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## "Federal Courts As the Asylum to Federal Interests": Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary

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# “Federal Courts as the Asylum to Federal Interests”\*: Randolph’s Report, The Benson Amendment, and the “Original Understanding” of the Federal Judiciary

WYTHE HOLT\*\*

## INTRODUCTION

CURRENTLY afloat in the eddies of contemporary conversation is the notion that there is some definite, pristine, observable “original understanding” of the Constitution. To apply any portion of that fundamental document to a current problem, those who hold such a notion argue that all one has to do is look to the language of the Constitution and the “intention” of its “framers,” where one discovers a so-called original understanding. This same intentionalist interpretation, then,

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\* The quotation in the title comes from the December 1790 report of Attorney General Edmund Randolph concerning the federal judiciary, and is quoted again in the text accompanying notes 28 and 79 *infra*.

The spelling, capitalization, and style of quotations taken from eighteenth and nineteenth-century manuscripts have been left as they were written, as best can be ascertained from sometimes murky manuscripts. Punctuation, including diacritical marks, regrettably has been modernized or sometimes omitted, since it has proved impossible to reproduce in modern type the variety of markings that people used then.

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This essay is dedicated to the spirit of two of my preceptors as historians of federal jurisdiction, William Winslow Crosskey and Wilfred J. Ritz. Those who march to a different drummer reap the lonely reward of a fuller richness of music. Let us be thankful that their independence, strength, and perseverance has allowed us to encounter their work and to profit by their example. The debt I owe to the work of Bill Ritz in particular can never be fully expressed.

provides the appropriate authority for resolving the dispute.<sup>1</sup>

Historical legalists of such a persuasion come to two conclusions about what might be called the "problem" of the federal judiciary. First, faced with a threat from the right to eliminate certain kinds of constitutional questions from the purview of federal courts, those on the left conclude that the federal court system must be organized the way it is and essentially has been since the Judiciary Act of 1789 (the Act, the 1789 Act, or the Judiciary Act).<sup>2</sup> These same individuals believe, among other things, that judicial review by the Supreme Court of federal constitutional issues is a structural requisite of the system.<sup>3</sup> Second, those on the right, faced with what they perceive to be a threat from the left posed by a flood of requests to gain access to federal courts brought by disadvantaged and oppressed persons, argue that the framers intended to preserve state court dignity. Those on the right conclude that many of these re-

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1. See, e.g., Schwartz, *Meese's Original Intent: A Constitutional Shell Game*, 241 THE NATION, Dec. 7, 1985, at 607; Easterbrook, *Legal Interpretation and the Power of the Federal Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984). The Attorney General of the United States, to say nothing of other public officials, including some judges, has in recent years claimed that such "original understanding" is binding upon the Supreme Court. See Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1 (1986). See generally Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 5 n.30 (1987).

It has become something of a custom, with regard to generalizations as stark and as simplified as are those in the first two paragraphs of this essay, to make a statement accepting social responsibility for the caricature they seem to represent. To the extent that the addition of detail and "thickness" to an observation enrich and substantiate the relevance, even "define" the very "meaning" of the observation, I am guilty of oversimplification if not caricature, and so I apologize. Life is to a great extent lived through thickness and detail, within the confusions and beauties of minutiae, caught up in and seemingly bounded by the throes of the usual. For an excellent example, focusing very accurately on the overwhelming intricacies and distinctions, incompletions and sophistications of the "accepted" world we live in, see Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

My particular intellectual talent does not seem to lie in this realm of sophistication—of "filling out," of sorting and talking about the masses of conflicting subtleties that highlight and somehow render much more real and three-dimensional whatever is being discussed—but rather seems to get to the roots, the heart, of an intellectual problem by shearing away much of the confusing detail. Those who look for a whole forest may not see many trees, leaves, or woodpeckers. They may, however, have a greater tendency to notice ecological problems. I think I have in the two paragraphs in the text accurately portrayed the sense of the intellectual positions I have attempted to sketch out, insofar as this essay might make meaningful commentaries upon those positions, in order to deal with ecological problems rather than with woodpeckers. Those who can "do" both ecology and woodpeckers well are rare. See, e.g., Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 730, 730-33 n.141 (1985).

2. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) [hereinafter Judiciary Act of 1789].

3. See, e.g., Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

quests can be *constitutionally* denied or indefinitely postponed, forcing persons with federally cognizable problems to pursue their actions in state courts if they wish relief.<sup>4</sup>

A forgotten episode in the history of our federal court system sheds light directly upon these two twentieth-century "originalist," "interpretivist," or as I shall refer to them "intentionalist" conclusions, ultimately casting much doubt upon the notion of constitutional interpretation that underlies both. During the last session of the First Congress in the winter of 1790-91, the first two proposals to reshape the structure of federal jurisdiction and the federal court system were brought forward. Attorney General Edmund Randolph suggested the complete elimination of federal Supreme Court review over state courts. In particular, he urged that state court determinations of constitutional issues or of federal law should not receive appellate review by the Supreme Court. Congressman Egbert Benson countered with a proposal that would have done away with the lower federal courts and essentially federalized the state judiciaries.

The adoption of either plan would have rendered the federal judiciary almost completely unrecognizable to us. Nevertheless, while some contemporaries argued that each plan was seriously flawed, no one claimed that either violated the intent of the framers. In fact, both proposals were treated by the public, by the drafters of the Constitution,<sup>5</sup> by Congress, and by all who might be described as "framers" as though they were fully legitimate and within the realm of constitutionality.

Moreover, both Randolph and Benson operated within an understanding that every person whose claim fell within article III, section 2 of the Constitution should be able to obtain some sort of federal judicial relief if the claim was valued above a minimum amount. At the time, no one suggested that this underlying understanding about access to federal courts was incorrect. In fact, the only reference to original intent or understanding during the debates over the proposals of Randolph and Ben-

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4. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L. J. 87 (1981); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). See also *Younger v. Harris*, 401 U.S. 37 (1971); *Monroe v. Pape*, 365 U.S. 167, 202, 224-46 (1961) (Frankfurter, J., dissenting); cases cited *infra* note 78. See also *Ex Parte Young*, 209 U.S. 123, 168-204 (1908) (Harlan, J., dissenting) (arguing that a suit against a state attorney general was subject to the Eleventh Amendment and therefore beyond the jurisdiction of federal courts).

5. Randolph sat on the Committee of Detail at the Federal Convention, and Benson was a strong Federalist proponent of the Constitution in divided New York.

son laid their common understanding about access within that protective mantle. Musty and obscure as the details of what actually happened might appear, a glance at the history and nature of these two startling suggestions may prove instructive in our present-day debate.

### I. RANDOLPH'S PROPOSAL TO ALTER THE JUDICIARY

The Judiciary Act of 1789<sup>6</sup> established the judicial branch of our new national government in such a thorough and intricate fashion that it "served the country substantially unchanged for nearly a century."<sup>7</sup> It was praised by later generations of admiring Americans as "probably the most important and the most satisfactory act ever passed by Congress."<sup>8</sup> Nevertheless, there was considerable dissatisfaction with the act during the first few years after its passage. As one Federalist wrote in early September 1789, revision was expected: "The Judicial [bill] . . . will probably pass, as an experimental law . . . in the confidence that a short experience will make manifest the proper alterations."<sup>9</sup>

Eleven months later, on August 5, 1790, the House of Representatives requested the Attorney General to study the federal judiciary after its first year of operation and to report his conclusions and any suggested alterations to the third session of the First Congress, which was to commence in December of the same year.<sup>10</sup> On New Year's Eve, the Speaker of the House laid before the body Randolph's substantial and thorough critique of and proposed substitute for the 1789 Act.<sup>11</sup>

6. See *supra* note 2 and accompanying text.

7. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 4 (1928)

8. Brown, *The New Federal Judicial Code*, 36 A.B.A. ANN. REP. 339, 345 (1911) (the author was a former Supreme Court justice).

9. Letter from Fisher Ames to George Richards Minot (Sept. 6, 1789), reprinted in 1 *THE WORKS OF FISHER AMES* 716 (W. Allen ed. 1983). James Madison found the Judicial bill "defective both in its general structure, and many of its particular regulations. . . . I hope the system may speedily undergo a reconsideration under the auspices of the Judges who alone will be able perhaps to set it to rights." Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), reprinted in 12 *THE PAPERS OF JAMES MADISON* 402 (1979).

10. H.R. Res., 1st Cong., 2d Sess. (Aug. 5, 1790), reprinted in 3 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA* 550 (L. De Pauw, C. Bickford & L. Hauptman eds. 1977) [hereinafter *FIRST CONGRESS DOCUMENTARY HISTORY*].

11. H.R. Rep., 1st Cong., 3d Sess. (Dec. 31, 1790), reprinted in 1 *AMERICAN STATE PAPERS: MISCELLANEOUS* 21-36 (W. Lowrie & W. Franklin eds. 1834) [hereinafter *Randolph's Report* with citations to page numbers in 1 *AMERICAN STATE PAPERS: MISCELLANEOUS, supra*].

Except for a sensitive but cursory mention in Casto, *The First Congress's Understanding of its Authority Over the Federal Courts' Jurisdiction*, 26 B.C.L. REV. 1101, 1120-22 (1985), treatment of Randolph's comprehensive proposal by legal historians has been disappointingly restricted and unimaginative. See F. FRANKFURTER & J. LANDIS, *supra* note 7, at 14-21; G. HASKINS & H. JOHN-

Randolph's report caused brows to knit and jaws to drop. This was in part because of the imprecise, circumlocutory, and noncombative prose style that Randolph characteristically employed.<sup>12</sup> The reaction was also due, in part, to the overwhelming comprehensiveness of Randolph's proposals. North Carolina Senator Benjamin Hawkins and future Attorney General Levi Lincoln of Massachusetts were sympathetic to the ideas but wanted time to study and mature the mass of detail,<sup>13</sup> while Rhode Island federal district judge Henry Marchant—numbed by the scope of the report—desired only that “some Additions and Revisions may be now made.”<sup>14</sup>

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SON, 2 HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER, JOHN MARSHALL, 1801-15, at 116-20 (1981); C. WARREN, 1 THE SUPREME COURT IN THE UNITED STATES HISTORY 65-86 (rev. ed. 1962); Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1552-56 (1986); K. Turner, *The Judiciary Act of 1801*, at 49-51 (1959) (unpublished doctoral dissertation) (University of Wisconsin, 1959).

The historical legalist most recently to comment upon the whole of Randolph's report has unfairly dismissed it as “an armchair critique,” containing only “his own ideas on how the judiciary should be organized” and “drawn in utter disregard of the criticisms levelled at a federal judicial system during the ratification struggle.” J. GOEBEL, 1 HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 541-42 (1971).

