Constitutional Text and Institutional Development: Contesting the Madisonian Compromise in the First Congress

MATTHEW S. BROGDON

ABSTRACT

This article revisits the constitutional dimensions of the debate on inferior courts in the First Congress. The basic question in the debate revealed the contested character of the new constitutional order and probed the extent to which it constituted a displacement of the old confederation order. Advocates of extending the federal courts, led by James Madison and Fisher Ames, employed the text of Article III to insist on the constitutional necessity of inferior courts, while the opposition relied on textual support for legislative discretion in the matter of judicial structure. I contend that by preserving and thus biasing certain arguments and by allowing those arguments to be made in terms of an appeal to higher law, the text lent weight to the Federalist position and thus demonstrated its capacity to shape the direction of institutional development in important ways.

Passage of the Judiciary Act of 1789 stands alongside the framing of the Bill of Rights and the formation of the executive departments as one of the great accomplishments of the First Congress. The establishment of a federal judicial system replete with its own trial courts was not merely a transitory victory for the advocates of federal power. It was a formative development, and central to the incipient political order envisioned by Federalists, for it solidified the institutional capacity of the federal government to enforce its own laws without relying on the states as intermediaries. The power of direct enforcement constituted the essential improvement of the Constitution over the Articles of

Matthew S. Brogdon is assistant professor of political science, University of Texas at San Antonio, One UTSA Circle, San Antonio, TX 78249-0648 (Matthew.Brogdon@utsa.edu).

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Confederation and necessarily entailed "the substitution of national executive officers and national courts for those of the States in exactly the proportion that nationalism was achieved" (Thach 1923/2010, 66). This meant that for opponents of federal expansion, the most effective means of slowing the nationalizing tendency of the Constitution was to frustrate the growth of executive and judicial institutions. Understanding the centrality of judicial institutions to the expansion of federal power, Anti-Federalists and their allies in the First Congress made the formation of the federal judiciary a major battleground in the struggle to mitigate the effects of their defeat in the ratification debates (Frankfurter and Landis 1928; LaCroix 2012).

This article revisits the constitutional dimensions of the debate on inferior courts in the First Congress with the aim of deepening our understanding of American constitutional and political development. I address the role of Article III, through its implementation in the Judiciary Act of 1789, as a central component of the "durable shift in governing authority" presaged by the Constitution of 1787 (Orren and Skowronek 2004). The basic question in the congressional debate vividly revealed the contested character of the new constitutional order and probed the extent to which it constituted a "displacement" of the old confederation order, and thus resolved or perpetuated the "intercurrence" of old and new orders (Orren and Skowronek, forthcoming). Would federal supremacy take the form of reliance on state courts for administration of federal law with appellate supervision by the Supreme Court, or would it take the form of direct administration of federal law by federal trial courts? The former arrangement would preserve in the very structure of government a key element of the old confederation order in which the federal government would continue to rely on state institutions for the pursuit of federal ends. This essentially Anti-Federalist view thus understood Article III to layer new structures (expanded appellate oversight of state decisions by the Supreme Court) on top of a durable, preexisting order (reliance on state courts for the exercise of original jurisdiction). By contrast, the latter arrangement would complete the shift, begun by the creation of executive departments, to a compound federalism in which the federal government contained within itself all the means to pursue its nonetheless limited ends (Zuckert 1986). This Federalist view understood Article III, with its provision of extensive federal jurisdiction as part of the broader system of direct enforcement, to "dismantle" the preexisting order of the confederation and to reconstitute a new order on its ruins.[1]

1. This supports Alison LaCroix's observation that the conventional understanding of Article III that emerged from the law school casebooks of the mid-twentieth century was far from settled in the early republic (LaCroix 2012). Recognizing the contested nature of these

The distinctive contribution of this study is its treatment of the constitutional text as an important factor shaping the direction of institutional development in the First Congress. This constitutional focus follows a central advancement in historical-institutional scholarship that has demonstrated the relevance of the Constitution beyond the judicial process. Recent works have restored appreciation for the continuing influence of constitutional structures on the political process (Ceaser 1978, 1979; Tulis 1987; Nichols 1994; Graber 2006; Whittington 2007; Connelly 2010), of the efficacy of constitutional deliberation by the political branches (Bessette 1997; Whittington 1999; Tushnet 2000; Fisher 2007), and even of the pervasive significance of constitutional disharmonies on political development (Jacobsohn 2006; Dyer 2009, 2012).

The rich legislative debate that established the basic institutional forms of the judiciary serves as a case study for further exploring the interplay of the Constitution and American political development, illustrating how the constitutional text itself influences political deliberation and thus development. I theorize that it does so in at least two ways: (1) by preserving and thus biasing certain arguments and (2) by allowing these arguments to be made in terms of an appeal to higher law.

This is not to say that the judiciary act sprang fully formed from the Constitution. The judiciary is most certainly a "politically constructed" institution (Graber 1993; Gillman 2002; Crowe 2007; Whittington 2007). But that observation needs to be qualified by an acknowledgment that the political process through which the judiciary developed was centrally concerned with and shaped by competing understandings of the new constitutional order.[2] The role of constitutional argument in the formation of the judiciary act was in fact another iteration of the "inseparable link between political justification and political change" (Lim 2014). Its passage, while in many senses a "political compromise" (Marcus and Wexler 1992, 13), was also a centrally important instance of "constitutional construction" (Whittington 1999, 1–3).

The remainder of the article will proceed as follows. I begin with a brief account of the Madisonian Compromise embedded in the text of Article III, which delegates primary responsibility for constructing the federal judiciary to Congress. This forms the groundwork for the ensuing analysis of the content of the House debate on inferior courts in the First Congress. The analysis gives particular attention to the House debate partly because it has been

questions is essential to understanding the nature of the original constitutional order and, by implication, the continuity or divergence of later developments in relationship to it.

2. In this vein, it is important to note that this analysis is distinct from, and does not settle, the interpretive question of what Article III does in fact require; the question is not so much what the Constitution requires as how it influences deliberation.

understudied and partly because it furnishes a robust historical record. I then take up the implications of this debate for our understanding of American political and constitutional development, elaborating on the insights outlined above: first, that judicial structure was the focal point for dealing with the "intercurrence" of the old and new constitutional orders and for mapping out in practice the degree and type of displacement implicit in the new order; and second, that this episode calls for more attention to the ways in which the constitutional text shapes legislative debate and thus influences development. I conclude by suggesting a new direction in the study of the federal judiciary that synthesizes recent historical-institutional insights with a revival of interest among legal scholars in the early Federalist understanding of Article III.

CRAFTING THE MADISONIAN COMPROMISE

In order to understand fully the congressional debate on the Judiciary Act of 1789, we must first have some grasp of the predecessor to that debate in 1787. When controversy over the creation of inferior federal courts emerged in the first weeks of the Constitutional Convention and threatened to stall deliberations, James Madison proposed a compromise: leave the question of inferior courts to Congress (Farrand 1937, June 5, 1:125). The ostensible textual product of this Madisonian Compromise, as it is often called, is the familiar language in Article III vesting the "judicial Power of the United States in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish." This provision, in turn, points to a corresponding delegation of legislative power in Article I, Section 8: "Congress shall have Power . . . to institute tribunals inferior to the Supreme Court." These political empowerment provisions form the textual basis for the conventional (albeit contested) view that the Constitution necessitates only a Supreme Court and leaves Congress with plenary discretion as to whether there shall be inferior federal courts at all. Congress's presumptive alternative to instituting inferior courts was, and is, reliance on state trial courts for administration of federal law with an appeal to the Supreme Court to ensure federal supremacy.

The Madisonian Compromise thus represented a refusal, at least early in the convention, to settle a fundamental question about the nature of the new political order being established. To what extent would the new Constitution preserve the confederation's prevailing reliance on state institutions or establish independent national institutions? That is to say, the compromise embedded in Article III opened the possibility of an "intercurrence" of the old confederation order and the incipient federal order.

