

Debates on the Federal Judiciary: A Documentary History

Volume I: 1787–1875

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Federal Judicial Center
Federal Judicial History Office
2013

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Introduction

This volume presents historical documents related to significant debates about the organization and jurisdiction of the federal judiciary in the years between the Federal Convention of 1787 and the Jurisdiction and Removal Act of 1875. The documents and accompanying annotation trace the long process of defining the judiciary within the relatively brief outline provided by Article III of the Constitution and by the appointment provisions of Article II. The delegates to the Federal Convention ensured that federal judges would have a degree of independence from political influence and popular pressure, but the delegates also granted the Congress and the president substantial authority over the structure, responsibilities, and officials of the federal courts. Although federal judges would enjoy unprecedented protections of tenure and salary, the constitutional provisions for nomination and confirmation further determined that the courts would be subject to the political process.

The Constitution ensured that the Congress would be the principal forum for debates on the institutional structure of the federal judiciary and on the jurisdictional authorities of the courts. In addition to its selection of documents from the debates on the constitutional provisions for the judiciary, this volume is organized primarily around proposals for judiciary-related legislation. Legislative proposals regarding the federal judiciary emerged from every branch of the federal and state governments, from the bar, from legal commentators, from popular political organizations, and occasionally from federal judges. A succession of debates on these proposals raised fundamental questions about the constitutional role of the judiciary and its relationship to the elected branches of the government.

The Constitution left for the elected branches of the government to define essential characteristics of the judiciary, including the establishment of federal courts other than the Supreme Court, the authorization of the range of jurisdiction permitted under the Constitution, and the division of jurisdiction between federal and state courts. As the debates over ratification demonstrated, the decisions about those aspects of the judiciary would be highly contested by opposing political factions, and expectations for the federal judiciary would often

reflect fundamentally divergent views of republican government and constitutional order. The emergence of political parties in the 1790s heightened the disputes over the judiciary, and the branch of government that received the least attention during the constitutional convention became a central subject of partisan debate.

Even as the intense partisanship of Federalists and Republicans subsided following the repeal of the Judiciary Act of 1801 and the failed effort to remove Justice Samuel Chase from the bench, the judiciary remained the subject of political debates on the character and scope of the federal government. In the first half of the nineteenth century, shifting political alignments gave rise to new advocates as well as critics of a strong national judiciary. The practical challenges of governing and political calculation produced new frictions between the branches of the government. Competing definitions of federalism and the emergence of a state rights ideology had enormous implications for a court system, the very organization of which was based on a recognition of state borders and local legal cultures. Changes in the nature of cases in the federal courts, driven by litigants and Supreme Court decisions as well as by legislation, prompted proposals for new courts and revised procedures that would facilitate access to justice and a timely resolution of disputes.

Almost all of the delegates to the Federal Convention and subsequent officeholders in the federal government supported some notion of judicial independence, but agreement on the precise definition of the term or on the necessary protections of that independence proved elusive. Those who recalled the colonial experience recognized the importance of judicial independence from the executive, and the excesses of state legislative authority in the 1780s alerted many others to the need to protect judges from the intrusive power of elected assemblies. With the growth of popular democracy in the years after the inauguration of the federal government, some, especially those allied with the Federalists, promoted a judicial independence that isolated judges from the reach of popular politics. More common were those who sought to define a judicial independence that shielded judges from overt political pressure and ensured judges would have the freedom to protect citizens' constitutional and legal rights. These varied and evolving conceptions of judicial independence came to bear on congressional debates about many aspects of the court system, including the authority of Congress to establish and abolish courts, the as-

signment of circuit duties for Supreme Court justices, judicial review, and, above all, judicial tenure.

Under a Constitution that rested on the concept of popular sovereignty, the guarantee of judicial tenure during good behavior and the vague standards for impeachment appeared to many as anomalies if not outright contradictions of the principle that all government officeholders derived their authority from the people and were in some way accountable to them. Recurring proposals for fixed judicial terms of service or judicial elections never found enduring support in Congress, but the constitutional protections of judges' tenure continued to shape debates on the judiciary as members of Congress sought to reconcile tenure during good behavior with the principles of accountability inherent in popular sovereignty. During the ratification debates, the Anti-Federalists argued that the tenure and salary protections in the Constitution imposed special obligations and responsibilities on federal judges. In the first half of the nineteenth century, many members of Congress offered similar arguments when they discussed the justices' circuit-riding duties, the use of local rules and procedures in the federal trial courts, the geographical organizations of the courts, and citizens' access to federal justice. For these members of Congress, the familiarity of court proceedings and the service of Supreme Court justices in federal courts throughout the states contributed to public confidence in an independent judiciary and in judges serving for what in most cases were life terms.

In the Judiciary Act of 1789, Congress organized the federal court system in ways that linked the judiciary to the geographical organization of the nation, and the dramatic expansion of United States territory and population had extensive implications for the federal court system. Throughout the nineteenth century, Congress considered diverse proposals to extend the system of 1789 to new states across the continent and to answer calls for uniform federal courts in every region. Many of the debates on these proposals reflected a widely held belief that some form of geographical balance was a necessary foundation of public respect for the federal courts and the judicial process. Some people even spoke of the "representative system" that included the appointment of Supreme Court justices from various regions of the country and the establishment of federal circuit courts in each state, where the justices would learn about the distinctive state-level legal cultures. Others recognized the ultimate impracticality of the judicial

system of 1789 and proposed new kinds of courts that could serve a nation that spanned the continent.

The organization of the federal court system in conformity with state borders, the establishment of court procedures that deferred to existing state rules, and the recognition of concurrent jurisdiction of state courts placed the judiciary at the center of ongoing debates on federalism. The participants in the ratification debates set out competing visions of a court system that established uniform federal justice and one that deferred to state courts on all but essential federal questions. This fundamental tension persisted throughout the period covered by this volume, and questions about the balance of federal and state jurisdiction arose in debates on numerous proposals regarding the judiciary. From the Federal Convention through the mid-nineteenth century, a persistent minority of public officeholders maintained that an expansion of federal jurisdiction would threaten not only the viability of state courts but even the survival of state governments. The centrality of the judiciary to any definition of federalism determined that the growth of the federal government's authority during the Civil War and Reconstruction would almost inevitably lead to a reorganization of the federal courts and an expansion of federal jurisdiction.

The selected debates examined in this volume are representative of recurring discussions about the judicial branch during the formative years of the federal government. Emphasis is on debates related to the institutional organization of the federal courts, broad questions about federal jurisdiction, relationships between the three branches of the federal government, and the balance of federal and state jurisdictional authorities. Many of the debates were selected because they attracted popular attention or reflected public dialogue on the role of the courts under the Constitution and within a republican form of government. The documents offer the range of opinions surrounding each debate, and include private correspondence, newspaper commentaries, and state government records, in addition to the excerpts from congressional debates that constitute the foundation of the volume.

Unless otherwise noted, the transcriptions of the documents present spelling and punctuation as they appeared in the originals.

A second volume covers similar debates in the period from 1875 to 1939, and a third volume will bring this documentary history to the

present. The third volume will also survey the history of bankruptcy in the federal courts.

Dara Baker, Daniel Holt, Brian Payne, and Jonathan W. White conducted much of the research to identify potential documents for inclusion in the volume. Daniel Holt and Jacob Kobrick assisted with the editing and proofreading of the volume. Russell Wheeler read the manuscript and offered substantial improvements and refinements in the annotations.

The Federal Convention—Debates on the Judiciary

At the Constitutional Convention of 1787, the delegates shared a commitment to an independent judiciary. They agreed that an indispensable part of any well-organized republican government was a separate and coequal judicial branch that would serve alongside the executive and legislative branches. But the delegates did not arrive in Philadelphia with a fully developed plan for the federal judiciary. Most were more concerned with the provisions for a national legislature and the executive or with the balance of federal and state authority. The constitutional outline of the nation's court system emerged over the summer, often in response to decisions the delegates made about the authorities of the executive and legislative branches. As the Convention delegates proceeded with their work, the importance of the federal judiciary became more and more evident, although much of the institutional organization central to the federal court system was not defined until the First Congress convened in 1789.

Beginning in 1776, the newly independent states dismantled the colonial court systems that were generally under the control of royal governors and established in their place judiciaries that would be important models for the Federal Convention. Virginia's constitution was the first to establish the judiciary as one of three independent branches of government. Some states provided for judges to serve during good behavior, and some mandated a fixed salary for judges. In the 1780s, several state courts asserted the authority to invalidate state laws in violation of the state constitution, and legal writers proposed ways to make the judiciaries more independent of the legislature as well as the executive. The framers would look to the experience of the state courts for lessons about the best ways to make a judiciary independent and to ensure a proper separation of powers.

The framers of the Constitution had no practical model of a court to serve the whole nation. The only court established under the Articles of Confederation was the Court of Appeals in Cases of Capture. This body had very limited jurisdiction; it dealt only with the capture of enemy ships and had no enforcement powers. The proper role of an

independent, national judiciary was a largely unexplored topic when the Federal Convention convened.¹

[*Editorial Note:* All selections from the Federal Convention are from Max Farrand's edition of *The Records of the Federal Convention of 1787*, first published in 1911. In accordance with modern standards of transcription and in the interest of clarity, most contractions and abbreviations have been expanded, a period has been added to the end of each sentence, and the first word of each sentence has been capitalized. The following document excerpts also omit the parentheses which Farrand used to indicate Madison's corrections and additions to his draft notes. Historic spelling has been maintained as in the Farrand transcription.]

The Virginia Plan for the Judiciary

The Federal Convention began its discussion of a new constitution with consideration of the so-called Virginia Plan submitted by Edmund Randolph and drafted by James Madison. Madison proposed that the legislature be authorized to establish one or more supreme courts (perhaps with different jurisdiction) that would hear appeals of cases, and inferior courts that would serve as trial courts for a limited range of international and interstate controversies and cases involving federal revenue. Judges of these courts would hold office during good behavior, be appointed by the Congress, and receive a fixed salary that could not be increased or decreased during their service. A council of revision, made up of the executive and some federal judges, would review state and federal laws and veto those they believed violated the Constitution or even those they considered harmful.

• • •

8. Resolved that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council

1. Julius Goebel, Jr., *History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 96–195; Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1997), 171–79.

shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by ____ of the members of each branch.

9. Resolved that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and 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. That the 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.

[Document Source: Max Farrand, ed., *The Records of the Federal Convention of 1787* (1937; repr., New Haven: Yale University Press, 1966), 1:21–22.]

Judicial Appointment

Some delegates, like James Wilson of Pennsylvania, recommended appointment by the executive as a protection against the “intrigues” associated with a large legislature. Many more supported appointment by the legislature or by the Senate alone. John Rutledge of South Carolina, who later served as a Supreme Court justice, feared that concentrating the appointment power in the hands of a single executive would lead to monarchy. Roger Sherman of Connecticut thought appointment by the Senate would ensure that judges were drawn from every part of the country. Madison feared that many members of the full Congress would not have the experience to assess the qualifications for a judge, and he initially preferred appointment by the more exclusive membership of the Senate.

Nathaniel Gorham, a delegate from Massachusetts, suggested the mode of judicial appointment that his state had used since the colonial period: nomination by the executive and approval by the smaller branch of the legislature. Once the convention decided that the Senate would represent states equally, Madison suggested that the president be authorized to appoint judges but that the Senate be

given the right to veto the appointment by a vote of two-thirds of the members. Only in the final two weeks of the convention did the delegates agree that Supreme Court justices, like ambassadors and other appointed officers, would be appointed by the president with the advice and consent of the Senate.



June 5. In the Committee of the Whole

Mr. Wilson [James Wilson of Pennsylvania] opposed the appointment of Judges by the national Legislature. Experience shewed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences. A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person.

Mr. Rutledge [John Rutledge of South Carolina] was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy. He was against establishing any national tribunal except a single supreme one. The State Tribunals are most proper to decide in all cases in the first instance.

Docr. Franklin [Benjamin Franklin of Pennsylvania] observed that two modes of chusing the Judges had been mentioned, to wit, by the Legislature and by the Executive. He wished such other modes to be suggested as might occur to other gentlemen; it being a point of great moment. He would mention one which he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves. It was here he said the interest of the electors to make the best choice, which should always be made the case if possible.

Mr. Madison [James Madison of Virginia] disliked the election of the Judges by the Legislature or any numerous body. Besides, the danger of intrigue and partiality, many of the members were not judges of the requisite qualifications. The Legislative talents which were very different from those of a Judge, commonly recommended men to the favor of Legislative Assemblies. It was known too that the accidental circumstances of presence and absence, of

being a member or not a member, had a very undue influence on the appointment. On the other hand He was not satisfied with referring the appointment to the Executive. He rather inclined to give it to the Senatorial branch, as numerous enough to be confided in – as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments. He hinted this only and moved that the *appointment by the Legislature* might be struck out, & and a blank left to be hereafter filled on maturer reflection. . . .

July 18. In Convention

Mr. Ghorum, [Nathaniel Gorham of Massachusetts] would prefer an appointment by the 2d branch [the Senate] to an appointment by the whole Legislature; but he thought even that branch too numerous, and too little personally responsible, to ensure a good choice. He suggested that the Judges be appointed by the Executive with the advice & consent of the 2d branch, in the mode prescribed by the constitution of Massachusetts. This mode had been long practised in that country, & was found to answer perfectly well.

Mr. Wilson, still would prefer an appointment by the Executive; but if that could not be attained, would prefer in the next place, the mode suggested by Mr. Ghorum. He thought it his duty however to move in the first instance “that the Judges be appointed by the Executive.” Mr. Gouverneur Morris [of Pennsylvania] 2ded the motion.

Mr. Luther Martin [of Maryland] was strenuous for an appointment by the 2d branch. Being taken from all the States it would be best informed of characters & most capable of making a fit choice.

Mr. Sherman [of Connecticut] concurred in the observations of Mr. Martin, adding that the Judges ought to be diffused, which would be more likely to be attended to by the 2d branch, than by the Executive.

Mr. Mason. [George Mason of Virginia] The mode of appointing the Judges may depend in some degree on the mode of trying impeachments, of the Executive. If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive. There were insuperable objections besides against referring the appointment to the Executive. He mentioned as one,

that as the seat of Government must be in some one State, and the Executive would remain in office for a considerable time, for 4, 5, or 6 years at least he would insensibly form local & personal attachments within the particular State that would deprive equal merit elsewhere, of an equal chance of promotion.

Mr. Ghorum. As the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters.—The Senators will be as likely to form their attachments at the seat of Government where they reside, as the Executive. If they can not get the man of the particular State to which they may respectively belong, they will be indifferent to the rest. Public bodies feel no personal responsibility and give full play to intrigue & cabal. . . .

