

## ARTICLE IX, ARTICLE III, AND THE FIRST CONGRESS: THE ORIGINAL CONSTITUTIONAL PLAN FOR THE FEDERAL COURTS, 1787–1792

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*This Article describes the original constitutional plan for the U.S. Supreme Court and the lower federal courts as set out in Article III of the U.S. Constitution, debated at the Constitutional Convention and state ratifying conventions, implemented by the First Congress, and realized with the first case docketed at the Supreme Court, from 1787 to 1792. In so doing, it relies on close readings of three primary sources: Article IX of the Articles of Confederation, the Judiciary Act of 1789, and the Process Act of 1789. The First Judiciary Act is well known but not often read and analyzed holistically as a single, integrated enactment designed to address concerns voiced during the state ratification conventions. Article IX and the First Process Act are neither well known nor identified as key sources of Article III of the Constitution and its original meaning. This Article enlarges modern conventional wisdoms about the early U.S. federal courts by showing:*

- *Their distinctly pro-foreigner orientation as befitting a new weak state, in sore need of inbound foreign trade, credit, and investment;*
- *The essentiality of the Supreme Court’s original jurisdiction to promote international and interstate peace and harmony;*
- *The controversial nature of the Court’s appellate jurisdiction “both as to Law and Fact” when the Constitution was discussed and adopted (1787–1788), based on the example of the national appeals court for captures under Article IX of the Articles of Confederation;*
- *The limited scope of state law rules of decision and procedures within the Article III categories of federal judicial power that the First Congress actually vested;*
- *The relatively limited importance of Article III “arising under” federal jurisdiction as an original matter outside of federal crimes and revenue laws; and*

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- *The overall “nationalist” orientation of the federal courts, to subordinate state interests to the overwhelming national survival interest in international and interstate peace and commerce.*

#### INTRODUCTION

This Article illuminates certain nationalist aspects of the original plan for the U.S. Supreme Court and the lower federal courts in the constitutional system of the founding period from 1787 to 1792 that are forgotten or ignored today. By “nationalist,” I mean that the federal courts were originally established, in significant part, to reduce tensions with foreign governments by subordinating states’ conflicting interests and protecting foreigners and providing them favorable forums for resolving maritime and commercial disputes with Americans. The paramount concerns were to ensure that the United States stuck together to keep its international law commitments, most importantly under the 1783 Treaty of Peace with Great Britain, and to restore and facilitate interstate and international commerce while keeping that peace.<sup>1</sup> One little known aspect of the mission to mitigate foreign friction was a distinct favoritism for foreign litigants and procedures over American litigants and state law procedures. For example, section 11 of the Judiciary Act of 1789,<sup>2</sup> the famous “assignee clause” (presently codified at 28 U.S.C. § 1359), prohibited assignment of claims to generate federal jurisdiction but did not apply to “cases of foreign bills of exchange,” although it blocked assignment of *domestic* bills of exchange to out-of-state Americans seeking to get into federal court.<sup>3</sup> Additionally, part of section 9 of the Judiciary Act, which is commonly known as the Alien Tort Statute (ATS), permitted friendly and neutral “aliens” to sue for any torts—noncontract injuries to their persons or properties—while most out-of-state American tort plaintiffs would be blocked by a five-hundred-dollar amount-in-controversy requirement.<sup>4</sup> Finally, the Process Act of 1789 specified that “forms and

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1. The first proposal for establishing a supreme court and lower federal courts contemplated jurisdiction over “all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; . . . and questions which may involve the national peace and harmony.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (containing James Madison’s notes regarding Edmund Randolph’s Virginia Plan for the Constitution).

2. This Article uses “Judiciary Act of 1789,” “First Judiciary Act,” and “Judiciary Act” interchangeably.

3. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

4. *Id.* § 9; see Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 895–900 (2006). For friendly and neutral aliens, such noncontract injuries generally met the statute’s “in violation of the law of nations” requirement because contemporaneous international law required a host sovereign state to provide safe conduct to the nationals of foreign sovereign states with whom it was at peace. *See id.* at 879 (quoting § 9, 1 Stat. at 77). As William Blackstone explained in his *Commentaries*, “[C]ommitting acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another.” 4 WILLIAM

modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction . . . shall be according to the course of the civil law,” not necessarily state law or English law, thereby promising favorable procedural law to European litigants who were more learned in the civil law.<sup>5</sup>

This Article focuses on three key primary sources to draw out this forgotten nationalist, pro-foreigner orientation in the original constitutional plan for the Supreme Court and the lower federal courts. The first is Article IX of the Articles of Confederation—an antecedent to Article III of the Constitution and thus an important source of Article III’s original meaning that is largely neglected by constitutional lawyers today. The second is the Judiciary Act of 1789—the framework statute passed by the First Congress, which created the federal court system. Although scholars have extensively scrutinized the First Judiciary Act,<sup>6</sup> they have not focused on its pro-foreigner orientation. Furthermore, there is confusion regarding the Judiciary Act’s role as an interpretative aid to resolving ambiguity in Article III and its importance as evidence of the original understanding of the constitutional scope of federal judicial power where Article III is silent. By explaining the interaction of certain key provisions of the Judiciary Act with both Article III and the Bill of Rights, I hope to dispel some of that confusion. The third key source in proving the nationalist feature of the original understanding of the federal judicial power I have described is the First Process Act. It was enacted on September 29, 1789, five days after the Judiciary Act.<sup>7</sup> As the first statute that the First Congress passed to prescribe forms and modes of proceedings in the newly created federal courts, it was the ultimate antecedent of the modern Federal Rules of Civil Procedure. The statute lasted less than three years (it was implicitly repealed on May 8, 1792<sup>8</sup>) and has been underexamined. But, given its vintage, the First Process Act is a crucial piece of evidence for divining the original understanding of how the national courts were intended to operate and the original meaning of Article III of the Constitution.

This Article’s explication of the original constitutional plan for the federal courts expands on prior accounts in at least three significant respects. As a general matter, federal courts scholarship usually begins with how the judiciary fits into separation of powers theory and what the courts do and should do now, rather than scrutinizing the primary sources and solving the puzzle of what they did then. First, although there is excellent legal academic scholarship on the importance of the Supreme Court and the federal courts in

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BLACKSTONE, COMMENTARIES \*68. Enemy nationals were generally barred from suing in the courts of another sovereign state with which their sovereign was at war.

5. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94. Consequently, a Dutch creditor could assign a bill of exchange to a New York agent to sue a New York debtor in federal court, even though a New York creditor could not sue a New York debtor directly or assign its claim to a Connecticut agent. *See infra* Part I.E.

6. *See, e.g.*, ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeve Marcus ed., 1992) [hereinafter ORIGINS].

7. *See* ch. 21, 1 Stat. 93.

8. Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792).

the foreign affairs of the early United States,<sup>9</sup> there is little discussion of the pro-foreigner orientation and the technical aspects of how the judicial branch would play this role in the new republic. Similarly, nonlegal scholarship about the centrality of the dire foreign policy picture at the founding to the creation of the Constitution does not examine how the design and operation of the federal courts under Article III and the First Judiciary Act addressed such concerns.<sup>10</sup> This Article shows how the fact that the United States was militarily weak and fearful of the European powers' influence, yet desirous of peace, credit, and trade with them, led to the establishment of federal courts as foreigner-friendly alternatives to state courts for dispute resolution in maritime and other cross-border commercial and investment cases. The motive is identical to the turn today toward international commercial arbitration and courts by countries seeking to encourage foreign investment and trade today.<sup>11</sup>

Second, there is a conventional view that the federal courts were originally designed to operate like state and English common-law courts, including by adhering to state rules of decision and procedures. Julius Goebel, the preeminent historian of the early U.S. courts, famously propounded the theory in his opening volume of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*.<sup>12</sup> The Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,<sup>13</sup> abolishing federal court power to use principles of "general law" to decide a tort suit brought by a citizen of one state against a citizen of another (only one of nine categories of Article III judicial power), is the modern bellwether precedent for the view. Goebel was correct that English common law, mediated by state law, controlled the law side of the federal courts' jurisdiction, but the dockets of the early federal courts were crowded with equity (e.g., title fights under conflicting states' land grants), admiralty (e.g., disputes about collisions, salvage, and lost or spoiled cargo), and maritime (e.g., contested captures at sea during hostilities) causes. And, with respect to those causes, in the crucial years between 1787 and 1792—when Americans drafted, debated, and ratified the Constitution, when the First Congress established the federal judicial system and the processes federal courts were to apply, and when the Supreme Court and lower federal courts started hearing cases—the original understanding

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9. See, e.g., WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (1995); MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 1–45 (2019).

10. See, e.g., MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

11. See Pamela K. Bookman, *The Adjudication Business*, 45 *YALE J. INT'L L.* 227, 231 (2020).

12. See generally 1 JULIUS GOEBEL JR., *THE OLIVER WENDELL HOLMES DEVISE* (Stanley N. Katz ed., 1971); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922).

13. 304 U.S. 64, 72 (1938).

and design of the federal judicial branch consciously departed from English and state law models. This Article demonstrates how the Goebel and *Erie* position of state and English common-law dominance as a matter of this *original* constitutional plan is incomplete, despite the fact that state and English common-law habits persisted and were plainly ascendant by the end of 1792, even in equity, admiralty, and maritime suits.<sup>14</sup> That federal judges should defer to state law and procedures, generally refrain from “making” law under other of Article III’s nine grants of judicial power (e.g., ambassadorial or admiralty or maritime jurisdiction), and leave foreign policy to the political branches is constitutional dogma today, and they are beliefs formed after decades of historical practice and institutional evolution. But that dogma is not compelled by the original constitutional plan for the federal courts as it was drawn up and implemented from 1787 to 1792.

Third, another prevalent modern understanding of the Supreme Court, underscored by the federal courts scholar Henry Hart, is that its “essential role” in our “constitutional plan” is the Court’s appellate jurisdiction, particularly of state court decisions.<sup>15</sup> Hart’s view requires enlargement in two respects, at least with respect to the plan when the Constitution was framed and initially implemented. First, the Supreme Court’s original jurisdiction of “all Cases affecting” foreign “Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party,”<sup>16</sup> such as “Controversies between two or more States,”<sup>17</sup> was also seen as an essential role in the plan, to promote international peace and harmony. The Court’s decision in 1803 in *Marbury v. Madison*,<sup>18</sup> which baptized judicial review, was itself a failed original jurisdiction case. Judicial review—the Supreme Court’s power to declare governmental acts unconstitutional—may be exercised in the Court’s original jurisdiction as well as its appellate jurisdiction.<sup>19</sup> The words of Article III of the Constitution explicitly require the two original jurisdiction roles because they were seen as “essential” to keep peace with the European powers that ambassadors represented, as well

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14. In the modern era, it was the Supreme Court’s decision in *Guaranty Trust Co. v. York* that extended the *Erie* principle to equity actions in the federal courts. See *Guar. Tr. Co. v. York*, 326 U.S. 99, 111 (1945) (“To make an exception to *Erie R. Co. v. Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision.”).

15. See Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953). Henry Monaghan reminds us that Hart’s famous *Dialogue* “still remains the mesmerizing starting point for anyone interested in congressional control of the Article III courts.” Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 66–67 (2019). Hart was also one of the two original authors of the leading casebook-treatise on federal courts law, now in its seventh edition. RICHARD H. FALLON JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015).

16. See U.S. CONST. art. III, § 2, cl. 2.

17. *Id.* cl. 1.

18. 5 U.S. (2 Cranch) 137 (1803).

19. James Pfander has previously remarked on the Court’s original jurisdiction as a means for enforcing federal rights against states. See James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 559–61 (1994).

as among the states. Second, when the Constitution was drafted and adopted between 1787 and 1788, the Court's appellate jurisdiction "both as to Law and Fact" was seen as key to ensuring uniform enforcement of federal laws, but it was also extremely controversial because of the potential for retrial of state jury verdicts in a distant capital based on the example of the national appeals court for captures under Article IX of the Articles of Confederation and the absence of any constitutional provisions against reexamination of state jury findings. And when the First Congress decided to create lower federal courts with exclusive original jurisdiction as to federal crimes, revenue laws, and admiralty and maritime cases (except for common-law causes) in 1789, it mitigated this need for uniform enforcement via the Court's appellate jurisdiction: lower federal court exclusive original jurisdiction and the Court's appellate jurisdiction were, to some extent, functional substitutes then as they are today. Modern debates about what Article III allows Congress to do with federal jurisdiction and the Supreme Court's essential role must take into the account the Court's original jurisdiction and the significant concerns voiced at the adoption of the Constitution regarding its appellate jurisdiction, as well as well-trod arguments for its need.<sup>20</sup> Relatedly and more generally, the original plan for the federal courts envisioned them not only as public law institutions to decide questions of constitutional law and to enforce federal laws but also as admiralty and commercial courts to promote interstate and international trade by supplying credibly neutral dispute resolution services. Today, the notion that federal courts were designed to be active in foreign affairs and to operate as "pro-business" commercial courts would be viewed by many as contrary to the original constitutional plan, not consistent with it.