That some measure of displacement of the old order would occur was not in dispute. Indeed, with respect to the execution of federal laws, the question

of institutional independence from the states had been answered early and decisively in the convention in favor of a unitary federal executive with power to enforce the law directly on individuals. And in the First Congress, the assumption that the federal executive would enforce federal law and that the executive departments would be accountable to the federal government, rather than the states, was not a matter of serious dispute. The major controversy was instead whether the president or Congress would retain (or share) control over the administration, which received its well-known initial answer in the debate over the removal power and remains the central controversy in debates over the nature of separated powers in the American system (Thach 1923/2010; Alvis et al. 2013).

With respect to the adjudication of federal laws, however, the question of reliance on state versus national institutions seems to have remained contested throughout much of the convention's business. Though the analysis that follows raises serious doubts about the prevailing assumption that Congress's control of federal judicial structure is plenary, the resultant ambiguity of Article III on the necessity of inferior courts did at least open the nature of federal judicial power to a more fundamental and far-reaching debate than had been the case with the executive power. No doubt, some degree of displacement would occur with respect to the adjudication of federal law. It was, for example, admitted on all hands—and actively advocated by Anti-Federalists—that at minimum federal judicial power would include appellate oversight of the state courts. The new Constitution had certainly changed something about the nature of federal judicial power and done so in the direction of national power. The deliberations of the First Congress would determine just how extensive the change would be.

DEBATING THE JUDICIARY ACT

Before recounting the House debate on the Judiciary Act of 1789 in detail, it may be helpful to trace it in broad outline and to briefly explain the reasons for framing the debate as one between Federalist and Anti-Federalist understandings of the constitutional order.[3] I have suggested that the "intercurrence" of

3. The Anti-Federalist label itself has been criticized as an anachronism, even as applied to the ratification debates, for a number of reasons, not the least of which being that Anti-Federalists never accepted the nomenclature and chafed at its pejorative implications (Maier 2010). I nonetheless follow Herbert Storing's (1981b) convention in using the label, denominating the opponents of ratification and their progeny in the First Congress Anti-Federalists (not, significantly, Antifederalists or anti-Federalists). As Storing argued, the capitalized and hyphenated nomenclature suggests that, while Anti-Federalists did share a conception of republican government that in a number of respects contained positive content, it was by their

the old confederation order and the new federal one—as well as the potential displacement of the former by the latter—was vividly captured in the conflicting accounts of the text of Article III in the debate. To characterize the House debate in this way implies continuity from 1787 to 1789 in the line of cleavage over the extension of federal executive and judicial machinery. That line of cleavage emerged in the Federal Convention (if not the Continental Congress), carried over into the ratification debates, and persisted into the "housewarming chores" of the First Congress, where "the organization of the judiciary also occasioned debate along Federalist-Antifederalist lines. Just as Antifederalists had argued against concurrent powers of taxation, they argued against the establishment of inferior federal courts as threatening to the preservation of liberty and of the state governments" (Aldrich and Grant 1993, 303n27). Projecting the Federalist and Anti-Federalist labels backward into the convention and forward into the First Congress is an imprecise but intuitive way of capturing this continuity.[4] Nonetheless, to obviate the danger of oversimplifying the political dynamics of the First Congress, I have been careful to note the political affiliations of participants in the debate prior to, during, and subsequent to the First Congress.

The broad outlines of the debate in the House can be briefly stated. Anti-Federalists, still raw from their defeat in the ratification debates, seized on the Madisonian Compromise as an opportunity to preserve some measure of the confederal form they had sought—and failed to secure—with the New Jersey Plan in the convention (Farrand 1937, June 15, 1:242–45). They were joined in this effort by a number of Federalist converts who opposed the emerging policies of the Federalist administration. First in the Senate and later in the House, this Anti-Federalist bloc proposed to confine federal trial courts to admiralty jurisdiction or to simply eliminate them altogether. This proposal rested

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common opposition to the Federalist position that they were ultimately united. Given that sense, it seems reasonable to use the label as shorthand for opponents in the First Congress of the extension of federal institutions to displace state institutions, especially given the prevalence in the ratifying debates of the specific complaint that an extensive system of inferior federal courts—along with a comprehensive taxing power and standing army—would "supercede" the state judiciaries and lead to a complete "consolidation" of the nation under one government, as Centinel, Brutus, and the Federal Farmer, among others, warned (Storing 1981a, 2.7.12, 2.8.10, 2.9.58).

4. Such imprecision would be intolerable if this were a study of party development, since the individuals associated with the two positions shifted somewhat, though not dramatically, over time. But the central concern here is the persistence of competing understandings of the federal system, not the precise composition of the factions that coalesced around these understandings. Indeed, the fact that the line of cleavage persisted even as the composition of the contesting factions changed would seem to buttress this study's claim that the constitutional text and the ambiguities embedded in it function as a determinant of development by structuring political discourse in significant ways.

on the assumption that only the Supreme Court is constitutionally necessary and that Congress may constitutionally choose not to establish inferior federal courts. Textually, their argument relied on the political empowerment provisions of Article III, which point to Congress as the principal agent responsible for establishing the particular form of the judicial system. With respect to the shape of the inferior courts, it does this by vesting the judicial power of the United States in "such inferior Courts as the *Congress may* from time to time ordain and establish." There were six vocal proponents of reliance on state courts: Samuel Livermore of New Hampshire, James Jackson of Georgia, Michael Jenifer Stone of Maryland, and Aedanus Burke, Thomas Sumter, and Thomas Tudor Tucker of South Carolina. Burke, Sumter, and Tucker had been Anti-Federalists during ratification and would all in time become Jeffersonian Republicans. Livermore, Jackson, and Stone, however, had been Federalists during ratification, but they aligned themselves with the small Anti-Federalist minority to form an antiadministration voting bloc in the First Congress, most of whom would later join the ranks of the Republican opposition in the 1790s (Bowling 1968/1990; Aldrich and Grant 1993).[5]

Federalist advocates of an extensive judiciary opposed reliance on state courts on constitutional grounds. They resisted the effort to construe the political empowerment provisions of Article III as a grant of plenary discretion to Congress and instead attempted to recast or appropriate this seemingly open-ended language as an aspirational constitutional commitment to the Federalist vision of a commercial republic. Analogizing the Vesting Clause of Article III to its counterpart in Article II, they argued that the Constitution vested federal judicial power exclusively in federal judges and thus foreclosed the possibility of delegating the administration of federal law to state judges. They therefore concluded that Congress was under a constitutional obligation to create at least some inferior federal courts. Textually, they relied on what I term the *functional requirements* of Article III. Among other things, these requirements specify the persons and offices in which "the judicial Power . . . shall be vested" and the cases and controversies to which that power "shall extend." Nine delegates spoke in support of the necessity of inferior federal courts: James Madison of Virginia; Fisher Ames, Theodore Sedgwick, and Elbridge Gerry of Mas-

5. Livermore is an exceptional case. Like Stone and Jackson, he was a Federalist who aligned with the Anti-Federalists throughout the First Congress. But unlike them, he would later rejoin the Federalist ranks upon leaving the House for a Senate seat in 1793. One might speculate that his brief dalliance with the Anti-Federalist preference for reliance on state courts can be traced to his stint as chief justice of the New Hampshire Supreme Court of Judicature from 1782 until his election to Congress in 1789. He was, we might thus adduce, the first in a long line of state judicial officers (later epitomized by Spencer Roane) who persistently contested the extension of federal judicial authority.

sachusetts; William L. Smith of South Carolina; John Laurence and Egbert Benson of New York; Roger Sherman of Connecticut; and John Vining of Delaware. All except Gerry had been Federalists in the ratification debates, and all except he and Madison would remain Federalists in the 1790s. Table 1 summarizes the affiliation of participants in the debate.[6]

Given the subsequent party affiliations of the members engaged in the debate, one may well ask why I do not denominate the factions as Federalists and Republicans. After all, seven of the nine proponents of inferior federal courts would remain Federalists, and five of the six proponents of reliance on state courts would eventually become Jeffersonian Republicans, while only three of these six had been Anti-Federalists. But doing so would present a serious problem. Though they did expend considerable energy to prevent further expansion of the federal judiciary, Republicans never made the elimination of inferior courts a serious objective. Conceptually, then, the proposal to eliminate federal trial courts is more accurately denominated an Anti-Federalist measure that dissipated after 1789.