Mr. Madison, suggested that the Judges might be appointed by the Executives with the concurrence of 1/3 at least of the 2d branch. This would unite the advantage of responsibility in the Executive with the security afforded in the 2d branch against any incautious or corrupt nomination by the Executive.

Mr. Sherman, was clearly for an election by the Senate. It would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate. For these reasons he thought there would be a better security for a proper choice in the Senate than in the Executive.

Mr. Randolph. [Edmund Randolph of Virginia] It is true that when the appointment of the Judges was vested in the 2d branch an equality of votes had not been given to it. Yet he had rather leave the appointment there than give it to the Executive. He thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal. He thought too that the hope of receiving appointments would be more diffusive if they depended on the Senate, the members of which would be diffusively known, than if they depended on a single man who could not be personally known to a very great extent; and consequently that opposition to the System, would be so far weakened.

Mr. Bedford [Gunning Bedford of Delaware] thought there were solid reasons against leaving the appointment to the Executive. He must trust more to information than the Senate. It would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens. The responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes.

Mr. Ghorum remarked that the Senate could have no better information than the Executive. They must like him, trust to information from the members belonging to the particular State where the Candidate resided. The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone. He did not mean that he would be answerable under any other penalty than that of public censure, which with honorable minds was a sufficient one. . . .

July 21 in Convention.

The motion made by Mr. Madison July 18. & then postponed, “that the Judges should be nominated by the Executive & such nominations become appointments unless disagreed to by 2/3 of the 2d branch of the Legislature,” was now resumed.

Mr. Madison stated as his reasons for the motion. 1. that it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters than the Legislature, or even the 2d branch of it, who might hide their selfish motives under the number concerned in the appointment – 2. that in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that 2/3 of the 2d branch would join in putting a negative on it. 3. that as the 2d branch was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their should be a concurrence of two authorities, in one of which the people, in the other the states, should be represented. The Executive Magistrate would be considered as a national officer, acting for and equally sympathising with every part of the U. States. If the 2d branch alone should have this power, the Judges might be appointed by a minority of the people, tho’ by a majority, of the States, which could not be justified on any

principle as their proceedings were to relate to the people, rather than to the States: and as it would moreover throw the appointments entirely into the hands of the Northern States, a perpetual ground of jealousy & discontent would be furnished to the Southern States.

Mr. Pinkney [Charles Pinckney of South Carolina] was for placing the appointment in the 2d branch exclusively. The Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust.

Mr. Randolph would have preferred the mode of appointment proposed formerly by Mr. Ghorum, as adopted in the Constitution of Massachusetts but thought the motion depending so great an improvement of the clause as it stands, that he anxiously wished it success. He laid great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications. The same inconveniencies will proportionally prevail if the appointments be referred to either branch of the Legislature or to any other authority administered by a number of individuals.

Mr. Ellsworth [Oliver Ellsworth of Connecticut] would prefer a negative in the Executive on a nomination by the 2d branch, the negative to be overruled by a concurrence of 2/3 of the 2d branch to the mode proposed by the motion; but preferred an absolute appointment by the 2d branch to either. The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses & intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment.

Mr. Gouverneur Morris supported the motion. 1. The States in their corporate capacity will frequently have an interest staked on the determination of the Judges. As in the Senate the States are to vote the Judges ought not to be appointed by the Senate. Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge. 2. It had been said the Executive would be uninformed of characters. The reverse was the truth. The Sen-

ate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the U. S. required by the nature of his administration, will or may have the best possible information. 3. It had been said that a jealousy would be entertained of the Executive. If the Executive can be safely trusted with the command of the army, there can not surely be any reasonable ground of Jealousy in the present case. He added that if the Objections against an appointment of the Executive by the Legislature, had the weight that had been allowed there must be some weight in the objection to an appointment of the Judges by the Legislature or by any part of it.

Mr. Gerry. [Elbridge Gerry of Massachusetts] The appointment of the Judges like every other part of the Constitution should be so modeled as to give satisfaction both to the people and to the States. The mode under consideration will give satisfaction to neither. He could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate. It appeared to him also a strong objection that 2/3 of the Senate were required to reject a nomination of the Executive. The Senate would be constituted in the same manner as Congress. And the appointments of Congress have been generally good.

Mr. Madison, observed that he was not anxious that 2/3 should be necessary to disagree to a nomination. He had given this form to his motion chiefly to vary it the more clearly from one which had just been rejected. He was content to obviate the objection last made, and accordingly so varied the motion as to let a majority reject.

Col. Mason found it his duty to differ from his colleagues in their opinions & reasonings on this subject. Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations. He considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself. He did not think the difference of interest between the Northern and Southern States could be properly brought into this argument. It would operate & require some

precautions in the case of regulating navigation, commerce & imposts; but he could not see that it had any connection with the judiciary department.

On the question, the motion now being “that the executive should nominate, & such nominations should become appointments unless disagreed to by the Senate.”

Massachusetts ay. Connecticut no. Pennsylvania ay. Delaware no. Maryland no. Virginia ay. North Carolina no. South Carolina no. Georgia no. [Ayes - 3; noes - 6.]

On question for agreeing to the clause as it stands by which the judges are to be appointed by 2d branch.

Massachusetts no. Connecticut ay. Pennsylvania no. Delaware ay. Maryland ay. Virginia no. North Carolina ay. South Carolina ay. Georgia ay. [Ayes - 6; noes - 3.]

[Document Source: Farrand, ed., *Records of the Federal Convention*, 1:119–20; 2:41–43; 80–83.]

Inferior Federal Courts

Early in the Convention, delegates agreed that there would be a single supreme court and one or more inferior courts, but that decision about inferior courts was soon reversed. Many delegates, including William Paterson, proposed that the state courts serve as the courts of first instance, or trial courts, in cases raising federal issues. After the delegates rejected a proposal to establish inferior federal courts, they accepted the proposal of James Madison and James Wilson to give the Congress authority to establish inferior courts, thus leaving open the option that state courts might serve as trial courts for many questions arising under federal laws or the Constitution. The new Congress would determine the organization of the court system.

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June 5. In Committee of the Whole

Mr. Rutledge having obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that that part of the clause in proposition 9 should be expunged: arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure

the national rights & uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system. . . .

Mr. Madison observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy: What was to be done after improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.

Mr. Wilson opposed the motion on like grounds. He said the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, & to a scene in which controversies with foreigners would be most likely to happen.

Mr. Sherman was in favor of the motion. He dwelt chiefly on the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose.

Mr. Dickinson [John Dickinson of Delaware] contended strongly that if there was to be a National Legislature, there ought to be a national Judiciary, and that the former ought to have authority to institute the latter.

On the question for Mr. Rutledge's motion to strike out "inferior tribunals."

Massachusetts divided, Connecticut ay. New York divided. New Jersey ay. Pennsylvania no. Delaware no. Maryland no. Virginia no. North Carolina ay. South Carolina ay. Georgia ay. [Ayes – 5; noes – 4; divided – 2.]

Mr. Wilson & Mr. Madison then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add to Resolution 9 the words following "that the National Legislature be empowered to institute inferior tribunals." They observed that there was a distinction be-

tween establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them. They repeated the necessity of some such provision.

Mr. Butler. [Pierce Butler of South Carolina] The people will not bear such innovations. The States will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon who gave the Athenians not the best Government he could devise; but the best they would receive.

Mr. King [Rufus King of Massachusetts] remarked as to the comparative expence that the establishment of inferior tribunals would cost infinitely less than the appeals that would be prevented by them. . . .

July 18. In Convention

12. Resolution “that National Legislature be empowered to appoint inferior tribunals.”

Mr. Butler could see no necessity for such tribunals. The State Tribunals might do the business.

Mr. Luther Martin concurred. They will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere.

Mr. Ghorum. There are in the States already federal Courts with jurisdiction for trial of piracies &c. committed on the Seas. No complaints have been made by the States or the Courts of the States. Inferior tribunals are essential to render the authority of the National Legislature effectual.

Mr. Randolph observed that the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance.

Mr. Gouverneur Morris urged also the necessity of such a provision.

Mr. Sherman was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done with safety to the general interest.

Col. Mason thought many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary.

On question for agreeing to 12. Resolution empowering the National Legislature to appoint “inferior tribunals”. Agreed to nemine contradicente [unanimously].

[Document Source: Farrand, ed., *Records of the Federal Convention*, 1:124–25; 2:45–46.]

A Proposed Council of Revision

The Convention’s longest debate involving the judiciary focused on Madison’s proposal for a council of revision. Following the model of the New York state constitution, Madison envisioned a council made up of the president and a group of judges who would review all legislation prior to adoption and have the authority to suggest revisions or to veto an act. The council would also have had authority to review Congress’s recommendation for the disallowance of state legislation. Madison, who believed that the natural tendency of a republican legislature was “to absorb all power into its vortex” and was particularly concerned about what he characterized as the abuse of power by many state legislatures, thought it was essential to bring the executive and judicial branches together as a check on improper, unjust, or, as James Wilson said, “unwise” legislation. Madison so strongly advocated this role of the judiciary that he advocated the motion twice after the Convention had rejected it.

Many delegates thought it would violate the proper separation of powers to join the executive and the judicial in this way. The Convention repeatedly rejected Madison’s proposal and left the president with the sole authority to veto legislation. Although the Constitution made no reference to judicial review, the debate on the council of revision made clear that many delegates believed the council was unnecessary because they expected the federal judiciary to exercise the power of judicial review to declare laws invalid when questioned as part of a case or controversy.

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July 21 in Convention

Mr. Wilson moved as an amendment to Resolution 10. that the supreme National Judiciary should be associated with the Executive in the Revisionary power. This proposition had been before made, and failed; but he was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort: The Judiciary ought to have an opportunity of re-

monstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature. — Mr Madison 2ded the motion.

Mr Ghorum did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded. He thought it would be best to let the Executive alone be responsible, and at most to authorize him to call on Judges for their opinions.

Mr. Elsworth approved heartily of the motion. The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.

Mr. Madison considered the object of the motion as of great importance to the meditated Constitution. It would be useful to the Judiciary department giving it an additional opportunity of defending itself against Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities. If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength either

to the Executive or Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles. . . .

Mr. Gerry did not expect to see this point which had undergone full discussion, again revived. The object he conceived of the Revisionary power was merely to secure the Executive department against legislative encroachment. The Executive therefore who will best know and be ready to defend his rights ought alone to have the defence of them. The motion was liable to strong objections. It was combining & mixing together the Legislative & the other departments. It was establishing an improper coalition between the Executive & Judiciary departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It was making the Expositors of the Laws, the Legislators which ought never to be done. A better expedient for correcting the laws, would be to appoint as had been done in Pennsylvania a person or persons of proper skill, to draw bills for the Legislature. . . .

Col. Mason Observed that the defence of the Executive was not the sole object of the Revisionary power. He expected even greater advantages from it. Notwithstanding the precautions taken in the Constitution of the Legislature, it would so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws; but would discourage demagogues from attempting to get them passed. It had been said (by Mr. Luther Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But

with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences. . . .

Mr. Ghorum. All agree that a check on the Legislature is necessary. But there are two objections against admitting the Judges to share in it which no observations on the other side seem to obviate. The 1st is that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them. 2d that as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him. . . .

Mr. Rutledge thought the Judges of all men the most unfit to be concerned in the revisionary Council. The Judges ought never to give their opinion on a law till it comes before them. He thought it equally unnecessary. The Executive could advise with the officers of State, as of war, finance &c. and avail himself of their information and opinions.

On Question on Mr. Wilson's motion for joining the Judiciary in the Revision of laws it passed in the negative —

[Document Source: Farrand, ed., *Records of the Federal Convention*, 2:73–80.]

Article III of the U.S. Constitution

The Constitution's grant of jurisdiction to federal courts extended to all cases "in law and equity" arising under the Constitution, federal laws, and treaties. Federal jurisdiction also included cases related to foreign diplomats, admiralty and maritime issues, disputes between states, and disputes between citizens of different states. Many of the Convention's decisions regarding the judiciary were not recorded in the surviving notes of delegates and are only evident from the final text of Article III. With little recorded debate, the delegates in the closing days of the Convention accepted language that guaranteed a trial by jury in criminal trials, but the delegates rejected pleas to extend the guarantee of jury trials to civil cases. Also with little debate, the delegates accepted a provision for appeals to the Supreme

Court “both as to Law and Fact.” By defining the range of federal jurisdiction, the Convention implicitly recognized that state courts would retain full jurisdiction over many legal questions.

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Section. 1. 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all 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.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Ratification Debates on the Judiciary

Once the proposed Constitution was presented to the states for ratification, critics of the charter, known as Anti-Federalists, offered the public a critique of the proposed judiciary, which they feared would weaken the authority of states and undermine legal rights secured by the establishment of independent state governments. The supporters of the Constitution, known as Federalists, responded with explanations of how important an independent judiciary would be for the success of a national government.

For opponents of the Constitution, the judiciary embodied the expansive power of a national government that they feared would soon overwhelm the states. Anti-Federalists frequently warned that the federal judiciary would “absorb” or “swallow” the state courts, even the states themselves. The Constitution’s broad grant of federal jurisdiction would allow judges and lawyers to expand the reach of the courts as far as they wished. Federal jurisdiction over suits between citizens of different states was seen as particularly threatening to state courts. The power and independence of the federal judges, who could not be removed for errors of decision or judgment, were, in the words of a leading Anti-Federalist writer, “unprecedented in a free country.”

The outline of the federal judiciary threatened to remove the courts from the local connections that many Americans believed were essential to the preservation of civil liberties. Even if a federal trial court were established in each state and the Supreme Court met in various locations, according to Anti-Federalists, the remoteness of federal courts would deprive most citizens of justice. The distance to a federal court would make legal proceedings too expensive and render justice “unattainable by a great part of the community,” according to George Mason. Jury trials protected the rights of defendants only if the jury members were drawn from the local community, and this would be impractical in a federal court.

Anti-Federalists saw in the proposed Constitution two grave threats to the right to a trial by jury, which they considered the most important means of protecting individual liberties and ensuring popular participation in the judicial process. Despite the guarantee of a jury trial in criminal cases, the absence of any reference to jury trials in civil

cases raised the specter of a civil law system in which “a few judges . . . possess all the power in the judiciary.” The provision for appeals to the Supreme Court on the basis of challenges to the facts as well as the law raised additional fears of the possible retrial of criminal cases without a jury. The Constitution’s failure to explicitly protect traditional rights to a jury trial became one of the most compelling criticisms raised by the Anti-Federalists.