Randolph, then the distinguished young governor of Virginia, had been a leading figure at the Convention and during the ratification debates. He was prized by President Washington for his legal skills and was no slouch as a lawyer, arguing several important cases during the 1790s. Randolph sought the aid of at least one eminent legal scholar, James Wilson, who was also a member of the Committee of Detail at the Convention and recently had been made a justice of the Supreme Court, in performing his task for Congress. See letter from Edmund Randolph to James Wilson (Aug. 5, 1790) (Society Collection, Historical Society of Pennsylvania). As this essay will demonstrate, Randolph dealt directly, realistically, and inventively with the problems of the federal court system, though his conclusions did not suit Federalists. Nor do they suit modern historians with an ingrained, if unconscious, Federalist view of the judiciary. Compare Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 340 (1982).

Randolph's biographer is a bit more comprehensive, and certainly fairer, than the legal historians, see J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 194, 196-97, 206 (1974), but the thoroughness, ingenuity, and political relevance of Randolph's proposals have yet to be fully appreciated.

12. See letter from Alfred Moore to Samuel Johnston (Feb. 23, 1791) (Library, Henry Ford Museum & Greenfield Village, Dearborn, Michigan). Randolph was viewed as a lightweight by many of his contemporaries. For example, Federalist Henry Van Schaack thought that the cause of Congressional inaction on judicial reform might be that “a certain Attorney [was] inadequate to the task.” Letter from Henry Van Schaack to Theodore Sedgwick (Dec. 18, 1791) (Sedgwick Papers, Massachusetts Historical Society) [hereinafter Sedgwick Papers].

13. Letter from Benjamin Hawkins to Alexander Martin (Jan. 13, 1791) (Governors' Papers, North Carolina State Archives); letter from Levi Lincoln to Theodore Sedgwick (Jan. 12, 1791), Sedgwick Papers, *supra* note 12.

14. “I do not expect Perfection but from Practice and Experience,” the exasperated Marchant added. “I do not pretend, however, but that the Bill has its Merits.” Letter from Henry Marchant to Theodore Foster (Jan. 31, 1791) (Theodore Foster Papers, Rhode Island Historical Society).

Most of the consternation over Randolph's proposals, however, resulted from political considerations. The judiciary was the focus of much political antipathy during the 1790s.<sup>15</sup> Anti-Federalists distrusted the undefined potential power that the Constitution seemed to vest in the new federal judiciary, while Federalists desired a powerful national court system. The 1789 Act had been the product of much compromise between the two views, ultimately satisfying neither. Publicly, and even in private life, the Attorney General was unlike most of his contemporaries. He was a genuine middle-of-the-roader whose loyalties after his appointment in 1789 lay with his mentor, President Washington,<sup>16</sup> in the emerging party struggle between the Federalist adherents of Alexander Hamilton, and those who followed Thomas Jefferson. Jefferson's views in some matters were increasingly resonant with those of the Anti-Federalists. Randolph's apparent ambivalence rendered his advice untrustworthy in both camps.

Randolph was, however, a close and acute observer of the new federal judiciary. His short-lived opposition to the Constitution, lasting from 1787 to 1788, rested in large part upon his belief that the power it gave the judiciary was too unlimited and ill-defined. At the close of the Convention, he proposed that this problem be resolved by "drawing a line between the powers of" the federal and state governments "so as to leave no clashing of jurisdictions nor dangerous disputes."<sup>17</sup> He was later to advise President Washington that "judiciary topics should be rendered as mild as possible."<sup>18</sup> Randolph was thus centrally aware of the particular danger that clashes over the scope of federal jurisdiction posed for the inchoate federal government. Like Randolph, many who supported the federal government were chary of the ill-defined power of its new courts, while other supporters disliked the cost of the large judiciary established under the 1789 Act. These critics of the judiciary might easily be pulled into the Anti-Federalist camp by real, potential, or imagined examples of encroachment by the national judiciary into the jurisdiction of state courts. The new government could probably not survive a drastic loss of

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15. See generally R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971), which remains a pathbreaking inquiry into the battles over the judiciary that took place from 1790 to 1810, but one with which I have some disagreement.

16. See Tachau, *George Washington and the Reputation of Edmund Randolph*, 73 J. AM. HIST. 15, 16 (1986).

17. Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), reprinted in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 123, 127 (M. Farrand ed. 1937).

18. Letter from Randolph to George Washington (Aug. 5, 1792), reprinted in 10 *THE WRITINGS OF GEORGE WASHINGTON* 513 (J. Sparks ed. 1836) [hereinafter *WASHINGTON WRITINGS*].

support in its early stages of existence, due to the lurking strength of Anti-Federalists and to the dangers presented by ambitious foreign designs against American territory and independence. In his December 1790 proposals, therefore, Randolph consciously sought compromise between Federalist and Anti-Federalist perceptions of the federal judiciary.

In his private thoughts, Randolph was less of a nationalist than either President Washington or the Hamiltonian Federalists. He believed that the Judiciary Act of 1789 tilted too strongly in favor of the national government, and needlessly empowered the federal courts in a manner that would eventually bring on the very clash between state and federal jurisdictions that the act was intended to avoid.<sup>19</sup> Consequently, his compromise proposals asked for substantial alterations in the federal court system.

The most important of Randolph's proposals, however, were unacceptable to the Federalists, who reacted with derision and incredulity. Massachusetts Senator Caleb Strong who served as a chief aide to Oliver Ellsworth in drafting the 1789 Act, found the proposal "better calculated for Virginia than New England."<sup>20</sup> Theodore Sedgwick, an important Hamiltonian Federalist and Massachusetts congressman, dismissed Randolph's work out of hand; in a letter to a friend who had inquired about the report, Sedgwick wrote that Randolph's proposals were "too inconsiderable to merit your attention."<sup>21</sup>

The Attorney General's goal was to establish "the *judicial power of the United States*, without blending state courts."<sup>22</sup> In the words of Rep-

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19. Randolph believed that the portion of the 1789 Act that was likely to cause the most tension and strain in federal-state relations was its section 25, giving the federal Supreme Court the power to review certain state court judgments. Randolph's prescience is demonstrated by the number of important clashes between federal and state jurisdiction over section 25 that have occurred in United States history. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 304 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). "Between 1789 and 1860 the courts of seven States denied the constitutional right of the United States Supreme Court to decide cases on writs of error to State courts [under section 25]—Virginia, Ohio, Georgia, Kentucky, South Carolina, California, and Wisconsin. The legislatures of all these states, except California, and also of Pennsylvania and Maryland, formally adopted resolutions or statutes against this power of the Supreme Court. Bills were introduced in Congress on at least ten occasions to deprive the Court of its jurisdiction—in 1821, 1822, 1824, 1831, 1846, 1867, 1868, 1871, 1872, and 1882." Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3-4 (1913).

20. Letter from Caleb Strong to David Sewall (Jan. 17, 1791) (Sewall Papers, Old York Historical Society, York, Maine).

21. Letter from Theodore Sedgwick to Ephraim Williams (Jan. 12, 1791), Sedgwick Papers, *supra* note 12.

22. Randolph's Report, *supra* note 11, at 23 (emphasis in original).



representative John Brown of Kentucky, Randolph expected that "great difficulties will arise [under the 1789 Act] from the concurrent Jurisdiction of the Federal with the State Courts which will unavoidably occasion great embarrassment & clashing."<sup>23</sup> Randolph believed that "maintain[ing] the harmony of the federal and State judiciaries"<sup>24</sup> could be best achieved, as he had said in 1787, by clearly separating the jurisdictions of state and federal courts as completely as possible. He accepted the argument made by Federalists and Anti-Federalists alike during the struggle over ratification of the Constitution<sup>25</sup> that the essential spheres of operation of state and federal governments were for the most part distinct and separable. In accordance with this general principle, the primary thrust of Randolph's proposal was to disjoin federal and state court jurisdiction.

The Attorney General advocated three significant changes to the 1789 Act in order to accomplish this result. First, the lines of demarcation between state and federal jurisdiction were to be clearly drawn. This would be accomplished by expressly delineating six categories of cases, which Randolph believed the Constitution, or their inherent nature, rendered exclusively federal. Those cases falling within any of the enumerated categories would be excluded from state court jurisdiction. All other heads of federal jurisdiction would be exercisable concurrently with the

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23. Letter from John Brown to Harry Innes (Sept. 28, 1789) (Innes Papers, Library of Congress).

24. Randolph's Report, *supra* note 11, at 22.

25. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 325 (J. Elliot ed. 1891) [hereafter DEBATES IN THE SEVERAL STATE CONVENTIONS] (remarks of Patrick Henry on the floor of the Virginia ratification convention); *id.* at 538 (remarks of James Madison on the floor of the Virginia ratification convention); 4 *id.* at 136 (remarks of Samuel Spencer on the floor of the first North Carolina ratification convention); *id.* at 139 ("[I]n [the] Convention, the unanimous desire of all was to keep separate and distinct the objects of the jurisdiction of the federal from that of the state judiciary.") (remarks of Richard Dobbs Spraight on the floor of the first North Carolina ratification convention); *id.* at 169 (remarks of Archibald Maclaine on the floor of the first North Carolina ratification convention); Remarks of J. Wilson at the Pennsylvania Ratification Convention (Dec. 4, 1787), reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 496 (M. Jensen ed. 1976); *Americanas*, Gazette of the United States, June 10, 1789 (New York City newspaper); Independent Chronicle, Mar. 4, 1790 (Boston newspaper); letter from Samuel Adams to Elbridge Gerry (Aug. 22, 1789) (Samuel Adams Papers, New York Public Library); letter from George Mason to Samuel Griffin, (Sept. 8, 1789), reprinted in 3 THE PAPERS OF GEORGE MASON 1172 (R. Rutland ed. 1970).

The argument for separability of power was essentially an Anti-Federalist one. See generally T. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 26 (1986). "[A]s a matter of logic and political theory, those who opposed the Constitution strongly resisted the idea that two sovereign governmental bodies could coexist, share concurrent jurisdiction, cooperate, and survive. They believed that sovereignty could be divided but not shared." *Id.* Federalists who espoused the argument may have been attempting to gather votes for the Constitution from among waverers and lukewarm Anti-Federalists.

states.<sup>26</sup>

Second, and most important, section 25 of the 1789 Act, which provided appellate jurisdiction for the Supreme Court over state judiciaries in most important federal question cases, was to be discarded. Instead, defendants in all federally cognizable cases brought in state courts would have the unconditional power to transfer those cases to a federal court before trial. However, a person representing a federal interest in a state court would be forever precluded from seeking federal review of the action once a trial had begun.<sup>27</sup>

Randolph made several cogent arguments to support this second and substantial alteration. First, he believed that the national government, including its courts, would not be bound by state court decisions invalidating a federal law or federal action. At the time, this was not a startling *legal* argument. Under the pre-positivist understanding of the law that prevailed in the 1790s, the law was found, not made. A judge's

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26. Randolph's Report, *supra* note 11, at 21-22 (discussion); *id.* at 26 (proposed legislation). Randolph did not number the sections of his proposed bill.