We can now turn to consider the debate in fuller detail. The judiciary bill passed the Senate on July 17 and was then sent to the House for its concurrence.[7] The judicial system outlined in the Senate bill was to consist of a Supreme Court composed of six justices empowered to hear appeals from state as well as federal courts and a system of federal trial courts composed of 13 district courts (one for each state) organized into three geographical circuits. The

6. The reader should note that I follow Bowling in classifying Madison as a member of the pro-administration faction in the first session, even though his break with the administration arguably began on the tail end of the session when the location of the capital became a contentious sectional issue. But his shift to the antiadministration faction and thence to the Democratic-Republican Party only solidified in the debate on Hamilton's first report on the public credit in 1790 (Bowling 1968/1990, 244–58). One might also note the parallel with William Maclay, who had strongly opposed Richard Henry Lee's similar motion in the Senate but otherwise remained part of the antiadministration faction and eventually became a Republican (Marcus and Perry 1985–2007, 4:409; Bowling 1968/1990, 120, 247).

7. I consciously pass over the Senate deliberations here. The existing literature has missed the constitutional dimensions of the House debate largely because of a myopic preoccupation with the Senate. The reasons are simple. The act originated in the Senate, first drafted by a committee in which Oliver Ellsworth seems to have had the initiative, and, following the superficial analogy with the Constitutional Convention, the bill's formation and passage through the Senate is the logical source of the original intent of its framers (Goebel 1971; Ritz 1990; Casto 1995). But the record of the Senate debate is remarkably sparse, consisting of outside correspondence and the introspective notes of a few senators, particularly Maclay. Entirely missing is a reliable record of the content of the floor debate. This too admits of an easily discernible reason. Neither chamber of Congress kept transcripts of debates at the time. What is now collected in the *Annals of Congress* is compiled from the records of the press. And since the Senate met in closed session, forbidding attendance by the public, the press was left to garner what news it could from the House of Representatives (Ritz 1990, 190).

Table 1. Participants in the House Debate on Inferior Courts

Representative	1788	First Congress, First Session	First Congress, Second and Third Sessions	1790s
	Vocal Proponents of Inferior Courts			
Madison (VA)	F	Pro-Admin	Anti-Admin	R
Ames (MA)	F	Pro-Admin	Pro-Admin	F
Smith (SC)	F	Pro-Admin	Pro-Admin	F
Sherman (CT)	F	Pro-Admin	Pro-Admin	F
Vining (DE)	F	Pro-Admin	Pro-Admin	F
Sedgwick (MA)	F	Pro-Admin	Pro-Admin	F
Laurence (NY)	F	Pro-Admin	Pro-Admin	F
Benson (NY)	F	Pro-Admin	Pro-Admin	F
Gerry (MA)	AF	Anti-Admin	Anti-Admin	R
	Vocal Proponents of Reliance on State Courts			
Livermore (NH)	F	Anti-Admin	Anti-Admin	F
Jackson (GA)	F	Anti-Admin	Anti-Admin	R
Stone (MD)	F	Anti-Admin	Anti-Admin	?
Burke (SC)	AF	Anti-Admin	Anti-Admin	R
Sumpter (SC)	AF	Anti-Admin	Anti-Admin	R
Tucker (SC)	AF	Anti-Admin	Anti-Admin	R

Sources.—Bowling (1968/1990); Aldrich and Grant (1993).
Note.—AF = Anti-Federalist; F = Federalist; R = Republican.

district courts would be responsible for admiralty jurisdiction (including prize cases arising from captures on the high seas) and minor criminal and revenue cases. The circuit courts were to have original jurisdiction of major federal crimes, among other things, and a limited appellate jurisdiction over the district courts. Circuit courts were to convene twice a year in each state and would be composed of the district judge from that state and two Supreme Court justices "riding circuit" (Bickford and Bowling 1972–2012, 5:1195–1212).

The jurisdiction of the inferior courts was by far the most controversial portion of the system. Soon after the judiciary bill found its way to the House in August of 1789, Samuel Livermore of New Hampshire introduced a motion to confine inferior federal courts to admiralty and maritime jurisdiction and thus rely on state courts for the administration of federal law with an appeal to the Supreme Court in cases of error. Livermore's motion was modeled on a measure that had been proposed by Richard Henry Lee of Virginia and rejected in the Senate. Lee's proposal had required "that no subordinate federal jurisdiction be established in any State, other than for Admiralty and Maritime causes but that federal interference shall be limited to Appeal only from the State Courts to the supreme federal Court of the U[nited] States"

(Marcus and Perry 1985–2007, 4:44).[8] Though nothing like a complete record of the ensuing floor debate in the Senate exists, William Maclay's journal entry on June 22 suggests that it aroused constitutional objections there as well: "The Effect of the Motion was to exclude the Federal Jurisdiction, from each of the States, except in admiralty and maritime Cases. But the Constitution expressly extended it to all cases in law and equity under the Constitution[,] Laws[, and] Treaties [of the United States.] We already had existing Treaties and were about making many laws. These must be executed by the federal Judiciary. The Arguments which had been used would apply well, if amendments to the Constitution were under Consideration[,] but clearly were inapplicable here" (Marcus and Perry 1985–2007, 4:409; see also 416).

Defenders of Livermore's motion to eliminate federal trial courts and rely on state courts, the most vocal of which were James Jackson of Georgia and Michael Jenifer Stone of Maryland, employed three arguments. First, the permissive "may" in the Article III Vesting Clause gives Congress plenary discretion in structuring the federal judiciary.[9] This was the conceptual heart of the argument and subordinated the functional requirements of Article III to its political empowerment provisions. Second, the Article VI Supremacy Clause vests jurisdiction over federal questions in the state courts when it declares them to be "bound" by the Constitution, laws, and treaties of the United States.[10] Third, the appellate oversight of the Supreme Court is sufficient to ensure the faithful administration of federal law in the state courts (1 Annals of Cong. 819, 829–33, 845–46, 852–54 [1834]).[11]

In response, James Madison and Fisher Ames, among others, argued that the Constitution required the establishment of a system of federal trial courts and that state courts were incapable of exercising jurisdiction in cases arising under federal law. Their arguments confronted head-on the contention that Congress's discretion in the organization of the federal judiciary is plenary. Against the Livermore faction's assertion of political empowerment as the es-

8. Lee's motion was made at the behest of the Virginia state ratifying convention, which had included a drastically revised version of Article III among its proposed amendments to the Constitution (Elliot 1836, 3:660–61).

9. The Vesting Clause of Article III reads as follows: "The judicial Power of the United States, shall be vested in one supreme Court, and in *such inferior Courts as the Congress may from time to time ordain and establish.*"

10. The relevant section of Article VI reads as follows: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

11. In substance, this reliance on the Supremacy Clause and appellate review in the Supreme Court was a resurrection of the New Jersey Plan (Farrand 1937, 1:242–45).

sential attribute of Article III, Ames and Madison identified two distinct functional requirements that, when combined, rendered inferior courts constitutionally necessary.[12] First, the *institutional integrity* of the judicial power required that "the judicial Power of the United States" be vested exclusively in the Supreme Court and inferior courts "ordained and established" by Congress, the judges of which must enjoy tenure during good behavior, have irreducible salaries, and be appointed by the president and confirmed by the Senate. No other office, state or federal, they argued, could be invested with the judicial power of the United States. Second, the *jurisdictional integrity* of the judicial power required that the power thus invested "extend" to certain classes of cases and controversies. In some of these cases, particularly those arising out of federal law, the state courts were possessed of no preexisting jurisdiction, and federal jurisdiction over them was thus exclusive. Their insistence on the constitutional necessity of inferior courts resulted from the combination of the two requirements. The judicial power is exclusively vested in federal courts and must extend to certain cases; state judges were constitutionally incapable of hearing some of those cases; thus, an adequate number of federal trial courts must exist to hear them.

