The supreme court handled cases that implicated boundaries within the federal system by implementing the empowerments and limitations of the federal system. Both the states and the federal government would be held to the terms of the grant of power from the people. This requirement meant enforcing the terms of the federal system by which states would be amenable to lawsuits in Chisholm v. Georgia. The states would be bound by the terms of federalism as much as would the branches of the federal government. Accordingly, the court struck down a congressional law in Hayburn's Case that infringed upon the separation of the branches. Finally, in Wiscart v. Dauchy, at the boundary between empowerments and limitations, the court utilized a measured approach that relied upon close scrutiny of the Constitution and the Judiciary Act as it searched for the limits of its own jurisdiction. The court in each case analyzed the framework of empowerments and limitations that governed its adjudicatory framework and then operated pursuant to those empowerments and limitations in issuing its rulings.

The court consistently operated as part of a government of limited and delegated powers that was empowered in a way fundamentally different from state governments. The court exercised judicial review to measure congressional laws against the Constitution's limitations and struck them down if they were unconstitutional. The court asserted federal powers that were delegated to it as in Chisholm v. Georgia where the Constitution empowers the federal courts to hear suits of the kind Georgia sought to avoid. The court ruled in a manner that held Georgia to the terms of the Constitution and

in so doing demonstrated that the federal government would be fully empowered within its delegated realm even if the result would prove unpopular. Consistently, even at the uncertain boundary of an empowerment, where constitutional authority rested upon a nuanced combination of the Constitution and congress, the justices demonstrated an adherence to the Constitution and legislatively designed limits.

SECTION IV

FEDERAL POWER TO ACHIEVE NATIONAL ENDS

The supreme court adjudicated a number of cases that did not raise federalism concerns but did involve the powers delegated to the federal government. These cases, chief among them admiralty cases, showed the full extent of federal power within its delegated realm. These cases did not have implications for state governance or for the balance of power at the federal level. Instead the justices utilized the full measure of power accessible to the federal government as it governed over national matters.

The quantum of power that the federal government wielded in this setting and the distinctive character of the power together highlight the unique blending of empowerments and limitations that distinguished the federal government from state governments. A feature of the federal government's authority to hear and adjudicate on admiralty and certain criminal matters was its use of general principles that were part of the law of nations. The law of nations included general principles that assisted the federal courts as they resolved issues over which there was not clear and settled law.

Yet the access to general principles that the federal courts had was not a general access to principles such as would be available to a state court. State courts had access to general principles because they were part of governments of inherent authority that were fully empowered by their very nature. The federal courts had access to such principles only through constitutional and statutory grants in certain areas. Thus, even when accessing powers similar to those of state governments, the federal courts were, in fact, adhering to the limited and delegated structure of empowerments imposed by the Constitution.

EXPRESS DIRECTION TO USE THE LAW OF NATIONS

In U.S. v. Henfield [129] the United States courts utilized the full breadth of the constitutional empowerments available to the federal government to prosecute an American citizen who violated United States neutrality. The constitutional empowerment evident as the federal government prosecuted Gideon Henfield demonstrated the degree to which the Constitution achieved the desired elevation of the federal government when national security was implicated. Yet, the distinctive nature of empowerments demonstrated that the federal government, even within its delegated realm, was still a government of limited and delegated powers.

[129] 11 Fed. Cas. 1099 (1793).

The United States prosecuted Gideon Henfield for violating the law of nations and a number of treaties. His was a criminal prosecution at common law.[130] He had sailed from Charleston, South Carolina aboard a French privateer, the Citizen Genet, that had been outfitted in Charleston and was cruising off America's shores in search of enemy ships to capture.[131] The French were then at war with a number of countries in Europe as they struggled for the survival of their own revolution both from internal turmoil and from a host of countries eager to crush a revolution that threatened the monarchies of Europe. In 1793 most Americans supported the French, even though the United States declared an official position of neutrality; the French seemed kindred souls fighting for principles similar to those that had sparked America's own revolution. It obviously did nothing to dampen public support for the French that Great Britain was one of France's chief adversaries. In this highly charged environment, on May 5, 1793 the Citizen Genet captured the British sloop William off the coast of Massachusetts; and Henfield was dispatched as prize master to sail the captured sloop into Philadelphia. From captain on board a prize, Henfield's fortunes took a turn for the worse. He quickly found himself surveying nothing more than the confined space of a jail cell, charged with having unlawfully engaged in war against nations with which the United States was at peace. Despite public sympathies, the federal government was determined to enforce American neutrality.

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[130] Another example of such a prosecution was the conviction for murder in United States v. Maunier at 26 Fed. Cas. 1211 (1792) before the circuit court of North Carolina in 1792. The matter involved four sailors charged with murder on the high seas. Maunier was a French sailor who, the evidence showed, had axed someone to death with a blow to the head. The prosecution was rebuffed in their attempts to present an examination from the defendant yet Maunier and the three other sailors were found guilty based upon other evidence and the court delivered a death sentence for all four.

[131] 11 Fed. Cas. 1099, 1116 and 1100 (1793).

The federal courts had to find both jurisdiction and law to prosecute Henfield. How they asserted these spoke to the underlying nature of the federal government. As to jurisdiction, and thus the authority of the federal government to assert control over a matter of national significance, there was no doubt. The Constitution mandated that the judicial power extend to admiralty matters.[132] As to the law upon which the matter would be decided the federal courts again had access to bodies of law that offered the federal government an opportunity to protect national interests. Yet the distinctive way in which the federal courts had to access that law buttresses the notion that the federal government was in fact as well as in theory a government of limited and delegated powers.

The government prosecuted Henfield for violating treaties and the law of nations.[133] Treaties were clear enough. The United States had entered into a number of them after the Revolutionary War, including one with Great Britain, that provided that the countries were at peace with each other.[134] Treaties were within the jurisdiction of the federal courts and were the supreme law of the land according to the Constitution.[135] Somehow the government would have to demonstrate that the obligations of the United States in the treaty applied equally to the actions of individual citizens. Prosecuting him also under the law of nations was hardly problematic although it has proven confusing for

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[132] Article III, Section 2, clause 1. This jurisdiction is allocated through Sections 9 and 11 of the Judiciary Act of 1789.

[133] For a detailed discussion of this case and its place within the larger context of the debate over whether the federal government had a general federal common law of crime see Robert C. Palmer, "The Federal Common Law of Crime," Law and History Review 4 (1986): 267.

[134] 11 Fed. Cas. 1099, 1111 (1793).

[135] Article VI, clause 2 provides in relevant part that ". . . all Treaties, made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."

modern scholars.[136] The law of nations was a body of law that was part of the common law.[137] The states, and not the federal government, were recipients of the general common law through statutes called reception statutes that explicitly mandated that the common law was the governing law that would determine cases in state courts.[138] This was altogether proper. States needed the reception statutes because they were new governments choosing which laws to retain from the colonial era. To receive the common law was also appropriate because the governments were fully empowered governments of inherent authority. The common law was rooted in natural law, and for governments born of a social contract such law was as comprehensive as the base of power upon which the government rested.[139]

The federal courts found themselves using the law of nations and thus a part of the common law but only through constitutional and statutory directives. This was fitting for the federal government because as a government of delegated powers it required empowerments for its jurisdiction and the substantive law.[140] The substantive law, the

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[136] See Palmer, "The Federal Common Law of Crime," 267-273 for a discussion of the persistent myth that the federal government had the authority to prosecute crimes under a federal common law.

[137] 11 Fed. Cas. 1099, 1107 (1793).

[138] Pennsylvania's reception statute of 1777 said in part: "Each and every one of the laws or acts of general assembly, that were in force and binding on the inhabitants of the said province on the 14th day of May last, shall be in force and binding on the inhabitants of this state, from and after the 10th day of February next, as fully and effectually, to all intents and purposes, as if the said laws, and each of them, had been made or enacted by this general assembly . . . and the common law and such of the statute laws of England, as have heretofore been in force in the said province, except as hereafter excepted. . . ."

[139] This is not to suggest that the common law was fitting only for republics. It was a body of law that supported governments that were fully empowered such as either the English monarchy or the fully empowered governments created in the American Revolution.

[140] The use of the common law applied also to punishments even if the offense was not cognizable under the common law. In United States v. Smith et al. (27 Fed. Cas. 1147 (1792)) the circuit court of Massachusetts allowed a prosecution against defendants who had counterfeited United States currency although there was no federal statute on the subject. In the face of arguments that the prosecution should be dismissed because there was no federal jurisdiction of common law offenses, the court nevertheless

Constitution gave congress the power "to define and punish. . . offenses against the law of nations."[141] Congress exercised their power not by fully defining offenses under the law of nations but rather by reserving a power through the Judiciary Act's Section 34 "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[142] Congress's action was not to define the offenses any more narrowly than the law allowed. The courts were directed to use the entire body of the law of nations available in each state in which a trial was had. For Henfield, because he was in Philadelphia, Pennsylvania law and the law of nations as received by Pennsylvania would apply. Thus the federal court gained jurisdiction over Henfield's case from the Constitution and the substantive law from congress pursuant to constitutional empowerments that directed the federal courts to utilize the law of nations in the states in which the courts sat.

Federal prosecutors laid out their case against Henfield as a violation of law of nations and the treaty with the British rather than as a more general criminal prosecution at common law as would have been done at the state level. All twelve of the counts against him cited violations of the treaty; six of the twelve also cited violations of the law

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allowed the prosecution to proceed. The court defined the offense as "arising under . . . the laws of the United States." The court defined the offense as "a contempt of and misdemeanor against the United States." The court used the common law as a guide as it handed down a punishment of fine, imprisonment and pillory. The court specifically did not force the defendants to pay costs because "paying costs being no part of the common law punishment."

[141] Article I, Section 8, clause 10.

[142] Judiciary Act of 1789, Section 34. See Palmer, "The Federal Common Law of Crime" 296.

of nations.[143] The form of the indictment was based upon a Pennsylvania case which was cited as evidence that the law of nations was a part of the Pennsylvania common law. [144]

The law itself was explained by Justice Wilson in an instruction to the grand jury that stressed the significance of the charges against Henfield and their bases in the law of nations and as violations of treaties. The law of nations was explained as the "law of states and sovereigns."[145] It was an obligation of states to follow the law of nations just as it was obligatory on individuals to follow the law of nature within societies.[146] The law of nations gave rise to certain enduring truths that Wilson described as obligations and duties. These were described as general principles. Significant among them was the prohibition of "one state exciting disturbances in another."[147] Having laid before the grand jury the general nature of the obligations of the law of nations, Wilson then outlined the obligations of a state with regard to citizens who were acting outside the boundaries of obedience to the law of nations. These obligations included holding the "disorderly citizens . . . responsible, when they can be rendered amenable for the consequences of their crimes and disorders."[148] The grand jury obliged the court by returning indictments based upon violations of treaties and the law of nations.

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[143] 11 Fed. Cas. 1099, 1109-1115 (1793). Also see, Palmer, "The Federal Common Law of Crime" 293.