Randolph's six categories of exclusive federal jurisdiction were: (1) admiralty and maritime jurisdiction; (2) instances in which the United States was a defendant; (3) instances in which any State was a defendant, except in its own courts; (4) "[c]ontroversies for land claimed under grants of different States"; (5) "treason against the United States," and federal crimes (unless Congress opted for trial in state courts); (6) "rights created by Congress, and having a special remedy given to them in the federal courts." *Id.*

These differ significantly from the categories of exclusive federal jurisdiction which one might infer from the language of the Constitution alone. Most importantly, Randolph did not conclude that "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties," U.S. Const. art. III, § 2 (emphasis added), *must* be cognizable in federal court either originally or by way of appeal. *But see* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (theory that the word "all" in article III, § 2 denotes a constitutional requirement of either original or appellate federal jurisdiction with respect to the three heads of jurisdiction modified thereby). Moreover, Federalist jurists, who in critiquing Randolph's proposal attempted to set forth their own theories of federal jurisdiction, did not allude to any such rigid formulation, nor did they even mention the word "all." *See* Memorandum of J. Iredell on Mr. Randolph's Report (undated) (Charles E. Johnson Papers, North Carolina State Archives) [hereinafter C.E. Johnson Papers] ("Congress should have the entire discretion of the new cases of jurisdiction"); letter from John Lowell to Fisher Ames (Jan. 10, 1791) (Fisher Ames Papers, Dedham Historical Society, by permission of the Board of Curators thereof) [hereinafter Ames Papers].

27. Randolph's Report, *supra* note 11, at 22-23 (discussion); *id.* at 29, 31-32 (proposed legislation). Randolph's proposal, though inartfully drawn, seems to provide that a plaintiff in a state court could remove the case to federal court before the commencement of trial if the defendant's pleadings brought the matter within federal jurisdiction, or if the defendant could demonstrate that he or she was initially ignorant that the instance was federally cognizable.

The judges of the Virginia Supreme Court of Appeals in 1815 concluded that an arrangement of federal court jurisdiction like that proposed by Randolph was constitutionally mandated. *See* Hunter v. Martin, 18 Va. (4 Munf.) 1 (1815), *rev'd*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

decision was not the law per se, but was only the latest effort to discover or approximate the law. Thus, no court could ever bind successor courts in the way that judicial decisions are routinely thought to be rigidly binding today. However, the proposal that state courts could not bind federal courts was an important *political* statement, insofar as Randolph sought to remind his audience, in his characteristically gentle way, that the new government, especially as embodied in the Constitution's Supremacy Clause, contained novel sovereignty arrangements. Second, Randolph argued that a person representing federally protected interests who chose to litigate in state courts would have a free choice to do so and should be bound thereby. In other words, Randolph argued that federal protection of federal interests should be undertaken entirely at the discretion of the litigant who represented those interests and that such a choice should be made before any adjudication had occurred. No federal interest, he believed, was so strong that it should be allowed a second chance in a federal court after an adverse state decision. Third, Randolph argued that uniformity of federal law was not as important as was the dignity of state governments. Fourth, he predicted that "the hostility of the supreme state courts—if hostility be possible—will be displayed but once. For the remembrance of an adverse decision or an adverse temper in those courts will inevitably proclaim the federal courts as the asylum to federal interests."<sup>28</sup> And fifth, it was doubtful whether the language of article III, section 2 of the Constitution, which provides appellate jurisdiction to the Supreme Court, referred to any but the lower federal courts.<sup>29</sup>

Randolph's third proposed revision to the 1789 Act would have eliminated section 14, which granted federal judges the power to issue "all other writs not specially provided for by statute."<sup>30</sup> The section's open-ended language might have allowed federal courts to use the common-law writ of certiorari to bring to themselves any case in state court that fell within their potential jurisdiction under article III, thereby circumventing all the carefully drafted language describing and limiting federal jurisdiction which Randolph desired. Randolph was probably aware that the North Carolina federal circuit court had accepted such an argument in the fall of 1790, in the first case to be brought there. A minor furor was created when the court, whose members consisted of

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28. *Id.* at 23.

29. *Id.* For a more comprehensive treatment of the pre-positivist flavor of the understanding of law in the 1790s, see W. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Oklahoma University Press, forthcoming, 1989).

30. Judiciary Act of 1789, *supra* note 2, § 14.

Supreme Court Justices Wilson, John Rutledge, and John Blair,<sup>31</sup> granted a writ of certiorari to bring a case from state court when federal jurisdiction was not available under the usual avenues prescribed by sections 11 and 12 of the Judiciary Act.<sup>32</sup> The state court refused to honor the writ and was commended for its recalcitrance by an angry North Carolina legislature. The episode created the potential for a major rupture in federalism. In Randolph's proposal, there was no analog to section 14, and the writs that federal courts might issue were carefully

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31. Both Wilson and Rutledge sat with Randolph on the Constitutional Convention's Committee of Detail and, thus, qualify as framers par excellence. Blair was also a convention delegate.

32. The litigant requesting the certiorari and thus seeking an asylum for his federal interests was none other than Senator Robert Morris of Pennsylvania, a rich merchant, entrepreneur, notorious out-of-state creditor, and land speculator. Morris was also a framer extraordinaire, since he was one of only two persons to have signed the Declaration of Independence, the Articles of Confederation, and the Constitution. He was also a member of the Senate that drafted the 1789 Judiciary Act. Morris had brought the suit in state court prior to North Carolina's belated entry into the Union, but attempted to transfer his case to the supposedly friendlier confines of the federal courts as soon as they were established there, because with good reason he thought that the North Carolina state courts and juries were biased against him.

All of the defendants were North Carolinians, so the case fit within the diversity of citizenship jurisdiction described in article III, section 2. Moreover, the diversity jurisdiction was instituted primarily to protect out-of-state creditors and merchants who feared bias at the hands of local juries or legislatures. Thus, presumably, Morris embodied precisely that sort of federal interest that the federal courts were instituted to protect. However, the two sections of the 1789 Act that prescribed federal circuit court jurisdiction did not permit the suit to be brought over into federal court. Section 11 allowed federal jurisdiction only over suits originally brought in federal court. Section 12 allowed the removal of diversity and alienage cases from state courts, but only at the request of the defendant and then only at the time of the initial pleadings in state court. Since Morris was plaintiff in a suit which had been pending for three years and more, he did not qualify under either section. He was plainly protected by the letter and the spirit of the Constitution, but was just as plainly not within the restrictive language of section 11 and 12 of the Judiciary Act. Which would prevail, the broad language and spirit of the Constitution or the restrictive language and dubious spirit of the 1789 Act?

Using the open-endedness of section 14, three justices of the Supreme Court essentially took the former course. But when the federal judges ordered the transfer, the state judges publicly and indignantly refused to obey the federal writ, leaving the case theoretically pending in both courts and creating one of those dangerous "clashings" between state and national courts that Randolph and others foresaw. *See supra* notes 17 & 23 and accompanying text. The Morris instance reportedly caused a great stir in the southern states in the fall of 1790, with reverberations in Philadelphia where Congress was sitting. *See Pennsylvania Mercury*, Dec. 14, 1790 (Philadelphia newspaper); letter from Fisher Ames to Thomas Dwight (Jan. 6, 1791), reprinted in 2 THE WORKS OF FISHER AMES, *supra* note 9, at 845; letter from John Blair to James Wilson (Feb. 2, 1791) (Konkle Manuscripts, Friends Historical Library of Swarthmore College). It is not unlikely that Randolph, who had moved to Philadelphia in the early fall of 1790, knew of the Morris case and took it into account as he was drafting his proposal, *see infra* note 33, but there is no direct evidence.

For a detailed study of the Morris case and three other such certiorari attempts in the early 1790s explaining why Morris had good reason to fear the North Carolina system of justice, see Holt & Perry, *Writs and Rights, "Clashings and Animosities": The First Confrontation Between Federal and State Jurisdictions* (accepted for publication by L. & HIST. REV.).

described and bounded.<sup>33</sup>

Along the way, Randolph made subsidiary suggestions for changes that would have enlarged the jurisdiction of federal courts, an idea that probably would have appealed to most Federalists. The most important of these alterations would have included the following: (1) an express grant of federal question jurisdiction, which was an item conspicuously missing from the 1789 Act; (2) removal of important limitations on the issuance of habeas corpus writs by federal judges; and, (3) provisions permitting cases within the federal system to be taken to the Supreme Court by appeal—a method of review which would have allowed the Supreme Court to review factual determinations made below.<sup>34</sup> He also proposed elimination of the circuit-riding duties of the Supreme Court, designating

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33. Randolph's Report, *supra* note 11, at 26 (district courts might issue the writs of ne exeat and injunction); *id.* at 28 (district courts: habeas corpus and four specified writs used to execute judgments); *id.* at 29 (circuit courts: ne exeat, injunction, mandamus, and certiorari); *id.* at 30 (circuit courts: habeas corpus and the four specified writs of execution); *id.* at 31 (Supreme Court: mandamus, certiorari, and the four specified writs of execution); *id.* at 31-32 (circuit and Supreme Courts: rules for issuing certiorari and procedendo). Randolph did not discuss this feature of his proposal in his report.

Randolph's proposal drew careful boundaries around the power to issue certiorari, unlike the open-ended language of section 14. Circuit courts and the Supreme Court could issue writs of certiorari to state courts only "according to the rules hereinafter prescribed." *Id.* at 29 (circuit courts); *id.* at 31 (Supreme Court). The "rules" clearly limited the issuance of certiorari to state courts by circuit courts to "any time before trial," *Id.* at 31, thus rendering certiorari and removal consistent. No rule spoke to the issuance of certiorari to state courts by the Supreme Court, which seems to have been a serious oversight on Randolph's part. There are similar, if less important, lacunae in the committee-drafted and congressionally-passed 1789 Act. It is extremely difficult to be consistent in such comprehensive legislation. Another rule, however, limited the issuance of certiorari by the Supreme Court to federal circuit courts to instances "in which, by the constitution of the United States, the Supreme Court has original jurisdiction." *Id.* at 31. It is likely that Randolph intended to place the same restriction on the Supreme Court's issuance of certiorari to state courts. *See also* Casto, *supra* note 11, at 1121 n.144. To argue that Randolph intended to leave such a gaping loophole, as would be provided by taking his proposal literally, would be contrary to the entire spirit of Randolph's scheme, indeed to his understanding of the nature of the federal union.