My intent in illuminating the 1787–1792 plan for the federal courts is not to suggest that we should resurrect it or seek to apply it again to the present in any way: I am not an originalist in that sense. My intent, rather, is to draw a more accurate and complete picture of how the original adopters of the Constitution designed the Supreme Court and federal courts to operate and

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20. Some jurists and scholars have argued that the Constitution requires Congress to vest some judicial power over "all Cases arising under the constitution, laws, and treaties of the United States" (federal question jurisdiction) in federal courts, whether lower court original jurisdiction and/or Supreme Court appellate jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339 (1816). In *Martin*, Justice Joseph Story distinguished between Article III, Section 2's use of "all Cases" "arising under" federal law, "affecting Ambassadors," and "of admiralty and maritime Jurisdiction" and the absence of "all" before listed "Controversies," such as those "to which the United States shall be a Party." *See id.* at 333–37. Justice Story reasoned that the Framers intended jurisdiction to be mandatory for the three enumerated sets of "all Cases," including arising under cases, whereas for "Controversies" lacking the word "all," Congress could "qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." *Id.* at 334. *See generally* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) (reframing Justice Story's argument); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981) (arguing that Congress's Article III power to make exceptions to the Court's appellate jurisdiction is "not an unambiguous license for Congress to do as it pleases").

the objectives they sought to accomplish by establishing them. The Framers and ratifiers of the original constitutional plan were not only political theorists but also empiricists and nation builders who designed and implemented new national institutions (including courts) to fit their practical governance imperatives, most pertinently, their geopolitical circumstances as a new, weak state. How that original picture should factor into constitutional interpretation today is a different question. If the Framers and ratifiers were to see our world, process our data, and observe our society and its political realities, would they have come up with the same solutions? What does it mean to be an originalist in matters of constitutional interpretation anyway? Must we stay faithful to the original meanings of written words when they became the Constitution? If so, then the original plan I have sketched may be the binding blueprint for what is constitutionally required today. Such questions can and should be debated forever. But to the extent that arguments on one side or the other invoke the original meaning of Article III, the original understanding of the federal judicial power in 1787 or 1789, the original constitutional plan for the Supreme Court and the federal courts, or some such formula of founding-era pedigree, I believe it is necessary to have as accurate a sense as possible of what that was. Hence, this Article.

This Article proceeds in two parts. Part I discusses the relevant history and key sources. My treatment will be brief, sketching widely known aspects and providing greater detail on uncharted matters. Part II revises modern conventional wisdom about the federal courts based on the account in Part I.

## I. CONTEXT AND TEXTS IN THE CREATION OF A NATIONAL JUDICIARY

### A. *Articles of Confederation*

Scholarship regarding the Article III courts generally neglects the important antecedent of the Articles of Confederation.<sup>21</sup> Admittedly, courts were a minor feature of the centralized government established by the Articles, which is unsurprising since it was a wartime constitution.<sup>22</sup> Ordinary justice delivered by courts is not a priority in war. Besides, the states already had courts of long standing as a legacy of British colonialism. But the Articles did provide for proto-national tribunals<sup>23</sup> in a manner that plainly influenced the plans for the judicial branch discussed at the Constitutional Convention that produced Article III of the Constitution.

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21. Goebel is the notable exception: his account of Article IX of the Articles of Confederation is characteristically rich and thorough in description, but he does not elaborate on its possible influence on Article III of the Constitution. *See* 1 GOEBEL, *supra* note 12, at 143–95. And despite his immense store of knowledge (or perhaps because of it), his account sometimes gets lost in the minutiae and obscures the larger themes.

22. The Second Continental Congress deliberated and approved the Articles by November 17, 1777, and they became fully ratified by all thirteen states on March 1, 1781, upon ratification by Maryland. MICHAEL J. GARCIA ET AL., CONG. RSCH. SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at XVIII (2017).

23. ARTICLES OF CONFEDERATION of 1781, art. IX.

Article IX of the Articles of Confederation addressed courts in four specific categories of subject matter.

### 1. Piracies and Felonies Committed on the High Seas

First, Article IX provided that the “United States, in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas.”<sup>24</sup> “[A]ppointing courts” apparently entailed Congress designating existing state courts to try piracies and felonies on the high seas, not establishing new courts to try those crimes under the maritime law of nations. The distinction between “appointing” and “establishing” courts in the Articles of Confederation yields a clue to interpreting Article III of the Constitution, which specifies that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and *establish*.”<sup>25</sup> However, when the Continental Congress actually passed the ordinance invoking this Article IX power in April 1781, it provided for “establishing courts” to try the crimes “as if the piracy or felony were committed upon the land,” with juries “according to the course of the common law,” and “any two or more” state justices or judges “constituted and appointed judges for hearing and trying such offenders.”<sup>26</sup>

### 2. “All Cases” of Maritime Capture

A second provision—also dealing with maritime jurisdiction—granted the United States in Congress the “exclusive right and power” of “establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.”<sup>27</sup> Original jurisdiction was wielded by state admiralty courts, which the states had quickly established to condemn prizes given the importance of interdicting Great Britain’s sea-lanes once hostilities had commenced. As early as June 1775, Elbridge Gerry urged the Massachusetts legislature to fit out armed ships and to establish a prize court to condemn captured ships and cargoes.<sup>28</sup> Five months later, on November 11, 1775, George Washington wrote to John Hancock, president of the Continental Congress, pleading for the establishment of a prize court for the Continental Navy: “Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels? Whatever the mode

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24. *Id.* para. 1.

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

26. 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 354–55 (Worthington Chauncey Ford ed., 1905) (Apr. 1781).

27. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

28. JAMES T. AUSTIN, THE LIFE OF ELBRIDGE GERRY 94 (Boston, Wells & Lilly 1828).



is . . . there is an absolute necessity of its being speedily determined . . . .”<sup>29</sup> On April 4, 1776, the Continental Congress itself, for the first and only time, took original jurisdiction in the matter of a British vessel that had run aground, condemning it as a prize and ordering it sold.<sup>30</sup> Thereafter, the state admiralty courts acted as prize courts, with appeals to Congress as eventually codified in Article IX.

When Congress did come around to establishing a court of appeals for maritime captures, “appeals” entailed full-blown trials, not appellate review of only legal issues in the modern sense.<sup>31</sup> No deference was required to the state courts’ findings of fact or law, even when the case had been tried by jury, as some states provided for in their admiralty courts, in contrast to the practice of adjudication exclusively by admiralty judges in Britain and continental Europe.<sup>32</sup> All factual and legal findings could be reexamined. As James Wilson underscored later at the Constitutional Convention, the consensus was that the general court of appeals’ jurisdiction in admiralty and maritime cases would mirror the practice in civilian admiralty courts, not the jury practice of the common-law courts.<sup>33</sup> Indeed, overriding state jury verdicts was the main reason for setting up this first federal court for appeals from state admiralty courts in the first place, as the Continental Congress explained:

That a controul by appeal is necessary, in order to compel a just and uniform execution of the law of nations:

That the said controul must extend as well over the decisions of juries as judges in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might at any time exercise the same in such manner as to prevent a possibility of being controuled; a construction which . . . would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties or other breaches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities . . . .”<sup>34</sup>

The Continental Congress had initially handled prize appeals from the state admiralty courts by ad hoc special committees and then through a five-

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29. Letter from George Washington to John Hancock (Nov. 11, 1775), in 3 THE WRITINGS OF GEORGE WASHINGTON 213, 213–14 (Worthington Chauncey Ford ed., New York, G. P. Putnam’s Sons 1889).

30. See *Today in Naval History: April 4*, NAVAL HIST. & HERITAGE COMMAND, <https://www.history.navy.mil/content/history/nhhc/today-in-history/april-4.html> [<https://perma.cc/CFK6-VX66>] (last visited Mar. 16, 2021) (“Continental Navy Frigate Columbus captures the British schooner HMS Hawk, making the first American capture of a British armed vessel.”).

31. See Richard P. McCormick, *Ambiguous Authority: The Ordinances of the Confederation Congress, 1781–1789*, 41 AM. J. LEGAL HIST. 411, 422 (1997).

32. *Id.*

33. 2 FARRAND’S RECORDS, *supra* note 1, at 157.

34. 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 26, at 284 (Mar. 6, 1779).

member standing committee.<sup>35</sup> It was only by a statute enacted on January 15, 1780, that Congress finally established a court of appeals for maritime captures, as Washington had advised more than four years earlier:

*Resolved*, That a court be established for the trial of all appeals from the courts of admiralty in these United States, in cases of capture, to consist of three judges, appointed and commissioned by Congress, either two of whom, in the absence of the other, to hold the said court for the despatch of business:

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That the trials therein be according to the usage of nations and not by jury . . . .<sup>36</sup>

The implicit substitutability of a congressional committee and a court is an important feature of Article IX. This interchangeable use of Congress and a court of appeals in the Articles-of-Confederation period undermines the modern view, embraced even by originalists, that founding-era Americans drew sharp distinctions between exclusively legislative versus judicial powers and institutions.<sup>37</sup> The founders were practicing revolutionaries who used whatever resources were available to solve urgent real-life problems of governance. They would not necessarily have presumed clean lines between the judicial and legislative powers of the general government.

During the War of Independence, sixty-four cases were submitted to the committees of Congress, which decided forty-nine of them and passed eleven to the Court of Appeals in Cases of Capture for decision.<sup>38</sup> Appeals came from all of the states, except New York, which was occupied by the British from the fall of 1776 until the end of the war, and Georgia, where the principal ports of Savannah and Brunswick were also occupied by British forces for most of the war.<sup>39</sup> The Court of Appeals in Cases of Capture is widely recognized by scholars as the first “federal court” and the prototype for the U.S. Supreme Court.<sup>40</sup> By the time the court issued its final decree of dismissal in Philadelphia on May 3, 1787, weeks before the Constitutional Convention, Goebel reports, “[T]he records indicate that a total of fifty-six cases [were] disposed of.”<sup>41</sup> What is less well known, but as clear, is that

35. Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts* (pt. 2), 27 J. MAR. L. & COM. 323, 342–43 (1996).

36. 16 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 26, at 61 (second emphasis added).

37. See, e.g., William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1520 (2020) (asserting that, “[b]ecause Article III vests [the judicial power of the United States] in the federal courts, nobody else can have it”).

38. J. C. Bancroft Davis, *Federal Courts Prior to the Adoption of the Constitution*, 131 U.S. app. xix, xxxiv (1889).

39. See Harrington, *supra* note 35, at 341 n.167. Both states established admiralty courts that do not appear to have heard any cases of maritime capture. See *id.*

40. See generally HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787* (1977). The court sat in Hartford, Philadelphia, New York City, and possibly other cities, with its final May 1787 sitting in Philadelphia.

41. 1 GOEBEL, *supra* note 12, at 182.

Article III's provision for "appellate Jurisdiction"<sup>42</sup> had its antecedent in the appellate jurisdiction of this court, which was designed to control state juries and ensure compliance with the law of nations.

### 3. Controversies Between Two or More States

The third type of tribunal that Article IX provided for was authorized to decide controversies between two or more states: "The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever."<sup>43</sup> Again, the specification was couched in the language of appellate jurisdiction—"the last resort on appeal,"<sup>44</sup> although such resort was to "Congress" not a court. In contrast to appeals from prize cases in the state admiralty courts, which, as we have seen, were initially entrusted to committees of the Continental Congress, Article IX contained an elaborate procedure for selecting judges to decide interstate disputes if the state parties could not themselves agree on a tribunal, presumably because of their special sensitivity. Five, seven, or nine judges—alternatively referred to as "commissioners"—were to be drawn from three names submitted by each state in the Confederation.<sup>45</sup> Each state party could then, in turn, strike a name from the aggregate list until thirteen names remained, from which Congress would draw by lot "not less than seven, nor more than nine names . . . and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges."<sup>46</sup> Even today, the International Centre for Dispute Resolution—the international commercial arbitration offshoot of the American Arbitration Association—uses a variation of the list

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42. U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

43. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2.

44. *Id.*

45. Article IX, paragraph 2 provides:

Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination . . . .

*Id.*

46. *Id.*

procedure for selecting an arbitral tribunal in cases where private parties cannot agree on who will decide their controversy.<sup>47</sup>

#### 4. “All Controversies” Involving Land Claimed Under Grants from Two or More States

Fourth, Article IX addressed the adjudication of “[a]ll controversies concerning the private right of soil claimed under different grants of two or more States.”<sup>48</sup> Such controversies were to “be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States”<sup>49</sup>—that is, by “commissioners or judges” selected by the state parties or Congress, as set out above.

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A comparison of these four provisions in Article IX of the Articles of Confederation and Article III of the Constitution reinforces a strong sense of the influence of Article IX. All four subject matters made it onto the list of cases and controversies to which the federal judicial power extends in Article III, Section 2 of the Constitution.<sup>50</sup> The constitutional category of “Controversies between two or more States” in Article III, Section 2 has been committed to the original and exclusive jurisdiction of the Supreme Court since the Judiciary Act of 1789 through to today.<sup>51</sup> Prize cases and piracies and felonies on the high seas—both falling within the category of maritime cases—were covered by Article III’s grant of federal judicial power as to “all Cases of admiralty and maritime Jurisdiction.”<sup>52</sup> Since the First Judiciary Act, original jurisdiction over admiralty and maritime cases has been vested exclusively in federal courts, subject to the exception of “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”<sup>53</sup> The fourth category—private disputes regarding land grants from different states—is plainly the inspiration for the provision in Article III of the Constitution extending federal judicial power to “Controversies . . . between Citizens of the same State claiming Lands under Grants of different States.”<sup>54</sup> According to James Madison’s notes, Roger Sherman “moved to insert” those words “according to the provisions in the

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47. INT’L CTR. FOR DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 12(6) (2014), [https://www.icdr.org/sites/default/files/document\\_repository/ICDR\\_Rules.pdf?utm\\_source=icdr-website&utm\\_medium=rules-page&utm\\_campaign=rules-intl](https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl) [<https://perma.cc/4VAG-BAG7>].

48. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 3.

49. *Id.*

50. *See* U.S. CONST. art III, § 2.

51. This feature of mandatory original jurisdiction over interstate “Controversies” is in tension with Justice Story’s and Professor Akhil Amar’s text-based theory that the three categories of “all cases” must be vested in federal court and are therefore implicitly more important exercises of judicial power than the six categories of “controversies,” which, lacking the word “all,” need not be vested in federal court. *See supra* note 20 and accompanying text.

52. U.S. CONST. art. III, § 2, cl. 1.

53. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 77.