[144] 1 U.S. (1 Dall.) 111 (1784). This is the case of Respublica v. De Langchamps which was a case tried before the Pennsylvania supreme court. The Court cited Blackstone's Commentaries for the proposition that the law of nations was part of the common law. The full significance of this case as part of Henfield's case is explained by Palmer at Palmer, "The Federal Common Law of Crime" 294-295.

[145] 11 Fed. Cas. 1099, 1107 (1793).

[146] This obligation was such that states enforced the rulings of each other's courts. See such an example in M'Grath v. The Caldalero at 16 Fed. Cas. 127 (1794) where a federal district court enforced the ruling of a French prize court and allowed a party damages based upon the French ruling.

[147] 11 Fed. Cas. 1099, 1107 (1793).

[148] 11 Fed. Cas. 1099, 1107 (1793).

Prosecutors and defense counsel argued over the extent to which the federal court had jurisdiction to try the matter and whether there was in fact a defined offense under the common law.[149] On both counts the prosecution had laid the arguments before the court to defeat both of these major objections. The last major point of defense for Henfield was his assertion that he had emigrated to France and therefore, as a citizen of France, he was not bound by the law of nations to the conduct agreed to by the United States. This ingenious argument might have obviated the application of the treaties and his duties under the law of nations. The right to emigrate he asserted was codified in the Pennsylvania Constitution. For Henfield, however, his claim of having emigrated, which he made after committing the offense, was too late to be effective as a bar to his prosecution. If he had made his emigration effective prior to committing the offense then the Pennsylvania constitution would not have applied. Therefore, whatever merit his claim of emigration had for his defense was defeated by his proud protestations of being an American citizen when he was first arrested.[150] His claim of being a Frenchman had obviously arisen only after his arrest. Arguments based only on law failed; the matter went to the jury after an instruction that encouraged the jury to do their duty on behalf of the nation and find Henfield guilty as charged. After deliberations over a weekend and clarifications about law relating to his claim of emigration, the jury delivered a rebuke to the government by finding Henfield not guilty.[151]

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[149] 11 Fed. Cas. 1099, 1116-1119 (1793). The arguments of counsel are summarized here.

[150] 11 Fed. Cas. 1099, 1116 (1793).

[151] Congress would pass an act to enforce neutrality at 1. Statute 383 (1794) and enforce it in United States v. Guinet et al. 26 Fed. Cas. 55 (1795).

Even though the government lost the case against Henfield the full measure of federal power was on display. Federal courts asserted their jurisdiction under the Constitution so that a matter of national importance was tried in the nation's courts; the court applied the full measure of the law of nations against a citizen who violated American obligations. Yet, in the midst of such a powerful display the nature of the adjudication and the means to reach the applicable law indicate that the federal government did not operate as a government of inherent authority. It asserted its powers only pursuant to constitutional and statutory directives and the applicable law, while broad in that it allowed the court to argue on general principles under the law of nations, was in fact only made available to the court by express constitutional and statutory grants to work under state law. Thus fully empowered within its delegated realm, the federal government was still bound within a system of limited government.

AMERICAN NEUTRALITY IN ADMIRALTY

In Talbot v. Jansen [152] the supreme court demonstrated that the federal government, though powerful within its delegated realm, was nevertheless a limited government. The supreme court measured the actions of two privateers, cruising under a French commission, against applicable treaties and the law of nations. The outcome of

[152] 3 U.S. (3 Dall.) 133 (1795). The case was originally argued in Talbot v. The Vrow Christina Magdalena at 13 Fed. Cas. 356 (1794). See Teasdale v. The Rambler (23 Fed. Cas. 824 (1794)) where the federal district court denied a plea by an agent of the French government that Ballard was not subject to suit because he was a citizen of the French republic. See also a tort suit for wrongful capture involving these parties at Martins v. Ballard et al. (16 Fed. Cas. 923 (1794)). The court ruled against Ballard. Finally, see Ballard's suit to be released from debtor's prison at Martins v. Ballard (16 Fed Cas. 925 (1808)). Ballard's plea was denied.

the privateers' claims and the way the court determined their validity would define the contours of American neutrality in the admiralty setting. In considering the competing arguments between the privateers and the owners of the captured ship, the supreme court utilized the full breadth of powers delegated to the federal courts. The Constitution broadly empowered the central government within its delegated realm. Broad empowerment though did not translate to unlimited or ill-defined powers.

In Talbot v. Jansen the supreme court ruled that a capture made by two privateers was illegal and the court awarded the aggrieved party damages for the value of their ship and cargo. The case involved a complicated scheme by American speculators to send out two vessels as privateers to profit from the hostilities between France and her European enemies.[153] The two vessels were commanded by William Talbot and Edward Ballard and owned by a number of Virginians. Ballard's ship, the L'Ami de la Liberte, captured the Dutch brigantine, the Magdalena, off of Cuba. Shortly after affecting the capture Ballard was joined by his cohort Talbot and Talbot's privateer, the L'Ami de la Point-Pitre. Both raiders deposited crewman onboard the Magdalena which guided the captured ship into Charleston, South Carolina. Jansen, the captain of the captured vessel, sought restitution in the district court for South Carolina. The district court rejected challenges to its jurisdiction and granted restitution to the Dutch owners. The circuit court affirmed the district courts ruling and the privateers appealed to the supreme court on the issue of jurisdiction and the legitimacy of the capture.

The privateers had gone to impressive lengths to legitimize their privateering. Talbot and his vessel's agent had sailed the Fairplay from Virginia to the French island of Guadaloupe in November of 1793 where both men took an oath of allegiance to France

[153] 3 U.S. (3 Dall.) 133, 133-134 (1795).

and received French citizenship. The agent, Samuel Redick, had a bill of sale from the true owners that purported to show that Redick owned the ship. (The court had evidence that indicated that the conveyance was fictitious and that profits from the venture were being disbursed to the true owners after the purported bill of sale.) Talbot and Redick received a commission from the French governor for their ship and after being fitted out, the Fairplay became the French raider, L'Ami de la Point-Pitre. Ballard also claimed to be French and had a commission for his raider, which the evidence indicated was owned by the same owners as Talbot's ship. Rather than traveling to a French territory as Talbot had, Ballard had officially renounced his Virginia citizenship in April of 1794 before a court in Virginia in accordance with a Virginia statute that sanctioned expatriation. He then received a commission for his raider from a French admiral whose fleet was then in the Chesapeake Bay. With a colorable claim to French citizenship and a French commission, Ballard joined forces with Talbot near the Savannah River for their initial cruise. After capturing a number of ships Talbot and Ballard captured the Dutch vessel, Magdalena, captained by Joost Jansen in June of 1794.

Justices Paterson, Iredell, Cushing and Chief Justice Rutledge all wrote opinions that relied upon the law of nations to reach their conclusion that the capture was invalid. They differed only in their handling of the Virginia expatriation statute; Paterson adopted a position that was staunchly nationalist. The court, except for Paterson, continued to search for the governing framework of empowerments and limitations that would apply to their analysis of the competing claims.

Justice Rutledge's only opinion in the supreme court was little more than a brief outline of his conclusions on the issues over which there could be some debate. He found

the capture to be an invalid one. He concluded that the "capture . . . was a violation of the law of nations, and of the treaty with Holland."[154] The weight of the evidence indicated that Talbot's attempt to become a French citizen were not sincere and that his ship remained American property "notwithstanding all the fraudulent attempts to give it a different complexion."[155] Ballard's vessel was illegally fitted out in the United States and therefore his claim to have effected a legitimate capture deserved no greater weight.

Justice Cushing's opinion based his judgment on the treaty with Holland and on "principle[s] of justice, law [and] policy . . . ."[156] He found the capture was a violation of the treaty with Holland and that the United States treaty with France did not prevent the court from asserting jurisdiction over the case.[157] Though not expressly relying on the law of nations, Cushing relied upon arguments based on the law of nations. He concluded that Talbot's efforts to adopt French citizenship were "fraudulent and collusive."[158] Yet, even if Talbot's role in the affair was free from blame, the capture was still invalid because Ballard was an American citizen commanding an American ship without a proper commission.[159]

Iredell also concluded that the capture was not a lawful prize. His opinion rested upon the law of nations. He began by analyzing whether the federal courts had jurisdiction. The issue was more complicated than simply concluding that the issue was

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[154] 3 U.S. (3 Dall.) 133, 169 (1795).

[155] 3 U.S. (3 Dall.) 133, 162 (1795).

[156] 3 U.S. (3 Dall.) 133, 169 (1795).

[157] 3 U.S. (3 Dall.) 133, 169 (1795). The then existing treaty with France allowed the French to bring prizes that had been captured by lawfully commissioned French privateers into United States' ports.

[158] 3 U.S. (3 Dall.) 133, 168 (1795).

[159] 3 U.S. (3 Dall.) 133, 168 (1795).

an admiralty one because the then existing treaty with France gave French privateers a right to bring captured ships into U.S. ports. As Iredell pointed out, though, this simply begged the question of whether the privateer in question was lawfully commissioned as a French privateer. To answer this question required a preliminary review of the facts to see if there was a substantive issue involving United States interests. Iredell analyzed the law of nations on the legal consequences of two issues: whether the commission was legal and whether the actions of privateers could be construed as acts of war without national sanction. Iredell concluded that the actions of the privateer were without lawful commission and contrary to the law of nations and cognizable in U.S. courts. "Such hostility committed without public authority on the high seas is not merely an offense against the nation of the individual committing the injury but also against the law of nations and, of course, cognizable in other countries."[160]

On the substantive issue Iredell dispensed with the defenses of Ballard and Talbot relatively quickly. Ballard had failed to expatriate himself and Talbot's commission, while lawfully provided, was not faithfully executed.[161] Ballard had acted the pirate and the evidence overwhelmingly supported the defense's arguments that Talbot had colluded with Ballard.[162] Such conduct was contrary to the lawful uses of his commission. Therefore, whatever claim Talbot might have had absent Ballard would have no weight. The authority that Iredell relied upon was the law of nations, which while not an explicit

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[160] 3 U.S. (3 Dall.) 133, 161 (1795). Iredell concluded even more bluntly that, "This is so palpable a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since that has provided a particular manner of enforcing it,) as well as of the law of nations generally; that I cannot entertain the slightest doubt, but that upon the case of the libel, prima facie, the district court had jurisdiction." The act of Congress that he referred to was passed on June 5, 1794.

[161] 3 U.S. (3 Dall.) 133, 155-156 (1795).

[162] 3 U.S. (3 Dall.) 133, 168 (1795).

code, was the law the court was directed to use pursuant to Section 34 of the Judiciary Act.