34. The three changes mentioned in the text were not discussed by Randolph, but appear in his proposed legislation. *See* Randolph's Report, *supra* note 11, at 26, 29 (grants of "federal question" jurisdiction to district and circuit courts); *id.* at 28, 30 (unlimited grants of habeas corpus jurisdiction to district and circuit courts); *id.* at 30 ("appeal or writ of error may be brought in the Supreme Court" from "any final decree or judgment rendered by a circuit court").

The Judiciary Act of 1789 had made no general grant or even mention of federal jurisdiction over cases "arising under the Constitution, laws, or treaties" of the United States—what we now call "federal questions"—though it did give to the Supreme Court appellate jurisdiction over many state court decisions of "federal questions" in section 25, which, as we have seen, would have disappeared under Randolph's proposal. Randolph's espousal of explicit "federal question" language, however, was probably not primarily due to any desire to strengthen the federal courts; rather, he decried the "inartificially, untechnically and confusedly worded" language used in the 1789 Act to describe the jurisdiction of federal courts, and the cure, he thought, was to "[e]ave] this point upon the constitution itself," that is, to use the precise language of article III, section 2. Letter from Edmund Ran-

the district judges rather than the Supreme Court justices to hold circuit courts.<sup>35</sup> This was a subtle sop to the most important Federalists in the judiciary, who were almost desperate in their desire to be rid of circuit-

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dolph to James Madison (June 30, 1789), reprinted in 12 THE PAPERS OF JAMES MADISON, *supra* note 9, at 273, 274.

The 1789 Act had allowed only those in federal custody to apply to federal courts for writs of habeas corpus. Judiciary Act, *supra* note 2, § 2. This limitation did not appear in the Randolph proposal, which would thus arguably have permitted state prisoners to apply for the federal writ. Such a change in federal law did not occur until the Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867). See generally Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 540-41 (1970).

The 1789 Act also had made the writ of error the only mode of federal appeal except in admiralty cases. Judiciary Act of 1789, *supra* note 2, §§ 22, 25. The writ of error was a device which brought to appellate review only questions of law, allowing a locally drawn trial jury's determination of the facts to be unchallengeable. This ingenious stratagem was apparently employed to assuage or eliminate the great worry of Anti-Federalists—repeatedly expressed during the ratification struggle—that the Supreme Court, either acting as a juryless court or through retrial on the issues before a new jury drawn from the vicinity of the national capital, would overturn findings of fact made by local juries, thereby depriving the people of their primary mode of oversight over the judicial officers of the government. See generally W. RITZ, *supra* note 29. Randolph was himself aware of and concerned about the problem of the Supreme Court's appellate jurisdiction over issues of fact, but had argued during Virginia's ratification convention that "Congress can regulate it properly, and I have no doubt they will," and that the problem "certainly will be removed by the amendatory provision in the instrument itself." 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 25, at 573, 576.

In *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796), Chief Justice Oliver Ellsworth persuaded a majority of the Supreme Court to agree that congressional limitation of review in the Supreme Court to writs of error and, thus to questions of law, was within Congress's regulatory power over the Court's appellate jurisdiction. Ellsworth can be considered a framer because of his membership on the Convention's Committee on Detail. As a senator, he was also a principal drafter of the 1789 Act. However, there was a strong dissent from two other framers on the Court, namely, Justices Wilson and William Paterson. Justice Wilson had joined Ellsworth, Rutledge, and Randolph on the Committee of Detail, while Paterson had greatly aided Ellsworth in the drafting of the 1789 Act during his tenure as a senator. The dissent concluded that such a Congressional regulation was "superseded by the superior authority of the constitutional provision." *Id.* at 325. See also Jennings v. The Brig Perseverance, 3 U.S. (3 Dall.) 336, 337 (1797) (notation by Paterson of his conjunction with Wilson in *Wiscart*, a matter theretofore not of record). The Constitution grants the Court "appellate Jurisdiction . . . as to . . . Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. This language seems to leave the question moot rather than decided by original intent.

Randolph also proposed elimination of the \$2,000 jurisdictional amount required under the 1789 Act to take a case from a federal circuit court to the Supreme Court, Randolph's Report, *supra* note 11, at 30, a change which would have increased the chance that poor litigants would be unable to afford such a costly matter and would lose by default on appeal. Anti-Federalists, and many Federalists as well, had been particularly worried about the costs of protracted federal litigation for the poor.

35. Randolph's Report, *supra* note 11, at 23-24 (discussion); *id.* at 29 (proposed legislation). In order to give the district judges time to ride on circuit, Randolph proposed to reduce the number of terms of district courts from four to two per year. However, the jurisdiction of the district courts was to be greatly enlarged.

riding.<sup>36</sup> Finally, Randolph signified his acceptance of important Federalist beliefs about the federal judiciary when he agreed that the Constitution intended to award jurisdiction to federal courts over suits in which citizens sued states without their consent.<sup>37</sup> He further endorsed Federalist principles on the judiciary by asserting that the very existence of federal courts meant that the choice of a litigant with a federal interest who proceeded in a federal court was superior to the choice of a litigant in the same case who proceeded in state court.<sup>38</sup>

Nevertheless, Federalists quickly and strongly opposed the Attorney General's propositions. They did not want to lessen the powers of the federal courts in any way, believing that the federal judiciary formed the linchpin, the final refuge, the ultimate check and balance of the new government. The courts, they hoped, would protect the Constitution when all else failed. Thus, they preferred the vague and open-ended drafting that characterized crucial features of the 1789 Act, such as section 14, over Randolph's carefully drawn boundaries and precise limitations, since they desired to give federal courts the leeway to construe grants of power broadly. As that astute Hamiltonian Federalist and draftsman, Egbert Benson, was later to exclaim with regard to the Constitution, "the Principle that with the *End the Means* is granted, is to apply in its utmost *Latitude*."<sup>39</sup>

The Federalists were also unwilling to accept Randolph's efforts, as a contemporary put it, to "preserve as much as possible the dignity of the

36. For the Supreme Court and the woes of circuit-riding, see the companion essay in this issue: Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793.

37. Randolph's Report, *supra* note 11, at 34-35 n.9 (discussion); *id.* at 31 (proposed legislation). His view was upheld by the Supreme Court in the notorious case of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and was reversed by the passage of the Eleventh Amendment. See *infra* note 71.

38. Randolph's Report, *supra* note 11, at 23. ("it may be said . . . that, if it be improper to tie a defendant to a State court against his will, it is equally so to force a plaintiff to a federal court against his will . . . [but] the judicial power of the United States was established to prevent suitors, in certain cases, from being obliged to submit entirely to State courts"). In the Virginia ratification convention, Randolph had quite frankly admitted the following: "If the state judiciaries could make decisions conformable to the laws of their states, in derogation to the general government, I humbly apprehend that the federal government would soon be encroached upon." And he later noted that federal courts had to be instituted because State courts would not do justice to creditors, particularly to foreign ones. "[I]n those nations [with which America has commercial connection], justice [for creditors] is obtained with much more facility than in America." 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 25, at 570, 575.

39. Letter from Egbert Benson to Theodore Sedgwick (Feb. 2, 1801) Sedgwick Papers, *supra* note 12 (emphasis in original).

State Judiciaries.”<sup>40</sup> The implied coordinate sovereignty of federal and state governments, which underlay Randolph’s proposal to eliminate Supreme Court review of state court decisions on constitutional questions, was anathema to those who had witnessed the way in which state courts hindered the collection of pre-Revolutionary British debts by obstructing the Treaty of Paris, or by shamelessly enforcing state laws similarly obstructive in their powers.<sup>41</sup> Federalists deplored the weakness of the confederation and desired a strong and central government that was superior to the states and that would promote commerce and growth. The federal court system had been created, they thought, to provide a refuge against state court bias and localism.

Supreme Court Justice James Iredell of North Carolina made this clear in his private annotation on Randolph’s report. “[I]t was evidently the intention of those who framed the Constitution & is the apparent Spirit of the Constitution itself,” wrote Iredell, in the sole contemporaneous reference to the intent of the framers relevant to this essay, to allow Congress to erect federal court jurisdiction as an alternative to state forums “for the purpose of . . . securing an impartial decision in particular instances where it may [be] apprehended [that] local interests, or a partial policy, might obstruct the fair & untrammelled [?] administration of Justice.”<sup>42</sup> Federal District Judge John Lowell of Massachusetts put the matter quite bluntly: the “constitutional efficiency” of the federal judici-

40. Letter from Benjamin Hawkins to Alexander Martin (Jan. 13, 1791) (Governors’ Papers, North Carolina State Archives).

41. A strong and comprehensive argument detailing alleged state legislative and judicial obstruction of British creditors is presented from the British point of view, with an appendix listing many allegedly offending state statutes and state court cases during and after the Revolution, in a letter from George Hammond to Thomas Jefferson (Mar. 5, 1792), reprinted in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 193-200 (W. Lowrie & M. St. Clair eds. 1832).

42. Iredell’s notes continued: “[T]he exercise of a coordinate authority in such cases by the State Legislature’s might interfere so as greatly to injure if not entirely to destroy the Federal Jurisdiction, in some of its most *essential* points, for if the powers in such cases are co-equal how can an interference be guarded against, except by the mutual discretion of such Governments, which surely is not a foundation on which any rational reliance can be placed . . .” Iredell, Memorandum on Mr. Randolph’s Report, *supra* note 26 (emphasis in original). See also *supra* note 33 and accompanying text.

Iredell’s direct reference to the intent of the framers in construing the Constitution was apparently unusual, since most contemporaries of the framers, including the framers themselves and Iredell on other occasions, usually refused to rely on evidence of the framers’ subjective intentions in order to apply the Constitution to a specific situation. Rather, they attempted to look first to “the plain import of the words” and “the general tenor and object of the instrument.” Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), reprinted in 1 DEBATES OF THE SEVERAL STATE CONVENTIONS, *supra* note 25, at 506-07. Then they would turn to judicial precedent, prior usage, and general usage to contextualize the Constitution’s provisions. See Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 913-24 (1985) (giving two other instances from the 1790s of direct reference to the “framers’ intent”); *id.* at 922 n.202 (views of Iredell).



ary would be "impair[ed] . . . in all Cases where the national laws are in any even the smallest Matters & in the lowest Degree permitted to be placed under the Jurisdiction of the State Courts."<sup>43</sup>

Most Federalists believed that the federal and state spheres of operation necessarily overlapped and could not be separated without destroying federal supremacy. There was always the possibility of local prejudice and the resultant need for an alternative forum for ordinary debt or property suits in which constitutional issues might arise or in which certain parties might need federal protection. Randolph knew, as he later put it, that many Federalists wished "to push the construction of federal power to every tenable extreme."<sup>44</sup> He now discovered that they were unwilling to accept any further limitation on federal judicial power. He was unable to draft a plan which satisfied the Federalists and yet promoted the kind of cooperative national harmony he desired, because the clash of jurisdictions was, in fact, inevitable.