Federalists were confident that the judges appointed to the federal courts would recognize and protect jury trials and the civil liberties that Americans defended during the struggle with British imperial authorities. Yet even many who supported ratification of the Constitution remained concerned that the provisions for the judiciary failed to provide institutional protections for established legal rights and procedures.²

The Anti-Federalist Critique

Letters of “Brutus”

The most extensive Anti-Federalist critique of the proposed federal judiciary was presented in the letters of “Brutus,” published in New York City between October 1787 and April 1788. Like George Mason, who feared that “the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several States,” Brutus foresaw the withering of state courts in the face of federal jurisdiction that would encompass all of the nation’s significant legal business. Brutus’s letters on the judiciary articulated common Anti-Federalist themes about the value of ties between local communities and courts, the need for courts that would be accessible in terms of both proximity and costs, and the importance of public familiarity with judges. All of these goals would be better served if the state courts exercised original jurisdiction in all types of cases except the few reserved by the Constitution for the Supreme Court. In what became a familiar Anti-Federalist argument, Brutus quoted Blackstone on the benefits of a court system that brought “justice to every man’s door.”

“Brutus,” who may have been Robert Yates, a New York delegate to the Federal Convention, also emphasized that the Constitution omitted many of the traditional checks on judicial power found in Great Britain and in the constitutions of the independent United

2. Rakove, *Original Meanings*, 186–88, 318–25.

States. While judges in Great Britain and in most states were granted tenure during good behavior, those judge could be removed by a super-majority or even a simple majority of the legislative branch, whereas federal judges would only be removable for crimes. With no legislative oversight of a judiciary authorized to determine the meaning of the federal statutes, the courts would effectively control the legislature.

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Brutus I, *New York Journal*, October 18, 1787

The judicial power of the United States is to be vested in a supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The powers of these courts are very extensive; their jurisdiction comprehends all civil causes, except such as arise between citizens of the same state; and it extends to all cases in law and equity arising under the constitution. One inferior court must be established, I presume, in each state, at least, with the necessary executive officers appendant thereto. It is easy to see, that in the common course of things, these courts will eclipse the dignity, and take away from the respectability, of the state courts. These courts will be, in themselves, totally independent of the states, deriving their authority from the United States, and receiving from them fixed salaries; and in the course of human events it is to be expected, that they will swallow up all the powers of the courts in the respective states. . . .

[Document Source: Bernard Bailyn, ed., *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification* (New York: The Library of America, 1993), 1:168.]

Brutus XIV. February 28, March 6, 1788

But the operation of the appellate power in the supreme judicial of the United States, would work infinitely more mischief than any such power can do in a single state.

The trouble and expence to the parties would be endless and intolerable. No man can say where the supreme court are to hold their sessions, the presumption is, however, that it must be at the seat of the general government: in this case parties must travel many hundred miles, with their witnesses and lawyers, to prosecute or defend a suit; no man of midling fortune, can sustain the

expençe of such a law suit, and therefore the poorer and midling class of citizens will be under the necessity of submitting to the demands of the rich and the lordly, in cases that will come under the cognizance of this court. If it be said, that to prevent this oppression, the supreme court will set in different parts of the union, it may be replied, that this would only make the oppression somewhat more tolerable, but by no means so much as to give a chance of justice to the poor and midling class. It is utterly impossible that the supreme court can move into so many different parts of the Union, as to make it convenient or even tolerable to attend before them with witnesses to try causes from every part of the United states; if to avoid the expence and inconvenience of calling witnesses from a great distance, to give evidence before the supreme court, the expedient of taking the deposition of witnesses in writing should be adopted, it would not help the matter. It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing, besides the expence of taking written testimony would be enormous; those who are acquainted with the costs that arise in the courts, where all the evidence is taken in writing, well know that they exceed beyond all comparison those of the common law courts, where witnesses are examined *viva voce*.

The costs accruing in courts generally advance with the grade of the court; thus the charges attending a suit in our common pleas, is much less than those in the supreme court, and these are much lower than those in the court of chancery; indeed the costs in the last mentioned court, are in many cases so exorbitant and the proceedings so dilatory that the suitor had almost as well give up his demand as to prosecute his suit. We have just reason to suppose, that the costs in the supreme general court will exceed either of our courts; the officers of the general court will be more dignified than those of the states, the lawyers of the most ability will practice in them, and the trouble and expence of attending them will be greater. From all these considerations, it appears, that the expence

attending suits in the supreme court will be so great, as to put it out of the power of the poor and midling class of citizens to contest a suit in it.

From these remarks it appears, that the administration of justice under the powers of the judicial will be dilatory; that it will be attended with such an heavy expence as to amount to little short of a denial of justice to the poor and middling class of people who in every government stand most in need of the protection of the law; and that the trial by jury, which has so justly been the boast of our fore fathers as well as ourselves is taken away under them. . . .

The courts of the respective states might therefore have been securely trusted, with deciding all cases between man and man, whether citizens of the same state or of different states, or between foreigners and citizens, and indeed for ought I see every case that can arise under the constitution or laws of the United States, ought in the first instance to be tried in the court of the state, except those which might arise between states, such as respect ambassadors, or other public ministers, and perhaps such as call in question the claim of lands under grants from different states. The state courts would be under sufficient controul, if writs of error were allowed from the state courts to the supreme court of the union, according to the practice of the courts in England and of this state, on all cases in which the laws of the union are concerned, and perhaps to all cases in which a foreigner is a party.

This method would preserve the good old way of administering justice, would bring justice to every man's door, and preserve the inestimable right of trial by jury. It would be following, as near as our circumstances will admit, the practice of the courts in England, which is almost the only thing I would wish to copy in their government. . . .

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 2:262–63, 265.]

Brutus XV. March 20, 1788

I said in my last number, that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of

justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe, the courts of law are put upon the most prudent establishment, they are on a very different footing.

The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union. I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution. They consider themselves bound to decide according to the existing laws of the land, and never undertake to controul them by adjudging that they are inconsistent with the constitution—much less are they vested with the power of giving an *equitable* construction to the constitution. . . .

The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to sit aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.

I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible. But I say, this system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering the judges independent; which, in the British constitution, means no more than that they hold their places during good behaviour, and have fixed salaries, they have made the judges *inde-*

pendent, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. . . .

The only clause in the constitution which provides for the removal of the judges from offices, is that which declares, that “the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.” By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors. Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges committed the error from wicked and corrupt motives. . . .

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 2:372–73, 375.]

Letters from the Federal Farmer

The Federal Farmer’s widely reprinted series of letters argued that the judiciary, like the other branches of government, must be subject to the consent of the governed. Establishing themes that would be central to the long-running discussion of the role of the judiciary under a constitution based on popular sovereignty, the Federal Farmer ranked the jury trial with the legislature as the most important foundations of a republican form of government. The proper geographical distribution of courts would determine citizen access to the courts, and the jury would be the means by which the people were represented in the judicial process. The Constitution’s failure to guarantee jury trials in civil cases was more than the omission of a long-held privilege; it threatened to deprive the people of the means to check arbitrary power in the courts. Regardless of their lack of

legal training, the people who served on a jury brought to the courts “common sense in its purity” and an unerring sense of how laws applied to the “condition of the people.”

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II. October 9, 1787

The essential parts of a free and good government are a full and equal representation of the people in the legislature, and the jury trial of the vicinage in the administration of justice – . . .

Under one general government alone, there could be but one judiciary, one supreme and a proper number of inferior courts. I think it would be totally impracticable in this case to preserve a due administration of justice, and the real benefits of the jury trial of the vicinage, there are now supreme courts in each state in the union; and a great number of county and other courts subordinate to each supreme court – most of these supreme and inferior courts are itinerant, and hold their sessions in different parts every year of their respective states, counties and districts – with all these moving courts, our citizens, from the vast extent of the country must travel very considerable distances from home to find the place where justice is administered. I am not for bringing justice so near to individuals as to afford them any temptation to engage in law suits; though I think it one of the greatest benefits in a good government, that each citizen should find a court of justice within a reasonable distance, perhaps, within a day’s travel of his home; so that, without great inconveniences and enormous expences, he may have the advantages of his witnesses and jury – it would be impracticable to derive these advantages from one judiciary – the one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it – and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court – that, however, inferior courts might be properly placed in the different counties, and districts of the union, the appellate jurisdiction would be intolerable and expensive.

[Document Source: Herbert J. Storing, ed., *The Complete Anti-Federalist*, vol. 2, *Objections of Non-signers of the Constitution and Major Series of Essays at the Outset* (Chicago: University of Chicago Press, 1981), 230–31.]

XV. January 18, 1788

As the trial by jury is provided for in criminal causes, I shall confine my observations to civil causes – and in these, I hold it is the established right of the jury by the common law, and the fundamental laws of this country, to give a general verdict in all cases when they chuse to do it, to decide both as to law and fact, whenever blended together in the issue put to them. Their right to determine as to facts will not be disputed, and their right to give a general verdict has never been disputed, except by a few judges and lawyers, governed by despotic principles. . . . The jury trial, especially politically considered, is by far the most important feature in the judicial department in a free country, and the right in question is far the most valuable part, and the last that ought to be yielded, of this trial. Juries are constantly and frequently drawn from the body of the people, and freemen of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department. If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases. It is true, the freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties. The body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined. Nor is it merely this controul alone we are to attend to: the jury trial brings with it an open and public discussion of all causes, and excludes secret and arbitrary proceedings. This, and the democratic branch in the legislature, as was formerly observed, are the means by which the people are let into the knowledge of public affairs – are enabled to stand as the guardians of each others rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them. . . .

[Document Source: Storing, ed., *The Complete Anti-Federalist*, 2:319–20.]

“A Farmer”

“A Farmer,” who published seven essays in the Baltimore *Maryland Gazette* between February and April 1788, drew further parallels between the legislature and the trial by jury, which he considered the “democratic branch” of the judiciary. Trial by jury was also, according to “A Farmer,” the surest guarantee of judicial independence from the executive. Without juries, judges’ power would be unchecked and would soon be absorbed by the executive.



The trial by jury is—the democratic branch of the judiciary power—more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks; in the one case the treason is never discovered until liberty, and with it the power of defence is lost; the other is an open summons to arms, and then if the people will not defend their rights, they do not deserve to enjoy them.

The *judiciary* power, has generally been considered as a *branch* of the *executive*, because these two powers, have been so frequently united; – but where united, there is no liberty. In every *free* State, the judiciary is kept separate, independent, and considered as an intermediate power. . . . Without then the check of the *democratic* branch – *the jury*, to ascertain those facts, to which the judge is to apply the law, and even in many cases to determine the cause by a *general* verdict – the latitude of judicial power, combined with the various and uncertain nature of evidence, will render it impossible to convict a judge of corruption, and ascertain his guilt. Remove the fear of punishment, give hopes of impunity, and vice and tyranny come scowling from their dark abodes in the human heart. Destroy juries and every thing is prostrated to judges, who may easily disguise law, by suppressing and varying fact: Whenever therefore the trial by juries has been abolished, the liberties of the people were soon lost. The judiciary power is immediately absorbed, or placed under the direction of the executive, as example teaches in most of the States of Europe. So formidable an engine of power, defended only by the gown and the robe, is soon seized and engrossed by the power that weilds the sword. Thus we find the

judiciary and executive branches united, or the *former* totally dependent on the *latter* in most of the governments of the world. . . .

[Document Source: Storing, ed., *The Complete Anti-Federalist*, vol. 5, *Maryland and Virginia and the South* (Chicago: University of Chicago Press, 1981), 38–39.]

Luther Martin Speech to the Maryland Legislature, 1788

The constitutional provision for appeals to the Supreme Court on questions of fact as well as law would, according to Luther Martin, effectively abolish the right to a trial by jury in any type of case. While many Anti-Federalists focused on the Constitution's failure to guarantee juries in civil trials, Martin thought the Constitution posed a threat to all jury trials. An appeal on the facts of a criminal trial would render the lower court jury trial "a needless expence" that could easily be reversed by the Supreme Court. In this speech to the Maryland state legislature, Luther Martin suggested that the Convention delegates deliberately undermined the right to a jury trial because they distrusted state judges. Martin had served as a Maryland delegate to the Federal Convention but left Philadelphia before the Constitution came to a vote, and he led the Anti-Federalist effort in his home state. Here he warned that the Constitution would reverse the protections found in the English and State constitutions, thereby destroying that "palladium of liberty"—the jury.

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And in all those cases where the general government has jurisdiction in civil questions, the proposed constitution *not only* makes *no provision for the trial by jury* in the *first* instance, but by its appellate jurisdiction *absolutely takes away that inestimable privilege*, since it expressly declares the supreme court shall have appellate jurisdiction both as to law and *fact*. Should therefore, a jury be adopted in the *inferior* court, it would only be a *needless expence*, since on an appeal the *determination* of that *jury, even on questions of fact*, however honest and upright, is to be of *no possible effect*—the supreme court is to take up *all questions of fact*—to *examine the evidence relative thereto*—to *decide upon* them in the *same manner* as if they had *never been tried by a jury*—nor is *trial by jury secured in criminal cases*; it is true, that in the first instance, in the inferior court the trial is to be by jury, in this and in this only, is the difference between criminal and civil cases; but, Sir, the

appellate jurisdiction extends, as I have observed, to cases *criminal* as well as to civil, and on the *appeal* the court is to *decide not only* on the law but on the *fact*, if, therefore, *even* in *criminal* cases the general government is not satisfied with the verdict of the jury, its officer may remove the prosecution to the supreme court, and *there* the *verdict of the jury is to be of no effect*, but the *judges of this court* are to *decide upon the fact* as well as the law, the *same as in civil cases*.

Thus, Sir, *jury trials*, which have ever been the *boast* of the English constitution, which have been by our several *State constitutions* so *cautiously secured* to us—*jury trials* which have so long been considered the *surest barrier* against *arbitrary power*, and the *palladium of liberty*,—with the *loss of which* the *loss of our freedom* may be dated, are *taken away* by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual*, but in *every case* whether *civil* or *criminal* arising under the laws of the United States, or the *execution* of those laws. It is *taken away* in *those very cases* where of *all others* it is *most essential for our liberty*, to have it *sacredly guarded* and *preserved*, in *every case*, whether *civil* or *criminal*, between *government* and *its officers* on the one part, and the *subject* or *citizens* on the other. Nor was this the effect of inattention, nor did it arise from any real difficulty in establishing and securing jury trials by the proposed constitution, if the convention had wished so to do: but the *same reason* influenced *here* as in the case of the establishment of inferior courts; as they could not trust *State Judges*, so would they not confide in *State juries*. They alledged that the general government and the State governments would always be at variance; that the citizens of the different States would enter into the views and interest of their respective States, and therefore ought not to be trusted in determining causes in which the general government was any way interested, without giving the general government an opportunity, if it disapproved the verdict of the jury, to appeal, and to have the *facts examined into again* and *decided upon* by *its own judges*, on whom it was thought a reliance might be had by the general government, they being appointed under its authority. . . .

[Document Source: Storing, ed., *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1981), 2:70–71.]