The only issue that gave Iredell pause was the expatriation issue and on this he disagreed in part with Paterson on the significance of the Virginia statute. He concluded that if Ballard had availed himself of the expatriation statute he would have expatriated himself from the United States.[163] Paterson thought that the Virginia statute could have no possible effect on Ballard's claim of expatriation; Iredell concluded that Ballard would have successfully expatriated himself.[164] Iredell's conceptualization of citizenship necessarily based national citizenship on citizenship within a state but left open the possibility that a man might have allegiance to no state.[165] He argued that those legal authorities that held that expatriation was "a right in each individual, over which no act of legislation can lawfully be exercised" simply failed to reconcile acknowledged

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[163] 3 U.S. (3 Dall.) 133, 166 (1795). The question before the court was whether Ballard and Talbot were United States or French citizens. Iredell's answer digressed to a discussion regarding the impact of the Virginia statute because, if the statute had been in force, this would have been dispositive of the issue for Iredell. If Ballard and Talbot had expatriated themselves in accord with the Virginia statute, Iredell would have considered them expatriated from the United States. For Iredell, state citizenship was the rule upon which the national government depended.

[164] 3 U.S. (3 Dall.) 133, 166 (1795). Iredell said regarding Ballard that, "Admitting him to have been expatriated (which, if the Virginia law was in force, I think he was) he did not become a French citizen."

The circuit court of Pennsylvania ruled in 1792 in the case of Collet v. Collet (6 Fed. Cas. 105 (1792)) that the power of naturalization was a power held concurrently by the federal and state governments. This was so with respect to Pennsylvania because the Pennsylvania Constitution of 1776 provided for naturalization and the Pennsylvania legislature passed an act in 1789 detailing the process for naturalization. In the later case of United States v. Villato (28 Fed. Cas. 377 (1797)) a federal court in Pennsylvania held that the federal statute on naturalization was the sole operative law because the Pennsylvania Constitution of 1792 did not provide a state mechanism for naturalization.

[165] His conceptualization left open the possibility that an individual might have allegiance to no state. This would have been Ballard's status if he had successfully expatriated himself from Virginia but not taken allegiance with another country. Paterson's ridiculed this possible outcome of Iredell's conceptualization of citizenship. He commented sarcastically that, "Ballard was, and still is, a citizen of the United States; unless perchance, he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic ancient or modern." See 3 U.S. (3 Dall.) 133, 163 (1795).

exceptions with their rule.[166] He argued that the proper way to conceptualize expatriation was as a social contract right that like any other was within the power of the legislature to regulate for the betterment of society.[167] Legislatures should draft statutes that would prescribe the mode that citizens might use. This would clarify the duties and obligations of both the state and the citizen that must be met prior to their separation.[168]

Paterson agreed with the conclusion of the court regarding the validity of the prize but his reasoning set him apart from the other judges. He wrote a longer opinion that focused on the nature of Ballard's and Talbot's citizenship. He built toward his conclusion by first analyzing Ballard's role in the affair. He concluded that Ballard was a citizen of the United States because he was domiciled in the United States and exhibited no intention to move and settle elsewhere.[169] Even though he had attempted to expatriate himself through the Virginia statute, the "act of the legislature of Virginia, does not apply."[170] Ballard had sailed with "an iniquitous purpose" and "it is an obvious principle that" no act of his, born of illegal intentions, could make his departure into a legal

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[166] 3 U.S. (3 Dall.) 133, 162 (1795).

[167] Iredell conceived of the right of expatriation as a social contract right like those other rights contained within state bills of rights that were significant but could be regulated. See his discussion of this right at 3 U.S. (3 Dall.) 133, 162-164 (1795). He argued that the right was not an absolute right that the legislatures could never regulate, as evidenced by the exceptions to the right of expatriation that a number of commentators recognized. He said, "The very statement of an exception in time of war [to the ability of any individual to expatriate himself] shows that the writers on the law of nations, upon the subject in general, plainly mean, not that it is a right to be always exercised without the least restraint of his own will and pleasure, but that it is a reasonable and moral right which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must forever give way."

[168] 3 U.S. (3 Dall.) 133, 164 (1795).

[169] 3 U.S. (3 Dall.) 133, 152 (1795).

[170] 3 U.S. (3 Dall.) 133, 153 (1795).

expatriation or emigration.[171] Thus Ballard was to be held accountable as an American citizen for his actions.

He reached the same result regarding Talbot's expatriation, or, as Jansen's attorney called it, "pretended expatriation."[172] Even though Talbot had a claim to French citizenship, Paterson gave little indication that would respect Talbot's claim because the facts surrounding his participation revealed the true nature of the "predatory schemes."[173] Paterson said of Talbot's ship that "the evidence of [the privateer] being French property is extremely weak and futile." [174] His intentions even if taken as he presented them were damaging to his claims. He had consorted with Ballard whose actions were "direct and daring violations of the principles of neutrality, and highly criminal by the law of nations."[175] Talbot had, according to Paterson, acted contrary to the principles of his commission and contrary to the principles of the law of nations.

Paterson gave less credence to the Virginia statute than did the other justices. He alone concluded that it simply could not apply and offered a more general opinion about such statutes.[176] Rutledge and Cushing declined to give an opinion on the issue; Iredell

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[171] 3 U.S. (3 Dall.) 133, 153 (1795).

[172] 3 U.S. (3 Dall.) 133, 151 (1795).

[173] 3 U.S. (3 Dall.) 133, 156 (1795).

[174] 3 U.S. (3 Dall.) 133, 155 (1795).

[175] 3 U.S. (3 Dall.) 133, 156 (1795).

[176] Both Paterson and Iredell were arguing over a hypothetical because the evidence was not in the record that Ballard or Talbot had fully complied with the Virginia statute. See Paterson's opinion at 3 U.S. (3 Dall.) 133, 152 (1795).and Iredell's at 3 U.S. (3 Dall.) 133, 164 and 166 (1795). Iredell and Chase would disagree over state governance issues in Calder v. Bull. See 3 U.S. (3 Dall.) 386 (1798).

openly disagreed with Paterson.[177] For Paterson, states simply had no role to play in determining national citizenship. He reasoned that the Virginia statute could have no effect on the duties of citizenship that Ballard owed the United States.[178] Ballard had violated these duties by threatening the peace and neutrality of the nation he was attempting to leave.[179] He applied this reasoning broadly and spoke more generally about the effect of statutes like Virginia's on claims of expatriation. As Paterson said, "The sovereignties are different; the allegiance is different; the right too, may be different."[180] Thus the Virginia statute and statutes like it were simply irrelevant to issues of expatriation involving the United States federal government because the federal government was wholly independent of the states with regard to the duties of citizens.

Talbot v. Jansen, thus, found the court using the law of nations and treaty provisions as the substantive law in an admiralty cause of action with national implications. As the court, and thus the federal government, made use of the powers entrusted to the federal government in the Constitution, the federal government acted powerfully within its designated realm. Yet even within its delegated realm, the court continued to adhere to constitutional and legislatively designed limits on its jurisdiction and substantive law.

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[177] See 3 U.S. (3 Dall.) 133, 169 (1795) for both Cushing and Rutledge's refusal to opine about the statute.

[178] One virtue of Paterson's position was clarity on the issue of citizenship with regard to the national government. His test was simply a factual one about were the individual was "domicilated." If not domiciled in the United States, the next inquiry for Paterson was the country to which he had "joined himself. . . settling there his fortune, and family." See pages 3 U.S. (3 Dall.) 133, 153-154 (1795).

[179] 3 U.S. (3 Dall.) 133, 156 (1795).

[180] 3 U.S. (3 Dall.) 133, 154 (1795). Paterson viewed the federal government as being imbued with the common law because the states had received it. There was, however, no reception statute for the federal government.

The operation of the federal courts within their designated realm indicates that the Founders achieved their desired aims of elevating the judiciary to the third coordinate branch of the federal government and of vesting in the federal government sufficient power that it could govern national matters. The empowerments used by the federal government and its courts extended to criminal prosecutions in Henfield's case and to prevent privateers from drawing the United States out of its neutrality in Talbot v. Jansen. The court made use of general principles that were part of the law of nations as it considered the actions of Henfield and Talbot. In short, the federal courts acted powerfully to fulfill their role within their designated realm.

Yet, for all the powers that the federal courts wielded to bring Henfield to trial and rebuff the French who were trying to gain American acquiescence to privateering, the courts still adhered to a set of limitations that distinguished the court as part of a government of limited and delegated powers. The court was limited by the jurisdictional grants of Article III and therefore had to justify the jurisdiction that it asserted in each case. The court also operated within the limitations imposed upon its power by the Constitution as to the law that it could use. The court's access to the law of nations was no general access to the common law, but rather access to a single defined body of law pursuant to constitutional and legislative empowerments. In Henfield's case, as much as the government might have wished that it could find Henfield guilty, all that the court could do was to allow his prosecution to be as vigorous as possible consistent with a statute that required a jury trial. That congressional statute was the Judiciary Act which had been passed to create lower federal courts and make exceptions and regulations to the

appellate jurisdiction of the federal courts. Even on the important issue of protecting United States neutrality in Talbot v. Jansen, the court adhered to constitutional and legislatively designed limits on its jurisdiction and substantive law.

SECTION V

STATE GOVERNMENTAL POWERS WITHIN THE FEDERAL COURT SYSTEM

The federal courts also adjudicated using the broader judicial powers of state governments in certain types of adjudication. These cases arose out of the empowerments and directives of the constitutional system rather than a general power in the federal government to adjudicate as a fully empowered government of inherent authority. When adjudicating in this framework, the federal courts were directed to adjudicate using state court powers and resolve issues pursuant to state law using state court powers. These cases revealed the nature of state governance powers and, therefore, the full measure of the different kinds of governments governing together in the federal system. Two features of this adjudication highlight how fundamentally different state governments were from the federal government. The first reflects upon the quantum of power that state governments had; the second reveals the allocation of power at the state level.

The court's adjudication used state court powers and revealed a breadth to state governance powers that did not exist at the federal level; a power so extensive that the court could base its decision on general principles of law. Federal power, because it was

based upon a government of only limited and delegated powers, did not include a power to base federal actions or the resolutions of disputes regarding federal power on general principles. The federal government had its powers limited and delegated and although supreme within its delegated realm, it could only rely upon specific grants of powers or legislative acts rooted in constitutional grants of power to justify its actions. State governments, because they were structured directly upon a theory of a social contract, utilized the general principles out of which the social contracts were crafted. They were governments of inherent authority; the federal government was one of only limited and delegated powers.

When adjudicating with state court powers, the federal courts not only used general principles of law, but also deferred to the state legislatures. Thus federal courts, which had no reluctance to strike down state legislation that violated the United States Constitution, became deferential to state legislatures when measuring state laws against state constitutions. This was certainly contrary to the posture that was required of them when adjudicating as part of the federal government, but it was in keeping with the general nature of state governments where the legislatures were supreme by design. This legislative supremacy was a necessary part of the governance structure at the state level so that the people could be the source of power both in theory and in reality.

Yet, even as the federal courts accessed state governmental powers to adjudicate cases, they continued to operate as part of a government of limited and delegated powers. All these cases reached the federal courts through specific constitutional empowerments and congressional directives. The law that they used, while that of governments of inherent authority, was specifically directed by congress in line with constitutional

empowerments. Thus, although the federal courts utilized expansive powers to adjudicate, they continued to operate pursuant to the specific empowerments and limitations that defined the federal government as a government of limited and delegated powers. This was consistent with an adjudicatory setting in which the federal courts adhered to the empowerments and limitations inherent in the judicial setting in which they operated.