Ames and Madison's argument rested on their account of the interrelation of the constitutional provisions. In particular, a response to the Anti-Federalist account advanced by proponents of Livermore's motion required an elaboration of the analogy between the Vesting Clauses of Articles I, II, and III and the compatibility of the exclusivity of the Article III Vesting Clause with the binding of state judges in the Article VI Supremacy Clause.

Ames began his attack on Livermore's motion by drawing the analogy with the Vesting Clauses to demonstrate the impropriety of delegating federal functions to state officers: "We live in a time of innovation; but . . . he should think it a wonderful felicity of invention to propose the expedient of hiring out our judicial power, and employing courts not amenable to our laws, instead of instituting them ourselves as the constitution requires. We might with as great propriety negotiate and assign over our legislative as our judicial power; and it would not be more strange to get the laws made for this body, than after their passage to get them interpreted and executed by those whom we do not appoint, and cannot control" (1 Annals of Cong. 837–38 [1834]).

12. The text also contains a third functional requirement, the *hierarchical integrity* of the judicial power, evident in Article III's careful specification that there shall be "one supreme Court" and in Article I's similar authorization of Congress to "institute tribunals inferior to the supreme Court" (Claus 2007; Pfander 2009; Glashausser 2010, 2012). While not directly relevant here, it arguably furnishes another compelling instance of the text anticipating and perhaps shaping the eventual institutional form of the judicial system.

Madison later elaborated on this point, arguing that the judicial authority ought to be coextensive with the legislative and executive powers of the government, for the new government was to be complete within itself and adequate to the execution of its own powers. The import of this comes into focus when the Constitution is contrasted with the Articles of Confederation: "Under the late confederation, it could scarcely be said, that there was any real Legislative power, there was no Executive branch, and the Judicial was so confined as to be of little consequence; in the new constitution a regular system is provided; the Legislative power is made effective for its objects; the Executive is coextensive with the Legislative, and it is equally proper that this should be the case with the Judiciary" (1 Annals of Cong. 843 [1834]). The fundamental institutional change between the confederation and the Constitution was the power of the federal government to enforce its own laws, and to do so by means of its own officers. For Madison (as well as other Federalists at the time) the Constitution created a presumption against reliance on the states as intermediary institutions between the federal government and the people. So, just as Ames had objected to the delegation of judicial authority by drawing an analogy to legislative power, Madison here adds weight to the argument by connecting the judicial with the executive function. One could hardly argue, he avers, that the Constitution permits Congress to charge state executives with the execution of federal law. The investiture of federal jurisdiction in state judges was, according to this reasoning, equally untenable.

Continuing his reliance on the Vesting Clause, Madison drew out at greater length its implications for judicial appointments. Were state judges vested with federal jurisdiction, they would necessarily become federal judges and be entitled to the protections of tenure during good behavior and an irreducible salary. Madison evidently understood the Vesting Clause to mean that Congress could only vest the "judicial power of the United States" in a federal judge, and that these necessarily enjoy the tenure and salary protections of Article III. Since many states fell short of these standards in the constitution of their judiciaries, their judges would be disqualified from wielding the federal judicial power (1 Annals of Cong. 844 [1834]).

The president's appointment power presented an even greater impediment to investiture of state judges. Under Article II, the president, "by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law"; thus, to vest a state officer with federal power would "violate the constitution by usurping a prerogative of the [president]" (1 Annals of Cong. 844 [1834]). To do so, Congress would have to transfer the appointment of state judges so vested out of the hands of the state and into the hands of the president.

Finally, "laying these difficulties aside," Madison noted that, even if Congress possessed the discretion to decline to create inferior courts, the deficient qualities of the state judiciaries stood as a constitutional bar to their exercise of the federal judicial function. "On the whole," Madison concluded, "he did not see how it could be made compatible with the constitution, or safe to the Federal interests, to make a transfer of the Federal jurisdiction to the State courts" (1 Annals of Cong. 844 [1834]).

Defenders of Livermore's motion made a quite simple response to all this, and it was the most compelling textual argument at their disposal. If the Constitution forbade the exercise of federal jurisdiction by state judges, how could one explain the fact that Article VI declared "the Judges in every State to be bound" by the Constitution, laws, and treaties of the United States, "anything in the Constitution or Laws of any State to the contrary notwithstanding"? Was this not a constitutional investiture of jurisdiction in state judges and a reliance on them to ensure conformity with federal law?

Ames's answer to this question was his most important contribution to the debate. The key, he argued, was the distinction between a source of jurisdiction and a rule of decision. Responding to the claim that, by declaring state judges "bound" by federal law, the Article VI Supremacy Clause vested jurisdiction over federal questions in state courts, Ames pointed out that a judge may be bound by a law as a rule of decision without the law functioning as the source of the court's jurisdiction. "The law of the United States is a rule to [state judges], but no authority for them. It control[s] their decisions, but could not enlarge their powers" (1 Annals of Cong. 839 [1834]).[13] In other words, state judges must consult federal law as an authority in any case within their jurisdiction, but their jurisdiction must arise from state law. So, for example, a case may arise under a state bankruptcy law in which an aggrieved creditor complains that the law violates the Contracts Clause of Section 9 of Article I. The state court may hear the case only because it arises under state law, but once having jurisdiction, it must give effect to all applicable laws, including those of the United States. Here the Contracts Clause functions as a rule of decision

13. Ames had begun considering the complex relationship between federal law and state courts long before the judiciary bill came before the House. On April 8, the day after the Senate committee was appointed to draw up a bill, Ames wrote the following passage in a letter to John Lowell: "May we refer to the state Courts, the suing for the penalties and forfeitures? All judges are bound by our laws [under Article VI.] But will our act give them jurisdiction? . . . If they have it, will it be as state judges, or will they, *eo instante*, become federal Judges, and be entitled, by the Constitution, to permanent seats and salaries?" (Marcus and Perry 1985–2007, 4:373). Ames again wrote to Lowell in July: "But questions arising under the Laws of the Union are purely federal. I have doubts whet[her] they may be transfer'd to the state courts[.] Excuse me the levity of calling it, endorsing authority over to them" (Marcus and Perry 1985–2007, 4:457).

in the case but is not the source of the state court's jurisdiction. This is manifestly the reason that the Constitution uses the phrase "arising under" so as to avoid a situation in which any case to which a federal law might apply as a rule of decision is of necessity thrown into federal court. It is only where the case arises upon a question of federal law that the jurisdiction over it is exclusively federal. In such a case, the state court would find itself with no jurisdictional handle by which to take hold of the case. Only a federal court could exercise jurisdiction in a case arising entirely out of federal law. "Causes of exclusive federal cognizance cannot be tried otherwise, nor can the judicial power of the United States be otherwise exercised" (1 Annals of Cong. 839 [1834]).

Some participants in the legislative debate had suggested that state judges were disqualified from exercising federal jurisdiction because of their limited terms of office and unprotected salaries, implying that these defects were the only impediment to conferring federal jurisdiction on them. But Ames emphasized that this exclusion of the state judges was not merely on account of some deficiency in their form. "In some of the States, he knew the judges were highly worthy of trust; that they were safeguards to Government, and ornaments to human nature. But whence should they get the power of trying the supposed action? The States under whom they act, and to whom they are amenable, never had such power to give, and this Government never gave them any" (1 Annals of Cong. 839 [1834]).