Although Randolph's report was committed by vote of the House of Representatives to the Committee of the Whole House, and was further established as the order of the day of that committee for January 8, 1791, there is no record that the report was discussed by the House during the rest of the session. It is likely that Sedgwick's "motion to refer [it] to the next session"<sup>45</sup> was carried but not included in the record, since the next we hear of the report is during the first session of the Second Congress in November, 1791. The report was widely disseminated in the newspapers, however. It represented a threat to the Federalists, being the only complete alternative to the 1789 Act to see the light of day, and thus constituted a focal point for discussion and perhaps for Anti-Federal hopes. The Hamiltonians counterattacked with a constitutional amendment,

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43. Letter from John Lowell to Fisher Ames (Jan. 10, 1791), Ames Papers, *supra* note 26. "The present Crisis is such respecting" the federal judiciary, Lowell continued, "that if it is altered at all it may be essentially mended or fatally injured . . . therefore I think it would be prudent to let it subside." *Id.* Alfred Moore of North Carolina, later to be appointed to succeed Iredell as Supreme Court Justice, in commenting upon Randolph's proposal, agreed with Lowell and most Federalists about the trustworthiness of state courts: the federal judiciary "must . . . control determinations that counteract the operation of the Constitution." Letter from Alfred Moore to Samuel Johnston (Feb. 23, 1791) (Library, Henry Ford Museum and Greenfield Village, Dearborn, Mich.).

44. Letter from Edmund Randolph to George Washington (Aug. 5, 1792), *reprinted in* 10 WASHINGTON WRITINGS, *supra* note 18, at 513.

45. Letter from Theodore Sedgwick to Ephraim Williams (Jan. 12, 1791), Sedgwick Papers, *supra* note 12. *See also* letter from David Sewall to George Thacher (Jan. 30, 1791) (Thacher Papers, Massachusetts Historical Society) ("it seems from a motion of Mr. Sedgwick that it will not be taken up this Session"); letter from Roger Sherman to Simeon Baldwin (Jan. 21, 1791) (Roger Sherman Collection, Yale University Library) ("It is not expected that it will be considered this Session.").

proposed near the end of the session on March 1, 1791.<sup>46</sup> The amendment was drafted by Egbert Benson, a close friend of Hamilton and a similarly aggressive advocate of a strong central government. Benson was also a constitutional theorist and an expert legislative draftsman. Discussion of the Benson amendment was also postponed to the next Congress.<sup>47</sup>

## II. BENSON'S COUNTERATTACK

Benson's proposal<sup>48</sup> was disarmingly short and simple, compared to Randolph's lengthy opus. Many persons, Federalists and Anti-Federalists alike, and probably a majority of those who considered the matter from 1787 to 1790, had thought that the state supreme courts, most of which were trial courts with some appellate functions, would serve as the lowest federal courts.<sup>49</sup> Benson simply demonstrated how dangerous to

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46. H.R. Res., 1st Cong., 3d Sess. (Mar. 3, 1791), *reprinted in* 3 FIRST CONGRESS DOCUMENTARY HISTORY, *supra* note 10, at 770. Contemporary newspapers all show that Benson submitted his amendment on March 1, 1791. *See* Gazette of the United States, Mar. 2, 1791 (Philadelphia newspaper); General Advertiser, Mar. 2, 1791 (Philadelphia newspaper); Independent Gazette, Mar. 12, 1791 (Philadelphia newspaper). On March 3, by motion of his New York colleague John Laurance, Benson's amendment was postponed until the next session. Federal Gazette and Philadelphia Advertiser, Mar. 4, 1791; Dunlap's American Daily Advertiser, Mar. 4, 1791 (Philadelphia newspaper).

47. H.R. Res., 1st Cong., 3d Sess. (Mar. 3, 1791), *reprinted in* 3 FIRST CONGRESS DOCUMENTARY HISTORY, *supra* note 10, at 770.

48. Benson's proposed amendment is reproduced in 3 FIRST CONGRESS DOCUMENTARY HISTORY, *supra* note 10, at 768-770 [hereinafter Benson's Proposal with citations to page numbers in 3 FIRST CONGRESS DOCUMENTARY HISTORY, *supra*].

49. For example, the Federalist Francis Dana, who was soon to be Chief Justice of Massachusetts, wrote to Vice President Adams in 1789 that "all cases at Common Law, whether between the Citizens of different States, or foreigners and Citizens, shou'd originate in the Supreme Common Law Courts of the respective States, whenever the Justices thereof are appointed during good behaviour, and have fixed permanent salaries annexed to their offices; that where this is not the case, that all such Causes may be originated in the federal district Courts," with appeal "when judgment shall be given against the foreigner or the Citizen of another State; but no appeal . . . when the judgement shall be in their favor." Letter from Francis Dana to John Adams (July 31, 1789) (Adams Papers, Massachusetts Historical Society) [hereinafter Adams Papers]. *See also* 3 DEBATES IN THE SEVERAL STATE COVENTIONS, *supra* note 25, at 517, 536, 563 (respectively, remarks of Edmund Pendleton, James Madison, and William Grayson on the floor of the Virginia ratification convention); 4 *id.* at 139 (remarks of Archibald Maclaine on the floor of the first North Carolina ratification convention); Ellsworth, *A Landholder VI*, *reprinted in* 3 THE DOCUMENTARY HISTORY OF RATIFICATION OF THE CONSTITUTION, 487, 490; Sherman, *A Citizen of New Haven*, *reprinted in* 3 THE DOCUMENTARY HISTORY OF RATIFICATION OF THE CONSTITUTION, *supra*, at 524-27; letter from William Bradford to Elias Boudinot (Sept. 1, 1789) (Wallace Papers, Historical Society of Pennsylvania) [hereinafter Wallace Papers] ("The general opinion this way is in favor of commencing all suits in the State courts . . ."); letter from Edward Carrington to James Madison (Aug. 3, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON, *supra* note 9, at 322; letter from Benjamin Goodhue to Cotton Tufts (July 20, 1789) (Miscellaneous Manuscripts, New York Historical Society); letter from

state sovereignty such an alternative to the other existing or proposed judicial arrangements might be by incorporating these ideas into his proposals and putting them forward as possible alternatives to the extant organization of the federal judiciary.<sup>50</sup>

Under Benson's proposal, each state would contain a "General Judicial Court" vested with original jurisdiction to the extent of the full "judicial power of the United States," with the restriction that such power would be "regulated as the Congress shall prescribe."<sup>51</sup> Each general judicial court would have exclusive appellate authority "in all cases, from every other court within the state."<sup>52</sup> The judges of such courts would be appointed by the states but paid by the federal government, and would "hold their commissions during good behavior, and without any other limitation whatsoever."<sup>53</sup> No fewer than three judges would serve, but

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Samuel Huntington to William Samuel Johnson and Oliver Ellsworth (Apr. 30, 1789) (Independence National Historical Park, Philadelphia); letter from William Maclay to Jared Ingersoll (July 4, 1789) (Maclay's Journal, Library of Congress); letter from David Sewall to George Thacher (Apr. 11, 1789) (Chamberlain Collection, Boston Public Library, by courtesy of Trustees thereof) [hereinafter Chamberlain Collection]; letter from James Sullivan to Elbridge Gerry (Mar. 29, 1789) (Elbridge Gerry Papers, Massachusetts Historical Society). None of these suggestions assumed that there would be any organic change of the state supreme courts resulting from their proposed new position as lower federal courts.

The idea of leaving the unregulated state courts to be the general federal trial courts, thereby avoiding lower federal courts, except for admiralty and maritime jurisdiction, had been strenuously advocated by the Anti-Federalists and equally strenuously argued during the debates on the judiciary bill in both the Senate and the House of Representatives in the summer of 1789. *See* W. MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES IN 1789-90-91, at 85-87 (1880) (describing Senate debates of June 22-23, 1789, regarding proposed judiciary bill); letter from Fisher Ames to Theophilus Parsons (Aug. 3, 1789), *reprinted in* 1 THE WORKS OF FISHER AMES, *supra* note 9, at 695; letter from Fisher Ames to George Richards Minot (Sept. 3, 1789), *reprinted in* 1 THE WORKS OF FISHER AMES, *supra*, at 713; letter from Peter Silvester to Francis Silvester (Aug. 27-28, 1789) (Silvester Family Papers, New York Historical Society). All such attempts had been rejected, both by the House and by the Senate.

50. In the House debates over the 1789 Act, Benson was one of the principal opponents of the plan of the Anti-Federalists to eliminate federal trial court jurisdiction (except for admiralty), leaving the state courts by default to be the federal trial courts. Letter from Peter Silvester to Francis Silvester, *supra* note 49; *see generally supra* note 49. He later proposed what appears superficially to be the same plan in his March 1791 amendment; however, the significant difference between the two was the degree of control and regulatory power Benson would have given to Congress over the state courts. It was this Congressional interference, subordinating the state courts to Congress, which shoved the Anti-Federalists into vigorous opposition to an idea seemingly quite like one they had just vigorously supported, just as the perspicuous Oliver Ellsworth and others had predicted all along. *See* letter from Caleb Strong to Ichabod Tucker (May 7, 1789) (Tucker Family Papers, Essex Institute, MSS165 B1F1); letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789) (Ernst Law Papers, Connecticut Historical Society) [hereinafter Law Papers].

51. Benson's Proposal, *supra* note 48, at 768 (emphasis in original).

52. *Id.*

53. *Id.*

their actual number "shall be in the proportion of one judge for every [blank] persons in the State," unless Congress and the State legislature set a different number.<sup>54</sup> If existing federal district courts were abolished by Congress, their judges would be severally added to the general judicial courts without diminishing the number of judges to be appointed by the states.

In addition to federal compensation, federal regulation of their tenure, and federal oversight of the jurisdiction they possessed, these courts were to have even more federal strings attached. Congress was to establish each general judicial court "either by declaring the superior or supreme common law-court of the state to be the court, or by creating a new court for the purpose."<sup>55</sup> Benson finished with a dagger thrust: "For avoiding of doubts . . . all officers, as well ministerial as judicial, in the *administration of justice* under the authority of a state, shall also be held to execute their respective offices, for carrying into effect the laws of the United States"<sup>56</sup> Congress might give them "such farther duties as they shall deem proper for that purpose."<sup>57</sup>

Thus did the Federalists attempt to make their point that matters committed to state and federal judicatures were not separable into two distinct spheres, but were rather inescapably joined, and that federal supremacy in such clashes was inevitable. These conclusions, of course, were subject to debate. A difficult case<sup>58</sup> forced Justice John Blair of Virginia, a Federalist and a learned, thoughtful, and eminent jurist, to bring

54. *Id.*

55. *Id.*

56. *Id.* at 770 (emphasis in original).