This judicial framework in which the federal courts utilized judicial powers found as part of state governments has been misunderstood by modern scholars. They have concluded, that because the federal courts exercised powers of a government more broadly empowered, that the federal government must be generally empowered. Inherent in this argument is a failure to appreciate the way in which the court measured the empowerments and limitations within each adjudicatory setting and the fact that each setting was created by specific constitutional empowerments.

A central piece of evidence for this erroneous conclusion has been the discussion of natural law principles in Calder v. Bull.[181] Gerald Gunther, in his widely used casebook on constitutional law concludes that the federal government had the powers of a broadly empowered government:

> Substantive due process as a protection of fundamental economic rights did not receive wholehearted support from a Court majority until the end of the 19th century. But arguments that property and economic rights were basic had long been in the air: the notion that there were fundamental rights, and that they were entitled to judicial protection, had considerable early support. . .Some of these

[181] 3 U.S. (3 Dall.) 386 (1798).

> natural law ideas surfaced sporadically in the early Court opinions: during the pre-Marshall years, some Justices were tempted to read the Constitution as a whole as guarantor of fundamental rights—rights that stemmed from the social compact and did not need any explicit textual support. The prime example is Justice Chase's opinion in 1798, in *Calder v. Bull.*[182]

This case is often cited as evidence that the federal government had a general access to general principles of social justice that could be used to resolve disputes.[183] If correct, this access would indicate that the federal government was a government that was broadly empowered like state governments and, yet, this reading of the opinion in Calder v. Bull is incorrect and fails to account for a number of cases that preceded Calder that indicate that the court was not asserting that the federal government had broad, general powers. In Calder and its predecessors, VanHorne v. Dorrance and Minge v. Gilmour the court was utilizing constitutional empowerments and directives to access state court powers as it adjudicated in this one particular setting.

FUNDAMENTAL PRINCIPLES OF THE SOCIAL CONTRACT

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[182] See Gerald Gunther, Constitutional Law, 12th ed., (New York: The Foundation Press, 1991) 433-435.

[183] See also Paul Brest and Sanford Levinson, Processes of Constitutional Decisionmaking, Cases and Materials, 2nd ed., (Boston: Little, Brown and Company, 1983) 116-118; David P. Currie, The Constitution in the Supreme Court, The First Hundred Years, 1789-1888 (Chicago: Univ. of Chicago Press, 1985) 41-49; and Kermit Hall, ed., The Oxford Companion to the Supreme Court of the United States (New York: Oxford University Press, 1992) 137-138 in which Stephen Presser describes Chase's opinion as having "explored what might be regarded as the natural law basis for the Federal Constitution of 1789."

In VanHorne v. Dorrance[184] the circuit court of Pennsylvania, with Justice Paterson presiding, analyzed competing claims to land by citizens of the same state and, in the course of doing so, measured a Pennsylvania law against the Pennsylvania constitution. The court's adjudication used state court powers pursuant to Section 34 of the Judiciary Act. The court acknowledged that state governments were governments of inherent authority whose courts could use general principles of law to resolve cases. Federal power, because it was based upon a government of only limited and delegated powers, did not normally include a power to found judgments on general principles but in this distinctive setting the federal courts could access general principles.

The federal court in VanHorne v. Dorrance carefully rested its opinion on the Constitution and federal statute. Not only was the applicable law provided through congressional directive, the jurisdiction also was dictated by express empowerments. The court gained jurisdiction over the case because VanHorne and Dorrance were citizens of Pennsylvania who each had a colorable claim to the same land from different states. This was, as Paterson put it, a "territorial controversy between the states of Pennsylvania and Connecticut."[185] VanHorne's claim was based upon a chain of title recognized by Pennsylvania law; Dorrance found, among other arguments for his rights to the land, a claim under Connecticut law.[186] The Constitution granted jurisdiction over such cases to the federal courts through Article III, Section 2. Congress had allocated jurisdiction for such suits to the circuit courts through section 13 of the Judiciary Act of

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[184] 28 Fed. Cas. 1012 (1795).

[185] 28 Fed. Cas. 1012 (1795).

[186] 28 Fed. Cas. 1012, 1013 (1795).

1789, which required that these suits be instituted in a state court first and then removed to the federal courts after demonstrating that their case fell within the courts' jurisdiction.

Thomas Van Horne and John Dorrance each asserted ownership to a parcel of land in Lucerne County, Pennsylvania. Van Horne had a clear chain of uninterrupted title to the property that dated back to a deed from William Penn. He bolstered his claim with surveys that depicted his land and he provided evidence that he had "fenced, tilled, and improved" the land.[187] It was, as Paterson described it, "clearly deduced and legally correct."[188] Yet his claim, even though grounded in Pennsylvania law, was ironically not supported by Pennsylvania. The state concluded that it had a greater interest in resolving a territorial dispute with neighboring Connecticut than in protecting Van Horne's rights to his land. John Dorrance, who occupied the land at the time of the suit, was among a group of Connecticut citizens who had settled in eastern Pennsylvania in a region that Connecticut had once claimed. Connecticut had even passed a law that sanctioned the claims of the settlers under Connecticut law. Dorrance's chain of title to the parcel in question was, however, shoddy at best; the court described his vesting deed as "radically defective and faulty;"[189] yet his claim was a strong one because Pennsylvania had passed a law that quieted title in Dorrance and provided Van Horne with other lands. Thus, over Van Horne's protestations, Pennsylvania had seen fit to sacrifice Van Horne in an agreement with Connecticut by which Connecticut abandoned its claim to the disputed

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[187] 28 Fed. Cas. 1012, 1013 (1795).

[188] 28 Fed. Cas. 1012, 1013 (1795).

[189] 28 Fed. Cas. 1012, 1013 (1795).

territory in eastern Pennsylvania and Pennsylvania mollified Connecticut settlers with land in the disputed region.

The court asserted jurisdiction and found its applicable law through constitutional grants of jurisdiction and congressional directives. Thus the court operated pursuant to the delegated powers of the federal government. The Constitution mandates in Article III, Section 2 that the federal courts have jurisdiction over controversies "between Citizens of the same State claiming Lands under Grants of different States." This was such a case because citizenship was really a matter of where one lived or intended to live and both Van Horne and Dorrance were domiciled in Pennsylvania.[190] Van Horne's claim was obviously under Pennsylvania law; Dorrance had a plausible and competing claim under Connecticut law. Pursuant to section 12 of the Judiciary Act of 1789, congress directed these suits to be brought first in a state court and then if the evidence truly warranted it the case could be removed to the nearest circuit court for a trial by jury. The court found its applicable law also through the Judiciary Act which declared in section 34, "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[191] Neither Constitution nor any treaty or statute impeded the basic directive here that state law be applied.[192]

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[190] See both United States v. Henfield (11 Fed. Cas. 1099 (1793)) and Talbot v. Jansen (3 U.S. (3 Dall.) 133 (1795) for lengthy discussion about the principles of citizenship.

[191] Section 34, Judiciary Act of 1789.

[192] See also Hancock v. Hillegas (11 Fed. Cas. 401 (1797)) for an example of the law of the state where the court sat being used to determine a legal question.

The first of these involved his expansive use of judicial review. While appropriate in the courts of the federal government, judicial review was not a power intended to be used at the state level in purely state matters unless the state violated the United States Constitution. In fact during the years preceding the Constitution only a very few examples have been found of state courts exercising judicial review. [193] One would not have guessed that from Paterson's opinion, but under state court powers judicial review was rarely exercised prior to 1787 because the legislatures were supreme by design at the state level. State courts were intended to be subordinate branches of government and not stand in the way of legislative will. Paterson boldly asserted a broad right to strike down state laws that conflicted not just with express provisions but also with principles gleaned from state constitutions. Other justices agreed with Paterson that courts utilizing state court powers could void laws that conflicted with express constitutional provisions but to declare laws unconstitutional that did not violate the letter of the constitution was another degree of power. Paterson said, "I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance."[194] That a principle, rather than an

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[193] As to the lack of judicial review see Allen Nevins, The American States During and After the Revolution, 1775-1789 (New York: MacMillian, 1924) 168-169. As to the paucity of cites justifying judicial review prior to 1787, Goebel says that the effort of courts to "vindicate constitutional purpose" had only "a remote effect on the then-current trend." Julius Goebel Jr., History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, (New York: Knopf, 1971) 142. Edwin S. Corwin and Louis B. Boudin concluded that there were significant precedents to trace the development of judicial review from the revolutionary period into the Constitutional period. Unfortunately they only found a total of seven cases from the revolutionary period to justify their conclusion. That is seven examples for 13 states over a twelve year period. Some of the cases are not even evidenced by written opinions but are recorded only in lawyers' notes. See Louis Boudin, Government by Judiciary (New York: W. Godwin, 1932) 51-73, Edwin S. Corwin, The Doctrine of Judicial Review (Princeton: Princeton Press, 1914) 8-20. See also Charles Haines, The American Doctrine of Judicial Supremacy, (Berkeley: University of California Press, 1932) 88-121, citing 8 cases. For evidence questioning the validity of some of these few cites see Robert Clinton, Marbury v. Madison and Judicial Review (Lawrence: University of Kansas Press, 1989) 48-54.

express prohibition, could form the basis for a court to strike down a state law was a broad assertion of judicial review even in 1795.

Paterson proceeded to use state law as the basis of the decision. He briefly explained Van Horne's chain of title and instructed the jury that it was a valid chain of title that "will entitle the plaintiff [Van Horne] to your verdict" unless "sufficient appears on the part of the defendant."[195] He then turned to Dorrance's arguments and quickly dispensed with Dorrance's claims by virtue of his vesting deed from Indians and by the legislative acts of Connecticut. The sum of these arguments did nothing to convince Paterson; he summed up Dorrance's legal position after reviewing these arguments by saying that they left all the Connecticut settlers, Dorrance included, as "trespassers and intruders" who had "purchased the land without leave, and entered upon it without right."[196] Yet, "the keystone of defendant's title" claim was still to be analyzed: Dorrance's claim that the quieting and confirming act of Pennsylvania made him the owner.

Paterson measured the Pennsylvania quieting and confirming act against the Pennsylvania constitution. He began his analysis by reviewing the powers of state governance. He explored the nature of legislative power and the effect of constitutions on legislative powers. He opined that in theory state legislative power was unlimited. Its origins were in English traditions where the "exercise of sovereign authority" is "transcendant and has no bounds."[197] This was the power that parliament exercised: a

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[194] 11 Fed. Cas. 1012, 1015 (1795).

[195] 28 Fed. Cas. 1012, 1013 (1795).

[196] 28 Fed. Cas. 1012, 1013 (1795).