The Federalist Defense

The *Federalist* essays of Alexander Hamilton offered the most notable defense of an independent judiciary and a persuasive answer to many of the Anti-Federalist criticisms of the proposed judicial power of the United States. Hamilton directly addressed the proposed judiciary in seven essays that were part of a series of 85 essays written by Hamilton, James Madison, and John Jay under the pseudonym “Publius.” The *Federalist* essays, originally published in New York in support of that state’s ratification of the Constitution, represent the most comprehensive analysis of the new government written by the supporters of the proposed charter of government.

The Federalist No. 78

In Alexander Hamilton’s famous phrase, the judiciary would be the branch of government “least dangerous to the political rights of the constitution.” The judges had no means of coercion comparable to executive control of the military or congressional power over spending, and the judiciary would in practice be dependent on the executive for the enforcement of its decisions.

What appeared to the Anti-Federalists as a virtually unchecked judicial authority was, Hamilton argued, absolutely essential to protect the liberties of the people and to monitor the constitutional limits on governmental power. The Constitution, once ratified by the states, would be the ultimate expression of the popular will, and it was the judiciary’s responsibility to enforce that popular will when it was violated by legislation that was contrary to the Constitution.

Only with the twin protections of tenure during good behavior and salaries that could not be reduced would judges be able to enforce the Constitution free of pressure from the other branches of government or temporary popular majorities. The unprecedented independence of judges was further required to attract to the bench individuals with the learning and moral character required for a just determination of the law.

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... All the judges who may be appointed by the United States are to hold their offices *during good behaviour*, which is conformable to the most approved of the state constitutions; ... The standard of good behaviour for the continuance in office of the judicial

magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. For I agree that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced

by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. . . .

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those prec-

edents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity. . . .

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 2:467–69, 473–75.]

The Federalist No. 81

Hamilton defended the proposal for a judiciary that would be independent of the other branches of the government in its structure and in its authority. While courts in Great Britain and in some states might be part of the upper house of the legislature or subject to revision of decision by the legislature, the Supreme Court's institutional independence from the legislature and its power of judicial review were essential if the judiciary was to be a check on legislative abuse. Hamilton also advocated the establishment of inferior federal courts that would be institutionally separate from state courts. Many state courts did not provide the protections of tenure required by the Constitution, and, more important, the "local prejudices" of state judges would undermine confidence in the state courts' ability to determine national causes and to establish national uniformity in the law.

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In the first place, there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution, or which gives them any greater latitude in this respect, than may be claimed by the courts of every state. I admit however, that the constitution ought

to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention; but from the general theory of a limited constitution; and as far as it is true, is equally applicable to most, if not to all the state governments. There can be no objection therefore, on this account, to the federal judicature, which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to the legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the supreme court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great-Britain and in that of this state. To insist upon this point, the authors of the objection must renounce the meaning they have laboured to annex to the celebrated maxim requiring a separation of the departments of power. It shall nevertheless be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a *part* of the legislative body. But though this be not an absolute violation of that excellent rule; yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit, which had operated in making them, would be too apt to operate in interpreting them: Still less could it be expected, that men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach, in the character of judges. Nor is this all: Every reason, which recommends the tenure of good behaviour for judicial offices, militates against placing the judiciary power in the last resort in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes in the first instance to judges of permanent standing, and in the last to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of

men, who for want of the same advantage cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as on this account there will be great reason to apprehend all the ill consequences of defective information; so on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and of equity. . . .

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the supreme court, in every case of federal cognizance. It is intended to enable the national government to institute or *authorise* in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude; yet the substance of the power in question, may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national constitution. To confer the power of determining such causes upon the existing courts of the several states, would perhaps be as much “to constitute tribunals,” as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favour of the state courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as

wide as possible. In proportion to the grounds of confidence in, or diffidence of the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction in the several classes of causes to which it is extended by the plan of the convention, I should consider every thing calculated to give in practice, an *unrestrained course* to appeals as a source of public and private inconvenience. . . .

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 2:484–85, 487–88.]

The Federalist No. 82

Hamilton envisioned a Supreme Court that would be the capstone of a single national judicial system encompassing all courts, state as well as federal, that had jurisdiction over any federal questions. Only a Supreme Court with appellate jurisdiction over state and federal courts would be able to define “principles of national justice” and to establish national uniformity in the interpretation of the law. Hamilton also suggested that the constitutional authorization for the establishment of inferior federal courts offered Congress the option of granting federal district courts jurisdiction over appeals from state courts. The jurisdiction of lower federal courts over appeals from the state courts would reduce the volume of appeals to the Supreme Court and make it safer to entrust state courts with jurisdiction over federal questions.

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. . . What relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the supreme court of the United States. The constitution in direct terms, gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance in which it is not to have an original one; without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance and from the reason of the thing it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the union may

be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought without evident necessity to be involved; the latter would be intirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is that all the causes of the specified classes, shall for weighty public reasons, receive their original or final determination in the courts of the union. To confine therefore the general expressions giving appellate jurisdiction to the supreme court to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the state courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention in the first place authorises the national legislature “to constitute tribunals inferior to the supreme court.” It declares in the next place that, “the JUDICIAL POWER of the United States *shall be vested* in one supreme court and in such inferior courts as congress shall ordain and establish”; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them, are that they shall be “inferior to the supreme court,” and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate or both is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate

national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals in most cases in which they may be deemed proper instead of being carried to the supreme court, may be made to lie from the state courts to district courts of the union.

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 2:495–97.]

The Federalist No. 83

Hamilton addressed what he acknowledged to be the most potent criticism of the judicial system outlined in the Constitution—the absence of any requirement for jury trials in civil cases. He dismissed the seriousness of the criticism, which he thought ignored the fact that most citizens would only be concerned with civil disputes in state courts. While most defenders of the Constitution reassured the public that jury trials would continue in civil cases, Hamilton suggested that the civil jury might be a relic of the past in many types of cases. He thought the Constitution wisely left Congress the discretion to follow the experiments in Great Britain and in some states that allowed other court procedures for settling property disputes. These suggestions convinced few, and the guarantee of a jury trial in civil trials would remain a central demand, even of many who supported the Constitution, until that traditional right was included in the Bill of Rights submitted by the First Congress to the states for ratification.

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The objection to the plan of the convention, which has met with most success in this state, and perhaps in several of the other states, is *that relative to the want of a constitutional provision for the trial by jury in civil cases*. The disingenuous form in which this objection is usually stated, has been repeatedly adverted to and exposed, but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the constitution, in regard to *civil causes*, is represented as an abolition of the trial by jury; and the declamations to which it has afforded a pretext,

are artfully calculated to induce a persuasion that this pretended abolition is complete and universal; extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter, would, however, be as vain and fruitless, as to attempt the serious proof of the *existence of matter*, or to demonstrate any of those propositions which by their own internal evidence force conviction, when expressed in language adapted to convey their meaning. . . .

From these observations it must appear unquestionably true that trial by jury is in no case abolished by the proposed constitution, and it is equally true that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the state constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration. The foundation of this assertion is that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the state courts only, and in the manner which the state constitutions and laws prescribe. All land causes, except where claims under the grants of different states come into question, and all other controversies between the citizens of the same state, unless where they depend upon positive violations of the articles of union by acts of the state legislatures, will belong exclusively to the jurisdiction of the state tribunals. Add to this that admiralty causes, and almost all those which are of equity jurisdiction are determinable under our own government without the intervention of a jury, and the inference from the whole will be that this institution, as it exists with us at present, cannot possibly be affected to any great extent by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. . . . The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention. . . .

I cannot but persuade myself on the other hand, that the different lights in which the subject has been placed in the course of these observations, will go far towards removing in candid minds, the apprehensions they may have entertained on the point. They have tended to show that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that even in far the greatest proportion of civil cases, and those in which the great body of the community is interested, that mode of trial will remain in its full force, as established in the state constitutions, untouched and unaffected by the plan of the convention: That it is in no case abolished by that plan; and that there are great if not insurmountable difficulties in the way of making any precise and proper provision for it in a constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails. For my part, I acknowledge myself to be convinced that even in this state, it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great-Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature. . . .

[Document Source: Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), 558, 561–63, 572–73.]

“A Citizen of America,” [Noah Webster], October 1787

Noah Webster found little of substance in the Anti-Federalist warnings of threats to state courts and to the traditional rights to a trial by jury. The Constitution clearly defined the limits of federal jurisdiction, and, he contended, a second trial on the facts might make rights more secure. Webster acknowledged that the geographical scale of federal courts would make it more difficult to draw juries from the vicinage of the defendant, but he suggested that in a more developed commercial society, the most impartial jury would be that consisting of strangers. Webster’s assurances about jury trials, like those of Hamilton, did nothing to lessen demands for a more explicit protection in the form of a bill of rights.

Noah Webster, best known for his *American Dictionary of the English Language*, became an advocate of a strong national judiciary following his travel to numerous state courts to secure copyrights for his early spellers and grammar books.



It is also intimated as a probable event, that the federal courts will absorb the judiciaries of the several states. This is a mere suspicion, without the least foundation. The jurisdiction of the federal courts is very accurately defined and easily understood. It extends to the cases mentioned in the constitution, and to the execution of the laws of Congress, respecting commerce, revenue and other general concerns.

With respect to all other civil and criminal actions, the powers and jurisdiction of the several judiciaries of each state, remain unimpaired. Nor is there any thing novel in allowing appeals to the supreme court. Actions are mostly to be tried in the state where the crimes are committed—But appeals are allowed under our present confederation, and no person complains; nay, were there no appeal, every man would have reason to complain, especially when a final judgement, in an inferior court, should affect property to a large amount. But why is an objection raised against an appellate jurisdiction in the supreme court, respecting *fact* as well as *law*? Is it less safe to have the opinions of two juries than of one? I suspect many people will think this no defect in the constitution. But perhaps it will destroy a material requisite of a good jury, viz. their vicinity to the cause of action. I have no doubt, that

when causes were tried, in periods prior to the Christian æra, before twelve men, seated upon twelve stones, arranged in a circular form, under a huge oak, there was great propriety in submitting causes to men *in the vicinity*. The difficulty of collecting evidence, in those rude times, rendered it necessary that juries should judge mostly from their own knowledge of facts or from information obtained out of court. But in these polished ages, when juries depend almost wholly on the testimony of witnesses; and when a complication of interests, introduced by commerce and other causes, renders it almost impossible to collect men, in the vicinity of the parties, who are wholly disinterested, it is no disadvantage to have a cause tried by a jury of strangers. Indeed the latter is generally the most eligible.

But the truth is, the creation of all inferior courts is in the power of Congress; and the constitution provides that Congress may make such exceptions from the right of appeals as they shall judge proper. When these courts are erected, their jurisdictions will be ascertained, and in small actions, Congress will doubtless direct that a sentence in a subordinate court shall, to a certain amount, be definitive and final. All objections therefore to the judicial powers of the federal courts appear to me as trifling as any of the preceding. . . .

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 1:152–53.]

“A Landholder,” [Oliver Ellsworth], December 3, 1787

The establishment of an effective federal government under the Constitution required a uniform national court system, according to Oliver Ellsworth. Ellsworth, who served as a delegate to the Federal Convention from Connecticut and would become the third Chief Justice of the United States, argued that a reliance on state courts to exercise federal jurisdiction would place the new federal government at the mercy of state governments or would increase the threat of local political protests, like the recent Shays’ Rebellion. Citizens needed to have confidence in the legal system throughout the nation, and Congress needed a federal judiciary to enforce its legislation in ways that were not possible under the Articles of Confederation.

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A perfect uniformity must be observed thro' the whole union or jealousy and unrighteousness will take place; and for a uniformity one judiciary must pervade the whole. The inhabitants of one state will not have confidence in judges appointed by the legislature of another state, in which they have no voice. Judges who owe their appointment and support to one state, will be unduly influenced, and not reverence the laws of the union. It will at any time be in the power of the smallest state by interdicting their own judiciary, to defeat the measures, defraud the revenue, and annul the most sacred laws of the whole empire. A legislative power, without a judicial and executive under their own control, is in the nature of things a nullity. Congress under the old confederation had power to ordain and resolve, but having no judicial or executive of their own, their most solemn resolves, were totally disregarded. The little state of Rhode-Island was purposely left by Heaven to its present madness, for a general conviction in the other states, that such a system as is now proposed is our only preservation from ruin. What respect can any one think would be paid to national laws, by judicial and executive officers who are amenable only to the present assembly of Rhode-Island. The rebellion of Shays and the present measures of Rhode-Island ought to convince us that a national legislature, judiciary and executive must be united, or the whole is but a name; and that we must have these or soon be hewers of wood and drawers of water for all other people. . . .

[Document Source: Bailyn, ed., *The Debate on the Constitution*, 1:243.]

John Marshall in the Virginia Ratification Convention

In the Virginia Ratification Convention, defenders of the proposed Constitution faced determined opposition from the many delegates who feared that federal courts would never provide the same guarantees of justice offered by the state courts. John Marshall assured them that the federal judges would possess at least as much independence as that enjoyed by Virginia judges. The future Chief Justice dismissed fears that states would be sued in federal courts, predicting (incorrectly) that individuals with claims against a state would appeal to that state's legislature for redress rather than sue the state.

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... Gentlemen have gone on an idea, that the Federal Courts will not determine the causes which may come before them, with the same fairness and impartiality, with which other Courts decide. What are the reasons of this supposition?—Do they draw them from the manner in which the Judges are chosen, or the tenure of their office?—What is it that makes us trust our Judges?—Their independence in office, and manner of appointment. Are not the Judges of the Federal Court chosen with as much wisdom, as the Judges of the State Governments?—Are they not equally, if not more independent?—If so, shall we not conclude, that they will decide with equal impartiality and candour?—If there be as much wisdom and knowledge in the United States, as in a particular State, shall we conclude that that wisdom and knowledge will not be equally exercised in the selection of the Judges?

The principle on which they object to the Federal jurisdiction, seems to me to be founded on a belief, that there will not be a fair trial had in those Courts. If this Committee will consider it fully, they will find it has no foundation, and that we are as secure there as any where else. What mischief results from some causes being tried there?—Is there not the utmost reason to conclude, that Judges wisely appointed, and independent in their office, will never countenance any unfair trial?—What are the subjects of its jurisdiction? Let us examine them with an expectation that causes will be as candidly tried there, as elsewhere, and then determine. The objection, which was made by the Honorable Member who was first up yesterday (*Mr. Mason*) has been so fully refuted, that it is not worth while to notice it. He objected to Congress having power to create a number of Inferior Courts according to the necessity of public circumstances. I had an apprehension that those Gentlemen who placed no confidence in Congress, would object that there might be no Inferior Courts. I own that I thought, that those Gentlemen would think there would be no Inferior Courts, as it depended on the will of Congress, but that we should be dragged to the centre of the Union. But I did not conceive, that the power of increasing the number of Courts could be objected to by any Gentleman, as it would remove the inconvenience of being dragged to the centre of the United States. I own that the power of creating a number of Courts, is, in my estimation, so far from being a defect, that it seems necessary to the perfection of this system. . . .

... Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution, and the laws of the United States? What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the Judiciary? There is no other body that can afford such a protection...

With respect to disputes between a State, and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no Gentleman will think that a State will be called at the bar of the Federal Court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power shall be dragged before a Court. The intent is, to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular State, is it to be presumed, that on application to its Legislature, he will not obtain satisfaction? But how could a State recover any claim from a citizen of another State, without the establishment of these tribunals?

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[Document Source: Herbert A. Johnson, ed., *The Papers of John Marshall*, vol. 1, 1775–1788 (Chapel Hill: University of North Carolina Press, 1974), 275–77, 279.]

The Judiciary Act of 1789

When the First Congress convened in the spring of 1789, it faced the challenge of organizing a federal judiciary that the Constitution had sketched only in general terms. With no model for national courts of general jurisdiction, the Senate and then the House of Representatives faced basic questions about the proper number of justices and meeting times of the Supreme Court and far more controversial debates on the need for inferior federal courts and the balance of federal and state jurisdiction. How could the court system promote the uniformity of law that most considered essential to the success of a government in a large republic? Would the federal judiciary require separate courts for different kinds of law, as was found in Great Britain and in most of the American colonies? And how could a national judiciary secure the confidence of a public that trusted local and easily accessible courts?

The debates over ratification of the Constitution revealed that many citizens feared that an independent federal judiciary might threaten the survival of state courts, and thereby limit access to justice and curtail civil liberties. In response to these concerns, members of Congress considered whether state courts might serve as federal trial courts or share jurisdiction with inferior federal courts. Congressional debate also addressed the advantages of a court system that preserved familiar local procedures and traditional rights to a jury trial and protected citizens from being called before distant, expensive courts. The debate over the Judiciary Act coincided with Congress's consideration of the Bill of Rights, which offered further assurances that the federal courts would respect traditional civil liberties.

In the Judiciary Act of September 24, 1789, Congress established a three-part federal court system. The Supreme Court consisted of a Chief Justice and five associate justices. In each state and in Kentucky and Maine (then parts of other states), a federal judge presided over a U.S. district court, which heard admiralty and maritime cases and some other minor cases. U.S. circuit courts, organized in the judicial district of each state, served as the principal trial courts in the federal system and exercised limited appellate jurisdiction, but they had no judges of their own. Two Supreme Court justices, "riding circuit," and the local district judge presided in each of the circuit courts.

The Judiciary Act of 1789 represented a compromise between those who wanted the federal courts to exercise the full jurisdiction allowed under the Constitution and those who opposed any lower federal courts other than admiralty courts. Extending the jurisdiction of the circuit courts to cases in which the parties were residents of different states greatly enhanced the importance of the federal courts, and Section 25 of the act granted the Supreme Court jurisdiction to hear appeals of decisions from the high courts of the states when those decisions involved constitutional questions or federal law. The act ensured the preservation of state legal traditions by providing for the use of state rules and procedures in most proceedings, by establishing judicial districts that coincided with state boundaries, and by requiring district judges to reside in the district. The relatively high monetary value required for suits in the circuit courts protected small debtors and those who could not afford to travel to a distant court.

Members of Congress and commentators in the legal community recognized that the plan for a judiciary in an extended republic was unprecedented and would necessarily be an experiment. Although a multi-tiered federal system operating parallel to state courts survives, the Judiciary Act of 1789 was almost immediately subject to calls for revision.³

Robert Treat Paine to Caleb Strong, May 18, 1789

Senator Caleb Strong of Massachusetts, like other senators, distributed copies of the proposed judiciary act to members of the legal community in his home state, and he received comments from leading lawyers and judges. Massachusetts' attorney general, Robert Treat Paine, addressed the challenge of devising a federal judiciary that would function alongside existing state judiciaries. Paine, a supporter of a strong national government, recognized popular concerns about the expense and administrative burden associated with a new network of courts, and he noted that combining multiple areas of law within the jurisdiction of a single federal trial court would reduce expenses and simplify the judicial process. Paine also sug-

3. Goebel, Jr., *History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801*, 457–508; Maeva Marcus, ed., *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (New York: Oxford University Press, 1992); Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts," *Duke Law Journal* 40 (December 1990): 1421–1531.

gested that the Supreme Court might convene in locations throughout the country, thereby reducing citizens' costs and alleviating fears of a distant, powerful court.

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. . . With regard to the forming the federal Infr. Courts I find there is a difficulty in the minds of many in Constituting the State Supreme Jud. Courts for that purpose; it is Said the regulation must be general & that the S.J. Court of every State do not hold quam diu; it certainly would Save much expence of time & money if Such a regulation could take place; & these are very great Objects in every point of View; but if this can't be done, & it became necessary to have distinct fedr. Inf. Courts, the Expence must then be lessened by reducing the number of the Judges; there must be a Court to determine all Matters of Revenue Seizures &c. and also all Admiralty Matters; Quære, is there a real inconsistency in Vesting these powers in one two or three persons by the name of fed. Infr. Court, or must there be an Admiralty Jurisdiction distinct? And then where will you vest the Jurisdiction of Revenue questions Seizures &c? in the Admiralty or Infr. Courts? Must there then in each State be an Admiralty Court and Infr fed. Courts beside the S.J. Court of the State? This complicates the Machine too much, and how will it be Supported? These are but hints of enquiry; I presume not to propose, I have too long been acquainted with public life to Suppose an Individual by himself can propose and determine Such questions So well as a collection of Sages who bring together all the matter to be considered, & ripen each others Judgment by mutual Observations. I think there is much less difficulty in forming the fed. Sup. Jud. Court, as you may construct it from first principles and are not fettered with the local Circumstances of particular States, who will unavoidably feel affected perhaps embarrassed & lessened or burthened by the Infr. fed. Court. I think the fed. Sup. Jud. will be Itinerant & the trial of Appealed Causes So regulated as to prevent as much as may be the expence and burthen of going far from home for Justice. . . .

[Document Source: Maeva Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 4, *Organizing the Federal Judiciary: Legislation and Commentaries* (New York: Columbia University Press, 1992), 393.]

Edmund Pendleton to James Madison, July 3, 1789

The chief justice of the Virginia court of appeals, Edmund Pendleton, warned that the federal judiciary would succeed only if it relieved popular fears that federal courts would be too remote to ensure ready access to justice. As president of the Virginia ratification convention, Pendleton had been a strong advocate of the judiciary outlined in Article III and of the implied power of judicial review, but the federal judiciary could only serve as a check on the legislature if the court system secured popular support. In this private letter to James Madison, then a member of the U.S. House of Representatives, Pendleton urged Congress to make the state courts the trial courts for all federal cases. The “familiar & easy” state court procedures would reassure a skeptical public more effectively than would a new circuit court system dependent on the regular attendance of Supreme Court justices. Pendleton was one of Virginia’s leading lawyers and jurists in the second half of the eighteenth century, and he had been a respected leader of the state convention during the Revolutionary War. In October 1789, Pendleton declined George Washington’s offer of appointment as U.S. district judge for Virginia.

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This department is the Sore part of the Constitution & requires the lenient touch of Congress. To quiet the fears of the Citizens of being drag’d large distances from home, to defend a suit for a small sum, which they had better pay however unjust, than defend with success, is as worthy of attention, as to provide for the speedy Adm[inistratio]n of Justice to honest Creditors.

The Circuit Courts I suppose intended as an Accomodation of these inconveniences, but I think an exceptionable one. The fatigue of the Circuits & other accidents, will generally reduce the Judges to two, a number unsatisfactory to be appealed to for final acquiescence; and to the Supreme Court, they will go at last. Their division in Opinion, wch must Often happen, will occasion delay, additional trouble & expence - & in appeals from the District Court, if that Judge be one in the Circuit, the Appellee will have a decided advantage.

The District Court will prevent Citizens from being sued out of their state but not from being drawn to great distances within it, which in large states is very injurious, . . .

Permit me then to ask why is this project necessary? And if it be not a Counter birth to the offspring of our late Assembly, unreasonable

jealousy? Have we any Security that Judges of foederal appointment, will possess Superior ability or Integrity, to those called into that duty by the States? If not, why may not all suits within the Appellate Jurisdiction, be Originated in the state Courts, - & from their last resort allow the Appeal to the Supreme Court for large Sums? The Judges of the State Courts are equally independent, take the same Oaths in Spirit, & have the same law to direct their decisions, as the Foederal. They have their Courts so model'd, as to render Justice Speedy to the Creditor & easy to the D[e]btor, the trial being near his home, & the Adm[inistratio]n so divided as to produce dispatch. The mode will be familiar & easy, & quiet the people's fears: and I submit it to my Representatives, whether this will not be, at least, the best experiment to make in the Infancy of our Government.

The Circuit part of the Plan suggests a thought worthy of Attention; whether the Supreme Court might not sit in each of those Circuits, instead of being Stationary. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 4, *Organizing the Federal Judiciary: Legislation and Commentaries*, 444–45.]

James Madison to Samuel Johnston, July 31, 1789

As the House of Representatives prepared to debate the judiciary bill approved by the Senate, James Madison warned his friend, North Carolina Governor Samuel Johnston, that the plan failed to achieve the needed balance between modest cost and easy access to federal justice. Although wary of vesting federal jurisdiction in existing state courts, Madison worried that the limited number of federal trial courts authorized by the Senate plan would never meet the people's expectation of accessible justice. In his campaign for the U.S. House of Representatives, Madison had faced formidable opposition from citizens who feared that a federal court system would be remote and would threaten many of their civil liberties. At the same time that Congress debated the new judiciary, Madison drafted amendments that would become the Bill of Rights, protecting civil liberties and the rights of defendants in the federal courts.

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... The Judiciary system has been sent from the Senate and will probably be taken up to day in the House of Rep's. It is pregnant with difficulties, not only as relating to a part of the constitution which has been most criticised, but being in its own nature peculiarly complicated & embarrassing. The Senate have proceeded on the idea that the federal Gov't ought not to depend on the State Courts any more than on the State Legislatures, for the attainment of its ends and it must be confessed, that altho' the reasons do not equally hold in the two cases, yet not only theoretic propriety, but the vicious constitution and proceedings of the Courts in the same states, countenance the precaution in both. At the same time it seems scarcely practicable to carry federal justice home to the people on this plan without a number of offices & a degree of expense which are very serious objections to it. The plan of the Senate is perhaps disagreeable with encountering these objections without securing the benefits for which the sacrifice is to be made. In criminal matters it appears to be particularly defective, being irreconcilable as it stands with a *local* trial of offenses. The most that can be said in its favor is that it is the first essay, and in practice will be surely an experiment. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 4, *Organizing the Federal Judiciary: Legislation and Commentaries*, 491.]

Oliver Ellsworth to Richard Law, August 4, 1789

Senator Oliver Ellsworth of Connecticut was one of the principal authors of the Judiciary Act of 1789 and a manager of Senate debate on the measure. Following Senate approval of the judiciary bill, Ellsworth described to Connecticut Judge Richard Law why the federal judiciary needed its own district and circuit courts. The varied judicial tenure in state courts rendered those courts unsuitable to serve as the only federal trial courts. Federal circuit courts, with Supreme Court justices presiding, would promote some measure of uniformity and earn the respect of parties in cases, thereby reducing appeals to the Supreme Court. In 1796, Oliver Ellsworth became the third Chief Justice of the United States, and served in that position until 1800. Richard Law accepted appointment as judge of the U.S. district court in Connecticut and served from 1789 to 1806.

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... To annex to State Courts jurisdictions which they had not before, as of admiralty cases, & perhaps of offences against the United States, would be constituting the Judges of them, protanto, federal Judges, & of course they would continue such during good behaviour & on fixed salaries, which in many cases, would illy comport with their present tenures of office. Besides if the State Courts as such could take cognizance of those offences, it might not be safe for the general government to put the trial & punishment of them entirely out of its own hands. One federal Judge at least, resident in each State, appears unavoidable. And without creating any more, or much enhancing the expence, there may be circuit courts, which would give system to the department, uniformity to the proceedings, settle many cases in the States that would otherwise go to the Supreme Court, & provide for the higher grade of offences. Without this arrangement there must be many appeals or writs of error from the supreme courts of the States, which by placing them in a Subordinate scituation, & Subjecting their decisions to frequent reversals, would probably more hurt their feelings & their influence, than to divide the ground with them at first & leave it optional with the parties entitled to federal Jurisdiction, where the causes are of considerable magnitude to take their remedy in which line of courts they pleased. I consider a proper arrangement of the judiciary, however difficult to establish, among the best securities the government will have, & question much if any will be found at once more economical, systematic & efficient than the one under consideration. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 4, *Organizing the Federal Judiciary: Legislation and Commentaries*, 495.]

Judiciary Act of 1789—U.S. House of Representatives Debate

The first legislative business of the U.S. Senate was the establishment of a committee to report on a bill for the organization of the federal judiciary. Oliver Ellsworth, with the assistance of William Paterson and Caleb Strong, drafted a bill, which was printed and sent to lawyers and judges for comments. The Senate did not record debate in the ear-

ly Congresses, but private commentaries of senators indicate that the most significant disagreements focused on the proposed inferior federal courts. The Senate, however, rejected Richard Henry Lee's motion to limit the U.S. district courts to admiralty jurisdiction, and on July 17, approved the bill. The House of Representatives opened debate on the judiciary bill following its approval of the constitutional amendments that would become the Bill of Rights. The published record of debate in the House of Representatives offered the public a view of the most important divisions of opinion on the proposed judiciary.

Representative Samuel Livermore of New Hampshire,
August 24, 1789

As the House debated the proper size and role of the Supreme Court, Livermore warned that the justices' service on federal trial courts in each state would heighten an innate popular mistrust of courts and raise fears of multiple trials on the same cause. Livermore recommended reliance on familiar state courts to exercise federal jurisdiction, not only to lessen costs, but to allay fears of an oppressive national government.

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... I fear this principle of establishing judges of a supreme court will lead to an entire new system of jurisprudence, and fill every state in the union with two kinds of courts for the trial of many causes, a thing so heterogeneous, must give great disgust: Sir, it will be establishing a government within a government, and one must prevail upon the ruin of the other. Nothing, in my opinion, can irritate the inhabitants so generally, as to see their neighbors dragged before two tribunals for the same offence. Mankind in general are unfriendly to courts of justice, they are vexed with law-suits, for debts or trespasses; and though I do not doubt but the most impartial administration of justice will take place, yet they will feel the imposition burthensome and disagreeable. People in general do not view the necessity of courts of justice with the eye of a civilian, they look upon laws rather as intended for punishment than protection, they will think we are endeavoring to irritate them rather than to establish a government to set easy upon them.