But may not Congress give it to them? Is that not what Livermore was proposing? Sounding a note that had been more fully explored by Madison, Ames points out that Congress could not remedy this defect in state power by vesting jurisdiction in state judges, for they would then become federal judges entitled to all of the privileges of Article III. "Individuals may be commanded [by federal law], but are we authorized to require the servants of the States to serve us?" (1 Annals of Cong. 839 [1834]). Ames pointed out the ironically nationalizing tendency of such a system in a subsequent letter to John Lowell: "For if the servants of the states are of course, or can be made by law, the servants of the U.S. it will produce a strange confusion of offices & ideas_ We may as properly assume the services & claim the duties of the state treasurer to keep & pay out our money_ or the sheriff to keep our rogues, & declare their bonds valid to secure their doing it_ If Judicial officers are not bound to execute our laws, as our servants, we cannot trust them_ and if they are, why are ministerial officers less our servants?" (Marcus and Perry 1985–2007, 4: 506).

Ames was attempting to show the immense consequence of delegating federal power—executive or judicial—to state officers. He insisted, however, that such a policy was not merely deficient on account of its consequences, but was

a constitutional impropriety. "It was not only true, he said, that [the state courts] could not decide [a federal] cause, if a provision was neglected to be made, by creating proper tribunals for the decision, but they would not be authorized to do it, even if an act was passed declaring that they should be vested with power; for they must be individually commissioned and salaried to have it constitutionally, and then they would not have it as the State judges" (1 Annals of Cong. 839 [1834]). The president might appoint a state judge to a federal court, but the judge would then become a federal office holder, receiving his salary from the federal treasury and entitled to tenure during good behavior. "His wish was to establish this conclusion, that offences against statutes of the United States, and actions, the cognizance whereof is created *de novo*, are exclusively of federal jurisdiction; that no persons should act as judges to try them, except such as may be commissioned agreeably to the constitution; that for the trial of such offences and causes, tribunals must be created. These, with the admiralty jurisdiction, which it is agreed must be provided for, constitute the principal powers of the district courts" (1 Annals of Cong. 839 [1834]).

Defenders of Livermore's motion attempted to undercut Ames's argument by showing that his insistence on exclusive federal jurisdiction was in tension with the act under consideration, which provided for concurrent jurisdiction with state courts in diversity cases. Under his rationale, Stone argued, "Congress must institute courts for taking exclusive cognizance of all cases pointed out in the constitution; but this would be contrary to the principle of the bill, which proposes to establish the inferior courts with concurrent jurisdiction with the State courts" (1 Annals of Cong. 841 [1834]). Jackson followed up with a similar objection (1 Annals of Cong. 845 [1834]). But Ames had in fact insisted that his argument did not lead to the conclusion that all cases falling within the confines of federal jurisdiction must necessarily be exclusive, for he had admitted a range of cases in which the state and federal courts might exercise concurrent jurisdiction. "The State courts were not supposed to be deprived by the constitution of the jurisdiction that they exercised before, over many causes that may be tried now in the national courts. The suitors [in cases of diverse citizenship] would have their choice of courts." Stone and Jackson's objection failed to grasp Ames's distinction between preexisting sources of state jurisdiction and de novo sources of jurisdiction growing out of the creation and operation of the federal government. To leave the states with concurrent jurisdiction in the former cases does not contradict the existence of exclusive federal jurisdiction in pure federal cases, for "who shall try a crime against a law of the United States, or a new created action? Here jurisdiction is made *de novo*. A trust is to be exercised, and this can be done only by persons appointed as judges in the manner before mentioned" (1 Annals of Cong. 838 [1834]). Ames later complained to John Lowell and George Richards Minot

that he had been misunderstood in the House and expressed his concern that he would be likewise misunderstood by readers of John Fenno's *Gazette of the United States*. "I calculate upon it's being termed heresy by some who will understand it, & worse names by many who cannot or will not take the pains so to understand it" (Marcus and Perry 1985–2007, 4:506–7). The opposition in the House seems to have fallen into the latter category.

Why Ames's colleagues found the notion of a rule of decision as distinct from a source of jurisdiction so hard to grasp is puzzling, for section 34 of the Judiciary Act of 1789 declared that the laws of the states "shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply" (Marcus and Perry 1985–2007, 4:105). No one argued that this would permit a federal court to assume jurisdiction over any case arising under state law. It merely meant, as Congress clearly understood, that if a state law applied to a case properly before a federal court and the law did not conflict with federal law, it was to be applied to the case.

Though not the primary focus of this analysis, it is important to note that (as had been the case in the debate on the removal power) Hamilton's treatment of the subject of concurrent state and federal jurisdiction in *The Federalist* was somewhat more modest than that of Madison and Ames. In *Federalist* 82, working from the premise that "the states will retain all *pre-existing* authorities, which may not be exclusively delegated to the federal head," Hamilton declines to read the Vesting Clause of Article III as an exclusive delegation. A reading of Article III that "admits the concurrent jurisdiction of the state tribunals" is therefore the "most natural and the most defensible construction." Thus far, Hamilton would seem to support reliance on state courts. However, he immediately qualifies the statement in a way that may point to the necessity of inferior federal courts. "But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to the constitution to be established" (Hamilton et al. 1961, 553–54; italics in original). This suggests that federal jurisdiction is in some instances the exclusive domain of federal courts, not because the Constitution has positively divested them of it, but because they never possessed it, an argument familiar from Ames's speeches.

In short, Hamilton suggests that some federal questions are the exclusive domain of federal courts while others may be the object of concurrent state jurisdiction. Though his discussion of the distinction is not exhaustive, he does provide some guidelines for distinguishing between the two categories. Again Hamilton begins with a fairly broad assertion and then narrows it significantly: "In every case in which they were not expressly excluded by the future acts of the national legislature, [the state courts] will of course take cognizance

of the causes to which those acts may give birth." This default preexisting jurisdiction derives from the conventions of international comity. "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction though the causes of dispute are relative to the laws of the most distant parts of the globe" (Hamilton et al. 1961, 555). Note the important confinement of this principle of comity to civil cases. In Hamilton's view, then, the jurisdiction of state courts would be presumptively concurrent in civil lawsuits arising out of federal law, but not, by implication, in criminal prosecutions and perhaps in admiralty cases. While Hamilton's argument in *The Federalist* is perhaps more attenuated than that of Madison and Ames in the First Congress, it still rests on an understanding of the federal system that makes reliance on state courts constitutionally improper in some cases and thus necessitates the creation of a robust system of federal trial courts.

On August 31, Livermore's motion to confine inferior courts to admiralty jurisdiction and rely on state courts in all other cases was defeated in committee of the whole by a wide margin, gaining only 11 out of 42 votes cast, meaning that the motion gained support from only five members in addition to the six who had spoken in open support during the debate. The bill ultimately passed the whole House intact and arguably in compliance with the principles enunciated by Ames and Madison. The district courts were given exclusive jurisdiction in all admiralty cases, over all seizures made and suits or penalties incurred under the laws of the United States, and over all misdemeanors cognizable under federal law. The circuit courts were given exclusive jurisdiction over all other federal crimes. Additionally, federal courts were given exclusive jurisdiction over cases brought against ambassadors, consuls, and other public ministers, while jurisdiction over suits brought by these officials was concurrent with state courts. But such lawsuits were not, strictly speaking, federal questions since they likely arose under state rather than federal law. Other cases falling within the party-based jurisdictional categories were largely concurrent with state courts, but this is of little import for the present since Madison and Ames's Federalist construction of Article III never suggested that such cases had to be exclusive. In sum, though there was no general grant of federal questions jurisdiction (Currie 1997), the piecemeal grants enumerated in sections 9, 11, and 13 of the act left few gaps, at least as things stood in 1789 (Marcus and Perry 1985–2007, 4:53–54, 59–60, 69).