57. *Id.* The Benson proposal also provided for impeachment of a general judicial court judge by either the federal House of Representatives or the lower house of the relevant state, to be tried by a special court to be chosen by Congress from among existing United States senators, Supreme Court justices, and other general judicial court judges. Existing judges of state courts which were selected by Congress to be general judicial courts would, ipso facto, be judges of those general judicial courts, limitations upon the numbers thereof notwithstanding, "but as vacancies happen they shall not afterwards be filled up beyond the number limited." A State might establish "a court of appeals or errors in the last resort . . . in cases and on questions only, where the supreme court of the United States hath not appellate jurisdiction from the general judicial court."

Two early versions of Benson's amendment exist, one in James Iredell's hand (entitled "Copy of a Paper which Mr. Benson was so obliging as to shew me"), C.E Johnson Papers, *supra* note 26, and another, slightly later version which appears to be in John Lowell's hand, Houghton Library, Harvard University. Aside from these evidences of collaboration with Federalist judges, we know nothing about the drafting history of Benson's proposal. It is likely, however, that he at least consulted his eminent friend Alexander Hamilton, since both would have been in Philadelphia with the government.

It is surprising that no historian seems previously to have directed attention to Benson's proposal.

58. See *supra* note 32 and accompanying text.

“up to my mind ideas which never before occur’d . . . There appears to be no certain boundary, clearly & distinctly marked, between federal & State jurisdiction.”<sup>59</sup> But Benson’s proposed federalization of state supreme courts forcefully showed that, even with state appointment of the judges, any such arrangement would involve ties to the federal government and safeguards for federal interests, which would amount to the destruction of state court independence.

Since Benson’s amendment was apparently never strongly brought forward, it is likely that nothing more than forceful counterpoint was intended. Presumably, he and his Hamiltonian colleagues were at least for the moment willing to accept the compromises between Federalist and Anti-Federalist desires hammered out in the 1789 Act. They wished to force to the attention of Anti-Federalists and others who voiced complaints about that Act the dangers attendant upon moving hastily to different forms of federal judicial organization. If Randolph’s proposal were to be given serious attention, they also wanted to have one of their own suggestions in the hopper.

Such views were apparently not expressed openly by Benson and his allies, however, since Randolph’s proposal was still alive. Benson’s amendment was published in the newspapers<sup>60</sup> and, like Randolph’s proposal, was debated by members of the public as though it were a possibility.<sup>61</sup> Opponents of the Federalists from Massachusetts to Georgia castigated “the aristocratic strides of the general government”<sup>62</sup> which would “most certainly destroy the idea of a separate existence of the states, and form the strongest consolidation of the whole.”<sup>63</sup> Since officers of government could not obey two authorities at the same time, “the great government will swallow up the lesser ones, as a large drop of water drinks up small ones with its attractive force.”<sup>64</sup>

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59. Letter from John Blair to James Wilson (Feb. 2, 1791) (Konkle Manuscripts, Friends Historical Library of Swathmore College).

60. See, e.g., Dunlap’s American Daily Advertiser, Mar. 8 1791 (Philadelphia newspaper).

61. See, e.g., letter from William Bradford to Susan Bradford (May 30, 1791), Wallace Papers, *supra* note 49. William Bradford succeeded Randolph as Attorney General in 1794.

62. *Curtius*, Augusta Chronicle, Apr. 30, May 28, 1791 (quote taken from May 28 edition). The essay continues: “[O]n taking a candid and impartial survey of the amendments in question, it is obvious that the sole scope and intentions of them is to absorb and annihilate those very governments to which the general one owes its existence . . . It may perhaps be considered as a palliation, that the states have the appointment of the judges—’Tis in politics, such consolation, as in private life, that when one is attacked with a fatal disorder, he has the privilege of chusing his physician.” *Id.*

63. J. SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA 51-52 (1791). Sullivan later became Jeffersonian governor of Massachusetts.

64. *Id.*

The Second Congress convened on October 24, 1791, and on November 3, the proposals of Randolph and Benson were committed to the Committee of the Whole for discussion the following day.<sup>65</sup> Difficulties ensued, the nature of which neither the *Annals of Congress* nor any surviving secondary source makes clear. The Committee of the Whole was discharged from consideration of the Benson amendment on November 9, and it was referred to a select committee, of which James Madison, Theodore Sedgwick, and Benson himself were prominent members. The Attorney General was invited to submit "such farther information as he may be in possession of, relative to the operation of the Judicial System."<sup>66</sup> On November 30, Randolph submitted a letter requesting that jurisdiction over the various federal district attorneys be shifted from the Department of State to his office. The Committee of the Whole was then discharged from consideration of Randolph's report, which was committed to a select committee whose membership overlapped that of the other committee but excluded Benson.

We hear nothing further of an official nature about either proposal. They were apparently buried in committee by mutual consent. Though two federal district judges, as late as November 1792, thought it was still possible that Randolph's suggestions concerning circuit-riding duty might still be enacted,<sup>67</sup> Randolph's report and Benson's amendment were both dead. A thoughtful letter from Sedgwick in November of 1791 explains the report's eventual fate. The choice, Sedgwick noted, was between "legislating on the Constitution as it now stands," as required by Randolph's proposals, or amending it, as required by Benson's plan:<sup>68</sup>

If the former, I must doubt whether anything very effectual can be done, because the greatest embarrassments seem to be inherent in the nature of the subject. They arise from an administration of justice by two distinct & independent sovereignties over the same persons, in the same place and at the same time; and [from] the necessity which will exist for the national government, if it shall provide for a compleat execution of its laws, of ex-

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65. The peregrinations of the two proposals as reported in the text may be traced in 3 ANNALS OF CONG. 154, 166, 216 (1849).

66. *Id.* at 166.

67. Letter from David Sewall to George Thacher (Nov. 25, 1792), Chamberlain Collection, *supra* note 49; letter from Henry Marchant to Benjamin Bourne (Nov. 30, 1792) (Peck Collection, Rhode Island Historical Society). About the same time, Charles Carroll of Carrollton wrote to a friend that he heard it rumored that the state judges were to be made United States judges within the boundaries of each state, which sounds as though the Benson amendment were still being discussed in some circles. Letter from Charles Carroll to John Henry (Dec. 16, 1792), *reprinted in* 2 THE LIFE OF CHARLES CARROLL OF CARROLLTON 191-192 (K. Rowland ed. 1898).

68. Letter from Theodore Sedgwick to Peter Van Schaack (Nov. 20, 1791) (Peter Van Schaack Papers, Rare Book and Manuscript Library, Columbia University).

tending its courts thro' the whole extent of country and multiplying its officers without number. If [the latter,] . . . it may excite all the agitations of federal and antifederal passions which now seem to lie dormant thro' all the northern and eastern states. . . . [T]hen another question presents itself whether it is not on the whole most prudent *at present* to do nothing . . .?<sup>69</sup>

The Federalists, though in power, were not yet strong enough to withdraw their endorsement of what they felt to be the restrictive compromises related to federal jurisdiction that were embedded in the 1789 Act in order that they might legislate an "Extension of the Jurisdiction of the US. to all the Objects which the Constn. admits."<sup>70</sup> Potential opposition from Anti-Federalists and others was great at this early stage of development of the new government. It would be difficult enough, as *Chisholm v. Georgia*<sup>71</sup> would demonstrate, for the federal courts to exercise the power they had already been given. A chief reason for establishing a separate federal court system was the reluctance of state courts and legislatures to honor pre-Revolutionary British debt claims as well as the claims of British sympathizers whose land had been confiscated. In the South, where such debts created significant political and economic problems, British creditors were beginning to inundate the federal courts. While an early decision in Massachusetts' federal court sustained the hopes of those Americans who had purchased confiscated land, a key constitutional decision had already been rendered against American debtors in the federal circuit court in Connecticut during the spring of 1791. Crucial questions concerning the constitutionality of state laws, which permitted the confiscation of British property had been argued in the federal circuit courts in the pivotal states of Virginia and Georgia during the fall term of 1791 and were awaiting decision as onlookers held their breath.<sup>72</sup>

Many feared that the most likely way to arouse and solidify the

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69. *Id.* (emphasis in original).

70. Letter from John Lowell to Fisher Ames (Jan. 10, 1791), Ames Papers, *supra* note 26.

71. 2 U.S. (2 Dall.) 419 (1793) (held, over Iredell's dissent, that a state could be sued in federal court without its consent, an announcement which led to an uproar and eventually to the Eleventh Amendment). See generally Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1920-41 (1983).

The federal circuit court in Georgia had already upheld jurisdiction over Chisholm's claim in October 1791. See *Ex'r of Farquhar v. Georgia* (C.C.D. Ga.), 1 Minutes of the United States Circuit of Court for the District of Georgia, 1790-1842, at 33 (May 1790-Apr. 1793) (available on National Archives microfilm reel M-1184, RG 21) (state's pleas to jurisdiction was overruled, Oct. 21, 1791).

72. Almost half (more than 2.3 million) of the five million pounds of debt owed to British merchants was attributable to the largest and most populous state, namely Virginia. Another third was owed by the states of South Carolina, Maryland, North Carolina, and Georgia, listed in descending order of value of debt. Only Massachusetts citizens owed as much to the merchants as did

lurking opposition to the federal government would be an attempt to expand federal judicial power while these extremely touchy situations were pending. "So crude is our judiciary system, so jealous are State judges of their authority, so ambiguous is the language of the constitution, that the most probable quarter from which an alarming discontent may proceed," Attorney General Randolph advised the President, "is the rivalry of these two orders of judges."<sup>73</sup> The Federalists, however, did have enough power to block any reform, and, given the boost shrewdly interjected by Benson's proposal, they pursued the course of action laid out by Sedgwick and did nothing.

Many Hamiltonians still wanted such an "extension of the Jurisdiction of the US," in Sedgwick's phrase, "extending its courts thro' the whole extent of country,"<sup>74</sup> but they wanted to wait until the operation of the new government pleased enough people to dissolve most of the opposition. "Premature attempts to amend, may check the good and increase the Evils of the present System," one of them wrote to Sedgwick.<sup>75</sup> "All that ought to be done cannot be done at once," Benson's close friend Chief Justice Jay wrote of judicial reform to the President.<sup>76</sup>

### III. THE OPEN-ENDEDNESS OF ORIGINAL UNDERSTANDING

Edmund Randolph, Egbert Benson, and their proposals to reform the Judiciary Act of 1789 have been forgotten by later generations of Americans, just as the proposals, and to a great extent the reputations of their incisive and thoughtful drafters, were buried by contemporaries. But these proposals deserve resurrection because of the persistent di-

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the citizens of any state below the Mason-Dixon line. See S. BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 140 (1962).