Will any gentleman say that the constitution cannot be administered without this establishment. I am clearly of a different opinion; I think it can be administered better without than with it. There is already in each state a system of jurisprudence, congenial to the wishes of its citizens, I never heard it complained of, but justice was distributed with an equal hand in all of them; I believe it is so, and the people think it so. We had better then continue them than introduce a system replete with expence, and altogether unnecessary. . . .

[Document Source: Charlene Bangs Bickford, Kenneth R. Bowling, and Helen E. Veit, eds., *Documentary History of the First Federal Congress*, vol. 11, *Debates in the House of Representatives, First Session: June–September 1789* (Baltimore, Md.: Johns Hopkins University Press, 1992), 1330–31.]

Representative William Loughton Smith of South Carolina,
August 29, 1789

As the House debated a motion to strike out the section of the Senate bill establishing federal district courts in each state, Smith argued that Article III of the Constitution required the establishment of inferior federal courts and the grant of full federal trial jurisdiction to those courts. The varying state provisions for judicial tenure and compensation furthermore rendered the state courts unsuitable for exercising the federal jurisdiction outlined in the Constitution. The debate over whether the Constitution mandated inferior federal courts or granted the Congress discretion to establish such courts would not be settled in 1789, and would reappear in subsequent congressional debates in the early years of the federal government.

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There is another important consideration; that is, how far the constitution stands in the way of this motion: It is declared by that instrument that the judicial power of the United States shall be vested in one supreme and in such inferior courts as Congress shall from time to time establish: Here is no discretion then in Congress to vest the judicial power of the United States in any other tribunal than in the supreme court and the inferior courts of the United States: It is further declared that the judicial power of the United States shall extend to all cases of a particular description – How is that power to be administered? Undoubtedly by the tribunals of the United States: If the judicial power of the United States extends

to those specified cases, it follows indisputably that the tribunals of the United States must likewise extend to them. What is the object of the motion? To assign the jurisdiction of some of these very cases to the state courts, to judges, who in many instances hold their places for a limited period, whereas the constitution, for the greater security of the citizen, and to insure the independence of the federal judges, has expressly declared that they shall hold their commissions during good behaviour; to judges who are exposed every year to a diminution of salary by the state legislatures, whereas the constitution to remove from the federal judges all dependence on the legislative or executive, has protected them from any diminution of their compensation. Whether the inexpediency or the unconstitutionality of the motion be considered, there are more than sufficient reasons to oppose it. The district court is necessary, if we intend to adhere to the spirit of the constitution, and to carry the government into effect. At the same time, I shall cheerfully assist in organizing this court in that mode which will prevent its being grievous or oppressive, and will render it conducive to the protection and happiness of our constituents.

[Document Source: Bickford, Bowling, and Veit, eds., *Documentary History of the First Federal Congress*, vol. 11, *Debates in the House of Representatives, First Session: June–September 1789*, 1352.]

Representative James Jackson of Georgia, August 29, 1789

Jackson believed the debate on inferior federal courts to be “the most important subject, which has yet come before this house.” His paramount considerations were the rights and conveniences of the people, which he thought would be best served by a reliance on state courts to exercise federal jurisdiction. The familiarity of the state court procedures and the proximity of state courts to litigants, witnesses, and jurors would allay popular fears about a distant and potentially expensive federal judicial system. The debate on the establishment of inferior federal courts revealed very different understandings of constitutional intent, despite the presence in this session of the House of Representatives of eight delegates to the Federal Convention.

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...The Constitution does not absolutely require inferior jurisdictions: It says, that “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." The word *may* is not positive, and it remains with Congress to determine what inferior jurisdictions are necessary, and what they will ordain and establish, for if they chuse, or think no inferior jurisdictions necessary, there is no obligation to establish them. It then remains with the Legislature of the Union to examine the necessity or expediency of those courts only. Sir, on the subject of expediency, I for my part, cannot see it, for I am of opinion that the State courts will answer every judiciary purpose. . . .

. . . I hold that the harmony of the people, their liberties and properties will be more secure under the legal paths of their ancestors, under their modes of trial, and known methods of decision. They have heretofore been accustomed to receive justice at their own doors in a simple form. The system before the house has a round of courts, appellate from one to the other, and the poor man that is engaged with a rich opponent, will be harassed in the most cruel manner, and although the sum be limited for appeals, yet, Sir, the poor individual may have a legal right to a sum superior to that limitation, say above a certain amount of dollars, and not possess fortune sufficient to carry on his law suit: He must sink under the oppression of his richer neighbor. I am clearly of opinion that the people would much rather have but one appeal, and which in my opinion would answer every purpose: I mean from the State courts, immediately to the supreme court of the continent. . . .

. . . That the system is vexatious can be easily proved, and is too obvious. An offender is dragged from his home, his friends, and connections, to a distant spot, where he is deprived of every advantage of former character, of relations, and acquaintance: The right of trial by a jury of the vicinage is done away, and perhaps he is carried to a place where popular clamor for the moment might decide against him; or if allowed a trial by vicinage, or his neighbors, it is equally vexatious to drag them two or three hundred miles from their homes, with evidences to try, and give testimony, at a distant place; every thing is to be dreaded from it. . . .

[Document Source: Bickford, Bowling, and Veit, eds., *Documentary History of the First Federal Congress*, vol. 11, *Debates in the House of Representatives, First Session: June–September 1789*, 1353–54.]

Representative Fisher Ames of Massachusetts, August 29, 1789

Ames believed that the Constitution required inferior federal courts, but he also emphasized the compelling practical need for an independent federal judiciary that would serve as the foundation of effective government. Responding to a proposal to authorize state courts to exercise federal jurisdiction at the trial level, Ames argued that federal courts were the only means by which the new federal government could carry out the authorities delegated to it by the people. Ames, like many Federalists, asserted that a strong central government with an independent judicial system enhanced popular sovereignty as it was manifested in the Constitution.

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...The judicial power is in fact highly important to the government, and to the people: To the government because by this means, its laws are peaceably carried into execution. We know by experience what a wretched system that is which is divested of this power. We see the difference between a treaty which independent nations make, and which cannot be enforced without war, and a law which is the will of the society. A refractory individual is made to feel the weight of the whole community. A government which may make, but not enforce laws, cannot last long, nor do much good. By this power too, the people are gainers. The administration of justice is the very performance of the social bargain on the part of government. It is the reward of their toils – the equivalent for what they surrender. They have to plant, to water, to manure the tree, and this is the fruit of it. The argument therefore, *a priori*, is strong against the motion, for while it weakens the government it defrauds the people. We live in a time of innovation; but until miracles shall become more common than ordinary events; and surprize us less than the usual course of nature, I shall 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 as properly negotiate and assign over our legislative as our judicial power; and it is not 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 controul. . . .

[Document Source: Bickford, Bowling, and Veit, eds., *Documentary History of the First Federal Congress*, vol. 11, *Debates in the House of Representatives, First Session: June–September 1789*, 1356–57.]

Representative John Vining of Delaware, August 31, 1789

Vining emphasized the role that “a general, independent, and energetic judicature” would play in establishing the commercial and diplomatic credibility of the new government. If the United States was to become the “asylum of liberty” heralded by so many of the Revolutionary generation, it would need a fair and uniform system of justice.

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I wish to see Justice so equally distributed as that every citizen of the United States should be fairly dealt by, and so impartially administered, that every subject or citizen of the World, whether foreigner or alien, friend or foe, should be alike satisfied: By this means you would expand the doors of justice, encourage emigration from all countries into your own, and in short, would make the United States of America, not only an Asylum of Liberty, but a Sanctuary of Justice: The faith of treaties would be preserved inviolately – your extensive funding system would have its intended operation – and your revenue, your navigation, and your impost laws would be executed so as to receive their many advantages – and in effect establish the public and private credit of the Union.

[Document Source: Bickford, Bowling, and Veit, eds., *Documentary History of the First Federal Congress*, vol. 11, *Debates in the House of Representatives, First Session: June–September 1789*, 1377.]

Representative Thomas Sumter of South Carolina, August 31, 1789

The frequent warnings about the expense of inferior federal courts emphasized the political as well as economic costs of a judicial system that would send government-appointed officers into every part of the nation. Sumter’s warning about the “double band” of judges

and the destruction of state courts reflected a broadly held fear that federal judges and court officers would serve as the enforcers of a distant government that would undermine state institutions. Better, he argued, to establish a “more moderate and convenient” court system that recognized the people’s ability to pursue their own best interests.



Gentlemen urged that this was not an expensive government; but to the eye of the people, who have not been accustomed to such a numerous set of officers, it will not appear in the same light. Will it be thought that the establishment of numerous courts are without expence, or that they will exercise their jurisdiction without oppression; or do gentlemen believe that the circumstances of the people are able to bear the expences of a double band of officers? If such is their opinion, they are certainly mistaken, at least so far as it respects the state of South-Carolina. Will gentlemen contend that this judicial establishment will not bring about the destruction of the state judiciaries; and are they prepared to prove to the satisfaction of my constituents, that such a measure would tend to preserve the liberties of America. Is the licentiousness which has been complained of in our state courts, so great as to warrant an exertion of power, little if any thing short of tyranny, I cannot believe it is; the people of America do not require the iron hand of power to keep them within due bounds, they are sufficiently enlightened to know, and pursue their own good; how, then, will they receive a system founded upon distrust, and levelled against the free exercise of that liberty which they have secured to our common country? Cannot a more moderate and convenient mode be found out? Most certainly it can: Let us then reject the present system, and endeavor to introduce one more adapted to their convenience and expectations. I have no doubt, but the abilities in this house would produce one infinitely more acceptable than that on the table, and which would secure the happiness and harmony of this country.

[Document Source: Bickford, Bowling, and Veit, eds., *Documentary History of the First Federal Congress*, vol. 11, *Debates in the House of Representatives, First Session: June–September 1789*, 1391.]

Rethinking the Judiciary Act of 1789

Edmund Randolph, “Report of the Attorney-General to the House of Representatives,” December 31, 1790

Less than a year after passage of the Judiciary Act of 1789, the House of Representatives, on August 5, 1790, asked Attorney General Edmund Randolph to report on “such matters relative to the administration of justice, under the authority of the United States as may require to be remedied.” House records leave no indication of the reasons for the request, but the report submitted by Randolph proposed fundamental changes in the nation’s new judicial system. Randolph had refused to sign the Constitution at the Federal Convention, largely because of his reservations about the vague plans for the federal judiciary. In his report to the House, Randolph presented draft legislation that would have established a much clearer division between federal and state jurisdiction. He wanted to grant the federal courts exclusive jurisdiction over all types of litigation mentioned in the Constitution, and federal and state courts would have concurrent jurisdiction over all other federal questions. Randolph wanted to eliminate Supreme Court review of any state court decisions, although he would have offered defendants in state court matters subject to federal jurisdiction the right to transfer the case to a federal court at the opening of the proceedings. Randolph also proposed to eliminate the circuit duties of Supreme Court justices, on the grounds that justices needed time for reading and reflection and that justices should not review their own decisions in trial courts.

Randolph’s report was twice referred to committee, but the House never debated the proposals, and the plan pleased almost no one. Supporters of a strong federal judiciary could not accept the denial of Supreme Court review of state court decisions, and those who favored reliance on state courts opposed the grant to federal courts of exclusive jurisdiction in the most important types of cases.⁴

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4. Wythe Holt, “Federal Courts as the Asylum to Federal Interests’: Randolph’s Report, The Benson Amendment, and the ‘Original Understanding’ of the Federal Judiciary,” *Buffalo Law Review* 36 (1987): 341–72.

On a farther prosecution of the cases acknowledged to be of concurrent jurisdiction, it appears, that a writ of error may issue from the supreme court of the United States to a final judgment or decree rendered in any suit by the highest state court of law or equity, in the nine following cases:

Where is drawn in question, 1. The validity of a treaty of the United States; 2. Or of a statute of the United States; 3. Or of an authority exercised under the United States; And the decision is against their validity. Or, where is drawn in question, 1. The validity of a statute of any state on the ground of being repugnant to the Constitution, treaties, or laws of the United States; 2. Or of an authority exercised under any state upon like grounds: and the decision is in favor of such their validity. Or where is drawn in question, 1. The construction of any clause of the Constitution of the United States; 2. Or of a treaty of the United States; 3. Or of a statute of the United States; 4. Or of a commission held under the United States: and the decision is against the title, right, privilege or exemption, specially set up, or claimed by either party under such clause of the said Constitution, treaty, statute, or commission.

That the avenue to the federal courts ought, in these instances, to be unobstructed is manifest. But in what stage, and by what form shall their interposition be prayed? There are perhaps but two modes; one of which is to convert the supreme court of the United States into an appellate tribunal over the supreme courts of the several states; the other to permit a removal by certiorari before trial. . . .

Does justice intitle a plaintiff to the first mode? When he institutes his suit, he has the choice of the state and federal courts. He elects the former, and to that election he ought to adhere.

Does justice intitle a defendant to it? Certainly not; should he be free to withdraw the cause by a certiorari at any time before trial, from the state court. For if with this privilege he proceeds without a murmur through the whole length of the state courts, ought he to catch a new chance from the federal courts? Have not both plaintiff and defendant thus acquiescing, virtually chosen their own judges?

Again. Let supposition itself be tortured: let the highest state courts, although sworn to support the Constitution, invalidate a treaty, a statute or an authority of the United States.

1. Such a decree could not invalidate them, nor impair the right of the lowest federal court to ratify them.

2. It would not disturb the tranquility of the United States. For even if aliens were the parties, the remonstrances of their prince might be repelled by shewing that they favored the state jurisdiction, by waiving the privilege of going into the federal courts.

3. Nor yet would the honor of the United States be sullied. For if it has not occurred, it may be conceived, that courts, whose jurisdiction is straitened in value, but whose decrees up to that value are final, may be refractory against a law, without diminishing the real dignity of government. Judicial uniformity is surely a public good, but its price may be too great if it can be purchased only by cherishing a power, which to say no more, cannot be incontestably proved.

4. At any rate, unless a party shall forsake the ordinary maxims of prudence, the hostility of the supreme state courts (if hostility be possible) will be displayed but once. For the remembrance of an adverse decision or an adverse temper in those courts, will inevitably proclaim the federal courts as the asylum to federal interests. . . .

It is obvious that the inferior *courts* ought to be distinct bodies from the supreme *courts*. But how far it may confound these two species of courts, to suffer the judges of the supreme to hold seats on the circuit bench, he declines the discussion, and circumscribes his reflections within the pale of expediency only.

Those who pronounce the law of the land without appeal, ought to be pre-eminent in most endowments of the mind. Survey the functions of a judge of the supreme court. He must be a master of the common law in all its divisions, a chancellor, a civilian, a federal jurist, and skilled in the laws of each state. To expect that in future times this assemblage of talents will be ready, without farther study, for the national service, is to confide too largely in the public fortune. Most vacancies on the bench will be supplied by professional men, who perhaps have been too much animated by the contentions of the bar, deliberately to explore this extensive range of science. In a great measure then, the supreme judges will form themselves after their nomination. But what leisure remains from their itinerant dispensation of justice? Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to

all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency.