Section 9, however, recognized concurrent jurisdiction of the states in cases "where an Alien sues for a tort only in violation of the law of Nations or a Treaty of the United States" (Marcus and Perry 1985–2007, 4:54). But this is perhaps the exception that proves the rule, as it furnishes the only explicit instance I can find of the act granting concurrent jurisdiction to state courts

over a case arising under federal law, as distinguished from a case arising under state law to which a federal law might apply as a rule of decision. As for the Federalists' failure to raise objections to this minor inconsistency, one surmises that it may have been imprudent to quibble over a small deviation from principle when victory in the far more consequential battle over the existence of inferior courts was in reach. However, it may also be the case that the apparent inconsistency is explained by Hamilton's distinction, discussed above, between civil and criminal suits, the former being enforceable in the courts of any nation having jurisdiction over the parties and the latter being enforceable only in courts instituted by the authority that enacted them.

On these grounds, at least, the Federalists carried the day on the central points of judicial federalism in the First Congress. Anti-Federalists and their Jeffersonian successors subsequently abandoned the project of eliminating inferior courts, instead focusing their efforts on obstructing further expansion of the federal judiciary. By establishing a system of inferior federal trial courts with exclusive jurisdiction of federal crimes and regulations and thus overcoming Anti-Federalist efforts to rely on state judiciaries for the administration of federal law, the Judiciary Act of 1789 was a substantial victory for judicial independence in particular and for the Federalist vision of a self-sufficient national government more generally. For this reason, the construction of a judicial system stands alongside the framing of the Bill of Rights and the formation of executive departments as the most important legislative business of the First Congress under the new Constitution. Its importance can hardly be overstated.

As is the case with other major constitutional questions, such as the executive removal power, the determinations of the First Congress on the meaning of Article III have carried tremendous precedential weight. It has even been called a second constitutional convention (Casto 1985). While there is ample reason to doubt that the First Congress was engaged in an unqualified endeavor to construe Article III, the House debate on the creation of inferior courts was at least a relatively clear case of self-conscious constitutional construction (Marcus and Wexler 1992). Accordingly, a latent assumption persists in the law journals that any construction of Article III that cannot be squared with the Judiciary Act of 1789 is ipso facto inconsistent with the original meaning of the Constitution (Meltzer 1990, 1570). Insofar as the judiciary act has precedential value, it has been taken to stand for the proposition that Congress's control of the structure and jurisdiction of federal courts is all but plenary—especially its complete discretion in the creation of inferior federal courts (Currie 1997, 49–50). Ironically, however, those who defended the judiciary act and won its passage in the House considered it to stand for a different proposition—that Congress was constitutionally obligated to create a system of inferior courts coextensive with federal law.

PRESERVING ASPIRATIONS

We are now in a position to apply the theory of constitutional influence outlined at the start. I posited that the text potentially influences debate in two ways: (1) by privileging and thus preserving certain arguments and (2) by allowing those arguments to be framed as appeals to higher law. Both types of influence are apparent in the debate.

On the face of the debate, there is some evidence that the constitutional appeal to higher law had some impact on the outcome. Though their construction of Article III clearly fell short of representing the consensus view of the members, Ames and Madison made a sufficiently compelling case to convince some of their potential opponents. Some Anti-Federalist skeptics bemoaned their inability to escape the onerous demands of the Constitution. When Madison had concluded his final speech on August 29, Aedanus Burke of South Carolina rose and declared that

> he had turned himself about to find some way to extricate himself from this measure; but which ever way he turned, the constitution still stared him in the face, and he confessed he saw no way to avoid the evil. He made this candid confession, to let them know why he should be a silent spectator of the progress of the bill; and he had not the most distant hope that the opposition would succeed. If any substitute could be devised that was not contrary to the constitution, it should have his support, but he absolutely despaired of finding any. (1 Annals of Cong. 844 [1834])

Again giving voice to his frustration, 2 days later Burke wound up voting in favor of Livermore's motion with an eye to "throw[ing] out the whole bill," but without denouncing his earlier doubts about the constitutionality of omitting federal trial courts (1 Annals of Cong. 865–66 [1834]). Similarly, Elbridge Gerry professed his own reservations about the inconveniences of federal trial courts but admitted the necessity of creating them and directed the opposition to the source of the evil: "Do they believe that these disadvantages can be remedied by Congress? I think they cannot; they result from the constitution itself, and therefore must be borne until the constitution is altered" (1 Annals of Cong. 859 [1834]).

There is, however, reason to question the degree to which these statements represent support for Madison and Ames's constitutional argument. Gerry's remarks especially point to the complex conundrum in which Anti-Federalists found themselves and to the importance of placing the debate on inferior courts in a broader context. During the ratification debates, Anti-Federalists had urged the necessity of structural amendments to the proposed constitution in part on the grounds that the Constitution as written aimed at eventual consolidation

of the states, specifically through the exercise of the taxing power and the displacement of the state judiciaries. Though they would eventually "appropriate" the more modest account of the effects of the Constitution articulated by Publius (Tulis and Mellow 2014), Anti-Federalists in the first session of the First Congress were still somewhat constrained to affirm their commitment to a broad reading of federal power. Indeed, the debate on inferior courts immediately followed the debate on Madison's proposed constitutional amendments, and, as Bowling (1988) has observed, Anti-Federalists had argued vigorously that "structural" amendments altering the form of the government were essential to rendering it safe for the states; Madison's largely "procedural" protections were, in their estimation, a mere "tub for the whale" to appease the Anti-Federalist masses while leaving the true defects of the Constitution unmitigated. This may also help explain why the most vocal proponents of Livermore's motion (including Livermore himself, Jackson, and Stone) were antiadministration Federalists who had not previously committed themselves to the broadest possible interpretation of federal power as their Anti-Federalist allies had done.[14]

Thus, while there is some ground for the contention that Madison and Ames's constitutional argument persuaded some members who might not otherwise have supported extension of federal judicial power, this evidence cannot be relied on as conclusive. Even setting aside the contextual considerations outlined above, it ultimately makes for a weak argument given the relatively few members who engaged actively in the debate and the partisan imbalance in favor of the pro-administration Federalists.[15] A simple counterfactual calls it into question. What if Livermore's motion enjoyed enough support that a few votes might be the difference between winning and losing? Would partisans have been as willing to throw up their hands and admit that the Constitution was against them if there was a reasonable prospect of winning? For that matter, would the rate of abstention have been so high, given that only 42 members voted on Livermore's motion, while contemporaneous votes showed consistent participation of at least 48 members (Aldrich and Grant 1993, 323–24)? There is a difference between overwhelming one's opponents and persuading them, though the difference may sometimes be hazy. Moreover,

14. As suggested in the introduction, it is important also to note that the Federalist victory in the debate on the removal power that had preceded the debate on inferior courts figured heavily here as well. Any member who had accepted their exclusive interpretation of the Article II Vesting Clause was hard-pressed to assent to the same construction as applied to Article III. Indeed, it is notable that at least one modern defense of a "mandatory" construction of Article III likewise rests its case on an intratextual analogy with Article II (Calabresi and Lawson 2007).

15. At this point, there were 35 pro-administration Federalists, 12 antiadministration Federalists, and 12 Anti-Federalists (Bowling 1968/1990; Aldrich and Grant 1993) if one classifies Madison as pro-administration for purposes of the first session.

there is sparse evidence that even proponents of extensive inferior federal courts were unified in their view of congressional discretion in the matter. Only nine members spoke in opposition to Livermore's motion, and while most of those raised constitutional objections to reliance on state courts, we know nothing of the views of the other 22 members who evidently voted to defeat the motion. These other members may well have supported the extension of federal courts on the ground of expediency and not constitutional necessity. Nonetheless, they were content to let Madison and Ames take the lead and shape the argument on constitutional grounds, which at least suggests acquiescence in, if not endorsement of, their constitutional views.