[197] 28 Fed. Cas. 1012, 1014 (1795).

power "sovereign and uncontroulable" that allowed parliament complete freedom in "the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations. . ."[198] His examples to demonstrate the breadth of legislative power in the English model included altering the religion of the land or even altering the constitution of the kingdom. The former had been done during the reign of Henry VIII and the latter with the act of union. The English constitution did not serve to limit parliament because it was not a written one against which parliamentary acts could be measured. In fact, parliament effectively expounded the constitution in the course of legislating. There was no written constitution by which to measure the acts of parliament against fundamental principles.

This was not the case in the states of the Union where constitutions are "reduced to written exactitude and precision" and serve as an embodiment of the people's will "in which certain first principles are established."[199] State legislatures wielded powers that were of the same character as parliament; both could legislate on matters regarding the health, safety and morals of a society. State legislative power was limited, however, by the constitutions that "were the work or will of the people themselves, in their original, sovereign, and unlimited capacity."[200] The constitutions then did not alter the fundamental character of legislative power, they simply prescribed limits in which the legislatures were to be confined as they exercised the powers of a government of inherent authority. The nature of these limitations were made clear by his examples. The

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[198] 28 Fed. Cas. 1012, 1014 (1795).

[199] 28 Fed. Cas. 1012, 1014 (1795).

[200] 28 Fed. Cas. 1012, 1014 (1795).

constitution, as Paterson showed by example, protected the "free exercise of religious worship" and decreed that elections "shall be by ballot, free and voluntary." Paterson explained that the rights that were reserved in the people were protected from legislative action. Therefore, the rights retained by the people, as the Pennsylvania constitution said, "shall forever remain inviolate."[201]

Paterson then brought these principles to bear on the Pennsylvania quieting and confirming act upon which Dorrance relied. He brought to his adjudication a determined judicial review that began with his fundamental premise that "every act of the legislature, repugnant to the constitution, is absolutely void."[202] He concluded that the right of acquiring and possessing property was "one of the natural, inherent, and unalienable rights of man" that was a "primary object of the social compact."[203] Thus no one could be called upon to surrender his property for the benefit of the community without compensation. To do otherwise would be to violate one of the fundamental tenets upon which the social compact was constructed. Assuming then that a legislature could in theory take property from one citizen for the common good (with compensation) the question then necessarily arose whether property could be taken from one citizen and vested in another for the common good (again compensating him for his lost property.)

Paterson held that in theory a state had the power to take property from one citizen and vest it in another with compensation. This power was rooted in the right of

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[201] See Pennsylvania Constitution of 1790, Article IX, Section 26. The Pennsylvania Constitution was a unique constitution that was a reflection of the United States Constitution. Rather than social contract rights in a bill of rights preceding the constitution, rights appeared at the end of the constitution and were wooden in design so that the legislature could not compromise them.

[202] 11 Fed. Cas. 1012, 1016 (1795).

[203] 11 Fed. Cas. 1012, 1016 (1795).

government to act in emergencies. Dorrance's attorneys argued that such a power existed in the legislature and that the legislature alone was the judge of when necessity called for such action. They argued that the Pennsylvania Constitution of 1790 empowered the legislature to make such decisions through its structure that vested all powers in the legislature not reserved in the constitution. Paterson agreed but only in theory. He concluded that he could not conceive of a necessity that would justify such action and, therefore, no act that divested VanHorne of property and vested it in Dorrance could be constitutional even if it provided compensation to VanHorne.

He found his justifications in "the eternal principles of justice, as well as the sacred principles of the social contract."[204] He stated that it made no difference to the government who owned land, but that once owned the constitution, even though there was no specific provision that prevented it, forbade divesting a party of property simply to vest it in another citizen. Condoning such legislative action fatally damaged the security in ownership of property that was inherent in the social compact. It would be counter to the "general, known, and established laws" by which "the rights of private property are regulated, protected and governed."[205] Thus the Pennsylvania quieting and confirming act was struck down as violative of the first principles of the Pennsylvania constitution. The court relied upon general principles gleaned from the social compact and inherent in a government born from such a compact to reach its conclusions.

Paterson adjudicated as part of a government of delegated and limited powers as he utilized constitutional grants of power and congressional directives to use state court

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[204] 11 Fed. Cas. 1012, 1016 (1795).

[205] 11 Fed. Cas. 1012, 1016 (1795).

powers. He found the jurisdiction over the case through the Constitution and federal statutes that allocated the jurisdiction over the case to the circuit courts. Constitutional and congressional direction also called for the applicable law to be state law. Thus the use of state court powers to analyze the competing claims of VanHorne and Dorrance was no general assertion of broad powers in the federal government but rather only the use of directives to adjudicate properly within a setting that relied upon state governmental powers.

The nature of the adjudication revealed that state governance powers were fundamentally different from the federal powers available in the normal course of adjudication in the federal courts. The distinction between these two sets of powers highlighted the differences between the federal and state governments. Federal courts only had access to general principles, and thus broader adjudicatory power, in limited settings. This limitation was pursuant to express constitutional and congressional directives to handle cases of a properly state nature in federal courts that were directed to operate as properly state courts. The court did use general powers in VanHorne v. Dorrance that were born of a social compact but only because state governments were governments of inherent authority. The federal government was differently empowered: it was only a government of limited and delegated powers that received its authority from the Constitution, a document codifying powers allocated to it by the people in the course of reordering the federal system. The state governments were empowered at the most fundamental level at which societies were born; the federal government was one of limited powers for specific national purposes.

JUDICIAL REVIEW BY NATURAL JUSTICE

In Minge v. Gilmour [206] the circuit court of North Carolina explored the power of a court to declare a state legislative act unconstitutional because it conflicted with principles of "natural justice."[207] The court addressed this issue in the course of utilizing state court powers in a dispute between citizens of Virginia and North Carolina who both claimed land in North Carolina.[208] The court's adjudication revealed that state governmental powers, as reflected in those powers accessed by the court, were broadly based and rested upon a theory of a social compact. These powers of a state government were those of a government of inherent authority: they extended to the very core principles upon which a society was founded. These general principles were accessible by a federal court when it was empowered to adjudicate like a state court.

Federal power was evidenced by the method of adjudication of the circuit court that relied upon the Constitution and congressional statutes to find its jurisdiction and

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[206] 17 Fed. Cas. 440 (1798).

[207] 17 Fed. Cas. 440, 443-444 (1798).

[208] The court did not explain its jurisdiction in the way modern courts usually do. Readers of virtually all early federal cases have to reconstruct the jurisdictional grounds upon which the court took the case. In this case, two pieces of evidence support the conclusion that the case was one of diversity jurisdiction between citizens of North Carolina and Virginia. The court twice refers to the character of rights that citizens outside of North Carolina hold. Iredell refers to the rights of the plaintiff under Virginia law. He, also, devoted a portion of his discussion to the reach of state powers and how such powers controlled the citizens of other states who hold lands in North Carolina. Beyond the specifics of Minge, every non-admiralty case prior to 1800 appears under the facts as a diversity case or one in which the citizens of the same state claimed land under the grants of different states. These two types of controversies were within the judicial power of the United States pursuant to Article III, Section 2 and would have necessarily involved the use of state law pursuant to Section 34 of the Judiciary Act. Minge was obviously not a case in which citizens of same state claimed lands under the grants of different states.

substantive law. Congress parceled jurisdiction over cases involving citizen of different states to the federal courts through section 11 of the Judiciary Act of 1789: suits between "a citizen of the State where the suit is brought, and a citizen of another State" was parceled to the circuit courts. The applicable law was state law pursuant to section 34 of the Judiciary Act. Thus the circuit court in Minge v. Gilmour, even though it would utilize general principles to reach its decision as it construed the North Carolina constitution did nothing more that follow the Constitution and statutes to find its substantive law: state law. The court was not asserting a power of the federal government to adjudicate as a state court would in all cases but only in a narrow range of cases specified by the Constitution and statute.

The court analyzed whether a statute of North Carolina was repugnant to the state constitution or to principles of natural justice.[209] One of the parties to the suit a claimed that a property right of his was unjustly destroyed by a North Carolina statute that defeated entailed estates. Gilmour relied upon an act of 1784 that legislatively removed restraints on alienation effectively ending the estate tail. Minge's attorneys responded

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[209] Minge v. Gilmour involved a dispute over a parcel of land. John Minge died in 1772 and left a parcel of land to his son David pursuant to a will. David received the land as the will dictated, but his ownership interest was a distinctive kind called a fee tail male. A fee simple estate would have given him the maximum rights of ownership. An estate tail was ownership but a conditioned kind that could only fully vest in a male heir of David's; it thus required Minge to meet requirements of lineal descent to preserve the land as a means of support and power for the male heirs of a family. If David Minge did not have a male heir the title reverted to the grandfather and his estate. This worked to the benefit of landed aristocrats by preventing the alienation of land. North Carolina arguably still recognized the fee tail if the heir did not receive other assets from the father that at least equaled the land in question. Thus under North Carolina law the land became a base amount of support that the eldest son would receive upon the death of the father if the eldest son himself had a son. Yet in February 1779 David Minge, the father, deeded the parcel in dispute to Charles Gilmour in a real estate transaction. The deed of conveyance to Gilmour warranted that Minge would "forever defend [Gilmour] from the lawful claim or demand of any person or persons whatsoever . . . " It made no mention that his ownership interest was compromised by the rights of his son. In David Minge's will, drafted in May of 1779, he devised other property to his son that was of greater value than that deeded to Gilmour. Nevertheless, the younger Minge contested the conveyance to Gilmour asserting that the character of an estate tail vested the land in him. The court was left to decided the competing claims to the land: Gilmour's pursuant to his deed and Minge's pursuant to the common law of property and the distinctive law surrounding fee tails.

that this law was unconstitutional because it was an ex post facto law prevented by the North Carolina constitution and that it was contrary to "natural justice."[210] Iredell proceeded to demonstrate the "intrinsic merits of . . . title" to the land by measuring the law against the North Carolina constitution.[211]

The court first construed the ex post facto provision of the North Carolina constitution, holding that the provision only prevented retroactive statutes of a criminal nature.[212] Iredell explained that historically ex post facto prohibitions did not apply to civil matters. This issue, as Iredell explained, had been debated in the supreme court in the recently concluded February term. A ruling would issued about it in its next term.[213] He was referring to Calder v. Bull.[214] To hold that the ex post facto provision barred retroactive civil statutes would prevent states from exercising powers of eminent domain or foreclosing upon property if the taxes were unpaid. The state always had and must continue to have a right to change the ownership of property or the character of that ownership as it saw fit as long as there were no criminal penalties involved.[215] Yet this did not truly answer the underlying objection to retroactive laws: that regardless of their

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[210] 17 Fed. Cas. 440, 443 (1798).

[211] 17 Fed. Cas. 440, 442 (1798).

[212] 17 Fed. Cas. 440, 443 (1798).

[213] 17 Fed. Cas. 440, 443 (1798).