For the sense of inundation and a discussion of the Virginia case, *Jones v. Walker*, 13 F. Cas. 1059 (C.C. Va. 1797) (No. 7507), see D. F. HENDERSON, *COURTS FOR A NEW NATION* 72-79 (1971) (also good on the other cases); Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176 (1984). Actually, from the standpoint of the English and Scottish merchants, who had approximately 200,000 claims, only a trickle of cases was brought in the 1790s.

For other post-Revolutionary circuit court cases involving British creditors, see Holt, *supra* note 36, at 323 nn.88-89.

73. Letter from Edmund Randolph to George Washington (Aug. 5, 1792), reprinted in 10 WASHINGTON WRITINGS, *supra* note 18, at 513.

74. Letter from Theodore Sedgwick to Peter Van Schaack (Nov. 20, 1791) (Peter Van Schaack Papers, Rare Book Room and Manuscript Library, Columbia University).

75. Letter from Peter Van Schaack to Theodore Sedgwick (Dec. 25, 1791), Sedgwick Papers, *supra* note 12.

76. Letter from John Jay to George Washington (Sept. 23, 1791), reprinted in 10 WASHINGTON WRITINGS, *supra* note 18, at 499.



lemma of our federal court system, which John Jay described as the "administration of justice by two distinct & independent sovereignties over the same persons, in the same place and at the same time."<sup>77</sup> The tension between the two intermingled systems of government is just as poignant today, and its resolution just as difficult, just as undetermined by a rigid, concrete original understanding, just as charged with the politics of law as it was in those exciting, perilous, and utterly ordinary times.

Each of the proposals can be seen as representing one of the two opposing moments of the contradiction that is federalism, a contradiction built deeply into the structure of our constitutional system, and one which has persisted to the present. Neither of these forces was perfectly represented in either proposal, since both involved elements of compromise. Although Benson's ideas were less conciliatory than those of Randolph, neither drafter went to the extremes he might have, since neither was an abstracted actor attempting to compose an ideal system somewhere outside of history. Both contemplated nothing other than taking into account the practicalities of politics. Randolph accepted several important Federalist ideas, and several portions of his proposal seem to cater to Federalist desires and constituencies, while Benson left the appointment of the judges of his general judicial courts to the state governments.

Randolph's proposal represents the moment of state sovereignty within our federal system. Under it, state judiciaries would retain some significant measure of their dignity, since they would have been able to adjudicate any matter of federal cognizance which litigants chose to litigate in their courts without fear of a subsequent federal decision overturning their judgment. They would also maintain a separate sphere of activity, carefully established by placing explicit restrictions on the scope of federal judicial power and by eliminating Supreme Court review of state court decisions. Randolph's proposals by no means went as far as the contemporary jurisprudence of Chief Justice Rehnquist and his cohorts, who would deny or indefinitely postpone the ability of certain categories of litigant to choose federal jurisdiction before trial,<sup>78</sup> since, unlike his modern comrades-in-arms, Randolph perceived that the "framers" had designated federal courts "as the asylum to federal interests."<sup>79</sup> That

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77. *Id.*

78. See, e.g., *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *Stone v. Powell*, 428 U.S. 465 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring). See generally Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L. J. 1317 (1982).

79. See Randolph's Report, *supra* note 11, at 23.

is, there would be no concrete reason to have an articulated federal court system if the state courts would have sufficed for most matters, but provision was made for lower federal courts in order to provide a refuge in the event that state courts proved inadequate for certain cases within their usual jurisdiction. These framers presumed that state courts might be biased against certain litigants or causes, enumerated those situations in article III, section 2, and set up a judiciary to handle them, leaving it up to Congress to decide the extent to which an articulated lower federal judiciary was actually needed.<sup>80</sup>

Federal jurisdiction could not be completely split apart from that of the state courts unless all litigation arising under article III, section 2 were made exclusively federal, including the ordinary debt and property actions which out-of-state or foreign creditors or land speculators might desire to bring in federal courts out of fear of local prejudice. Exclusive federal jurisdiction in such instances would probably have excited such strenuous protest and opposition as to imperil the new government, so Congressional wisdom in 1789 had not been exercised in favor thereof in most instances. The pressure of Anti-Federal opposition,<sup>81</sup> chief among relevant factors, made federal alienage and diversity jurisdiction concurrent with state courts, and then only in suits valued at five hundred dollars or greater, with no federal jurisdiction over those valued at less and no original federal jurisdiction over issues of federal law or constitutionality. Persons in these crucial categories who represented a federal interest, who thus came within the terms of article III, section 2, and who thought that they could predict state court bias or localism, could choose to go to federal court or state court either as a matter of original choice, or, with respect to federal or constitutional issues, by appeal after final

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80. See the quotations from Justice Iredell's private memorandum on Randolph's proposal, *supra* note 42 and accompanying text, which express this understanding of original intent as well as it was to be expressed by any contemporary. See also letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789), Law Papers, *supra* note 50; letter from William Smith to Edward Rutledge (Aug. 9-15, 1789), reprinted in *The Letters of William Loughton Smith to Edward Rutledge*, 69 S.C. HIST. MAG. 1, 13 (G. Rogers ed. 1968); letter from Abiel Foster to Oliver Peabody (Sept. 23, 1789), Chamberlain Collection, *supra* note 49; see also, e.g., 11 ANNALS OF CONG. 78 (1851) (remarks of Senator Morris made in January 1802). Among modern historians, Amar develops this point well. Amar, *supra* note 26.

81. See letter from Oliver Ellsworth to Oliver Wolcott Sr. (May 30, 1789) (Wolcott Papers, Connecticut Historical Society); letter from Richard Henry Lee to Patrick Henry (May 28, 1789), reprinted in 2 THE LETTERS OF RICHARD HENRY LEE 486 (J. Ballagh ed. 1914) [hereinafter LEE LETTERS]; letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789) (Patrick Henry Papers, Library of Congress). The portion of this letter relevant to our concerns has not been published, though other portions have been, with no indication that the letter has been edited. See 2 LEE LETTERS, *supra*, at 501.

state court adjudication.<sup>82</sup> The matter of anticipating and dealing with state court bias was left to the litigant's choice, as opposed to Congressional mandate. Thus the genius of the compromise embodied in the 1789 Act was the choice it gave litigants to pursue certain actions in either state or federal court.

Randolph, unwilling to accept the likelihood of state court bias in cases involving federal or constitutional issues, merely proposed to surrender those suits to the litigant's choice *at the commencement of an action*, as Congress had already done with regard to actions involving foreigners or out-of-state citizens.<sup>83</sup> The Attorney General, more shrewd and astute than many of his contemporaries in understanding the Constitution and the 1789 Act, misjudged the extent to which most Federalists distrusted state courts.<sup>84</sup> Those Federalists could not accept a state court's ability to make a decision on any constitutional question without the possibility of further review by a federal court. They perceived that the state court's technical lack of legal authority to bind the federal government in a constitutional matter might be easily lost in the publicity surrounding a decision that purported to cripple the power of the new government. Political realities, as usual, would be much more significant than legalistic quibbles. Moreover, Federalists were unwilling to cabin the federal courts with strict rules about exclusive jurisdiction or to relinquish the safety-value, oversight authority provided by section 14 of the

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82. Judiciary Act of 1789, *supra* note 2, §§ 11, 12, 25.

83. The Judiciary Act of 1789 did not give appellate federal authority over diversity or alienage cases that were brought in state courts but were not removed to federal courts before trial. As persons with Randolph's desire for statutory symmetry might deem somewhat surprising, no judiciary act has done so since then, either. But the reason is plain: the federal interest in diversity and alienage cases rests solely within any litigant who senses possible state court bias. If neither litigant perceives such bias, there is no federal interest in having a federal court adjudicate the case since state courts are perfectly capable.

The federal interest in a case covered by section 25 of the 1789 Act, however, rests in the issues of the case—issues of Constitutional import—and litigants might not be capable of detecting, or might not initially be desirous of avoiding, state court bias. The federal interest lies at least partially outside the litigant, and Federalists, as well as their successors in interest who were suspicious of state courts, would demand at least the possibility of an independent federal inspection of the problem upon appeal. Such inspection would of course still be at the instance of a litigant, but presumably the litigant's eyes would have been opened to the actuality of state court bias, or to the importance of the constitutional issue, by the eventuation of the trial. Even so, some important constitutional issues might not get appealed, and, given the Federalists' fear of the dissolution of the inchoate national government, that was as far as they were willing to go in the 1790s.

84. "[I]f they were all like the supreme Court of Massa. it might be well, but such Supreme Courts as I have known in some other States are a burlesque on Justice." Letter from John Lowell to Fisher Ames (Jan. 10, 1791), Ames Papers, *supra* note 26.

1789 Act.<sup>85</sup> They preferred instead the Act's open-ended language.

Benson's proposal, on the other hand, clearly and somewhat more consciously represented the moment of federal centralization and supremacy. In order to protect federal interests pursuant to article III section 2 in the absence of a system of lower federal courts, it was necessary for Benson to postulate a degree of supervision by the Supreme Court through appeals, and by Congress through legislation regulating state judges and judicial officials. The result would have been the conversion of the state judiciaries into subordinate adjuncts of the federal courts. As its opponents immediately understood, Benson's amendment would have been a giant step along the path towards consolidation of the states into the federal government, thereby converting sovereignties, as one opponent put it, "into extensive but feeble CORPORATIONS."<sup>86</sup> Just as Benson expected, his opponents were unable to countenance his proposal. It was, after all, designed chiefly as a bargaining chip, and achieved its desired result when Randolph's ideas were discarded.

The most important thing to note about the two proposals is that both were made without the slightest argument from contemporaries that either violated the framers' intent. Randolph's and Benson's proposals represented two of the many legitimate ways in which the federal judiciary might have been organized under the vague and broad language of article III.<sup>87</sup> While each proposal would have greatly altered the map of governmental structure and the interaction between federal and state government, nothing of a constitutional or legalistic nature prevented their being proposed or enacted. As Randolph understood, the constitu-

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85. Judiciary Act of 1789, *supra* note 2, § 14. See *supra* note 30 and accompanying text.

86. *Curtius*, *supra* note 62 (emphasis in original).