54. U.S. CONST. art. III, § 2, cl. 1.

9th art. of the Confederation—which was agreed to” without objection.<sup>55</sup> One final, striking textual point of resemblance is the use of “all cases” with reference to maritime captures and “all controversies” for disputes concerning land grants of different states in Article IX. The words “all Cases” marks the first three categories of judicial power in Article III, Section 2, including admiralty and maritime jurisdiction, while the word “Controversies” marks the six subsequent categories of enumerated judicial power, including “Controversies between two or more states.” In sum, the evidence strongly suggests that the adopters of the Constitution consulted and sometimes copied Article IX of the Articles of Confederation in designing Article III. This continuity of national “judicial” power between the Articles of Confederation and Article III of the Constitution is striking but often overlooked, even by federal courts experts.

### B. *The Constitutional Convention*

Although debate regarding the judiciary article at the Constitutional Convention was relatively limited, it does yield some important clues. This ground is well trod in contrast to discussion of the judiciary provisions of the Articles of Confederation, and so I will be brief. There was consensus at the Convention that there should be a national judiciary with a Supreme Court, which both the Virginia and New Jersey Plans provided for.<sup>56</sup> Disagreement focused on how to appoint judges, their terms of office, and whether lower federal courts should be created. Protection against salary diminution and life tenure during good behavior were agreed on after some dialog.<sup>57</sup> Debate about judicial appointment procedures was more contested. The starting point was the Virginia Plan’s proposal for appointment by the legislature, but discussion shifted to consideration of the Senate as the appointing body on Madison’s urging of a “less numerous & more select body.”<sup>58</sup> Madison changed his mind, concerned that this would give too much power over federal court appointments to the states and instead proposed presidential appointment, with or without Senate approval. The ultimate solution of presidential appointment with the advice and consent of the Senate was part of an omnibus settlement on appointments.<sup>59</sup>

Discussions regarding the creation of federal courts other than the Supreme Court were the most heated and protracted debates about the

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55. 2 FARRAND’S RECORDS, *supra* note 1, at 431–32.

56. 1 *id.* at 21–22, 223–24; 3 *id.* at 600.

57. The original proposal for a federal judiciary in the Virginia Plan had prohibited increases in salary too: federal judges were “to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.” 1 *id.* at 21–22. Delegates John Dickinson (Pennsylvania), Elbridge Gerry (Massachusetts), and Roger Sherman (Connecticut) also proposed removal by the president “on the application [by] the Senate and House of Representatives,” for which only Connecticut voted. *See* 2 *id.* at 428–29 (alteration in original).

58. *See* 1 *id.* at 233 (June 13, 1787).

59. *Cf.* 2 *id.* at 132, 155, 169, 183 (reporting Convention proposals in which Supreme Court Justices would be appointed by the Senate).

national judiciary at the Convention. An initial consensus on establishing “one or more inferior tribunals” was challenged by John Rutledge on the view “that the State Tribunals might and ought to be left in all cases to decide in the first instance” because “the right of appeal to the supreme national tribunal” was “sufficient to secure the national rights & uniformity of Judgmts.”<sup>60</sup> Roger Sherman supported Rutledge based “on the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose.”<sup>61</sup> Madison and James Wilson pushed back strenuously. John Dickinson, supported by Madison and Wilson, suggested as a compromise that Congress “be empowered to institute inferior tribunals.”<sup>62</sup> Pierce Butler resisted the compromise, asserting that “[t]he people will not bear such innovations” and that “[t]he States will revolt at such encroachments.”<sup>63</sup> Dickinson’s motion passed, however, with eight votes in favor.<sup>64</sup>

Details regarding the Article III specification of judicial powers and allocations of original and appellate jurisdiction are harder to come by. The Virginia Plan had originally provided:

[T]he jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.<sup>65</sup>

In the Committee of the Whole, Randolph moved that the specific categories of jurisdiction be left to the Committee of Detail, with only general guidance “that the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony.”<sup>66</sup> Madison later suggested a further simplification of the guidance: “that the jurisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony,” which was agreed to without objection.<sup>67</sup> The

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60. See 1 *id.* at 124. Michael Collins believes that Rutledge moved to reconsider because the idea of the legislature appointing judges had been abandoned, and he and others feared vesting the power with the president. See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 116–19.

61. See 1 FARRAND’S RECORDS, *supra* note 1, at 125.

62. *Id.* The records use the word “appoint,” *id.* at 118, which is the same word used in Article IX of the Articles of Confederation as to the Continental Congress’s power to designate courts for the trial of piracies and felonies on the high seas. Goebel notes that some delegates wanted stronger clarification that Congress’s power under the Constitution would be the same as under the Articles, with “the state courts participants in the national system.” 1 GOEBEL, *supra* note 12, at 225.

63. See 1 FARRAND’S RECORDS, *supra* note 1, at 125.

64. See *id.*

65. See *id.* at 22.

66. *Id.* at 238 (emphasis omitted).

67. 2 *id.* at 46.

animating principle of the jurisdiction of the newly federal courts was thus distinctively “national.”

The “cases” and “controversies” listed in Article III, Section 2, which were the product of the Committee of Detail with substantial revision and input by the Committee of Style, conform to the guidance given by the Committee of the Whole. The nine categories to which the “judicial Power shall extend” are:

- (1) “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”;
- (2) “all Cases affecting Ambassadors, other public ministers and Consuls”;
- (3) “all Cases of admiralty and maritime Jurisdiction”;
- (4) “Controversies to which the United States shall be a Party”;
- (5) “Controversies between two or more States”;
- (6) “between a State and Citizens of another State”;
- (7) “between Citizens of different States”;
- (8) “between Citizens of the same State claiming Lands under Grants of different States”; and
- (9) “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>68</sup>

The Supreme Court’s original jurisdiction clause uses the same language as subheading two and a combination of parts of subheadings five, six, and nine: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”<sup>69</sup> The Supreme Court’s original jurisdiction is the only judicial power that the Constitution’s plain language prohibits Congress from altering. Article III states that “the supreme Court shall have original Jurisdiction”<sup>70</sup> without any recognition of congressional power to tamper with the jurisdiction. By contrast, the Supreme Court’s “appellate Jurisdiction, both as to Law and Fact,” “[i]n all the other Cases before mentioned,” is subject to “such Exceptions, and under such Regulations as the Congress shall make.”<sup>71</sup> The extension of appellate jurisdiction to fact-finding—as was the case with the state admiralty courts during the Articles of Confederation—would be the subject of controversy during the state

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68. U.S. CONST. art. III, § 2, cl. 1.

69. *Id.* cl. 2.

70. *Id.*

71. *Id.*

ratification conventions.<sup>72</sup> With respect to inferior federal courts, the plain language of the Constitution does not require Congress to create them: “The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>73</sup>

### C. State Ratification Conventions

Considerable resistance to the new Constitution in the state ratification conventions focused on the national judiciary. Nineteen of 103 constitutional amendments proposed by the six ratifying states that suggested amendments dealt with Article III.<sup>74</sup> The principal focus of these amendments were:

(1) Express protection of the right to a jury trial in civil and criminal cases. This was partly a reaction to prior experience with the national court of appeals for maritime captures overturning state admiralty court jury verdicts. These concerns produced the “saving to suitors” clause exception to the admiralty and maritime jurisdiction and jury guarantees in the Judiciary Act of 1789,<sup>75</sup> as well as the Sixth Amendment<sup>76</sup> and Seventh Amendment jury trial protections.<sup>77</sup>

(2) Confining appellate power to questions of law, not of fact. Again, this was an important issue because of the prior experience with the Court of Appeals in Cases of Capture under the Articles of Confederation, which had appellate jurisdiction as to questions of both law and fact, as we have seen. And that model was explicitly replicated in Article III with the specification of “both as to Law and Fact” in the appellate jurisdiction clause.<sup>78</sup> Constraints on appellate jurisdiction, accordingly, were written into sections 22 and 25 of the First Judiciary Act by confinement to the writ of error as the vehicle for Supreme Court appellate review, which was further

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72. See, e.g., 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1399 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DHRC] (reporting that Edmund Pendleton, a supporter of the Constitution at the Virginia ratifying convention, expressed the sentiment on June 19, 1788, that the words “both as to law and fact” “had been buried in oblivion”); *id.* at 1420 (noting that, on the next day, Patrick Henry, an opponent of the Constitution at the same convention, believed that the appellate jurisdiction would “in operation destroy the trial by jury”).

73. U.S. CONST. art. III, § 1.

74. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 286–91 (2010) (Virginia ratifying convention debates); *id.* at 449–54 (congressional discussion of amendments).

75. See STEVEN L. SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW: ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION 304–21 (2007).

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

77. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .” *Id.* amend. VII.

78. *Id.* art. III, § 2, cl. 2.



circumscribed to the “face of the record” for writs from the state courts,<sup>79</sup> and by the Seventh Amendment Re-examination Clause.<sup>80</sup>

(3) Elimination of lower federal courts of first instance or limiting them to admiralty courts or to what was minimally necessary to enforce federal crimes and revenues.<sup>81</sup> These reforms were effected by statute, and there was no constitutional amendment. Specifically, in the Judiciary Act of 1789, the First Congress was parsimonious in doling out lower federal court jurisdiction; most importantly, there was no civil “arising under” jurisdiction vested, with the exception of the ATS and the provision of jurisdiction for civil forfeitures or penalties under U.S. laws on land. Additionally, the Judiciary Act imposed amount-in-controversy requirements in sections 9 through 12, and section 34 (the Rules of Decision Act) prescribed state rules of decision in cases where they applied, ensuring that even if lower federal court jurisdiction extended to certain cases at law, the substantive law they would apply would be that of the states.

(4) Elimination of diversity and alienage jurisdictions. These headings of judicial power had been designed to provide alternative forums for foreign and out-of-state litigants to protect against potentially biased judges and juries in state courts, and, to some extent, biased state laws as well. The Rules of Decision Act preserved the operation of state laws in response to these perceptions. The Judiciary Act’s amount-in-controversy requirements also cut out smaller-stakes matters under these headings. Moreover, the assignee clause in section 11 prohibited collusive assignments to generate diversity jurisdiction, although, as noted above, foreign bills of exchange were exempted from the ambit of the assignee clause.

In summary, the First Congress addressed most of the concerns that were voiced in the state constitutional ratification debates by provisions in the Judiciary Act of 1789, to which I turn next. The notable exceptions to statutory fixes were the Sixth and Seventh Amendments targeting protection of jury trial rights and particularly jury fact-finding. The fact that the First Congress, which originated the entire Bill of Rights, decided to address these particular *constitutional* concerns largely by *subconstitutional* fixes presents an interesting solution and is a testimony to the genius of the First Judiciary Act as a landmark framework statute establishing the federal court system.

#### D. The Judiciary Act of 1789

Implementing Article III and setting up the national judiciary were high priorities when the First Congress met in the fall of 1789. George

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79. Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87.

80. “In Suits at common law, where the value in controversy shall exceed twenty dollars, . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

81. See Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 66–68, 119–27 (1923).

Washington signed the First Judiciary Act into law on September 24, 1789.<sup>82</sup> The statute established the Supreme Court as well as lower circuit and district courts, defined their respective jurisdictions and terms, and provided for court staff (clerks, marshals, and U.S. attorneys).<sup>83</sup> It set up a Supreme Court with a Chief Justice and five Associate Justices, thirteen district courts in the eleven states that had ratified the Constitution (not North Carolina and Rhode Island), and district courts for the part of Massachusetts that would become Maine and the part of Virginia that would become Kentucky.<sup>84</sup> The eleven district courts were further grouped into three circuits: (1) Eastern (Connecticut, Massachusetts, New Hampshire, and New York); (2) Middle (Delaware, Maryland, New Jersey, Pennsylvania, and Virginia); and (3) Southern (Georgia and South Carolina).<sup>85</sup> Circuit courts consisting of two Supreme Court Justices and the resident district judge were to be held twice a year in each district, with a two-judge quorum and any district judge recused “in any case of appeal or error from his own decision.”<sup>86</sup>

Three considerations are worth keeping in mind when contemplating the geographical distribution of the district courts and the system of circuit courts and Supreme Court Justices’ circuit riding. First, in a nod to their importance as commercial (predominantly maritime) courts, the new federal district courts were sited at principal sea and riverine ports, with the exceptions of Williamsburg, Virginia, the colonial capital, and Harrodsburg, Kentucky, which was the largest settlement west of the Appalachian Mountains at the time.<sup>87</sup> Second, there was an obvious balancing between the interest in having a small federal judiciary for reasons of cost and avoiding encroachment on state courts, on the one hand, and the interest in having both trial courts and initial appeals courts spread throughout the country for reasons of geographical convenience for potential litigants, on the other hand. The First Judiciary Act ordained an extremely compact court system—nineteen judges total; thirteen fixed district courts in commercial centers; and the Supreme Court at the capital, with the six Supreme Court Justices riding circuit to convene twice-a-year circuit courts in the districts with the resident district judge. Third, less obvious but equally important, was the fact that the thirteen district judges and the six Supreme Court Justices when riding circuit represented the most senior federal officers appointed by the president “on the ground” in the states in the late eighteenth century, an era in which the federal government was an exceedingly modest going concern. President George Washington expressed the sentiment aptly in his cover letter transmitting the commission to serve as “Associate Judge in the Supreme Court of the United States” to John Rutledge of South Carolina on September 30, 1789, six days after the Judiciary Act became law: “Considering the Judicial System as the chief Pillar upon which our national Government must

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82. *See* ch. 20, 1 Stat. 73.

83. *Id.* §§ 1–3, 1 Stat. at 73–74.

84. *Id.*

85. *Id.* § 4, 1 Stat. at 74.

86. *Id.* §§ 4–5, 1 Stat. at 74–75.