The detaching of the judges to different circuits, defeats the benefit of an unprejudiced consultation. The delivery of a solemn opinion in court, commits them; and should a judgment rendered by two, be erroneous, will they meet their four brethren unbiassed?

...

Jealousy among the members of a court is always an evil; and its malignity would be double, should it creep into the supreme court, obscure the discovery of right, and weaken that respect which the public welfare seeks for their decrees. But this cannot be affirmed to be beyond the compass of events to men agitated by the constant scanning of the judicial conduct of each other. . . .

4. Situated as the United States are, many of the most weighty judiciary questions will be perfectly novel. These must be hurried off on the circuits, where necessary books are not to be had; or relinquished for argument before the next set of judges, who on their part may want books, and a calmer season for thought. So that a cause may be suspended until every judge shall have heard it. . . .

The supreme judges themselves who ride the circuits, will (if indeed such a circumstance can be of much avail) be soon graduated in the public mind, in relation to the circuits; will soon be considered as circuit judges, and will not be often appreciated as supreme judges. . . .

Should the judges of the supreme court become stationary, they will be able to execute reports of their own decisions, and thus promote uniformity through the whole judiciary of the United States.

Reports may be traced up to a venerable antiquity. In England they were composed for centuries by prothonotaries of the court, at the charges of the crown: And ever since the patronage of government has retired, their utility has been universally avowed. In our own country too, labors like these have diffused a knowledge of the laws of particular states. And how valuable in point of authenticity and instruction, must reports be, from the supreme court?

But these are not the only advantages:

They announce the talents of the judges.

If the judge, whose reputation has raised him to office, shall be in the habit of delivering feeble opinions, these reports will first excite surprise, and afterwards a suspicion, which will terminate in a vigilance over his actions.

In a word, when by means of these reports, the sense of the supreme courts shall be ascertained and followed in the inferior tribunals, much time and money will be saved to dissatisfied suitors, who might otherwise appeal. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 131–36.]

Representative Egbert Benson of New York, Amendments to the Constitution of the United States Relative to the Judiciary, March 3, 1791

Benson, on the final day of the First Congress submitted proposed constitutional amendments that would have merged the highest state courts with the federal system and extended to judges of those state courts the constitutional protections of tenure and salary. Although the states would still appoint judges to these high courts, the judges would have full federal jurisdiction within their states and would be responsible for carrying out all duties prescribed by the Congress. Benson's plan incorporated a representative principle in the state-level courts by allocating the number of judges based on the same enumeration of state population used for allocating seats in the House of Representatives.

Benson's amendments were referred to committee during the Second Congress, but they received no substantive legislative consideration. In newspapers and in private correspondence, defenders of state judiciaries condemned the plan that they recognized would have eliminated any independent state judicial authority. Benson, who had served as attorney general of New York from 1777 to 1789, served as judge of the U.S. Circuit Court for the Second Circuit for the one year that court was in existence.⁵

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5. Holt, "Federal Courts as the Asylum to Federal Interests': Randolph's Report, The Benson Amendment, and the 'Original Understanding' of the Federal Judiciary."

THAT the Congress shall, either by declaring the superior or supreme common law-court of the state to be the court, or by creating a new court for the purpose, establish a *General Judicial Court* in each state, the judges whereof shall hold their commissions during good behavior, and without any other limitation whatsoever, and shall be appointed and commissioned by the state, and shall receive their compensations from the United States only; and the compensations shall not be diminished during their continuance in office.

The number of judges of the general judicial court in a state, unless the same should be altered by the consent of the Congress and the legislature of the state, shall be in the proportion of one judge for every ____ persons in the state, according to the enumeration for apportioning the representatives among the several states; but there shall always be at least three judges in each state.

The general judicial court shall, in all cases to which the judicial power of the United States doth extend, have original jurisdiction, either exclusively or concurrently with other courts in the respective states, and otherwise regulated as the Congress shall prescribe; and, in cases where the judicial power is reserved to the several states, as the legislature of each state shall prescribe: but shall have, and exclusively, *immediate* appellate jurisdiction, in all cases, from every other court within the state, under such limitations, exceptions and regulations, however, as shall be made with the consent of the Congress, and the legislature of the state: there may, notwithstanding, be in each state a court of appeals or errors in the last resort, under the authority of the state, from the general judicial court, in cases and on questions only, where the supreme court of the United States hath not appellate jurisdiction from the general judicial court. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 170.]

Circuit Riding

The circuit riding duties of the Supreme Court justices were the subject of recurring debates for more than 100 years. Many of the justices complained about the burdens of travel and questioned the propriety of assigning appellate judges to trial courts; a majority of the Congress, however, supported a judicial system that required the justices to preside in the trial courts, where they would interact with juries, learn first-hand about local law, and offer trusted judgments to parties in the federal courts.

Following the inaugural sessions of the U.S. circuit courts in the spring of 1790, the Supreme Court justices circulated among themselves a draft letter to President Washington outlining concerns about their assignment to the circuit courts. The unidentified author of the draft argued that the Constitution required the duties of appellate and trial court judges to be strictly separated, and that the circuit court assignments of justices who might later hear appeals of circuit court decisions raised questions of judicial impartiality and threatened public confidence in the judiciary. The author of this letter, which may never have been sent, also contended that the assignment of Supreme Court justices to the circuit courts was a “departure from the constitution” because the justices had not been nominated by the president and confirmed by the Senate for their seats on the circuit courts.⁶

Justices of the Supreme Court to President George Washington, Draft, September 1790

We are aware of the Distinction between a Court and it's Judges, and are far from thinking it illegal or unconstitutional, however it may be inexpedient to employ them for other Purposes, provided the latter Purposes be consistent and compatible with the former. But from this Distinction it cannot, in our Opinions, be in-

6. Wythe Holt, “The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects: The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793,” *Buffalo Law Review* 36 (1987): 301–40.

ferred, that the Judges of the Supreme Court, may also be Judges of inferior and *subordinate* Courts, and be at the same Time both the *Controllers* and the *controled*.

The Application of these Remarks is obvious. The Circuit Courts established by the Act, are Courts inferior and subordinate to the Supreme Court. They are vested with original Jurisdiction in the Cases from which the Supreme Court is excluded; and, to us, it would appear very singular, if the Constitution was capable of being so construed, as to exclude the Court, but yet admit the Judges of the Court. We, for our Parts, consider the Constitution as plainly opposed to the Appointment of the same Persons to both Offices, nor have we any Doubts of their legal Incompatibility. . . .

The Constitution not having otherwise provided for the Appointment of the Judges of the Inferior Courts, we conceive that the Appointment of some of them, vizt of the Circuit Courts, by an Act of the Legislature, is a Departure from the Constitution, and an Exercise of Powers, which, constitutionally and exclusively belong to the President and Senate. . . .

[Document Source: Mark A. Mastromarino, ed., *The Papers of George Washington, Presidential Series*, vol. 6, July–November 1790 (Charlottesville: University Press of Virginia, 1996), 427–30.]

Supreme Court Justices to George Washington, August 9, 1792

The Constitution provided no means for formal communications between the judiciary and the other branches of government. When the justices of the Supreme Court wanted to report problems for the consideration of Congress, they chose to send their comments through the president, citing his “official connexion” with the legislative branch. This request for an unspecified revision in the circuit duties of the justices emphasized the practical challenges of circuit riding rather than the constitutional objections presented in the draft letter to President Washington in September 1790. Here the justices described the burdens of travel and the disruption of families, as well as the threats to public confidence in a judiciary that required justices to review appeals of their own decisions in the trial courts. In March 1793, Congress revised the Judiciary Act of 1789 by requiring only one justice to attend sessions of the U.S. circuit courts.

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Your official connection with the Legislature and the consideration that applications from us to them, cannot be made in any manner so respectful to Government as through the President, induce us to request your attention to the enclosed representation and that you will be pleased to lay it before the Congress.

We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms.

On extraordinary occasions we shall always be ready, as good Citizens, to make extraordinary exertions; but while our Country enjoys prosperity, and nothing occurs to require or justify such severities, we cannot reconcile ourselves to the idea of existing in exile from our families, and of being subjected to a kind of life, on which we cannot reflect, without experiencing sensations and emotions, more easy to conceive than proper for us to express.

With the most perfect respect, esteem, and Attachment, we have the honor to be, Sir, your most Obedient and most humble Servants,

John Jay, William Cushing, James Wilson, John Blair, James Iredell, Thomas Johnson.

[Enclosure]

The Chief Justice, and the Associate Judges of the Supreme Court Respectfully represent to the Congress of the United States,

That when the present Judicial arrangements took place, it appeared to be a general and well-founded opinion, that the Act then passed was to be considered rather as introducing a temporary expedient, than a permanent System, and that it would be revised as soon as a period of greater leisure should arrive.

The subject was new and was rendered intricate and embarrassing by local as well as other difficulties; and there was reason to presume that others, not at that time apparent, would be discovered by experience.

The ensuing Sessions of Congress were so occupied by other affairs of great and pressing importance, that the Judges thought it improper to interrupt the attention of Congress by any application on the subject.

That as it would not become them to suggest what alterations or system ought in their opinion to be formed and adopted, they omit making any remarks on that head; but they feel most sensibly the necessity which presses them to represent.

That the task of holding twenty-seven circuit courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which considering the extent of the United States, and the small number of Judges, is too burdensome.

That to require of the Judges to pass the greater part of their days on the road, and at Inns, and at a distance from their families, is a requisition, which, in their opinion, should not be made unless in cases of necessity.

That some of the present Judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome Journeys through different climates, and seasons, which they are called upon to undertake; nor is it probable that any set of Judges, however robust, would be able to support and punctually execute, such severe duties for any length of time.

That the distinction between the Supreme Court and its Judges, and appointing the same men, finally to correct in one capacity the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the supreme Court which it is so essential to the public Interest should be reposed in it.

The Judges decline minute details, and purposely omit many considerations, which they are persuaded will occur whenever the subject is attentively discussed and considered.

They most earnestly request that it may meet with early attention, and that the System may be so modified as that they may be relieved from their present painful and improper Situation.

John Jay, William Cushing, James Wilson, John Blair, James Iredell, and Thomas Johnson.

[Document Source: Robert F. Haggard and Mark A. Mastromarino, eds., *The Papers of George Washington, Presidential Series*, vol. 10, *March–August 1792* (Charlottesville: University of Virginia Press, 2002), 643–45.]

Supreme Court Justices to Congress and the President of the United States, February 18, 1794

Less than a year after the Congress reduced the burdens of circuit riding by requiring only one justice rather than two for the circuit court sessions, the justices again sent through the president a message to Congress describing perceived problems with the circuit duties of justices. With only one justice in each circuit court, the health or travel delays of a single person could disrupt the proceedings. More troubling was the problem of cases that continued from one session to another and were thereby subject to the inconsistent rulings of different justices, who rotated their circuit assignments. The justices again declined to propose specific legislation, and no one in Congress proposed changes in the circuit court system until 1798, when the Senate debated but failed to vote on a bill to eliminate circuit riding and to organize circuit courts composed of all the district judges in the circuit.

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The Chief Justice and the Associate Justices of the Supreme Court of the United States, respectfully represent to the Congress of the United States,

That their Representation communicated, last year thro' the President, to both Houses of Congress, and to which they refer; comprehended few other remarks than such as were suggested by the personal difficulties to which the Judges were subjected.

They acknowledge, with Sensibility and Gratitude, that the Act which, thereupon passed, and whereby the attendance of one Judge only was made indispensable to the holding of a Circuit Court, afforded them great relief, and enabled them to pass more time at home and in studies made necessary by their official duties.

They think it incumbent on them to submit to the Consideration of Congress, whether the sessions of the several Courts, comprehended in any of the three Circuits, ought to depend entirely on the Health of the Judge to whom either of them may be assigned; for, in case, by accident or Illness, his attendance should be prevented, the Inconveniences and useless expences to all the parties would certainly be great as well as obvious.

It has already happened, in more than one Instance, that different Judges, sitting at different times in the same Court but in similar Causes have decided in direct opposition to each other, and that in cases in which the parties could not, as the Law now stands, have the benefit of Writs of Error. They, therefore, also submit to the Consideration of Congress, whether this Evil, naturally tending to render the Law unsettled and uncertain, and thereby to create apprehensions and diffidence in the public mind, does not require the Interposition of Congress.

They fear it would not become them to take a minute View of the whole system, and to suggest the Alterations which to them appear requisite; and their Hesitation is increased by the reflexion that some of those Alterations would, from the nature of them, be capable of being ascribed to personal Considerations.

John Jay, Wm Cushing, James Wilson, John Blair, Wm Paterson.

[Document Source: Christine Sternberg Patrick, ed., *The Papers of George Washington, Presidential Series*, vol. 15, 1 January–30 April 1794 (Charlottesville: University of Virginia Press, 2009), 248–50.]

Nonjudicial Responsibilities of Federal Judges

In the early years of the federal government, federal judges carried out a variety of administrative and nonjudicial responsibilities, as had judges under the colonial governments and in Great Britain. Some of these responsibilities were associated with the office of the judge; others resulted from appointment of individual judges to nonjudicial positions. In a constitutional government based on separation of powers, however, the nonjudicial duties of judges gave rise to public debates on the appropriate relationship between the judiciary and the other two branches of government. When did the assignment of nonjudicial duties, the solicitation of advisory opinions, or dual-office holding threaten judicial independence and with it public confidence in the courts?

The most significant controversies arose when Congress assigned to the U.S. circuit courts administrative responsibilities for screening veterans' claims, when President Washington solicited an advisory opinion from the Supreme Court, and when Chief Justice John Jay agreed to serve as the principal negotiator of a treaty with Great Britain. Each of these controversies is discussed below.