87. Three vastly different modes of potential federal court structure were presented during the opening of the Senate debates on the judiciary bill on June 22-24, 1789. The first was the minimalist notion of having only a few federal courts—one Supreme Court and a scattering of admiralty courts—leaving most business to the state courts. Put forward by the Anti-Federalist Senators Richard Henry Lee and William Grayson of Virginia, it was hotly debated for two days before being voted down. See THE JOURNAL OF WILLIAM MACLAY 86-87 (E. Maclay ed. 1890); Casto, *supra* note 11, at 1107-08, 1133-35 (Paterson's notes for the speech he gave opposing Lee's motion on June 23); *supra* notes 49-50 and accompanying text. The second, adopted momentarily on June 24, if the notes made by Senator William Maclay of Pennsylvania are correct, was the *nisi prius* system of the British courts. District and circuit courts would have been replaced by a large supreme bench, the members of which would travel about the states to preside over jury trials but would return to a conference at the Capital to decide knotty or undecided legal points. See THE JOURNAL OF WILLIAM MACLAY, *supra*, at 87-88; Casto *supra* note 11, at 1108-09 & n.63 (eighteenth century understanding of *nisi prius*); *id.* at 1137-38 (lines 15-51 of Paterson's notes taken during judiciary bill debates and addressing *nisi prius* court system). The third, of course, was that advanced by Ellsworth and eventually adopted. No one is on record as arguing that any of the three was prohibited by the Constitution or by the framers' intent, even though each differed substantially from the others.

tional provisions for a federal judiciary were "so ambiguous"<sup>88</sup> that either proposal would have fit into them. The structural tensions of federalism which hastened the disappearance of these two ideas were not legal in nature, but were, as we have seen, political.

Additionally, both proposals assumed that article III, section 2 was intended to apply to a class of litigants whose federally protected interests required that they be given access to federal courts at the trial or appellate stage, provided that their claims were valued above the minimum amount in controversy. Those litigants seeking the protection of federal jurisdiction could not be shunted permanently to state courts, due to the constitutional presumption of possible bias in those courts. The contrary assumption—that state courts were of equal dignity with federal courts—was an Anti-Federalist belief and was not within even the broad limits of the original understanding of the Federalist framers.

A third matter of note is that many of those today who adhere to original understanding have misread American history as it relates to the origins of the federal judiciary. They claim that the Constitution was intended to establish one and only one type of judicial structure—surprisingly enough, the very one we have today. At the same time, they discover nothing in the framers' intent to support a claim that the federal courts should be accessible to all potential federal plaintiffs.<sup>89</sup> In fact, the federal judiciary might have been legitimately structured in many variant ways, but if the framers intended anything it was that the federal courts should be an asylum to federal interests for the reason that state courts might not be trusted in some very important matters.

A study of politics, not merely of words, leads the legal historian to these conclusions. The framers desired a strong federal judiciary that could hear cases free from the bias that may be present in state courts,<sup>90</sup> especially for those cases involving foreign and out-of-state plaintiffs, federal law, and constitutional issues. However, neither a required structure of federal courts nor a required quantum of federal jurisdiction over claims involving out-of-state or foreign litigants, federal law, or constitutional questions was ordained in the constitution. This reluctance to create an inflexible federal judiciary rested on several factors: (1) a strong

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88. Letter from Edmund Randolph to George Washington (Aug. 5, 1792), *reprinted in* 10 WASHINGTON WRITINGS, *supra* note 18, at 512, 513. *See also* letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *reprinted in* 1 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 25, at 506-07.

89. *See supra* notes 3, 4 & 78 and accompanying text.

90. *See supra* notes 40 & 41 and accompanying text.

and constant pressure from those who were not so prepared to distrust state courts and those who disliked a strong central government; (2) an enormously fluid political situation in which the Federalists seriously and probably correctly doubted that they represented a stable majority; (3) the preference of Federalists for getting a national government accepted and started rather than ensuring from the first that the details of its organization matched their ideal of a centralized polity; (4) the need that Federalists felt to make the document open-ended, especially as concerned the judiciary; and (5) the lack in the last quarter of the eighteenth century of that sort of extreme precision and fixity in the definitions of words which we today seem to find unquestionable.<sup>91</sup> Instead, Congress was given a broad realm of discretion in order that it could respond to possible state-court bias or take Anti-Federalist sentiment into account to the extent it saw fit, so long as those who represented important federal interests were at least given a choice of access to federal jurisdiction in some meaningful way.

Thus, Congress was not required to create the type of lower federal courts that Benson proposed.<sup>92</sup> Nor was Congress required to establish completely concurrent jurisdiction between state and federal courts, utilizing litigant choice at the trial stage and perhaps eliminating federal review over crucial Constitutional questions, though the history surrounding Randolph's report makes clear that such an alternative would have fallen within the vague limits of what was understood to be the meaning of the Constitution. While both Randolph and Benson drew heavy fire from their opponents, no one is on record as attacking either proposal on grounds that it seriously departed from what the Constitution established as our form of government.

The problem is not with original understanding. If original understanding in some sense was not necessary to our understanding and application of the Constitution, we would disregard that document and

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91. Compare Casto, *supra* note 11 (Constitution intended to grant Congress extensive legislative discretion over the jurisdiction of the federal courts) with J. GOEBEL, *supra* note 11, at 240-47 (inferior federal courts vested with the complete range of federal jurisdiction were mandated by the Constitution) and Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 750-54 (1984) (article III intended to create a mandatory federal jurisdiction in order to ensure the supremacy of federal law) and Clinton, *supra* note 11, at 1520-22 (federal courts must be given the complete range of federal jurisdiction by Congress, but such jurisdiction can be either original or appellate from state courts) and Amar, *supra* note 26 (federal courts must be given jurisdiction over cases within the three "heads" of jurisdiction in article III, section 2, that are modified in the word "all," but such jurisdiction can be either original or appellate from state courts).

92. *Contra* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

start each problem somewhere else, perhaps afresh. Yet, we assume that the Constitution itself has meaning for us. We accept the framers' work as legitimate, and we recognize, after all, that it is a *constitution*. Still the problem with intentionalism, as with most positivist liberal legalism, is that it creates idealistic and overly-rigid boundaries; it places absolute reliance upon words themselves, words understood in a static and abstracted sense, words unnaturally divorced from the political, social, historic context which gave them their meaning. History, not dictionaries, is where the meaning of every word is to be found. Intentionalism presumes that words possess a single meaning and that those meanings were absolutely known to and used by the persons who uttered them. History is much less exact, much less determined, much more a matter of contention and contentiousness, than this aseptic and essentially unreflective preoccupation with surgical precision permits. The framers had many choices, many differences, many misunderstandings, and many unresolved disputes.<sup>93</sup>

This is not to say that "there are *no* determinate continuities derivable from history,"<sup>94</sup> as perhaps some seem to assert in deconstructive response to intentionalism<sup>95</sup> and to the positivistic legalism of which intentionalism is only the most recent and fashionable expression.<sup>96</sup> I have tried to deal with this argument elsewhere.<sup>97</sup> Nor is it to say that "[a] jurisprudence of original intention . . . would be obliged to seek the intention of the Framers in the words of the Constitution, as the Framers themselves intended."<sup>98</sup> Both extremes are overly abstracted and idealis-

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93. "Understanding the implications of article III and the jurisdictional statutes Congress has enacted will not . . . be found through a search in history for a [single] 'true meaning.' Rather, the search is for the *choices* that were open to the drafters of the Constitution and the Judiciary Act of 1789 and for the changes in the interpretations given to the written language. Our history could have been different, our future can be different, depending upon the interplay of the courts and Congress, the judicial and the political processes." H. FINK & M. TUSHNET, *FEDERAL JURISDICTION POLICY AND PRACTICE*, at vii (2d ed. 1987) (emphasis in original).

94. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 825 (1983) (emphasis added). See also Tushnet, *The U.S. Constitution and the Intent of the Framers*, 1 TIKKUN 35-40 (1986).

95. See *supra* notes 1, 3 & 4 and accompanying text.

96. Compare Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (arguing that "rules" may be usefully differentiated from "standards" by the relative open-endedness of the latter) with Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (repudiating the same) and Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (taking a radically indeterminate position).

97. See Holt, *Recovery By the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth-Century Contract Law*, 1986 WIS. L. REV. 677.

98. Hutson, *supra* note 1, at 38-39. The relative unreliability of the evidence of the framers'

tic. Although the framers argued bitterly about the degree to which the context of words was important, they and their adversaries had a much healthier view of constitutional interpretation in that they took for granted that the political context—however vague, however much a matter of dispute—was determinative.<sup>99</sup>

The judiciary proposals of Edmund Randolph and Egbert Benson help to demonstrate that the original understanding of article III, section 2 had quite broad, vague, even disputed boundaries, and that those boundaries were to be constantly drawn by interpretation informed by political activity, not by arid, legalistic discourse. A study of the historical context of the proposals shows that the breadth of those constitutional boundaries derived chiefly from the dilemma of federalism—a structural contradiction between the sovereign powers of the states and the new national government. The antagonisms of this dilemma were not experienced in an abstracted realm of federalism, but were fueled by the desires of those who wished to use state or federal power for their own ends. Thus, while federalism remains a structural dilemma, the actual content and political focus of the struggles will change with each generation.

The contradiction of federalism has persisted to the present. Importantly, the debate that surrounded Randolph's and Benson's proposals, when viewed from a historical perspective, is quite similar to those today involving the federal judiciary. As the story of their ideas suggests, when dealing with proposed changes in federal jurisdiction, we should consider why it is desired to limit or broaden access to federal courts, rather than restrict our focus to the constitutional words which define access. Randolph and Benson each understood their proposals to follow, to implement, indeed, necessarily to strengthen the Constitution, and both were certainly acting within the boundaries of original understanding. Federal jurisdiction was established principally to allow litigants to have a refuge from possible state court bias, but Congress was given a wide leeway of

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intentions, which Hutson so skillfully and aptly demonstrates in the cited essay, while it must be at the forefront of the mind of the historian, does not render impossible the historian's task. Rather, the historian is reminded again of the complexity and delicacy involved in making the judgments which are at the foundation of the historian's usefulness. The evidence for the making of the Constitution is no less reliable than that for most other important trajectories of past human activity; it only seems so when compared to the absolute clarity that intentionalists and other modern-day legalists seem to expect from the historical record.

99. See generally Powell, *supra* note 42. Powell's essay makes it clear, however, that the defensive arguments of the framers on this topic and, later, those of the Jeffersonians carried with them the seeds of today's neutralistic, apolitically legalistic modes of discourse about law, while the arguments of the Anti-Federalists do not seem so legalistic.



political choice within which to structure the federal court system and federal jurisdiction. It is the politics of choice that should be focused upon, and those choices are made and remade by Congress, by the courts, and by the problems and exigencies of the times, not by the original understanding of the Constitution.