87. *Id.* § 3, 1 Stat. at 73–74.

rest, I have thought it my duty to nominate, for the high Offices in that department, such men as I conceived would give dignity and lustre to our National Character.”<sup>88</sup>

We turn now to the First Judiciary Act’s key provisions defining the jurisdiction and powers of the three newly created categories of federal courts. They are important because they dole out the “judicial power of the United States” as specified in Article III—the legal authority of the three tiers of newly created federal courts to decide cases and controversies brought before them. The provisions are familiar enough to federal courts experts. However, there is fresh insight to be gained from understanding how the jurisdictions and powers were specified, and, more importantly, how the different sections fit together. Too often, judges, lawyers, and scholars treat the parts of the Judiciary Act of 1789 as if they were independent statutes (e.g., the ATS or the Rules of Decision Act), rather than interlocking parts of a single framework enactment.

### 1. District Court Original Jurisdiction

Section 9 of the Judiciary Act of 1789 detailed the subject matter jurisdiction of the newly created district courts. Section 10 applied only to the district courts in Kentucky and Maine (soon-to-be-independent parts of Virginia and Massachusetts, respectively) and contained special provisions for appeals and writs of errors from those courts but otherwise replicated the six categories of jurisdiction specified in section 9. That section provided for district court original jurisdiction as follows.

Jurisdiction exclusive of state courts for:

- (1) “all crimes and offences . . . cognizable under the authority of the United States, committed within their respective districts, or upon the high seas” with punishment not to exceed thirty lashes, a one-hundred-dollar fine, or six months’ imprisonment;
- (2) “all civil causes of admiralty and maritime jurisdiction,” including seizures under U.S. “impost, navigation or trade” laws on navigable waters or on the high seas, “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it”;
- (3) “all seizures on land, or other waters than as aforesaid, made” for penalties and forfeitures under U.S. laws; and
- (4) “all suits against consuls or vice-consuls,” unless for crimes or offenses exceeding “aforesaid” district court jurisdiction.<sup>89</sup>

Jurisdiction concurrent with state courts or the circuit courts “as the case may be” for:

- (5) “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”; and

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88. 1 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 21 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter *DHSC*].

89. Ch. 20, § 9, 1 Stat. at 76–77.

- (6) “all suits at common law where the United States sue” and the amount in dispute is up to one hundred dollars.<sup>90</sup>

Section 9 also provided that trial of issues of fact in the district courts “in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”

## 2. Circuit Court Original Jurisdiction and Removal Jurisdiction

Section 11 extended the jurisdiction of the circuit courts *exclusively* of state courts to “all crimes and offences cognizable under the authority of the United States,” which was concurrent with the district courts as to the minor offenses listed in section 9.<sup>91</sup> And section 11 also gave jurisdiction *concurrently* to the state courts over “all suits of a civil nature at common law or in equity, where the matter in dispute exceeds” five hundred dollars and the “United States are plaintiffs, or petitioners” or “an alien is party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.” Section 11 further specified that the circuit courts “shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.” Section 12 mimicked section 11 and provided for removal to the circuit courts (or to a district court in the Districts of Maine or Kentucky) for a suit “in any state court brought against an alien, or by a citizen of the state in which the suit is brought against the citizen of another state” when the matter in dispute exceeded five hundred dollars.<sup>92</sup>

## 3. Supreme Court Original Jurisdiction and Other Powers

Section 13 doled out the Supreme Court’s original jurisdiction set out in Article III, Section 2 as follows:

For “*all Cases affecting Ambassadors, other public Ministers and Consuls*” in Article III:

[T]he Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.<sup>93</sup>

One interesting feature of this provision in the First Judiciary Act is that the Supreme Court’s original jurisdiction was exclusive as to all suits *against* ambassadors or public ministers (or their family members or domestic servants) but concurrent, presumably with state courts, for all suits *brought by* ambassadors or other public ministers. And although the Article III

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90. *Id.*

91. *Id.* § 11, 1 Stat. at 78–79.

92. *Id.* § 12, 1 Stat. at 79–80.

93. *Id.* § 13, 1 Stat. at 80–81.

provisions mention “consuls” in the same phrase as ambassadors and other public ministers, the First Judiciary Act distinguishes them. As we have seen, section 9 provided for district court original jurisdiction, exclusive of state courts, for civil suits “against consuls or vice consuls”<sup>94</sup> in conjunction with section 13’s provision for concurrent original jurisdiction in the Supreme Court as to “all suits . . . in which a consul, or vice consul, shall be a party,” whether plaintiff or defendant. As I have explained in previous work, this was because consuls and vice consuls were not full-fledged diplomats under the law of nations like ambassadors or ministers but rather agents of foreign sovereigns who watched over their subjects or citizens and their commercial interests.<sup>95</sup> In the late eighteenth century, consuls were usually based in the commercial port cities where the district courts were located, making these courts a logical choice for consular litigation. Moreover, many consuls and vice consuls in the United States were actually U.S. citizens who undertook to represent the interests of a foreign state with which they had a personal connection or commercial interests. Regardless, ambassadors, public ministers, and consuls or vice consuls alike were surely not intended to be covered by the word “alien” in the separate ATS provision of section 9, because they had public or quasi-public status and were thus separately and explicitly provided for in the First Judiciary Act. This is an important point often overlooked in commentary on the ATS that becomes self-evident when one scrutinizes the different jurisdictional provisions of the Act together.

For “*those in which a State shall be Party*”:

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.<sup>96</sup>

In prior work, I argued that the state-as-party half of the Supreme Court’s Article III original jurisdiction included suits brought by a foreign “state as party” against one or more U.S. states for treaty violations, most notably of the 1783 Treaty of Peace with Great Britain.<sup>97</sup> That foreign relations function would have increased the essential role of this aspect of the Court’s original jurisdiction in the original constitutional plan for the federal judiciary. And we have already examined how Article IX of the Articles of Confederation

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94. *Id.* § 9, 1 Stat. at 76–77.

95. See Lee, *supra* note 4, at 855–63.

96. Ch. 20, § 13, 1 Stat. at 80–81.

97. See Thomas H. Lee, *The Supreme Court of the United States as Quasi-international Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits Brought by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1768 (2004) (asserting that the Constitution “vests in the Supreme Court original and exclusive jurisdiction over suits against States brought by foreign states alleging violation of ratified treaties of the United States”). I argued that this original jurisdiction survives the passage of the Eleventh Amendment and subsequent Supreme Court precedents, including *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). See *id.* at 1770–75.

provided for this important jurisdiction to decide controversies between states.<sup>98</sup> On a textualist note, the antecedent of “those” would appear to be “all Cases,” as used in the “affecting Ambassadors” part of the original jurisdiction clause, but, as noted above, the word “Controversies,” not “all Cases,” is used in Article III, Section 2’s enumeration of the disputes in which a state might be party. Section 13 of the Judiciary Act, in turn, uses the phrase “all controversies of a civil nature.”

Section 13 also specified that “the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.”<sup>99</sup> That the Judiciary Act’s specification of the Supreme Court’s original jurisdiction provided for jury trials to any degree<sup>100</sup> suggests that the Court’s original jurisdiction was viewed as identical to the original jurisdiction of the district and circuit courts. The only differences were the more exalted status of the forum and the number of judges—a quorum of six, as opposed to three or one. The Supreme Court’s exercise of its original jurisdiction today, however, is very different from that of the lower courts, particularly in that fact-finding is done by a special master, not by jury. Article III does not say anything one way or the other, of course. Moreover, Congress no longer provides for exclusive original jurisdiction in the Supreme Court for suits by states against citizens of the United States (or actions against ambassadors or public ministers).<sup>101</sup>

As a textual matter, the state-as-party provision in section 13 may be read to encompass suits brought by citizens of other states or aliens against a state. If so, then it would have possibly permitted suit in the Supreme Court’s original jurisdiction by these private plaintiffs pleading state violations of the Constitution, laws, or treaties of the United States. This would have enabled a powerful tool of Supreme Court judicial review of state laws. But the Eleventh Amendment—proposed by Congress in 1794 and declared to be part of the Constitution in 1798—explicitly foreclosed such suits.

Section 13 additionally spelled out the Supreme Court’s judicial powers outside of its mandatory original jurisdiction. Section 13 provided that the “Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided

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98. See *supra* Parts I.A.3–4.

99. Ch. 20, § 13, 1 Stat. at 80–81.

100. An account of the only reported jury trial at the Supreme Court, *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), surmises that the jury was a Mansfieldian “special jury” culled from a venire of merchants with specialized knowledge regarding the contesting claims between Georgia and a British private creditor as to a 1774 bond owed by a Georgia citizen. See Lochlan F. Shelfer, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 211 (2013).

101. See 28 U.S.C. § 1251(b). The statutory specification of the Court’s original jurisdiction is now not only nonexclusive, it extends only to “actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.” *Id.* § 1251(b)(1). There are, I suppose, plausible arguments that Supreme Court original jurisdiction that is nonexclusive jurisdiction but never in fact exercised offends the holding in *Marbury* that Congress may not alter the Court’s original jurisdiction, and that the present specification does not cover “all Cases *affecting*” foreign ambassadors, ministers, and consuls, such as those involving their families and domestic servants as set forth in section 13 of the First Judiciary Act.

for.”<sup>102</sup> A separate provision in section 13 also granted the Supreme Court power “to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction.” Finally, it authorized the Court to issue “writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”<sup>103</sup> This mandamus provision was famously held to be unconstitutional in *Marbury*, on the view that it enlarged the Supreme Court’s original jurisdiction, which Congress lacked the power to do because Article III’s specification could not be altered.<sup>104</sup>

Section 14 gave all federal courts the “power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>105</sup> The power of Supreme Court Justices and district court judges to grant writs of habeas corpus under section 14, however, was limited to prisoners in custody under federal authority, or committed to trial or necessary for testimony in federal court.

#### 4. Equity Jurisdiction

Section 16 provided that “suits in equity shall not be sustained in . . . the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.”<sup>106</sup> Section 19 provided that “it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record.”<sup>107</sup> Notwithstanding section 16’s requirement of first resort to remedies at law, equity causes were important in land grant cases, a prominent and important category of cases in federal courts in the late eighteenth century.

#### 5. Circuit and Supreme Court Appellate Jurisdiction from Federal Courts

Sections 21 and 22 provided the specifics regarding appellate jurisdiction from district court to circuit court, as promised in section 11. Section 21 provided that “from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars . . . an appeal shall be allowed to the next circuit court, to be held in such district.”<sup>108</sup> Section 22 provided that

final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars . . . may be re-examined, and reversed or affirmed in a circuit court . . . upon a writ of error . . . . And upon a like process, may final judgments and decrees in

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102. Ch. 20, § 13, 1 Stat. at 80–81.

103. *Id.* (emphasis omitted).

104. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803).

105. Ch. 20, § 14, 1 Stat. at 81–82.

106. *Id.* § 16, 1 Stat. at 82–83.

107. *Id.* § 19, 1 Stat. at 83.

108. *Id.* § 21, 1 Stat. at 83–84.

civil actions, and suits in equity in a circuit court . . . where the matter in dispute exceeds the sum or value of two thousand dollars . . . be re-examined and reversed or affirmed in the Supreme Court . . . . But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact.<sup>109</sup>

Section 4 separately provided that “no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.”<sup>110</sup> Interestingly, there was no similar disqualification in the Judiciary Act for Supreme Court Justices from voting in cases of appeal or error from their own circuit court decisions, perhaps because it would have left the six-Justice Court shorthanded in too many cases.

Section 22 refers to both civil actions and equity suits, permitting review upon writ of error to the Supreme Court. Strangely, section 21 does not explicitly provide for “appeal” to the Supreme Court from a circuit court in admiralty and maritime cases after an appeal to the circuit court from a district court. (Nor is there any appeal to the Supreme Court in criminal cases.) Section 13 separately authorized the Supreme Court to issue writs of prohibition to the district courts “when proceeding as courts of admiralty and maritime jurisdiction.”<sup>111</sup> That writ gave the Court the power to stop the district courts from going ahead with exercising jurisdiction in an admiralty or maritime case upon a successful petition for the writ. But any appeal of issues decided by the district court in an admiralty or maritime case would lie only to the circuit court under section 21, subject to the three-hundred-dollar amount-in-controversy requirement. Regardless, the Supreme Court from the start entertained writs of error from the circuit courts in admiralty and maritime cases, and so the absence of reference to appeals or writs of error in such cases seems to be a drafting oversight.

#### 6. Supreme Court Appellate Jurisdiction from State Courts

Section 25 detailed the Supreme Court’s appellate jurisdiction from the state courts:

That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . . But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before

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109. *Id.* § 22, 1 Stat. at 84–85.

110. *Id.* § 4, 1 Stat. at 74–75.

111. *Id.* § 13, 1 Stat. at 80–81.



mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.<sup>112</sup>

Section 25 did not provide for any reexamination by the Court upon a writ of error with respect to a judgment or decree from the highest state court in a suit in which the state court had decided *in favor of* the validity of a treaty, statute, or authority of the United States. Additionally, any reexamination by the Supreme Court was limited to error that appeared “on the face of the record” and “immediately respects” the validity of the federal treaty, statute, or authority in dispute. And, most importantly, review was by “writ of error,” not “appeal,” foreclosing the possibility of any reexamination of facts, whether by jury or judge. Consequently, the First Congress strongly implemented its Article III, Section 2 power to “make” “exceptions” and “regulations” to the Supreme Court’s “appellate Jurisdiction, both as to Law and Fact,” which had occasioned such hostility in the state ratifying conventions.<sup>113</sup> This exceedingly narrow specification of the Court’s appellate jurisdiction from the state courts lasted until 1867.