[214] Iredell describes two distinctive features of this case that the court had heard arguments on: the case was argued in the February term of 1798 and one Justice doubted that ex post facto provisions only prohibited retroactive criminal statutes. Calder v. Bull (3 U.S. (3 Dall.) 386 (1798)) was argued in the February term and Paterson identified himself as the Justice who initially thought that ex post facto provisions should apply to prohibit all retroactive laws. On these points see 3 U.S. (3 Dall.) 386 and 397 (1798).

[215] 17 Fed. Cas. 440, 443 (1798).

history they were contrary to the basic tenets of a social compact, that they were contrary to natural justice.

Iredell held that courts did not have the right to declare laws void only because they violated natural justice. His reasoning was rooted in his analysis of state governance. The people, with whom power rested, empowered their legislatures as the voice of popular will. If the legislatures violated express prohibitions of a constitution, then the courts had a duty to void the offending laws.[216] If laws only conflicted with natural justice no court was competent to replace its judgment for the representatives of the people because ". . . the legislature have exercised a trust confided to them by the people . . . ."[217] The legislatures in their capacity as the voice of the people were designated to determine what accords with natural justice. Therefore, legislative will should be respected because, as Iredell asked rhetorically, "Whose opinion is properly to be regarded--those to whom the authority of passing such an act is given, or a court to whom no authority, in this respect, necessarily results?"[218]

Yet, even if courts were in no position to consider whether laws violated natural justice, Iredell proceeded to explain how legislative destruction of vested rights was consistent with natural justice. In doing so Iredell demonstrated the breadth of legislative power inherent in state governments. Even though no law had been passed to end estates tail prior to the statute in question Iredell pointed out that the "subject . . . did not escape the attention of the convention who framed the constitution . . . ."[219] Two sections of the

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[216] 17 Fed. Cas. 440, 444 (1798).

[217] 17 Fed. Cas. 440, 444 (1798).

[218] 17 Fed. Cas. 440, 444 (1798).

[219] 17 Fed. Cas. 440, 444 (1798).

constitution clearly demonstrated an opposition to the restraints on alienation embodied in the estate tail and other mechanisms like it.[220] These expressly left it to a future legislature to codify in law the remedies to the "evil" and that when such law was passed "it should have the same effect as if the provisions in it has formed part of the constitution itself."[221]

Equity principles, which Minge relied upon also did nothing to rescue him. Equity principles, "whose object it professedly is to decide on the principles of natural justice when no express law interferes," actually codified the principles of the North Carolina constitution. Because the law of 1784 ending estate tails did nothing more than codify principles enshrined in the constitution, Minge's loss of his property rights did not offend principles of equity.[222] Iredell even went so far as to weave the reception statute into his analysis. He held that the reception statute, by which the state legislatively mandated adoption of the common law, filtered from the common law the power of landowners to limit alienation in the way the estate tail did.[223] This being the case, the

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[220] 17 Fed. Cas. 440, 444 (1798). Section 23: "That perpetuities and monopoles are contrary to the genius of a free state, and ought not to be allowed." Section 43: "That the future legislature of this state shall regulate entails in such a manner as to prevent perpetuities." See Constitution of North Carolina passed in 1776.

[221] 17 Fed. Cas. 440, 444 (1798). Iredell thus agreed with Paterson that the constitutions of a state were a more fundamental expression of popular will than a legislative act. Paterson saw the constitution as only controlling and limiting the legislatures; Iredell argued that the constitutions also empowered the legislature to embody in law constitutional principles rooted in the social compact.

[222] 17 Fed. Cas. 440, 445 (1798).

[223] 17 Fed. Cas. 440, 445 (1798). The operative portion of the statute is quoted by Iredell: "that all such statutes and such parts of the common law as were heretofore in force and use within this territory, and all the acts of the late general assemblies thereof, or so much of the said statutes, common law, and acts of assembly as are not destructive of, repugnant to, or inconsistent with the freedom and independence of this state, and of the government therein established, and which have not been otherwise provided for in the whole or in part, not abrogated, repealed, expired, or become obsolete, are hereby declared to be in full force within this state."

right that the elder Minge had in 1778 was not one that was burdened by an estate tail; he held a character of ownership that allowed him to deed the property to Gilmour.

Iredell operated pursuant to Article III empowerments to decide upon an issue under state constitutional and common law. The court accepted the case through constitutionally mandated jurisdictions clarified by Congressional directives. With the case before the court, Iredell then followed Section 34 of the Judiciary Act which directed him to apply state law. Yet, the court, even as it accessed state common law with its general principles was nevertheless operating consistent with Article III and the Judiciary Act.

Iredell's opinion elucidated the nature of state governmental powers in the course of his opinion. State governments were fundamentally empowered. Their constitutions, while paramount to the power of the legislatures, were embodiments of principles born of a social compact that the legislatures were empowered to codify into law. The legislatures as the voice of popular will deserved wide latitude in the legislative sphere as long as they did not pass laws that directly conflicted with the constitutions. The judiciaries were subordinate institutions in state governance without the legitimacy to act on behalf of the people as the legislatures could. The court accessed general principles that explained how a seemingly retrospective law was in fact perfectly consistent with underlying principles of the social compact. This empowerment of the federal court when using state governmental powers demonstrated that state governments were broadly empowered and thus empowered differently from the federal government. Federal courts

thus, when constitutionally operating as if they were state courts, were more fully empowered than the federal legislature.

THE FEDERAL EX POST FACTO PROVISION

In Calder v. Bull [224] the supreme court defined the terms under which acts of state legislatures would be held to be ex post facto laws prohibited by the United States Constitution. The case was thus one in which the federal courts had an opportunity to construe a constitutional provision. In the course of defining what constituted an ex post facto law the court's adjudication highlighted the nature of federal power. The powers at the disposal of the court were defined and limited and included jurisdictions and, at times, the substantive law for determining cases. Two justices commented on the limits of state power in the course of evaluating whether state legislatures could pass laws that conflicted with first principles of a social compact.

The Constitution in Article III, Section 2 of the Constitution mandated that the case be adjudicated in the federal courts.[225] This case was one "arising under this Constitution" because the case hinged upon an explanation of what constituted ex post facto laws under Article I, Section 10, clause 1.[226] Congress granted the jurisdiction to the supreme court through the Judiciary Act's section 25 which clarified exactly what

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[224] 3 U.S. (3 Dall.) 386 (1798).

[225] Article III, Section 2, clause 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . . ."

[226] Article I, Section 10, clause 1 reads in relevant part: "No State shall. . .pass an Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts. . . ."

"arising under this Constitution" meant. The Act said that final judgments or decrees in the highest courts of a state ". . . where is drawn in question the construction of any clause of the constitution . . .and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, . . . may be re-examined and reversed or affirmed in the supreme court of the United States . . . ." The breadth of review in such a case was also defined by congress in the Judiciary Act: "But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution . . . ." In other words, the only issue that would come before the court in such cases was the explication of the constitutional provision in question. The court was thus explicitly denied the power to review other matters in the case beyond the clause of the Constitution in dispute.

Calder v. Bull was a case that rested solely on the federal ex post facto provision; the litany of appeals and Calder's tale of woe were irrelevant. The case had reached the supreme court pursuant to section 25 of the Judiciary Act, that limited the court to a single federal question issue. Justice Chase framed the issue simply, "The sole enquiry is, whether this resolution or law of Connecticut, having such operation, is an ex post facto law, within the prohibition of the federal constitution?"[227] Paterson also saw the issue before the court as a straightforward one, "The question then which arises on the

[227] 3 U.S. (3 Dall.) 386, 387 (1798).

pleadings in this cause, is, whether the resolution of the legislature of Connecticut, be an ex post facto law, within the meaning of the constitution of the United States."[228]

Yet, even if the case was litigation governed by Section 25 of the Judiciary Act, the question before the court necessarily involved delving into state governmental issues. The clause of the Constitution being interpreted was a prohibition against states passing ex post fact laws. Exactly what constituted an ex post facto law under state law was at the heart of the arguments of the two parties.[229] Bull's attorney argued that the Connecticut legislature's action was a judicial resolve passed by a legislature that had a long history of granting new trials. Thus the Connecticut action was not a law and therefore not prohibited by the federal ex post facto provision because the federal provision only prohibited laws, not judicial acts. Furthermore, even if the Connecticut action was legislative in nature, as opposed to judicial in nature, Bull's attorney argued, it was still valid because it applied to civil rather than criminal matters. Ex post facto provisions only proscribed retroactive laws of a criminal nature. Calder's attorneys argued that the Connecticut legislative action was a law and that all retrospective laws should be prohibited by the federal ex post facto provision.

Calder v. Bull was the culmination of litigation that had been ongoing for five years and had produced five court rulings and an act of the Connecticut legislature. The dispute was over the "premises," which was most likely a family home. The wives of Calder and Bull were probably members of the Morrison family. The dispute surfaced in

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[228] 3 U.S. (3 Dall.) 386, 1396 (1798).

[229] An odd feature of Calder v. Bull was the debate over exactly how to characterize what the Connecticut legislature passed. There are three terms used in this discussion related to that action of the Connecticut legislature. A 'resolve' is an action of the legislature that is judicial in nature; a 'law' is an action of the legislature that is legislative in nature; an 'act' is a generic term in which that which Connecticut passed is referred to without any reference to it as being judicial or legislative in character.

the public record in 1793 after the death of N. Morrison. Morrison's will, drafted in 1779, was submitted for probate in Hartford, Connecticut in 1793. Bull and his wife, who claimed the premises under the will, lost before the Probate Court of Hartford on March 21, 1793. The court refused to probate the will, most likely sending Calder and his wife home happy, as the new owners of a second home, a home that was probably not altogether unfamiliar to Calder's wife. The Calder's claim was based on the assertion that Mrs. Calder was the heiress of an elder N. Morrison, who was described as a physician, senior to the N. Morrison whose will had been rejected. The Calders had reason to feel secure as they left the courthouse. Not only did they have the satisfaction of a court ruling in their favor, but the law of Connecticut allowed no appeal from probate court rulings. The Calders thought the matter at an end when in fact the dispute had just barely begun.

Exactly how the Connecticut legislature got involved after the probate court ruling is unclear, but the legislature's response provoked the series of appeals that reached the supreme court. The legislature passed an act on May 2, 1795 that set aside the probate ruling and granted Bull a new hearing before the same probate court that had previously rejected him. Not only did he get a new hearing, but the Connecticut legislature altered the process to allow for an appeal. With the force of the legislative enactment behind him, Bull and his wife returned to the probate court and, not surprisingly, the court reversed itself and probated the will. Calder, probably with growing cynicism for both lawyers and politicians, appealed the ruling to the superior court of Connecticut and finally the supreme court of errors; he lost each appeal. Having exhausted their options at the state court level, Calder and his wife appealed to the United

States supreme court. Possibly with some degree of renewed hope, Calder and his wife thought that they had a chance. Connecticut's courts were clearly against him; the United States supreme court would seem a new and neutral forum. The supreme court heard oral arguments during its February term and issued its ruling during the August term. All four justices concluded that the act in question was not an ex post facto provision. Two of the four thought that the act in question was judicial in nature thus not even a law. One thought both that the Connecticut act was civil as opposed to criminal and that Calder had not been damaged because no rights had ever vested. The fourth thought that the act in question was not prohibited whether considered as a judicial resolve or a law.[230] In the course of their analyses justices Paterson and Cushing stopped short after measuring the Connecticut act against the federal ex post facto provision. Justices Chase and Iredell, while agreeing that the issue before the court was actually a narrow one, nevertheless, offered an analysis of whether a state court could find a state law unconstitutional because it conflicted with first principles.