There is, in any case, a much stronger argument to be made for the importance of the text without resort to counting votes. The text itself privileged certain arguments, loading the dice in favor of the Federalist position by depriving opponents of the bill of any affirmative constitutional support for limiting its reach. The best possible construction of Article III from the Anti-Federalist perspective still left Congress with full discretion to extend federal judicial power. They argued that Congress may decline to create inferior courts, not that Congress may not create them. A limiting principle derived from the Constitution was conspicuously absent from the debate. Thus, even a victory on the constitutional question did not necessarily secure an Anti-Federalist victory on the institutional question. Consider once more the analogy with the removal power debate. The declining influence of the executive power theory that undergirded the Federalist victory in the First Congress and the rise of the congressional delegation theory that initially lost have not arrested the extension of federal administrative power (Alvis et al. 2013). Indeed, they have only emboldened Congress to extend it further. Similarly, acquiescing in a plenary view of Congress's discretion with respect to judicial structure would not (indeed, did not) limit the scope of federal judicial power. Winning on the constitutional question would do nothing to further the substantive aims of Anti-Federalist opponents of the bill. It would simply lead them back to the ground of expediency on which they might still lose and leave them in precisely the same situation they would face in absence of the Vesting Clause of Article III. This is perhaps why the Virginia ratifying convention, among others, had sought to eliminate inferior federal courts via constitutional amendment.

For Federalist advocates of extensive inferior courts, however, the Constitution made for a more advantageous strategic position. Winning on the constitutional question translated immediately into, at minimum, a partial victory on the substantive outcome. Consequently, a strong argument may be made that the constitutional text can (and did) prejudice the direction of political development by privileging the argument for displacement of the old confederation order in favor of the new federal order. To accomplish this, the text does not

have to be determinate; it can in fact contain a great many ambiguities. But it can nonetheless limit the range of plausible outcomes and thus prejudice the capacity of partisans to marshal the support of constitutional principle. And it makes a material difference whether one's favored construction produces a constitutional mandate (Federalist insistence on the necessity of inferior courts) or constitutional permission (Anti-Federalist insistence on plenary congressional discretion).

The impact of the text indicated by this case study is not unique and in fact, on reflection, should be familiar. The very existence of the Tenth Amendment is a testament to the rationale at work here. Even if we accept the conventional view that the amendment is a truism, it may still serve the purpose of preserving the basic concept of delegated, and thus limited, federal powers—even against plausible accounts of the Constitution that militate toward illimitable federal power. And one must remember that the most powerful antidote to otherwise plausible state compact theory accounts of the Union—and the attendant doctrines of state sovereignty and federal agency—has been the rhetorical flourish of the preamble: "We the People of the United States . . . do ordain and establish this Constitution" (Remini 1984; Brogdon 2011). The fact that this understanding of the Union lost out in the political arena for a time (Whittington 1999) only helps to reaffirm the importance of the text, which preserved and biased certain arguments in favor of popular sovereignty (Brogdon 2011).

Coming back to the matter of Article III and the development of the federal judiciary, broadening the historical scope of the analysis may provide more support for the argument that the text can preserve and thus bias certain arguments—in particular the functional requirements militating in the direction of a more extensive federal judiciary. The repeal of the Judiciary Act of 1801 would seem to have been a repudiation of the Federalist understanding of Article III insofar as it rested on an interpretive approach that subordinated the functional requirements of the text to its political empowerment provisions. Indeed, in this circumstance, the key phrases resulting from the Madisonian Compromise—"such inferior Courts as Congress may from time to time ordain and establish"—might be said to have counterbalanced and nullified the functional requirements Federalists had managed to imbed in the text. And such is the conventional understanding of Article III. But the Federalist construction was nonetheless preserved in part because it was inseparable from the text. Indeed, the persuasiveness of the argument advanced by Madison and Ames suggests that the text of Article III may have been less of a compromise than is conventionally assumed. To a significant degree, the later inclusion of the mandatory language that pervades the Vesting Clause and jurisdictional menu may have nullified the convention's earlier concession to those jealous of state

power and thus pointed to the necessity of an extensive federal judiciary.[16] There is, one must admit, considerable force, as well as irony, in finding Madison himself opposing the core of the Madisonian Compromise.

It is important to note as well that the debate on inferior courts presents a challenge to conventional conceptions of the relationship between the Constitution and the development of the American state by suggesting that constitutional text may shape development in an unexpected direction. Conventionally, constitutional forms are described as obstacles to the extension of power and discretion. Thus, displacement of older forms and the growth of the state are "tied to the contingent removal of [such] constraints . . . on federal action" (Orren and Skowronek, forthcoming). But this study presents a quite different role for constitutional "constraints." Madison and Ames's defense of the inferior courts on the ground of constitutional necessity presents a counterexample wherein formalism, or insistence on adherence to constitutional structures, functions as a means of extending governmental power. It was in fact opponents of federal expansion who argued for plenary legislative discretion in the matter of judicial structure. The Federalist constitutionalism on display in the First Congress employed constitutional forms in furtherance of federal power. Constitutional forms can constrain institutions to act or at the very least encourage them to do so, as Publius's deployment of the concept of energetic government in *Federalist* 37 and 70 had suggested.

Existing American political development scholarship fails to see the positive role of constitutional forms in state development in part because it has too narrow a view of constitutionalism itself. The remedy is to be found in recent studies that identify the dual function of a constitution as both a conservative endeavor to preserve certain orders over time and an aspirational endeavor to shape future outcomes. "A constitution is an effort to preserve a particular kind of polity through time, but it is also an effort to become that polity through time" (Thomas 2011, 287). Constitution makers seek both to create an enduring political order and "to alter future states of affairs" (Tulis 1991b, 712) by shaping substantive outcomes and constraining the process through which future constitutional change will occur (Ceaser 1978, 1979; Tulis 1991a). This imparts an aspirational, and not merely preservative, function to constitution making (Jacobsohn 2004, 2006). Constitutions cannot be reduced to a pres-

16. Madison and Wilson proposed the compromise language to the convention on June 5 in committee of the whole (Farrand 1937, 1:125). The Vesting Clause and the mandatory language of the jurisdictional menu were added by the committee of detail, which commenced its work 7 weeks later on July 26 and reported its draft to the convention on August 6 (Farrand 1937, 2:128–89).

ervation of the status quo. The framers of constitutions may aim for much more. They may, for example, frame constitutional provisions to accommodate (or even encourage) incipient cultural shifts or anticipated territorial expansion. This was the essence of the Federalist argument in the First Congress. The functional requirements of the text, they contended, constrained Congress to exercise what discretion it possessed in the formation of the judiciary to further rather than confine federal power. Thus, the claim that Article III's reliance on political empowerment for institutional effectuation "served to undermine the *branch* independence and institutional autonomy of the judiciary from the outset" (Crowe 2012, 28) may be open to question.

Article III is a microcosm of this complex conservative/aspirational dynamic in constitution making. The functional requirements of Article III, at least as interpreted by Federalists in the First Congress, aspire to an institutionally independent and federally supreme national government. But given the country's trajectory as a commercial republic of unknown extent, those functional requirements call for shifting institutional forms over time. Thus, the Federalist "appropriation" (Tulis and Mellow 2014) of the Madisonian Compromise holds that the political empowerment provisions are aspirational, not limiting. And it is the functional requirements of the text that make this appropriation possible.