### 7. Rules of Decision Act

But what law would the new federal courts apply in their exercise of the Article III judicial powers that the First Congress had vested in them in the Judiciary Act of 1789? Section 34 of the First Judiciary Act—the Rules of Decision Act—prescribed that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”<sup>114</sup> For a century after its 1842 decision in *Swift v. Tyson*,<sup>115</sup> the Supreme Court construed section 34 to include “strictly local” state laws, including statutes (and the “construction thereof adopted by local tribunals”) as well as “rights and titles” pertaining to real property or other “intraterritorial” matters but not to “questions of general commercial law.”<sup>116</sup> But in 1938, the Court in *Erie*, relying in part on Charles Warren’s interpretation of the Senate bill version of section 34, held that “laws of the several states” included all state judicial decisions and that federal courts did not have the power to invoke “general law” as rules of decision when their judicial power was based on the Article III, Section 2 grant as to controversies “between citizens of different States.”<sup>117</sup> That was, of course, only one of the nine grants of judicial power,

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112. *Id.* § 25, 1 Stat. at 85–86.

113. In theory, until the ratification of the Re-examination Clause of the Seventh Amendment in December 1791, the Court might have still reexamined and reversed jury fact-finders challenged by writ of error from the highest law court of a state so long as an error appeared “on the face of the record.” But there is no evidence that this was ever attempted or done in any of the handful of Supreme Court cases docketed in 1791.

114. Ch. 20, § 34, 1 Stat. at 92 (Rules of Decision Act).

115. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

116. *Id.* at 18–19.

117. *Erie*, 304 U.S. at 72–73, 73 n.5.

however, and all of the other grants implicated the law of nations either directly or indirectly to the extent that the law of nations was a source for the U.S. law of interstate relations.<sup>118</sup> It is not my intent to delve at length into the rich and complex debates regarding the *Erie* doctrine; it suffices for present purposes to note that section 34 had two important limitations: it only applied to “trials at common law” and only then “in cases where [the laws of the several states] apply.”<sup>119</sup> In other words, state laws, whether statutes or judicial decisions, did not apply in equity causes or in admiralty and maritime suits in federal court and might in theory not “apply” even in “trials at common law.” State rules of decision were thus the exception, not the norm, for the small set of suits in federal courts under the original plan of 1787–1792, a point Wilfred Ritz has made.<sup>120</sup> That is consistent with the reality that the original and removal jurisdictions of the federal courts were so limited, as elaborated in detail above, precisely to preserve state court concurrent jurisdiction.

Four summary points may be made about the design and implementation of the federal courts contained in the Judiciary Act of 1789. First, it is important to get an integrated understanding of how all the specifications of the judicial power were implemented. Take the ATS for example. The Supreme Court in *Sosa v. Alvarez-Machain*<sup>121</sup> concluded that the ATS was originally enacted to address three late eighteenth-century paradigm law-of-nations violations—piracy, attacks against ambassadors, and violations of safe conducts.<sup>122</sup> Given that the ATS is a part of section 9 that gives *concurrent* jurisdiction to state and circuit courts, and a different clause of section 9 gives the district courts *exclusive* admiralty and maritime jurisdiction subject to the saving-to-suitors clause, it is implausible to assert that the ATS had anything to do with piracy. Furthermore, section 13 gave the Supreme Court “original, but not exclusive jurisdiction of all suits brought by ambassadors,” with the implication that concurrent jurisdiction would be exercised not by district courts in the diverse states but by the courts of the state or district of the national capital (first New York and then the District of Columbia), where ambassadors were received and restricted unless given freedom of movement by the president. The ATS, by contrast, specified district court jurisdiction concurrent with state and circuit courts.

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118. See Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1709 (2018) (“The law of nations was the original federal common law. By this I mean that the law of nations was to be the default source of rules of decision for federal courts to apply in cases and controversies before them ‘except where the constitution, treaties or statutes of the United States otherwise require or provide,’ pursuant to parts of all nine grants of judicial power in Article III . . . .” (quoting ch. 20, § 34, 1 Stat. at 92)).

119. Ch. 20, § 34, 1 Stat. at 92.

120. See generally WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Wythe Holt & L. H. LaRue eds., 1990).

121. 542 U.S. 692 (2004).

122. *Id.* at 724 (finding “no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses [of the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy”).

The upshot is that the ATS was enacted solely to address safe-conducts and did not address piracy or ambassadorial infringements at all.<sup>123</sup> That conclusion only becomes obvious by a careful examination of all the jurisdictional provisions of the First Judiciary Act together, not just the ATS clause in section 9.

Second, the original jurisdiction of the new federal courts was exceedingly narrow in comparison to what Article III authorized in terms of the judicial power of the United States. The district courts had exclusive original jurisdiction over: (1) low-level federal crimes and seizures on land or inland waters, applying the Article III arising under judicial power; (2) civil causes in admiralty and maritime jurisdiction, which included maritime seizures under U.S. customs laws (subject to the saving-to-suitors clause), implicating the Article III admiralty and maritime power; and (3) suits against consuls or vice consuls, implicating the Article III power as to all cases “affecting ambassadors, public ministers, or consuls.”<sup>124</sup> And they had concurrent original jurisdiction when the United States was plaintiff and less than one hundred dollars was at issue, involving the Article III United States-as-party power; and for alien tort claims, for which the United States bore sovereign responsibility, since it owed a duty of protection to friendly and neutral aliens, under treaties and the law of nations, implicating the Article III arising under power.<sup>125</sup> The circuit courts had exclusive federal crime jurisdiction, implicating the arising under power; ATS jurisdiction concurrent with the district courts; original and removal jurisdiction concurrent with the state courts of “all suits of a civil nature at common law or in equity” exceeding five hundred dollars when the “United States are plaintiffs or petitioners,” applying part of the Article III United States-as-party power; and jurisdiction when “an alien is party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State,” implicating the foreign and citizen diversity headings of Article III.<sup>126</sup> And the Supreme Court’s original jurisdiction, as we have seen, was confined exclusively to ambassadorial and state-as-party cases, hewing closely to the two halves of the Article III original jurisdiction clause.<sup>127</sup> What is clear is that the First Congress was exceedingly parsimonious in doling out land-based Article III power given the concerns about encroachment on state judicial power and juries expressed at the Constitutional Convention and the state ratification conventions.

Third, although Article III authorized “appellate” jurisdiction “both as to Law and Fact” in the wide-ranging sense of the Court of Appeals in Cases of Capture under the Articles, the First Congress did not follow the lead of the Continental Congress on such jurisdiction. The Judiciary Act, in sections 22 and 25, severely limited the Supreme Court to review by writ of error in civil

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123. See Lee, *supra* note 4, at 836 (concluding that the “ATS was enacted to allow aliens to sue in federal district court for only one of the three violations *Sosa* identified, namely transgressions of safe conducts”).

124. See ch. 20, § 9, 1 Stat. at 76–77.

125. See *id.*

126. See *id.* §§ 11–12, 1 Stat. at 78–80.

127. See *supra* notes 93–99 and accompanying text.

actions and equity suits from the lower federal courts and the highest state courts of law and equity, the latter only as to what was evident on the face of the record and “immediately” respecting the validity of a federal law or authority that the state court had struck down. In fact, there was no explicit provision made as to Supreme Court appellate jurisdiction as to admiralty and maritime cases from the district courts, nor any appellate jurisdiction from state court decisions that upheld federal treaties, statutes, or authorities. The creation of lower federal courts that were optional to Congress under Article III may have mitigated the perceived need for such appellate jurisdiction. But whatever the reason, the First Congress aggressively exercised its Article III, Section 2 power to “make” exceptions to the Supreme Court’s appellate jurisdiction.

At the same time, Congress went very broad in implementing the Supreme Court’s Article III original jurisdiction for “all Cases affecting Ambassadors, public Ministers, and Consuls” and for when a state is a party. For instance, in section 13 of the Judiciary Act, Congress provided for *exclusive* original jurisdiction in the Supreme Court for cases involving an ambassador’s “domestics, or domestic servants” and extended nonexclusive original jurisdiction to vice consuls, a largely honorific quasi-diplomatic position that was arguably not within Article III’s specification of “all Cases affecting Ambassadors, other public Ministers, and Consuls.” The contrast in these two aspects of the First Judiciary Act’s doling out of the Supreme Court’s jurisdiction—appellate versus original—confirms the sense that the First Congress believed that the Constitution *required* thorough vesting of the Supreme Court’s original jurisdiction, particularly as compared to its parsimonious vesting of appellate jurisdiction, particularly of state courts.

Finally, it bears noting how much the Judiciary Act’s specifications of judicial power were oriented to the foreign policy picture and to providing dispute resolution favorable to foreign emissaries and merchants, particularly in the maritime setting. There was little evident interest in bringing the newly created federal courts to bear for domestic governance concerns or the vindication of Americans’—as opposed to foreigners’—rights, outside of the enclaves of federal crimes and U.S. enforcement actions (e.g., land seizures for customs collection or habeas corpus when in federal custody) and admiralty and maritime jurisdiction. Indeed, the only land-based resort to federal judicial power that a U.S. citizen-plaintiff could access, absent the implication of a foreign party, seems to be the “Citizens of different States” diversity jurisdiction,<sup>128</sup> subject to a five-hundred-dollar amount-in-controversy requirement.

In addition to the establishment of the Supreme Court and the lower federal courts and the specifications of judicial power, the First Judiciary Act also

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128. U.S. CONST. art. III, § 2.

set forth some basic rules of evidence<sup>129</sup> and jury selection.<sup>130</sup> However, it did not otherwise address procedures to be used in the new federal courts, including whether they were to proceed as a general matter under the procedural rules then in use in England and in the states.

#### *E. The First Process Act*

The First Congress tackled the vital lacuna of procedures in the Judiciary Act in an enactment that became law five days later, on September 29, 1789. This statute was titled “An Act to regulate Processes in the Courts of the United States.”<sup>131</sup> It originated in the same Senate committee of the First Congress that had drafted the Judiciary Act. It was most likely drafted by the same person who was the principal architect of the Judiciary Act, Senator Oliver Ellsworth of Connecticut, who was later appointed the third Chief Justice of the United States.<sup>132</sup>

The First Process Act has not received the sort of scholarly attention one might have expected for what was effectively the first federal civil procedure statute. Part of this may be attributable to the fact that it was supposed to be temporary—Congress provided that it was to “continue in force until the end of the next session of Congress and no longer.”<sup>133</sup> The statute proved to be longer lived: the next two Congresses ended up voting to continue the Process Act of 1789, and a new process act was not passed until May 8, 1792.<sup>134</sup> Another reason for the low profile of the statute may be its concision. The entire statute consists of 328 words in three sections.<sup>135</sup> The original Senate bill had been much more detailed, but the Senate pared it down, ostensibly to prevent undue wrangling with the House of Representatives.<sup>136</sup>

One major controversy was not averted, however. The original Senate bill of the First Process Act had provided “[t]hat all Writs & Processes issuing out of any of the Courts of the United States, shall be in the name of the President of the United States of America.”<sup>137</sup> Some senators chafed at this whiff of the British king’s writs;<sup>138</sup> such objections were joined by like-

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129. Ch. 20, § 15, 1 Stat. at 82 (“[P]ower in the trial of actions at law, on motion and due notice . . . to require the parties to produce books or writings in their possession or power . . .”); *id.* § 30, 1 Stat. at 88–90 (prescribing a uniform “mode of proof by oral testimony and examination of witnesses in open court” and procedures for taking testimony of distant persons).

130. *Id.* § 29, 1 Stat. at 88.

131. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (repealed 1792).

132. 4 DHSC, *supra* note 88, at 108.

133. Ch. 21, § 3, 1 Stat. at 94.

134. *See* 4 DHSC, *supra* note 88, at 112–13.

135. *See* ch. 21, 1 Stat. 93.

136. *See* 4 DHSC, *supra* note 88, at 110.

137. *Id.* at 115.

138. *See, e.g.,* JOURNAL OF WILLIAM MACLAY: UNITED STATES SENATOR FROM PENNSYLVANIA 1789–1791, at 166–67 (Edgar S. Maclay ed., New York, D. Appleton & Co. 1890) (Sept. 26, 1789) (“This is only a part of their old system of giving the President as far as possible every appendage of royalty.”).

minded members of the House. When the bill reached the House, Representative Michael Jenifer Stone of Maryland moved to strike the words “the President of” so that writs would run from the United States, in which sovereignty rightfully reposed.<sup>139</sup> A “warm and animated” debate resulted, and the House passed Stone’s amendment by a 25 to 18 vote.<sup>140</sup> But the Senate stuck to its guns and rejected the House’s amended bill. The House also refused to back down, voting 28 to 22 to press the amendment upon return from the Senate.<sup>141</sup> The impasse, on a matter that seems trivial to the modern legal mind, was resolved only when the two bodies agreed not to say anything at all about from whom writs and processes would issue. This resolution punted the fraught issue to the newly created judiciary.<sup>142</sup>

The incident highlighted the hostility to implementing legal practices redolent of British monarchy in the new national courts. The royal writ was the key for litigants to unlock the king’s courts, and it was framed as a royal command to the defendant or to the sheriff. The whole point of the American War of Independence had been to slip the yoke of royal commands, and it seemed antithetical to that purpose to substitute the command of a president for that of a king. More generally, a significant segment of the American people had come to be wary of the political and legal institutions of the country with which they had just fought a bloody and vicious war of separation. It was natural for them to seek other sources of inspiration for designing the revolutionary republic’s governance institutions, including its courts. One important such source was the practices of the various states, but those were also ultimately derived from English common-law models. The only other plausible source was the civil law tradition, descended from Roman law, which had an important enclave in the British admiralty courts.

The controversy over who originates writs illuminates how the design of the new republic’s legal practices sought departures from English legal tradition in certain respects, but it was small beer compared to another part of the First Process Act, which directly invoked the civil law tradition. The statute’s key operative provision does not set forth actual procedural rules but rather, ordains choices of procedural law for the three categories of cases expected to constitute the main business of the new federal courts: (1) suits at common law, (2) causes of equity, and (3) suits in admiralty and maritime jurisdiction. The latter two categories in fact would come to constitute the lion’s share of the work of the early national courts, which is unsurprising since the state courts had concurrent jurisdiction over all suits at common law. With respect to equity causes and maritime and admiralty suits, the Process Act prescribed that “the forms and modes of proceedings . . . shall be according to the course of the civil law.”<sup>143</sup> As we shall see, it is almost certain that the First Congress was directing federal judges to apply

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139. 4 DHSC, *supra* note 88, at 110, 112.