Justice Paterson held that the only issue properly before the court was the question of whether the Connecticut act was an ex post facto provision prohibited by the United States Constitution.[231] He concluded that it was not. The answer lay first in an analysis of the act in question: was it a resolution or a law. Paterson looked to the history of Connecticut's legislature for the answer. He found that the legislature had "a superintending power" to exercise all legislative, judicial and executive functions and

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[230] It was necessary to enquire into the conduct of the Connecticut legislature because its boundaries were to be found in its history rather than in a constitution. It had preserved its governmental structures without drafting a state constitution after the Revolution. There was, therefore, no constitution to be reviewed as the ultimate guide to popular will as there had been in VanHorne v. Dorrance and Minge v. Gilmour.

[231] 3 U.S. (3 Dall.) 386, 391 (1798).

among the judicial powers was a power to grant new trials. This had been done in a number of cases and Paterson concluded that this feature of Connecticut's governmental structure should be respected: "This usage makes up part of the constitution of Connecticut, and we are bound to consider it as such . . ." so long as it did not conflict with the United States Constitution.[232] He concluded that it was judicial in nature and therefore not even a law.

Paterson nevertheless also considered the act as having been passed in a legislative capacity in order to answer the question directly put to the court on the pleadings: whether it was an ex post facto law. He concluded that it was not. He looked to common law definitions and the state constitutions for guidance and concluded that the prohibition against ex post facto laws applied to "crimes, pains, and penalties, and no further." Acts such as the one Calder complained of were not in these categories and therefore not prohibited by the ex post facto provision of the United States Constitution.[233]

Justice Cushing joined the other three justices in their conclusion that there had been no violation of the ex post facto provision and, like Paterson, refused to move beyond the issue directly before the court. His was a two sentence concurrence that the

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[232] 3 U.S. (3 Dall.) 386, 395 (1798).

[233] This conclusion was not one that he reached easily. Initially he had argued to apply the ex post facto provision in a way that would bar "retrospective laws in general." He was alone in this position. The reasoning that supported his initial conclusion is more evidence that he was the sole justice on the court who believed that the United States Constitution was a social compact and that the federal government was more generally empowered than the other justices thought. Paterson explained his initial position:

> I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact. See 3 U.S. (3 Dall.) 386, 397 (1798).

Connecticut act was constitutional considered either as a judicial action or as a legislative action. He presumably relied upon the fact that it was not criminal in nature.

Justices Chase and Iredell also agreed that the only issue properly before the court was the question of whether the Connecticut act violated the federal ex post facto provision. They both also concluded that the act was not barred by the Constitution. In his opinion Justice Chase explored the "sole enquiry" before the court: ". . . whether this resolution or law of Connecticut, having such operation, is an ex post facto law, within the prohibition of the federal constitution?"[234] Two sources of information aided him in defining what the laws were that were covered by the prohibition. He first looked to English history and concluded that the Framers of the Constitution intended to prohibit laws of a nature similar to Parliamentary acts that altered the punishment for a crime or the evidence needed to prove one or that punished acts not illegal when committed. He also relied upon the definition of an ex post facto law expressed in state constitutions. He concluded that the prohibition of ex post fact laws was one "to secure the person of the subject from injury, or punishment, in consequence of such law."[235] It was not intended to secure private rights such as rights created by contracts, for which there was a separate constitutional prohibition. Even though numerous kinds of retrospective laws might be unjust; mere injustice did not make them ex post facto laws. Examples of laws that would be prohibited included laws that punished an action that was legal at the time of the commission and laws that enhanced punishment or lessened the burden to prove guilt. As to Calder and his wife, the matter was a simple one for Chase: the act in question was

[234] 3 U.S. (3 Dall.) 386, 387 (1798).

[235] 3 U.S. (3 Dall.) 386, 390 (1798).

not criminal in nature and furthermore the first probate court ruling had not vested rights in them because it, in and of itself, did not "transfer any property to them."[236]

Justice Iredell also found that the Connecticut act was not an ex post facto provision. It was not legislative in nature and even if it were a law it was not one that would be prohibited as an ex post facto law. Iredell, as had Paterson and Chase, relied upon the history of Connecticut's legislature to show that it "has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials."[237] Yet even as a law the Connecticut act passed constitutional muster because the ex post facto provision only applied to criminal matters. As Iredell saw it the provision denied the state legislatures the power to "inflict a punishment for any act, which was innocent at the time it was committed; nor increase the degree of punishment previously denounced for any specific offense."[238]

Iredell and Chase though went beyond the issue directly before the court in their opinions as they disagreed over whether a state legislature could "revise and correct by law, a decision of any of its courts of justice, although not prohibited by the constitution of the state . . . ."[239] While beyond the scope of Calder's appeal, the issue was relevant for the court: in diversity cases that began in federal court Chase and Iredell would have an opportunity to exercise general principles to void state laws that violated "the great first principles of a social compact."[240] Justices on the court had faced such issues in the

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[236] 3 U.S. (3 Dall.) 386, 394 (1798).

[237] 3 U.S. (3 Dall.) 386, 398 (1798).

[238] 3 U.S. (3 Dall.) 386, 399 (1798).

[239] 3 U.S. (3 Dall.) 386, 387 (1798).

lower courts in VanHorne v. Dorrance and Minge v. Gilmour. This was an issue, as Chase said, "not necessary now to be determined" because the jurisdiction of the court was limited by the pleadings that limited the court's analysis to the ex post fact provision. The issue was nonetheless tantalizingly close to being before the court. If, in fact, as Chase, Iredell and Paterson had concluded, the Connecticut legislature had the power to act in a judicial capacity then it could certainly have passed a resolution that would pass judgment on the will rather than simply force a rehearing before the probate court.

Chase and Iredell clearly disagreed about the limits of state legislative powers within the context of the social compact. Chase's position was that state legislatures had to confine their legislation within the principles upon which the social compact was based. Legislatures were not "absolute and without control."[241] Even though not expressly delineated in a constitution, the principles that restrained the authority of a legislature were "the purposes for which men enter into society" and these form the limits and inherent restraints upon legislative power. Examples violative of these "great first principles of the social compact" included laws that "take property from A and give it to B" or "a law that punishes a citizen for an innocent action."[242] These, although not expressly prohibited in a state constitution, were nonetheless not "rightful exercises of legislative authority." As Chase said,

> The genius, the nature, and the spirit, of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they

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[240] 3 U.S. (3 Dall.) 386, 388 (1798).

[241] 3 U.S. (3 Dall.) 386, 388 (1798).

[242] 3 U.S. (3 Dall.) 386, 388 (1798).

> may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime or violate the right of an antecedent lawful private contract; or the right of private property.[243]

As further evidence that he was not discussing the nature of a social compact underlying the United States Constitution, Chase argued that the place for the judicial review of such matters was within the context of state governmental powers. In this case, "the courts of Connecticut are the proper tribunals to decide, whether laws, contrary to the constitution thereof are void."[244]

Justice Iredell joined this argument that was an aside to the issue properly before the court[245] and argued that courts could not use only principles of natural justice as a basis to find laws unconstitutional. Iredell argued that legislative power within constitutions framed since the Revolution, including the United States Constitution, set "marked and settled boundaries" on the objects of legislative power. As long as the legislatures remained within those boundaries the judiciary ought not rule their acts unconstitutional simply because they conflicted with "natural justice."[246] Iredell was not here arguing that the state and federal governments were similarly empowered, but only

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[243] 3 U.S. (3 Dall.) 386, 388 (1798).

[244] 3 U.S. (3 Dall.) 386, 393 (1798).

[245] 3 U.S. (3 Dall.) 386, 398 (1798).

[246] 3 U.S. (3 Dall.) 386, 399 (1798).

that judicial review could only be exercised if the legislatures "transgress the boundaries of that authority."[247]

Thus Chase and Iredell argued over whether they could invalidate state laws based on only principles of natural justice, with Chase maintaining that courts should and Iredell arguing that they should not. Although they argued in general terms to discern the applicable principles of judicial review, their debate was about using state principles as the yardstick against which questionable state law would be measured. Chase argued that fundamental principles could be used by federal judges operating in a state court mode to invalidate state laws. Iredell argued that under state powers, judges could only use written prohibitions as a basis for striking down state legislation.

The federal courts' adjudications provided an opportunity to see state governmental powers at work but only within the context of federal adjudication that highlighted that the federal government was a government of limited and delegated powers. The courts made use of state governmental powers through specific constitutional empowerments of jurisdiction and congressional directives to use state law. This congressional directive, section 34 of the Judiciary Act of 1789, was enacted pursuant to a constitutionally mandated power in congress to make 'exceptions and regulations' to the federal courts' appellate jurisdiction. The ability of the federal courts to utilize the state governmental powers was not general. Only specific categories of cases entered federal courts to be adjudicated using state law.

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[247] 3 U.S. (3 Dall.) 386, 399 (1798).

Each case adjudicated in the federal courts fit within one of the heads of jurisdiction mandated to be heard in the federal courts pursuant to Article III, Section 2. Each of the cases in which state governmental powers were used was one of these cases with the additional feature that the dispute rested upon differing interpretations of state law. In VanHorne v. Dorrance the circuit court of Pennsylvania accessed the case through that provision of Article III, Section 2 that directed controversies between citizens of different states be heard in the federal courts. The circuit court of North Carolina similarly heard Minge v. Gilmour because there was a specific empowerment in Article III, Section 2 that mandated the case be heard in the federal courts. The court had jurisdiction because the parties were citizens of different states. In both cases congress had refined the constitutionally mandated jurisdiction through the Judiciary Act of 1789. Sections 12 and 11 clarified the procedures and evidentiary burdens necessary for the case to reach the federal courts properly.

The applicable law, state law, was not generally accessed common law. Rather it was the law of the state in which the court sat or that governed the parties' dispute. The directive to use state law was found, not as a general power in the federal government, but in the Judiciary Act of 1789 and specifically its section 34 which mandated that state law be used as the rule of decision in all cases in the federal courts unless applicable constitutional provisions, treaties or statutes in fact governed. Thus the use of state law and state law principles in VanHorne v. Dorrance and Minge v. Gilmour were accessed because of a specific constitutional empowerment to congress which congress utilized to direct the use of state law in these federal trials. For each of these cases, the courts used, not general principles but those found in the specific laws of the state in which they sat.