Arguably, it remains so. The functional requirements have preserved certain orders and thus make possible revisionist efforts to fit modern developments into the constitutional framework. Otherwise, the only available apologia for modern judicial structures would be prudential and extraconstitutional. It is of great significance that defenders of the modern judiciary have textual support and can thus make an appeal to higher law. One may therefore argue that the success of the Federalist vision in framing the text should not be measured by the standard of whether it was decisive in winning a mandate for a national judiciary. It may have contributed, but its contribution is admittedly difficult, if not impossible, to disentangle from the electoral victory of the Federalists and the political entrepreneurship of key members of Congress (Crowe 2012). What is more important is that the functional requirements of Article III provided crucial textual support for a highly contested structural principle: that federal law should be administered by federal, not state, courts and that reliance on state institutions for administration of federal policy should be minimized, if not eliminated altogether. This structural principle was contested by an Anti-Federalist minority in the First Congress, and then by a Jeffersonian majority in the Seventh. But its arguably constitutional status made it persistently available to its defenders: Federalists in the First Congress, the minority in the Seventh, and (most famously) Justice Story in his *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) opinion, which, in turn, has served as inspiration

for the most prominent modern exposition of "mandatory" federal jurisdiction (Amar 1985, 1992).

Given the wide disparity in these constructions of Article III that have emerged over the long history of American constitutional discourse, one may reasonably ask whether Article III is not simply a piece of poor draftsmanship. Could the framers not have made the necessity of inferior courts clearer, if that indeed was the intention? The framers' handiwork might be defended on two grounds. The first, suggested above, is that the desire for a national judiciary, independent of the states, necessitates reliance on a continuing legislative process to adapt and expand judicial institutions as the nation develops. That is to say, constitutional framers can build an aspirational commitment to a commercial republic into the "genetic code" of the text (Tulis 1987), but their limited prescience regarding the scope and character of future developments necessitates framing those aspirations as discretionary grants of power. And, one might observe, the greater the aspiration, the broader the discretion necessary to institutionalize it.

The second possible ground of defense is that the textual ambiguity of Article III is more a product of political savvy or constitutional statesmanship than of poor draftsmanship. The full institutional implications of the text's potentially Federalist aspirations were not altogether politically palatable in 1789 and became even less so as the first party system developed. Its political empowerment provisions, which left the particular forms of the judiciary to legislative construction, were therefore a necessary corollary to its static functional requirements. Any effort to ensconce the particular institutional forms of the federal court system—by, for example, a requirement that at least one inferior federal court must exist within each state or that there must be one inferior federal court for every 30,000 residents—certainly would have alarmed partisans of state autonomy in the convention and furnished ammunition to Anti-Federalist critics. From this perspective, it might have been more prudent to leave the textual product of the compromise on inferior courts in place and then hedge it about with mandatory language that could be used to redirect congressional discretion to pursue Federalist aims.

Lest one think that such a construction is excessively esoteric, note that I am not the first to suggest that the ambiguities of Article III were in some measure a clandestine effort to build national aspirations into the text without alarming Anti-Federalists. Gouverneur Morris, who took so active a part in the convention and famously penned the final draft as the leading member of the committee on style, reflected on the matter in 1814: "[The Constitution] was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit;

excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others" (Farrand 1937, 3:419–20). Morris exaggerates his own role in shaping the text—the content of Article III was in substantially final form when it was submitted to the committee on style—but his remarks nonetheless reveal the manner in which nationally minded framers might have employed textual ambiguity to accomplish their desired ends.

Of course, textual ambiguity cuts both ways, as the very discretionary grants that Federalists would invoke as aspirational commitments may also be readily employed to frustrate those aspirations. But this is precisely why the inclusion of the functional requirements embodied in the Vesting Clause and other mandatory provisions of Article III was a substantive victory in favor of national power. It loaded the deck in favor of extension by preserving and privileging the Federalists' aims even if it did not secure them outright.

To be clear, we should carefully avoid drawing any universal conclusion that the Constitution shapes legislative debate from the examination of a single episode in a very singular deliberative body like the First Congress. Even if the Constitution exerted such an influence in the First Congress, it does not necessarily follow that it continues to do so subsequently. There is, for one thing, the path dependence that comes with the growth of resilient institutions over time. With the matter of inferior courts having been decided by the First Congress, there is less reason for subsequent Congresses to consider it again, the exception being the debate occasioned by repeal of the Judiciary Act of 1801 in the Seventh Congress. But one might also note that another possible reason for inattention to constitutional forms in subsequent debates has been the widespread view among the relevant actors, including the Supreme Court, that the Constitution has little to say about judicial structure. Indeed, one important aim of this and other similar analyses is to reintroduce these early debates in order to reopen the possibility of ongoing relevance for the Constitution, a matter to be taken up directly in the final section.

ARTICLE III AND THE MODERN JUDICIARY

In conclusion, it seems appropriate to point to some of the broader implications of this analysis for future scholarship on the development of federal judicial power. In one sense, the foregoing characterization of the debate on inferior courts fits neatly within a growing scholarly interest in the institutional, rather than merely doctrinal and behavioral, aspects of the judiciary's development. Historical-institutionalists in this vein see judicial power as a "complex and politically constructed institution" (Fish 1970; Graber 1993; Gillman 2002;

Whittington 2007). Proponents of this approach have eschewed the assumption that judges establish their own autonomy by fiat and that judicial power thus advances merely by the judges' pronouncement of legal doctrine. The enjoyment of judicial autonomy instead rests on a complex institutional foundation—including the structure and jurisdiction of the judiciary—that is largely the product of the political process and not case law. The judiciary did not spring fully formed from Article III of the Constitution or from John Marshall's pen, but had to be "built . . . from the ground up, as part and parcel of American political development" (Crowe 2007, 85).

As Justin Crowe's (2012) recent analysis so vividly demonstrates, a more robust picture of judicial power and its role in American political development emerges when we place the work of courts in its broader institutional context and when we consider the independence of the judiciary as a phenomenon distinct from the independence of judges. Tenure during good behavior and irreducible salary may be sufficient to secure the independence of the judge, but those protections alone are insufficient (though perhaps still necessary) to secure the independence of the judiciary as a coequal branch of government. "Branch independence" requires certain minimal institutional forms that promote institutional autonomy. From this angle, relatively mundane matters of court structure and jurisdiction may be more central to the exercise of judicial power than the more provocative doctrinal and ideological bases for judicial decisions—the Circuit Courts Act of 1891 and the Judiciary Act of 1925 may be more essential to the substantive jurisprudence of the twentieth century than *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) and *Griswold v. Connecticut*, 381 U.S. 479 (1965), just as the Judiciary Act of 1789 may have been more important for the establishment of judicial review in the nineteenth century than *Marbury v. Madison*, 5 U.S. 137 (1803) (Graber 2003). Thus, the structure and jurisdiction of the inferior federal court system warrant the same scholarly attention so lavishly bestowed on the Supreme Court.

This strain of historical-institutional research needs to be extended, particularly to a more robust consideration of the continuity between the Federalist conception of Article III and the institutional contours of the modern judiciary. The most glaring example of this continuity is the remarkable affinity between the Federalist reforms embodied in the (failed) Judiciary Act of 1801 and the eventual realization of those reforms in the Circuit Courts Act of 1891 and its progeny. These similarities have garnered little more than a passing mention. Meanwhile, a growing body of legal scholarship in the mold of Federalist constitutionalism has recovered considerable textual and historical support for constraining legislative discretion and supporting judicial independence (understood as branch independence) on a constitutional basis. What was once considered a highly unorthodox construction of Article III

confined primarily to the aberrational dictum of Justice Story's opinion in *Martin v. Hunter's Lessee* and a few speeches in the First Congress now garners considerable scholarly support from respected constitutional lawyers (Clinton 1984; Amar 1985; Calabresi and Lawson 2007; Claus 2007; Pfander 2009; Glashausser 2010).

What is needed is further study of the judiciary's institutional development that puts these historical-institutionalist and legal strains of scholarship in dialogue. An examination of that kind requires an analytical framework that connects the institutional development of the judiciary over time with its constitutional foundations in the work of the framers. This study has suggested one such framework by identifying the functional requirements embedded in the text—institutional integrity, jurisdictional integrity, hierarchical integrity—and specifying their relationship to the political empowerment provisions that accompany them. If applied to the broader narrative of American constitutionalism, it may turn out that what we deem novel about the modern judiciary is in reality a working out of the Federalist understanding of Article III.

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