140. *Id.* at 112.

141. *Id.*

142. The Justices of the Supreme Court, in their first term of February 1790, decided that their writs would run from the president of the United States. *See id.*

143. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (repealed 1792) (emphasis added).

procedural rules according to the evolving practice of civilian courts like the British admiralty courts and continental European courts, not the rules of the state courts or of the English common-law courts. This is an astonishing and little-remarked innovation.

Before discussing the puzzling provision, we need to address the preliminary question of why Congress chose to vest multiple judicial powers in the same court. A fusion of judicial powers in one court (law and equity) was a common feature in civil law countries (including Scotland), but it was anathema in England. The common-law courts were the masters of law, and the Court of Chancery was the dispenser of equity. The splitting into two of the rule-of-law atom was an axiom of the English legal order but foreign to the civil law legal order. The two institutions evolved a long and famous history of mutual suspicion and rivalry, and the English believed that combining them in one organ was a dangerous fusion of power.<sup>144</sup> But that was what the First Congress did,<sup>145</sup> and in an even greater departure from the English example, they also vested the new national courts with the all-important admiralty and maritime jurisdiction, which had been the separate province of the civilian admiralty courts in England.<sup>146</sup>

It is unclear exactly why the business of three courts in England (the common-law courts, Chancery, and the admiralty courts) was put into one new national court in the United States,<sup>147</sup> so it is hard to say for sure if the Framers were influenced by the civilian norm of a unitary court with law and equity powers. James Pfander and Daniel Birk have read the *constitutional* extension of “judicial power . . . to all Cases, in Law and Equity” in Article III, Section 2 as pointing to a unitary court influenced by the civilian-based Scottish model,<sup>148</sup> but that provision does not have to be read to mean that “all Cases, in Law and Equity” requires vesting both law and equity cases in the same court. The First Congress could have created law courts and equity courts and still been in compliance with Article III.

Although the Constitution does not require it, the First Congress did fuse common-law and equity powers, along with the admiralty and maritime power, in one system of courts through the First Judiciary Act. The trifold fusion inspired strong objections based on the English example, including

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144. Limited border crossings were common, however. For instance, litigants in the common-law courts could obtain bills of discovery from Chancery to aid litigation. See JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 361 (2009).

145. *But see* Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (limiting the reach of equity by providing “[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law”).

146. *See id.* § 9, 1 Stat. at 76–77.

147. *See* 2 FARRAND’S RECORDS, *supra* note 1, at 428 (noting that William Samuel Johnson suggested the merger of law and equity).

148. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1666–69 (2011) (suggesting that the Framers were influenced by Lord Kames’s exposition of the merits of the Scottish unitary model).

from future Justice Samuel Chase.<sup>149</sup> My own view is that Congress may have overridden such objections not necessarily out of a desire to emulate the Scottish or civilian model but because they wanted to create a compact judiciary to save money and mitigate the fear that the new courts would transgress the business of the state courts. For instance, Robert Treat Paine, a future justice of the Massachusetts Supreme Judicial Court, wrote to Caleb Strong, a member of the Senate committee that originated the bill, and “suggested combining the admiralty and revenue jurisdictions rather than having them referred to separate courts.”<sup>150</sup> The fact that the First Congress seems to have thought they had the discretion to combine or not to combine suggests, contrary to Pfander’s and Birk’s theory, that Article III’s reference to “Cases, in Law and Equity” is inconclusive on a requirement of unity.

But let us return to the main event of the choices made by the First Process Act. It prescribed two choices of procedural law: one for the common-law causes of action and one for equity causes and admiralty and maritime suits combined. Before discussing the specific prescriptions, it is useful to consider the range of possible choices. The First Congress could have: (1) applied state procedural rules; (2) drafted their own procedural rules by statute; (3) allowed the federal judiciary to make their own rules; or (4) adopted the rules of the English courts—common law, equity, and admiralty.

For the law side, the Senate had originally passed a bill prescribing procedural rules (option two) with a carveout for state rules as to “executions in actions” and fees,<sup>151</sup> but Congress ended up choosing state rules (option one). To be specific, with respect to “suits at common law,” the First Process Act declared that “except where . . . otherwise provided” by federal statutes, “the forms of writs and executions . . . and modes of process and rates of fees . . . in the circuit and district courts . . . shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.”<sup>152</sup> The choice of state procedural law for suits at law was unsurprising: each of the new states had their own settled common-law courts, which had evolved particular ways of regulating procedures. The local bar would not have welcomed a new set of rules for actions at law that might be entertained in the local federal courts too, for instance by virtue of diversity jurisdiction. This part of the First Process Act also tracked the Rule of Decisions Act’s prescription of state substantive law “in trials at common law in the courts of the United States in cases where they apply.”<sup>153</sup> The law side of the statute has been the subject of a good deal of judicial and scholarly commentary, most notably for its quixotic, static command that the relevant state procedures were those “now used or allowed” in 1789 and implicitly not thereafter.<sup>154</sup>

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149. See Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS, *supra* note 6, at 13, 19.

150. *Id.*

151. 4 DHSC, *supra* note 88, at 115–18.

152. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1792).

153. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

154. Ch. 21, § 2, 1 Stat. at 93–94.



It is the other choice of procedural law in the First Process Act for equity causes and admiralty and maritime suits that is surprising. Neither the original Senate bill nor the final act adopted one of the four logical options suggested above. Instead, for “causes of equity, and of admiralty and maritime jurisdiction,” section 2 of the Process Act prescribed that “the forms and modes of proceedings . . . shall be according to the course of the civil law.” One threshold interpretive question is whether the phrase “according to the course of the civil law” contemplated reference to the English Chancery Court with respect to equity causes. Chancery had civilian roots, but unlike the ecclesiastical and admiralty courts, it had evolved a distinct identity in England by the late eighteenth century. Although, it is almost certain that Chancery practice would not have been characterized as “common law” procedure, it seems improbable that Congress and early American lawyers would have viewed it as part of “the course of the civil law.” Thus, despite the model of Chancery practice, it appears that these words in the Process Act directed the new national courts to use the Roman-law-based procedural rules of continental Europe and Scotland to govern their “forms and modes of proceeding” in equity, as well as in admiralty and maritime suits. With respect to maritime and admiralty suits, the English admiralty courts were civilian institutions and so they were already applying civil law procedures, although inflected by local usage over the decades.

Why did the First Congress opt for Roman-law-based, civil law procedures in equity, admiralty, and maritime jurisdiction suits? Goebel posed a theory of negative motive: the choice of civil law was due to postwar hostility against English practice in the Court of Chancery and admiralty courts.<sup>155</sup> “The Committee had earlier experienced the explosions over adopting English chancery practice during the Judiciary Act debates . . . and it may have been conceived that something less contentious was being tendered.”<sup>156</sup> English law did seem like the most logical choice: American lawyers knew it, and it promised a benefit comparable to civil law in terms of uniform rules across the states and with England. State rules, as on the law side, were also plausible in theory, although the more flexible nature of equity made it likely that procedures had evolved greater differences over time among the states. Another problem with using state rules was that there were separate courts of chancery in only five of the then states—Maryland, New Jersey, New York, South Carolina, and Virginia—and their rules were modeled on English chancery anyway.<sup>157</sup> Goebel does not shirk from expressing his opinion of the provision for civil law practice actually enacted: he called it “done in haste,” “ill advised,” and “unrealistic.”<sup>158</sup> He believed it was “idle to suppose that the judges or the practitioners . . . were likely to set afoot unfamiliar and untried procedures.”<sup>159</sup>

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155. See 1 GOEBEL, *supra* note 12, at 534–35.

156. *Id.* at 534.

157. *Id.*

158. *Id.* at 534–35.

159. *Id.* at 534.

Goebel is surely correct about anti-English sentiment, but his negative theory may be incomplete because it neglects an important positive motive: the First Congress imported the “course of the civil law” to govern procedures for equity and admiralty suits in federal court because they wanted to encourage continental European merchants—Dutch, French, Prussian—who were more familiar with civilian procedures derived from Roman law, to trade and do business with, and lend money to, Americans. Such dealings, especially with denizens of a new revolutionary “republic” run by former freedom fighters and led by their general, are always haunted by the specter of unreliable dispute resolution in the developing country’s courts if the deals falter. The state courts, with their partisan juries and arcane procedures of English origin, were notoriously hostile to foreign and out-of-state commercial interests, particularly creditors.<sup>160</sup>

To counteract this reality, Congress tried to make the new general courts as cosmopolitan and user-friendly as possible for continental European merchants, shippers, and bankers. The First Process Act prescribed “forms and modes of proceedings” in equity, maritime, and admiralty suits “according to the course of the civil law.”<sup>161</sup> And of course there was no jury in equity, maritime, or admiralty, suits. By the expansion of equity, maritime, and admiralty jurisdiction, the national courts might further erode local juries, a concern that animated the saving-to-suitors clause of the admiralty jurisdiction grant.<sup>162</sup> Furthermore, as noted above, the Judiciary Act gave foreigners special access to the federal courts for injuries to their persons or properties (alien torts) that Americans did not have.<sup>163</sup> Finally, in “cases of foreign bills of exchange,” the First Judiciary Act accorded a special right to serve process on a defendant in a district other than where he lived or was served and for an assignee of a promissory note to sue in federal court even if the assignor could not have.<sup>164</sup> The former was the earliest example of a nationwide process rule, which today is limited to federal question suits,<sup>165</sup> although a modern analogue would likely be constitutional

160. See Wythe Holt, *“To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1449–50, 1450 n.94.

161. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (repealed 1792).

162. “[T]he district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . within their respective districts as well as upon the high seas; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . .” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

163. See Lee, *supra* note 4, at 882.

164. Specifically, section 11 of the Judiciary Act of 1789 provided:

[N]o civil suit shall be brought [in federal court] against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

Ch. 20, § 11, 1 Stat. at 78–79.

165. See FED. R. CIV. P. 4(k)(2).

under the Fifth Amendment, because the defendant would be a U.S. resident with “minimum contacts” with the United States. Process served by state courts was necessarily limited by the borders of the relevant state; the creation of a national court system that enabled nationwide process posed a real risk of inconvenience and cost to American defendants who would strongly prefer to be sued, if at all, near home. The nationwide process and assignment exceptions for “foreign bills of exchange” in the Judiciary Act are, accordingly, consistent with the theme of preferential treatment and privileges in federal court for foreign merchants and creditors in suits against Americans. This accommodation of foreign European interests with respect to procedural rules complemented the Rules of Decision Act’s implicit reservation of decisional rules in equity, admiralty, and maritime suits to federal judicial discretion, because state substantive laws, presumptively tending to favor in-state citizens, would only supply “rules of decision in trials at common law . . . in cases where they apply.”<sup>166</sup>

By way of postscript, Goebel was right. Lawyers resented the innovation and persisted in settled ways. The provision drew intense fire from the first U.S. attorney general, Edmund Randolph, who emphatically expressed his concerns in a 1790 report to the House of Representatives:

A diversity of opinion has prevailed on the forms and modes, to be observed in causes of equity and of admiralty and maritime jurisdiction: Whether they are to be according to the mere civil law, unqualified by the usages of any modern nation, or under limitations?

If the untempered severity of the Roman law is to predominate, the rights of property, and of personal liberty, are in jeopardy: Without exhibiting a tedious list of what are termed the substantial and accidental parts of a civil cause, let a few of the most obnoxious forms of the civil law be selected.<sup>167</sup>

Randolph’s problems with civilian procedure included its overreliance on oaths, the relative ease with which arrests could be made and property sequestered, its practice of turning an estate over to a plaintiff to satisfy judgment, and the “insult” to a judge countenanced by automatic grants of dilatory exceptions in proceedings without a trial to enforce a schedule on the litigants and the judge.<sup>168</sup> These do appear to have been aspects of civil law procedure, and it is impressive that Randolph knew them well enough to criticize real drawbacks of civilian practice vis-à-vis English equity. He proposed replacing civil law procedures with English ones: “It cannot be denied, that the nation, whose jurisprudence is the source of our own, presents the best limitations; and that they ought to be adopted, until better shall be devised.”<sup>169</sup>

Notwithstanding Randolph’s criticisms, “forms and modes of proceedings . . . according to the course of the civil law” continued as the law

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166. Ch. 20, § 34, 1 Stat. at 92.

167. EDMUND RANDOLPH, REPORT OF THE ATTORNEY GENERAL TO THE HOUSE OF REPRESENTATIVES (1790), reprinted in 4 DHSC, *supra* note 88, at 128, 136.

168. *See id.*

169. *Id.* at 137.

on the books governing equity, admiralty, and maritime suits in federal court for two and a half more years. When the Second Congress met in October 1791, a revision was high on the agenda. The initial Senate committee wanted to keep the law as it was, but the full Senate made a complete reversal and changed it to “state practice.”<sup>170</sup> Surprisingly, it was the House that suggested the less state-deferential version that was enacted: “according to the principles, rules, and usages which belong to Courts of equity” or courts of admiralty, respectively.<sup>171</sup> The lower courts were given “discretion” to make “alterations and additions” to these rules that they deemed “expedient.” And the Supreme Court was authorized to make “such regulations as [it] shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.”<sup>172</sup> The formulation was deceptively general, for it allowed lawyers to stick to the American and English procedural rules they knew best.