Having accessed state court powers through specific empowerments, the federal courts utilized the powers of state governance and, in the course of doing so, revealed the power of state governments. As Iredell, Paterson and Chase all agreed, state governments were founded from social compacts that were based upon fundamental principles of mankind. Empowerment of this nature led to state governments being generally empowered in a way that did not require the governments to justify the exercise of its powers. As Iredell and Chase both agreed, the state governments were governments of inherent authority in which, by their very nature, all power rooted in the social compact was vested in the governments. The constitutions reflected this fundamental empowerment. Few if any powers were reserved to the people; the institutions of governance were assumed to be vested with power. The constitutions contained only exceptions from power that reflected reservations in the people.

The state constitutions were the embodiment of popular will and codified the terms of the social contract that undergirded society. While Chase and Iredell disagreed about the outer limits of legislative power, both agreed that the state legislatures were the ongoing voice of popular will; they were the continuing voice of the people in whom ultimate power resided. The power that they exercised, while limited in theory by the terms of the social contract, was the preeminent power of the governments. The judiciaries were not the republican institutions that the legislatures were and, therefore, they were subordinate by design. While Chase saw limits in theory to legislative power that Iredell did not, both agreed that the power of the judiciary over the legislature extended only to declare flagrant violations of the boundaries of the social compact. For Iredell this required the statute to violate an express provision of the constitution; for

Chase there was a place, in theory, for state judiciaries to strike down laws that violated the fundamental terms of the social compact.

PART VI

CONCLUSION

The federal courts, both in their rulings and in their rhetoric, adjudicated as part of a federal system containing two fundamentally different kinds of governments. The federal courts described the states as governments of inherent authority rooted in fundamental principles of social compacts. These governments, as shown in Penhallow v. Doane's Administrators and Ware v. Hylton, were sovereign governments with ultimate authority resting in the people. Their powers included those found in sovereign states and included the powers of war and peace, which were exercised jointly prior to the Articles of Confederation. As shown in VanHorne v. Dorrance, Minge v. Gilbert and Calder v. Bull, the fundamental nature of the empowerment of state governments left their power ill-defined because the governments had all that power not specifically retained by the people. The amorphous breadth of state governmental powers was actually much greater than the delegations made to the federal government. It was not codified, specified and thus limited. The constitutions delineated the fundamental terms of the social compact and included those few powers retained in the people rather than the powers of the government. Justice Paterson's evaluation of the 1790 Pennsylvania Constitution and Justice Chase's reference to the Massachusetts's Constitution as reserving powers in the people were evidence that the broad empowerment was not

without limits after 1789, but it was nonetheless far broader than that seen in the federal government.

This general empowerment was most evident in the access that state governments had to general principles to resolve disputes. Justices Paterson and Iredell used them respectively in VanHorne v. Dorrance and Minge v. Gilbert when the federal courts were required to use state powers and Chase and Iredell referred to them in Calder v. Bull. State courts had access to these general principles, which were not found in legislation or constitutions, because their governments were generally empowered. All issues of society were within the realm of possible legislation, and the full range of natural rights evidenced by the social compact were available to the courts for decision-making. Reliance upon general principles as a basis for a judicial finding was a powerful testament to the general empowerment of state governments. Yet, the institutional voice of ongoing popular will in each state was still the legislative branch, which utilized the powers inherent in these governments to pass legislation. These legislatures were not omnipotent, yet they deserved wide latitude in passing legislation. The courts, while having the power to adjudicate using the powers inherent in their governments, were nonetheless subordinate branches of the government. While the constitutions were certainly superior to legislative power, the fact remained that the legislatures, which were wielding the powers of a government of inherent authority, could only be checked if they violated specific provisions of the constitutions and thus stepped beyond the agreed bounds of the social contract.

The federal government was a government of limited and delegated powers that was empowered very differently from the state governments. Federal courts could not

presume their powers, but had to find their jurisdiction from specific mandated and applicable law passed by congress pursuant to constitutional empowerments. Unable to rely directly on the social compact, the federal government relied only upon the Constitution, which embodied powers delegated to the federal government by the people. It thus had a narrower base because it was specifically and not generally empowered. Yet within areas delegated to it, the federal government was supreme and much more resistant to the influence of popular will than were state governments. The reach of the federal courts was clearly defined; and in defining the limits of the federal government, the Founders both empowered the federal government and ensured that state governance would remain powerful in accordance with the terms of the federal system embodied in the Constitution.

The federal courts in the course of adjudication mirrored the government of which they were a part. In the range of litigation in which state power and federal supremacy were in conflict the federal courts enforced the supremacy of the federal government within the limits set down in the Constitution. In Ware v. Hylton a treaty clearly trumped state law; in Penhallow v. Doane's Administrators New Hampshire was forced to abide by the terms of an agreement with the pre-Articles congress.

In those cases having to do with challenges to the federal system by the branches of the federal government, the federal courts enunciated a system of limited powers constructed by specific grants of power. Even in the very act of ruling upon such matters, the federal courts made use of specific empowerments as a basis for their authority. As described in Hayburn's Case, the federal system was one of checks and balances in which the federal courts could not be subjected to executive and Congressional demands in

matters inappropriate for the courts. The Constitution extended federal judicial power to encompass suits between a state and foreign citizens in Chisholm v. Georgia. Finally, even in cases such as Wiscart v. Dauchy, in which there was some question about the limits of the federal judiciary, the justices first undertook a serious debate in search of their limits and secondly searched only the Constitution and legislation legitimately based on the Constitution to find them.

Empowerments and limitations defined the Constitution's federal system even in the realm in which national matters were supreme. Empowerments enabled the federal courts to prosecute violations of American neutrality, disallow captures, and rule upon the limits of federal power; but embedded in these rulings were always inherent limits to federal power rooted in the Constitution. This tension was most evident in the law used to prosecute Gideon Henfield and in admiralty cases. Even though the access to state law made available general principles upon which the justices could rely, access to the law of nations was a narrow grant of power required by the Constitution. There was no general grant of common law authority that would have enabled the federal courts to utilize the range of power found in a government of inherent authority. In fact, only in admiralty cases and those in which an interpretation of state law was required did the federal courts use general principles to reach judgments, rather than merely to justify the reasonableness of judgments already reached.

The states retained those powers not delegated to the federal government; the federal government exercised those powers in the Constitution that were intended to ensure its governance over national matters. The federal system embodied a unique combination of governments. The state governments were governments of inherent

authority with the primary role of regulating society; the federal government was a government, supreme within its realm, but nevertheless one of limited and delegated powers.

PART III

CONCLUSION

CONCLUSION

The Framers reaffirmed their faith in republicanism during the constitutional convention. They created a federal system that preserved state governments and empowered the federal government to govern over only a limited number of matters. The federal system, far from the product of a conservative reaction against purported excesses of republicanism, actually guaranteed the continued viability of the states as important centers of governance. The states were necessary for the federal system to function effectively.

The states retained the plenary power of governments rooted in a social compact. Vested in these governments was the full power to legislate over all the health, safety and morals of society. The crowning achievement of the Revolution was to bring the legislatures to the center of state governments so that the people controlled these governments of inherent authority. With such power, the legislatures passed the laws and resolves necessary to direct their states through the revolutionary war and the turbulent post-war years. It was only with the efforts of the states, and specifically the assemblies, that the Revolution was won. Power rooted in the people provided a form of liberty in which executive and judicial functions could be assumed by the legislature if the people's representatives thought it necessary. The people reigned supreme through legislatures that dominated their governments.

These governments governed responsibly in the course of pursuing consistent policies that aimed to win the war and care for the citizens at home. They also began to reorganize their societies around republican principles. State legislatures directed the

procurement of resources and the fielding of armies; they managed societies in turmoil with enemy troops and Loyalists in their midst; they cared for widows, orphans, minors, heirs, wounded and pensionsers. Legislative policies were applied through a certain set of rules and guidance that ensured an orderly distribution of assets in absentees' estates and estates of deceased. The assemblies also embodied the discretion within the state governments. They exercised executive and judicial functions so that justice would be done to those suffering from the application of laws that produced unjust results. Among the tools used to exercise this discretion were resolutions granting new trials. The legislatures granted new trials rarely and only in situations that would further justice by allowing the parties to litigate fully their disputes.

The federal system enshrined in the Constitution included a new limited government of delegated powers to be added to the pre-existing state governments. The federal government would govern over only a limited number of matters including diplomatic relations, national commercial and military policy. The federal government was the product of drafters motivated to preserve republicanism. Their first instinct was to base the new national government upon thoroughly republican principles. They quickly realized that simply to use republican principles at the national level would endanger the very state governments that embodied republicanism. They searched for a compromise as their goal of empowering a national government ran against the significant value of protecting state government. Reconciling the desire to vest the national government in majoritarianism and the value of protecting republicanism at the state level consumed most of their efforts at the convention. The result was a fundamentally new kind of government that was powerful but only within a limited

realm. The federal government was a government of limited and delegated powers based as much as possible upon republican principles but not so much that the national government would overwhelm state governments. The Bill of Rights with the inclusion of the Xth Amendment strengthened the protections for state governments within the federal system.

Federalists and Anti-federalists agreed that the Constitution called for a federal government of delegated powers that would also have different concerns from state governments. They argued over whether the allocation of powers in the federal system were proper and whether the barriers to hem the federal government in were sufficient. Federalists argued that the Constitution embodied the correct quantum of power in the federal government so that significant national issues would be handled effectively without overwhelming state governments. Their defense of the federal system hinged primarily on the position that the federal government was one of defined and thus limited powers. Anti-federalist critiques of the Constitution were premised upon the notion that the federal government was supposed to be a limited government. They contended that the Constitution simply did not contain sufficient checks on federal power to protect state governments. They argued that the quantum of power vested in the federal government alone would prove destructive of republicanism at the state level. They posited a future in which the federal government used its delegated powers to infringe upon state governments. Although they lost the debate narrowly, their efforts resulted in the passage of amendments that included additional protections for state governments.

The First Congress enacted the Judiciary Act of 1789 to create a lower federal court system and allocate federal jurisdiction; its decision on the court system and federal

jurisdiction were both determined by constitutional empowerments and limitations. Congressmen were not passing enabling legislation for Article III; they made policy decisions within a constitutional framework that only mandated a blueprint for federal courts and their federal jurisdiction but not a specific court system or jurisdictional structure. Congress finally chose a court system and allocation of federal jurisdiction that maximized the effect of the Constitution, federal laws and treaties within the range of options permitted by the Constitution.

The federal courts also operated pursuant to constitutional directives that defined the government of which they were a part as a government of limited and delegated powers. The Constitution provided a structure of jurisdiction; the First Congress through the Judiciary Act provided for substantive law. These two features only highlighted the federal courts as being part of a federal government that was fundamentally different from the fully empowered state governments. When directed by the Constitution to adjudicate pursuant to federal governance powers, the federal courts found their power in the Constitution and constitutionally permissible legislation passed by congress. They had no reluctance to exercise judicial review. They rested their decision upon the Constitution, federal laws and treaties and principles of federalism that were document-driven. At other times, the federal courts were directed to adjudicate pursuant to state court powers. The profoundly different character of adjudication with state governance powers only highlighted how different state and federal governments were. The courts were deferential to state legislatures but found expansive judicial powers through an access to state general principles.