#### F. *The First Supreme Court Case*

We have just seen how the First Congress adopted civil law procedures to encourage European merchants to use the new national courts for dispute resolution. It should be no surprise that the very first case with which the Supreme Court had to grapple also involved international commerce. But this time the issue was public debt: specifically, sovereign debt that the states had incurred to finance the War of Independence. The national government, led by Alexander Hamilton,<sup>173</sup> would eventually implement a political solution by assuming much of the state sovereign debt. In the meantime, frustrated creditors contemplated their litigation options.

*Vanstophorst v. Maryland*,<sup>174</sup> the first case on the docket of the Supreme Court, showcased the most important constitutional question in the first decade after ratification: whether the Constitution permitted foreign and out-of-state private creditors to adjudicate state sovereign debt cases in the Court.<sup>175</sup> In their efforts to secure ratification of the Constitution, Alexander Hamilton in *Federalist No. 81* and James Madison and John Marshall at the Virginia ratifying convention had asserted that the Article III enumeration of judicial power as to “Controversies . . . between a State and Citizens of another State . . . [or foreign] Citizens or subjects” did not extend to suits against an unconsenting state in federal court.<sup>176</sup> But a number of such suits

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170. 4 DHSC, *supra* note 88, at 176–82.

171. *Id.* at 181.

172. Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792).

173. See REPORT RELATIVE TO A PROVISION FOR THE SUPPORT OF PUBLIC CREDIT (1790), reprinted in 6 THE PAPERS OF ALEXANDER HAMILTON 65 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

174. 2 U.S. (2 Dall.) 401 (1791).

175. See 5 DHSC, *supra* note 88, at 7–56.

176. See THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (proclaiming “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*”); see also 10 DHRC, *supra* note 72, at 1414 (relaying James Madison’s opinion at the Virginia convention on June 20, 1788, that “[i]t is not in the power of individuals to call any state into court”); *id.* at 1433 (reporting John Marshall remarked

were quickly filed in the Supreme Court as soon as it was established. At issue were two foundations of states' sovereignty: their fiscal autonomy and their political status in the new United States. If the Constitution authorized the Court's jurisdiction and the Court were to issue a judgment adverse to a state, then payment would draw money out of the state's treasury, which only its legislature had the power to spend.<sup>177</sup> And the very idea that the Court could make a state answer before it on the plea of a foreign litigant was not only an insult, but it was also not something the states had necessarily agreed to when they accepted the Supreme Court's original jurisdiction over cases "in which a State shall be party."<sup>178</sup>

*Vanstophorst* involved loans to Maryland by two Dutch brothers, Jacob and Nicolaas van Staphorst, who were money lenders in Amsterdam.<sup>179</sup> In March 1781, the Maryland legislature had appointed Matthew Ridley, a British-born Baltimore merchant, to go to Europe to secure war loans. Six months later, Ridley arrived in France where he was unsuccessful in obtaining a sovereign-to-sovereign loan. In May 1782, Ridley went to Holland and, two months later, came to an agreement with the van Staphorsts for a line of credit for Maryland with repayment to be made by annual shipments of a large, fixed amount of tobacco crop. The terms Ridley negotiated were disastrous for Maryland: the contracts pegged tobacco at a very low price and gave the van Staphorsts the option of buying any surplus tobacco left over after repayment at the same low price.

Maryland tried for several years to renegotiate the improvident bargain to no avail. The van Staphorsts, acting through an American agent, ultimately sought leave to file suit against Maryland in the Supreme Court in the February 1791 term, with the case docketed on March 3, 1791. For Chief Justice John Jay, it was the second time that he was asked to decide the controversy: he had been one of four arbitrators appointed by the parties to try to resolve the dispute in 1786.<sup>180</sup> The arbitration had been aborted when the Maryland legislature voted to negotiate a settlement in 1787.

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soon thereafter that "I see a difficulty in making a state defendant, which does not prevent its being plaintiff").

177. See Christine A. Desan, *Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in Chisholm v. Georgia*, in *THE HOUSE AND SENATE IN THE 1790s*, at 178, 212 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).

178. U.S. CONST. art. III, § 2, cl. 2. I have argued that the issue was very different when a state was being asked to pay a debt owed to its own citizen—a question the Framers of the national constitution would not have been inclined to address. See generally Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2002).

179. See 5 DHSC, *supra* note 88, at 7–17.

180. The identity of the arbitrators indicates the importance of the dispute in the early American Republic. Maryland picked as its arbitrators John Jay, then the Confederation's secretary of foreign affairs; and Robert R. Livingston, Jay's predecessor as secretary of foreign affairs and the chancellor of New York at the time. *Id.* at 14–15. The van Staphorsts chose James Duane, the mayor of New York; and Rufus King, who was a Massachusetts delegate to the Continental and Confederation Congresses, a future member of the Committee of Style of the national Constitutional Convention, and a U.S. senator from New York. *Id.*

Arbitration had been a common method of dispute resolution in England among merchants and tradespeople, but it had been overshadowed in England by the late eighteenth century on account of the primacy of the jury and the common-law courts. It continued, however, as an important dispute resolution mechanism among merchants engaged in foreign maritime trade and commerce. A modern marker of this reality is that when Congress enacted the Federal Arbitration Act,<sup>181</sup> it did so under the admiralty and maritime powers that had been inferred from Article III's grant of admiralty and maritime jurisdiction to the national courts.

The plea of Supreme Court original jurisdiction in *Vanstophorst* appeared to have a sound constitutional textual basis. Article III extended the national judicial power to "Controversies . . . between a State . . . and foreign . . . Citizens" and also provided that "the supreme Court shall have original jurisdiction" in cases "in which a State shall be Party."<sup>182</sup> Luther Martin, Maryland's very able attorney general and an ardent anti-Federalist during the Constitutional Convention,<sup>183</sup> did not initially file a reply on the state's behalf but later complied with the Court's order to plead or face default judgment.<sup>184</sup> Since the key witnesses were in Holland, plaintiffs' counsel, Attorney General Edmund Randolph, acting in a private capacity, moved the Court to appoint commissioners to conduct depositions there, pursuant to section 30 of the Judiciary Act.<sup>185</sup> Although a docket entry indicates that these depositions were taken, the parties ended up settling and the case was dismissed on August 6, 1792.<sup>186</sup>

What is most striking about *Vanstophorst* are the international and thoroughly modern features of the controversy. The problem of enforcing sovereign debt persists today on the international plane, as does the challenge of designing a viable forum for dispute resolution of sovereign debt cases.<sup>187</sup> The potential use of the Supreme Court was an ingenious attempt at a solution: the Court—as an intermediate institution between foreign bankers and individual state legislatures (a "quasi-international tribunal")—promised a "credibly neutral tribunal."<sup>188</sup> Accordingly, the question of whether Article III of the Constitution contemplated such a tribunal was a difficult one. Legal scholarship on these early constitutional cases usually emphasizes the

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181. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15).

182. U.S. CONST. art. III, § 2.

183. See MAIER, *supra* note 74, at 90–91. Martin arrived late at his state's ratification convention and said nothing, pleading laryngitis. *Id.* at 244.

184. The pleadings have not survived. It is likely that the plaintiffs filed a writ of *assumpsit*, which was the writ filed in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). James Sullivan, attorney general of Massachusetts, reported that "[a] plea is filed to the action in common form, that the state never promised." 5 DHSC, *supra* note 88, at 22.

185. 5 DHSC, *supra* note 88, at 18; see also Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88.

186. See Fine Minutes of the Supreme Court (Aug. 6, 1792), reprinted in 1 DHSC, *supra* note 88, at 200, 201.

187. See, e.g., Shane Romig, *Ghana Ordered to Release Argentine Ship*, WALL ST. J. (Dec. 15, 2012, 6:56 PM), <https://www.wsj.com/articles/SB10001424127887323297104578181382814430450> [<https://perma.cc/UL4T-9N3W>].

188. Lee, *supra* note 97, at 1783.

sovereign immunity doctrinal features, which tend to obscure the thoroughly modern larger policy implications and functional design motivations.

As *Vanstophorst* was winding down, a far more famous suit that was not settled—*Chisholm v. Georgia*<sup>189</sup>—was making its way through the national courts. *Chisholm*, too, involved state sovereign debt to an out-of-state creditor. However, it did not implicate the more sensitive, structural problem of foreign bankers with lines of credit extended to multiple states but rather, a onetime past contract to an out-of-state American creditor. As such, *Chisholm* accentuated the symbolic aspect of the state sovereign debt cases and de-emphasized their systemic international political economy ramifications. Both cases illustrate the importance of commercial cases in the early years of the Supreme Court, a fact that we often forget today when we are accustomed to the Court as a public law institution and as a constitutional court, not as a court of international and interstate commerce.

## II. ENLARGING CONVENTIONAL WISDOM

Part I sketched the basic contours of the original constitutional plan for the newly created Supreme Court and federal court system based on the Articles of Confederation, the Constitutional Convention, the language of Article III, and the Judiciary Act and Process Act, both passed by the First Congress in 1789. It also examined the first case docketed at the Supreme Court, an international state sovereign debt controversy. Part II applies that account of the original constitutional plan for the federal courts to point out some ways in which present-day conventional wisdom about the federal courts diverges from the 1787–1792 plan.

### A. *Federal Courts Should Stay out of Foreign Affairs and Defer to the Political Branches*

We do not need to spend too much time on rebutting this conventional wisdom: even a quick scan of Article III reveals the extent to which foreign affairs were a focus of federal judicial power.<sup>190</sup> The most important was the admiralty and maritime jurisdiction. The seas were the primary arena of interaction between U.S. and foreign sovereign and private interests. Given the importance of transatlantic commerce and trade to the fledgling United States, maritime and admiralty jurisdiction was important in peacetime, thus the need to provide a credible forum for dispute resolution of shipping disputes. And it was also important in war, when disrupting this trade was an essential part of any armed conflict involving the European powers.

Congress did have constitutional power, under Article I, Section 8, Clause 11, to “make Rules concerning Captures on Land and Water,” and it did pass statutes authorizing captures<sup>191</sup> and regarding distribution of prize proceeds

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189. 2 U.S. (2 Dall.) 419 (1793).

190. See FLAHERTY, *supra* note 9, at 1–45; Lee, *supra* note 118, at 1730–36.

191. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170–71 (1804) (interpreting an act of Congress that authorized the capture of any U.S. owned or chartered vessel bound for French ports or under the employment of persons subject to French jurisdiction).

to captains, officers, and crews. But Congress did not usually go into the nuts and bolts of setting out the rules of maritime capture—e.g., when to declare a blockade, the conditions under which captures were valid, how to determine belligerent or neutral status, what private Americans could or could not do to maintain neutrality, what was contraband that could be seized off a neutral vessel in time of war, or what was condemnable cargo even if not contraband under the doctrine of contamination.<sup>192</sup> Such important and fact-dependent issues were left to the federal courts to decide. The Supreme Court's decision in *The Paquete Habana*<sup>193</sup> shows that this default foreign policy role of federal judges was still well understood at the turn of the twentieth century.

Another example of the capacious foreign affairs jurisdiction of the federal courts in the original constitutional plan is the Supreme Court's original jurisdiction. Article III provides that the Supreme Court shall have original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls."<sup>194</sup> "Affecting" is a very expansive word. As it turned out, there were not many cases involving ambassadors filed in the Supreme Court, but the lack of such cases was certainly not by design. The other prong of the Supreme Court's original jurisdiction is as to cases "in which a State may be Party." That included not just state-on-state controversies, which are functionally like international disputes among the states but also potential suits brought by foreign states against states for systemic treaty violations, such as of the 1783 Treaty of Peace.<sup>195</sup>

### B. Appellate Jurisdiction Is the Supreme Court's "Essential Role"

Today, the Supreme Court is viewed primarily as a constitutional appellate court in both expert and popular opinion, but the plain language of Article III suggests another essential role: the Supreme Court's original jurisdiction over foreign ambassadorial cases and interstate or international controversies involving states. In the present day, the Supreme Court's original jurisdiction is only rarely exercised and almost exclusively in state-as-party cases, but that was not the original constitutional plan, an intuition borne out by Article IX of the Articles of Confederation, the provisions of the Judiciary Act of 1789, and the Court's early cases, the first of which was *Vanstophorst*.

It is important to emphasize that judicial review—the "judicial duty to say what the law is" as a matter of federal treaty, statute, or the Constitution—can and does arise in the exercise of the Court's original jurisdiction, too, and not only by the Court's appellate jurisdiction. Furthermore, original

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192. The equivalent on land would be for federal judges to decide all legal questions regarding the conduct of sieges or captures of prisoners or confiscation or destruction of roads, food, bridges, and crops as enemy property during land warfare. Of course, granting federal judicial power to decide such matters was *not* a part of the original constitutional plan, which was based on anticipated international conflicts at sea where there would be less need to account for overlapping and dominant state judicial power.

193. 175 U.S. 677 (1900).

194. U.S. CONST. art. III, § 2, cl. 2.

195. See Lee *supra* note 97, at 1849–66.



jurisdiction entails power to decide the entire case or controversy that appellate jurisdiction limited to issues that “arise under” federal law does not, although any adjudication of state law would not be binding on state courts. For example, one way to think about *Marbury* is as a failed attempt by the petitioner for a writ of mandamus against U.S. Secretary of State James Madison to assert that the Court could entertain his petition because his “Case” was one “affecting” a “public Minister,” namely, Madison. Of course, the Court implicitly and correctly presumed that the original jurisdiction clause applied only to “all Cases affecting” *foreign* “Ambassadors, other public Ministers, or Consuls,” not American ministers, because the clause was about minimizing foreign friction, not about preventing executive branch officials from violating the legal rights of Americans. It was possible for an American to sue a state, including for a claim under a constitutional provision such as the Contract Clause, under a plain reading of Article III and section 13 of the First Judiciary Act as the Court in *Chisholm* held. However, this possibility was foreclosed by the ratification of the Eleventh Amendment.<sup>196</sup> But as the recent motion for leave to file in the Court in *Texas v. Pennsylvania*<sup>197</sup> demonstrates, judicial review of important issues by states suing to invoke the Court’s original jurisdiction (e.g., for unconstitutional selection of presidential electors by another state) is a surging phenomenon.<sup>198</sup> Whatever the merits of Texas’s specific motion, which was dismissed for lack of standing, the Court’s original jurisdiction is a viable forum for airing important constitutional issues with an impeccable originalist pedigree. This is particularly true given the potential for conducting independent constitutional fact-finding before the Court, perhaps even by jury, as section 13 of the First Judiciary Act authorized. This intriguing way to think about constitutional adjudication at the Supreme Court may seem fanciful, but it is consistent with the original constitutional plan for the Supreme Court.

The Supreme Court’s appellate jurisdiction was seen as critical to ensure the supremacy and uniformity of federal law, as Henry Hart famously argued,<sup>199</sup> but when the Constitution was framed and ratified, there were also significant concerns about that jurisdiction that extended “both as to Law and Fact,” based on the experience with the national court of appeals under the Articles. At the time (before drafting and passage of the Bill of Rights), there was no guarantee that the Court could not conduct a new jury retrial under Article III to nullify the state proceedings. Edmund Pendleton, who backed the Constitution at Virginia’s ratifying convention and was its first chief

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196. The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

197. No. 155, Orig., 2020 WL 7296814 (U.S. Dec. 11, 2020) (mem.) (denying leave to file a bill of complaint for lack of standing).

198. See Motion for Leave to File Bill of Complaint, *Texas*, 2020 WL 7296814 (No. 155, Orig.).

199. See generally Hart, *supra* note 15.

justice, spoke for the view of many regarding Article III: “I object to the appellate jurisdiction as the greatest evil in it.”<sup>200</sup> Consequently, he and other moderate Federalists believed that salvation lay in a robust power for Congress to make regulations and exceptions to the appellate jurisdiction.<sup>201</sup>

### C. *The Importance of “All Cases Arising Under” Federal Law*

As described in Part I.D, there was no constitutional arising under jurisdiction implemented in the Judiciary Act of 1789 except for crimes, seizures under federal revenue and customs laws, and the ATS.<sup>202</sup> Indeed, although specialized arising under statutes like the ATS were occasionally enacted in the nineteenth century to protect important federal interests, a lasting general federal-question jurisdiction statute was not enacted until 1875 after the Civil War.<sup>203</sup> By contrast, controversies between states were not only an important part of the Court’s original jurisdiction in the Judiciary Act, interstate controversies were also a key subject matter of the Articles of Confederation system.<sup>204</sup> And yet there is no “all” before “Controversies between two or more States” in Article III.

The upshot is that Justice Joseph Story’s presumption that “all” before “Cases” is significant and requires mandatory jurisdiction not constitutionally required for “Controversies”<sup>205</sup> does not fit the words of the Constitution or the original constitutional plan. The key primary sources do not confirm the modern intuition that “arising under” jurisdiction must be vested in federal courts. Again, a large part of the perceived essentiality of Article III federal-question jurisdiction is that it includes jurisdiction of cases “arising under” the Constitution and therefore provides a textual basis for the Court’s power of judicial review for constitutionality. But judicial review could and was exercised under other heads of Article III jurisdiction.

### D. *Original and Appellate Jurisdiction Are Qualitatively Different*

If the idea of “appellate jurisdiction” was an outgrowth of the national court of appeals from the Articles of Confederation, which is the sense we

200. 9 DHRC, *supra* note 72, at 1101 (June 10, 1788).

201. *See* 10 *id.* at 1399–1400 (June 19, 1788) (reporting Pendleton’s assertions that Congress’s power to make regulations and exceptions to the appellate jurisdiction was the “great security” against it and that Congress, being composed of representatives of all the states, would not suffer to allow citizens to be forced to travel “a great distance” to pursue appeals to the Supreme Court).

202. *See supra* text accompanying notes 120–24; *see also* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1147 n.14 (1999).

203. *See* Removal of Causes Act, ch. 137, § 1, 18 Stat. 470, 470 (1875) (“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature . . . and arising under the Constitution or laws of the United States . . .”).

204. *See* THE FEDERALIST NO. 80, *supra* note 176, at 478 (Alexander Hamilton) (“[T]he national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.”).

205. *See supra* note 20.

get from the Virginia Plan and the Convention materials, then “Appellate Jurisdiction” as the words are used in Article III means a full-blown reexamination of facts and law. “Appellate” jurisdiction essentially means “retrial,” no matter how brief or protracted the proceedings were in the court of original jurisdiction.<sup>206</sup> Hence, section 12 removal jurisdiction in the Judiciary Act of 1789 was viewed as an instance of appellate jurisdiction, even when a suit was merely filed without any proceedings in state court. On the opposite end, a suit already tried to jury verdict in state court could be removed to federal court and there retried by federal judges and still be viewed as a species of appellate jurisdiction. This latter possibility validated the concerns about federal appellate jurisdiction raised in the state ratifying conventions, which ultimately resulted in the Re-examination Clause of the Seventh Amendment to close off posttrial removals to nullify civil jury verdicts. The self-constraint mechanism that the First Congress imposed despite this potential constitutional breadth of appellate jurisdiction was the “writ of error” (versus “appeal” as typical in admiralty and maritime suits) in section 22 (circuit courts) and section 25 (state courts) of the Judiciary Act.<sup>207</sup>

The presumption among modern federal courts scholars that original and appellate jurisdiction are entirely different has caused confusion about the nature of the early federal court system, such as the belief that appellate jurisdiction is necessary for the Supreme Court to exercise its constitutional duty to declare federal law. Indeed, original jurisdiction is in theory a more effective means of judicial review because it gives the Court power to decide the *entire* case or controversy, not just the federal questions and hence cannot be blocked by pretextual state law grounds, although the Court’s view of state law would not be binding on state courts. Additionally, if Article III “appellate Jurisdiction” differed from “original Jurisdiction” only in that the case “originated” in another court before reaching the “appellate” court—then it reinforces the need for Congress’s power to make “Exceptions” and “Regulations” to it, as the First Congress did so robustly. Moreover, understanding the equivalence helps us to perceive how federal court exclusive original jurisdiction and Supreme Court appellate jurisdiction were viewed as functional substitutes, and so the First Congress’s creation of the former mitigated the imperative for the latter. Finally, grasping that there is very little conceptual difference between original and appellate jurisdiction makes it hard to accept, at least as an originalist matter, the “appellate review” model that Article III review of legal questions and deference as to fact-finding satisfies any Article III concerns about Congress conferring judicial power to non–Article III tribunals.

#### *E. Reliance on State Law and Common Law for Substance and Procedure*

The Rules of Decision Act and the First Process Act show that the First Congress endeavored to limit reliance on state law and common law,

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206. See RITZ, *supra* note 120, at 6–7.

207. Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87.

applying state law in common-law causes of action only, but not equity causes or admiralty and maritime suits, both in terms of substantive rules of decision and procedural rules. Section 16 of the Judiciary Act made clear that *equity* was a last resort, unavailable “in any case where [a] plain, adequate and complete remedy may be had at law.”<sup>208</sup> But of course there were many admiralty and maritime suits in the late eighteenth century, and equity was also an important and growing aspect of the early federal courts’ business (e.g., deciding title to land based on conflicting state grants and claims), growing to the point that today equity almost seems the norm, not the exception. The fact that the First Process Act required courts to apply “the forms and modes of proceedings . . . according to the course of the civil law,”<sup>209</sup> however short-lived, is a telling confirmation of the extent to which the founders were willing to experiment with foreign rule-of-law modes, move away from the English common-law example, and provide a hospitable forum for continental European merchants, creditors, and litigants.

#### F. Federal Courts and State Sovereignty

The conventional wisdom is that an important function of the Supreme Court and the federal courts is to protect state sovereignty and the constitutional commitment to federalism. That view was strongly voiced in Justice James Iredell’s dissent in *Chisholm* (which was abrogated by the Eleventh Amendment), underpinned Chief Justice Roger Taney’s infamous majority opinion in *Dred Scott v. Sandford*,<sup>210</sup> later returned in post-Reconstruction Supreme Court precedents, and underwent a modern resurgence in Rehnquist Court anti-commandeering and state sovereign immunity decisions.<sup>211</sup>

But the *Chisholm* majority may have been correct in interpreting the original Article III as permitting it to decide a suit brought by a South Carolinian against Georgia based on contracts the state had allegedly breached, as Justice John Marshall Harlan surmised in his concurrence in *Hans v. Louisiana*.<sup>212</sup> Certainly, offering the Supreme Court up as a credibly neutral forum for the resolution of state sovereign debt cases is a plausible reading of the original meaning of Article III and consistent with the general original orientation of setting up the national judiciary to solve “state as party” controversies, including commercial and contract debt cases. Recall, on this point, that the first case on the Supreme Court’s docket was *Vanstophorst* and that Maryland’s attorney general, Luther Martin, a noted anti-Federalist, did not object to the Court’s original jurisdiction.

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208. *Id.* § 16, 1 Stat. at 82–83.

209. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (repealed 1792).

210. 60 U.S. (19 How.) 393 (1857), *superseded in part by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

211. *See generally* *Printz v. United States*, 521 U.S. 898 (1997) (invalidating federal law because it commandeered state legislatures); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding Congress may not use the Article I Indian Commerce Clause to abrogate Florida’s sovereign immunity).

212. 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

I do not mean to overdo this point, and it bears remembering that the First Congress was parsimonious in dispensing Article III judicial power precisely because it sought to limit encroachment by the new federal courts on preexisting state judicial power, juries, and the business of the state courts. The federal judicial power was deployed very sparingly and exclusively only as to federal crimes, admiralty and maritime cases, and matters of revenue, forfeiture, and penalty under U.S. impost and trade laws. But I think it is equally clear that within those exclusive enclaves (with the important exception of the saving-to-suitors exception to admiralty and maritime jurisdiction), during the critical early years and especially from 1789 to 1792, state rules of decision and procedures were displaced in favor of the law of nations and civil law. In other words, there was a clear and strong desire to depart from state and English precedents in these subject matters of greatest interest for foreign merchants, creditors, and public litigants. The aim was to entice foreigners to bring their grievances in the new federal courts rather than to face inhospitable state courts or to lobby foreign sovereigns to resort to political measures including war, which would have been disastrous for the demilitarized United States from 1787 to 1792.

#### *G. The Supreme Court Is Predominantly a Public Law Institution*

The early Supreme Court did hear many important public law cases that are famous today, but it was also designed to hear international commercial cases like *Vanstophorst*, the first case docketed at the Court in 1791. Certainly, commercial and public maritime cases featured prominently on the dockets of the lower federal courts in the late eighteenth century and well into the early nineteenth century.<sup>213</sup> Diversity jurisdiction in the late eighteenth century was functionally similar to international commercial arbitration today—a credibly neutral form of dispute resolution available to foreigners and out-of-state parties to encourage cross-border loans, business deals, shipping, trade, and investment. Both experts and the public today perceive the Supreme Court as a constitutional and appellate court. But the original plan for it included much more: an international commercial court, a diplomatic court, an interstate umpire, and to borrow Edmund Randolph’s words from the Virginia Plan that launched the Constitutional Convention, a trial court of “dèrnier resort.”<sup>214</sup>

#### CONCLUSION

My aim in this Article has been to use primary sources to draw an accurate picture of what the adopters of the Constitution’s judiciary article and the First Congress which implemented it were doing from 1787 to 1792, the critical years in which the Constitution was adopted and the federal courts

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213. Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 LAW & HIST. REV. 245, 275 (2012) (“[T]he dockets of the lower courts were crowded with admiralty actions . . .”).

214. 1 FARRAND’S RECORDS, *supra* note 1, at 211.

established. I do not claim to have uncovered any new source that the great scholars of the early federal courts—Warren, Goebel, and Ritz—did not previously locate and describe to some degree. But attempting to reconstruct history is a kaleidoscope. Every lawyer-scholar looks for different things and notices different things at different times in history. In the early and mid-twentieth century, when Warren and Goebel labored in these vineyards, they sought to curtail federal judicial lawmaking vis-à-vis Congress and reinforce the primacy of state regulation of Americans' primary conduct and interactions, notwithstanding the onset of the modern administrative state. The pro-foreigner orientation, the robust specification of the Supreme Court's original jurisdiction, the pinpoint nature of the lower federal courts' exclusive original arising under jurisdiction, and the severe regulation of the Court's appellate jurisdiction were not prominent concerns given those eminent scholars' perspectives.

What is the picture that emerges of the original constitutional plan for the federal courts from 1787 to 1792? There was a strong consensus that the new courts should not encroach on the state courts beyond what important national interests required. Consequently, and for reasons of cost, the federal courts were designed to have a small footprint that focused on the oceans, the principal paths of international and interstate trade and commerce. (Justice Story would conquer the seas and move the pro-commerce campaign landward in the nineteenth century.) There is very little sense that the new national courts were to play a leading role in domestic governance or in protecting the rights of Americans. In fact, there was a distinct, hardwired favoritism for foreign litigants, especially foreign diplomats. And the Supreme Court's original jurisdiction (including jury trials and an unlimited power of judicial review over the entire case or controversy) was an essential feature of this federal judicial system as originally planned.

What this all means for constitutional jurisprudence and federal judiciary reform today is a separate question. It is noteworthy that originalism as a mode of constitutional interpretation is ascendant both on the Supreme Court and in the academy. An accurate picture of the original constitutional plan accordingly seems more important than ever. Additionally, there are increasing calls for reforming the Supreme Court and the federal judicial system. A better understanding of the original constitutional plan can inform our sense of the art of the possible in terms of federal court reform and foster an appreciation for the complexity of the problem. But at the end of the day, my primary aim has been to draw a more accurate picture of the original constitutional plan, without an eye for modern implications. In that respect, I have been surprised and learned greatly from trying to reconstruct the past.