Justices and judges served in other nonjudicial capacities without controversy. The first Chief Justices of the United States sat on a panel that supervised coinage at the U.S. Mint and sat on the Sinking Fund Commission, which oversaw reduction of the national debt. District judges were authorized to maintain records of presidential electoral votes, to examine witnesses and report to Congress on contested elections, to hear complaints from sailors of unsafe ships, and to assist in meeting treaty obligations related to disabled French ships. The federal judges also processed naturalization requests, and federal court clerks accepted copyright applications.⁷

7. Russell Wheeler, "Extrajudicial Activities of the Early Supreme Court," *The Supreme Court Review* (1973): 123–58.

Invalid Veterans' Pensions and the Federal Courts

In the Invalid Pensions Act of 1792, Congress assigned to the U.S. circuit courts responsibility for reviewing and determining the validity of applications for pensions from disabled veterans of the Revolutionary War. The findings of the circuit court would then be forwarded to the secretary of war, who was authorized to recommend to Congress that any applicant he considered ineligible not be placed on the pension list. Within two weeks of the act's passage, the U.S. Circuit Court for New York, in response to a pension application, declared that the Constitution prohibits Congress and the president from assigning any nonjudicial duties to the courts. The opinion, written by Chief Justice Jay, concluded that the duties described in the act were not judicial and that the judges would be able to review the applications in their capacity as commissioners appointed by the act rather than as federal judges. Several days later, the U.S. circuit court in Pennsylvania refused to consider the petition of veteran William Hayburn, and the judges of the court explained in a letter to President Washington that they considered the Invalid Pensions Act an unconstitutional imposition of nonjudicial duties on the courts. The judges—James Wilson, John Blair, and Richard Peters—also thought the act violated the judicial independence established in the Constitution because it subjected the decision of a federal court to revision by an officer of the executive and by the Congress. In June 1792, Justice James Iredell and District Judge John Sitgreaves, sitting as the U.S. Circuit Court for the District of North Carolina, wrote President Washington that they would not be able to carry out the Invalid Pensions Act because it violated the Constitution by assigning nonjudicial duties to the federal courts and by allowing the executive and the Congress to review and overturn the decisions of the courts. There was some popular outcry for impeachment of the judges who had obstructed the veterans' pensions, but many other public writings applauded the defense of judicial independence.

Attorney General Edmund Randolph asked the Supreme Court to order the circuit court in Pennsylvania to act on Hayburn's petition, but the Court delayed its decision until after Congress in 1793 revised the Invalid Pensions Act to give the U.S. district judges an administrative role in collecting evidence related to the veterans' claims. In a case of 1794, *United States v. Yale Todd*, the Supreme Court held that the

justices were not authorized to act as commissioners under the Invalid Pensions Act, but no report was made to document the reasons for the Court's decision, which may or may not have been a constitutional ruling.⁸

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Minutes of the U.S. Circuit Court for the District of New York,
April 5, 1792

The Court were thereupon unanimously of opinion. That by the Constitution of the United States the government thereof is divided into three distinct and independent branches and that it is the duty of each to abstain from and oppose encroachments on either.

That neither the Legislative nor the executive branches, can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner.

That the duties assigned to the Circuit Courts by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decisions of these Courts made pursuant to those duties, first to the consideration and suspension of the Secretary at war, and then to the revision of the Legislature, whereas by the constitution neither the Secretary at War nor any other executive officer nor even the Legislature are authorized to sit as a Court of Errors on the judicial acts or opinions of this Court.

As therefore the business assigned to this court by the act is not judicial nor directed to be performed in a judicial manner, the act can only be considered as appointing commissioners for the purposes mentioned in it by official, instead of personal descriptions.

That the Judges of this Court, regard themselves as being the Commissioners designated by the act, and therefore as being at liberty to accept or decline that office.

8. In *United States v. Ferreira*, 54 U.S. 53 (1851), Chief Justice Roger Taney found that "the results of the opinions expressed by the judges of the Supreme Court" in the *Yale Todd* case led to the conclusion "That the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts." Keith E. Whittington, "Judicial Review of Congress Before the Civil War," *The Georgetown Law Review* 97 (2009): 1257–1332.

That as the objects of this act are exceedingly benevolent, and do real Honor to the humanity and justice of Congress, and as the Judges desire to manifest on all proper occasions, and in every proper manner their high respect for the national legislature, they will execute this act in the capacity of Commissioners. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, *Cases: 1790–1795* (New York: Columbia University Press, 1998), 370–71.]

National Gazette, Philadelphia, Pennsylvania, April 16, 1792

A correspondent remarks, that the late decision of the Judges of the United States, in the circuit court of Pennsylvania, declaring an act of the present session of Congress *unconstitutional*, must be matter of high gratification to every republican and friend of liberty: since it assures the people of ample protection to their constitutional rights and privileges, against any attempt of legislative or executive oppression. And whilst we view the exercise of this noble prerogative of the judges in the hands of such able, wise and independent men, as compose the present judiciary of the United States; it affords a just hope that, not only future encroachments will be prevented, but also, that any existing law of Congress, which may be supposed to trench upon the constitutional rights of individuals, or of states, will, at convenient seasons, undergo a revision. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, *Cases: 1790–1795*, 51–52.]

General Advertiser, Philadelphia, Pennsylvania, April 20, 1792

Never was the word ‘impeachment’ so hackneyed, as it has been since the spirited sentence passed by our judges on an unconstitutional law. The high-fliers, in and out of Congress, and the very humblest of their humble retainers, talk of nothing but impeachment! impeachment! impeachment! as if forsooth Congress were wrapped up in the cloak of infallibility, which has been torn from the shoulders of the Pope; & that it was damnable heresy and sacrilege to doubt the constitutional orthodoxy of any decision of

theirs, once written on calf-skin! But if a Secretary of war can suspend or reverse the decision of the circuit judges, why may not a drill sergeant or a black drummer reverse the decision of a jury? Why not abolish at once all our courts, except the court martial? And burn all our laws, except the articles of war? This would be a summary way of doing business; and we would then live as happy as the subjects of the Dey of Algiers, none of whom are ever heard to complain a second time. But when those impeachment mongers are asked, how any law is to be declared unconstitutional, they tell us that nothing less than a general convention is adequate to pass sentence on it; as if a general convention could be assembled with as much ease, as a committee of Stock Jobbers. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, *Cases: 1790–1795*, 54–55.]

Advisory Opinions of the Supreme Court

In the summer of 1793, President Washington and his Cabinet asked the justices of the Supreme Court for an advisory opinion on twenty-nine questions related to treaty obligations with France and the rights of neutral nations under international law. The Washington administration was determined to remain neutral in the recently declared war between France and Great Britain, but when French agents in the United States commissioned ships to serve as privateers and established their own admiralty courts within the United States, the administration feared that the federal district courts would be unable to settle the inevitable challenges to French authority.

The request to the justices was submitted by Secretary of State Thomas Jefferson, who suggested that the president would like to have regular recourse to the advisory opinions of the justices and to make these opinions public. Jefferson wrote a friend that the request for an advisory opinion was similar to those frequently submitted to British judges by the government. Since taking office in 1789, Chief Justice John Jay had privately answered President Washington's call for advice on various matters, particularly foreign affairs, but the letter from Jefferson was the first formal request to the Court for advice on a legal question.

Washington and Jefferson understood that the justices might find it inappropriate to deliver a formal opinion, and when Chief Justice Jay asked for a delay until all of the justices arrived in the capital, the administration issued new regulations governing foreign traders. In their letter of August 8, 1793, five of the six justices (one was unable to reach Philadelphia) responded to Jefferson's formal request with a carefully worded suggestion that the Constitution's separation of powers might prevent them from offering opinions on questions that had not come before them in a formal judicial proceeding. Six months later, in the case of *Glass v. Sloop Betsey*, the Supreme Court decided that foreign nations did not have a right to establish their own admiralty courts within the United States unless such a right was defined by a treaty.

In the midst of the delicate exchanges between the executive and the judiciary, a contributor to the anti-administration newspaper, the *National Gazette*, argued that any advisory role might better be played by the citizens acting through their elected representatives in the Congress, than by judges who could never speak for the people.

Washington and his successors never again asked for a formal advisory opinion, but Supreme Court justices and other federal judges would continue to offer private advice to presidents and members of Congress and more public advice on policy related to the organization and functions of the federal judiciary.⁹



Thomas Jefferson to the Justices of the Supreme Court, July 18, 1793

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the US. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land; and are often presented under circumstances which do not give a cognisance of them to the tribunals of the country. Yet their decision is so little analogous

9. Wheeler, "Extrajudicial Activities of the Early Supreme Court"; Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale University Press, 1997).

to the ordinary functions of the Executive, as to occasion much embarrassment and difficulty to them. The President would therefore be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the supreme court of the US, whose knowledge of the subject would secure us against errors dangerous to the peace of the US, and their authority ensure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, Whether the public may, with propriety, be availed of their advice on these questions? and if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on.

[Document Source: John Catanzariti, et al., eds., *The Papers of Thomas Jefferson*, vol. 26, 11 May 1793 to 31 August 1793 (Princeton, N.J.: Princeton University Press, 1995), 520.]

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“Juba” in the *National Gazette*, Philadelphia, Pennsylvania, July 25, 1793

It is said that the Judges of the United States have been convened to assist the understanding of our executive on the treaty between France and the United States. It is a little strange that lawyers alone should be supposed capable of deciding upon common sense and plain language, for such is the treaty. If any doubts are entertained by the executive on this subject; if the opinion of the *people* ought to be a rule of conduct in a free government, which seems a little doubtful at present, why are not the people, in their representatives, convened and consulted upon affairs of the most serious import to the United States? There is a mystery about this which I cannot penetrate; for it appears to me that the *voice of America* would be the best interpretation of the treaty, and surely this is not to be obtained from a few interested individuals buzzing in the sunshine of court favour; or from a pair of Secretaries whose principles are a little doubtful; or from a bench of judges, who can speak their own sense of it, but not the sense of the people. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, *Cases: 1790–1795*, 754.]

Justices of the Supreme Court to George Washington, August 8, 1793

The Lines of Separation drawn by the Constitution between the three Departments of Government – their being in certain Respects checks on each other – and our being Judges of a court in the last Resort – are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to executive Departments. . . .

[Document Source: Marcus, et al., eds., *Documentary History of the Supreme Court of the United States, 1789–1800*, vol. 6, *Cases: 1790–1795*, 755.]

Judicial Office Holding

In April 1794, as Great Britain's restrictions on the commerce of the United States pushed the two nations toward war, President Washington nominated Chief Justice John Jay to serve as a special envoy to negotiate a treaty with Great Britain. Jay had frequently and unofficially advised the president on foreign affairs. After confirmation by the Senate, Jay left for Great Britain, where he attempted to settle disputes relating to the United States trade in the British West Indies, the continued British occupation of forts in the Northwest Territory, and the repayment of pre-Revolutionary debts owed to British merchants by Americans. The treaty negotiated by John Jay and ratified by the Senate in June 1795 defused the threat of war, but it also enflamed the growing tensions between the emerging Republican and Federalist parties. The treaty was one of the most controversial in U.S. history, and Republicans attacked it for perpetuating the young nation's commercial dependence on Great Britain and for favoring the financial goals of Federalist merchants and bankers. The role of the Chief Justice in promoting Federalist policies offered Republicans further evidence of a dangerous concentration of governmental power in the executive, and, as described below by the Democratic Society of Pennsylvania, it threatened the separation of powers defined by the Constitution by enabling the executive to dispense offices to judges.

Soon after ratification of the treaty, Jay resigned as Chief Justice to serve as governor of New York. The debate on dual-office holding of justices resumed after President John Adams appointed Chief Justice Oliver Ellsworth to serve as special envoy to France. Although the Senate confirmed the nomination with little debate in 1799, in February 1800, Republican Representative Edward Livingston of New York proposed a constitutional amendment prohibiting judges on any federal courts from serving in nonjudicial offices while they were still judges and for six months following resignation from the bench. Senator Charles Pinckney of South Carolina proposed to attach a similar provision to a bill to reorganize the judiciary. His motion, defended in the speech below, narrowly failed to win Senate approval.

Justices and judges would continue to fill nonjudicial positions. Chief Justice John Marshall agreed to President Adams' request to continue to carry out the duties of Secretary of State for the final weeks of the Adams administration, just as Chief Justice Jay had carried out those duties in 1789 and 1790, before Jefferson could return from France.¹⁰

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Resolutions of the Democratic Society of Pennsylvania, May 8, 1794

Resolved, as the opinion of this society, that the constitution of the United States, the sacred instrument of our freedom which every public officer has sworn to preserve inviolate, has provided, that the different departments of the government should be kept distinct; and consequently that to unite them is a violation of it and an encroachment upon the liberties of the people guaranteed by that instrument.

Resolved, as the opinion of this society, that, as by the constitution all treaties are declared to be the supreme law of the land, it becomes the duty of the judiciary to expound and apply them; to permit, therefore, an officer in that department to share in their formation is to unite distinct functions and tends to level the barriers of our freedom, and to establish precedents pregnant with danger.

10. Wheeler, "Extrajudicial Activities of the Early Supreme Court."

Resolved, as the opinion of this society, that justice requires, and the security of the citizens, of the United States, claims an independence in the judiciary power: that permitting the executive offices of honor and profit upon judges, is to make them its creatures, rather than the unprejudiced and inflexible guardians of the constitution and the laws.

Resolved, as the opinion of this society, that from the nature and terms of an impeachment against a President, it is not only necessary that the chief justice of the United States should preside in the Senate, but that he should be above the bias which the honors and emoluments in the gift of the executive might create: that it is, therefore, contrary to the intent and spirit of the constitution to give him a foreign mission, or to annex any office to that which he already holds.

Resolved, as the opinion of this society, that every attempt to supercede legislative functions by executive interference, is highly dangerous to the independence of the legislature, and subversive of the right of representation.

Resolved as the opinion of this society that the appointment of John Jay, chief justice of the United States as envoy extraordinary to the Court of Great-Britain, is contrary to the spirit and meaning of the constitution; as it unites in the same person judicial and legislative functions, tends to make him dependant upon the President, destroys the check by impeachment upon the executive, and has had a tendency to controul the proceedings of the legislature, the appointment having been made at a time, when Congress were engaged in such measures as tended to secure a compliance, with our just demands. . . .

[Document Source: *The Independent Gazetteer*, Philadelphia, May 14, 1795.]

Senator Charles Pinckney of South Carolina on Proposal to Prohibit Dual-Office Holding for Federal Judges, March 5, 1800

As the Judiciary is among the most important departments in our government, as it reaches every situation in society, neither the rich, the honoured, or the humble, being without its influence, or above its controul—as it is the department to which not only the lives and fortunes, but the characters of our citizens are peculiarly

entrusted, it becomes us to be extremely careful that the Judges should not only be able and honest men, but independent in their situation—our Constitution has in some degree secured their independence by giving them permanent salaries, and rendering them ineligible to the Legislature, but in vain will we consider them independent, in vain may we suppose their opinion beyond the controul or interference of the Executive, until we have determined it shall not be in his power to give them additional offices and emoluments, while judges; until in short, we confine them wholly to their duties as judges, and teach them to believe that in the execution of the laws they should consider themselves as little obliged to please the President, or to fear his disapprobation, as that of any other man in the government: this can only be done by preventing them accepting other offices, while they continue as judges, and thus depriving him of the power of heaping upon them additional favours and emoluments. . . .

If we recollect the manner in which our judges are appointed, that circumstance alone should induce us to adopt every mode in our power to render them independent of the executive. They are appointed by the president, and if the moment after they receive their commissions, they were really so independent as to be completely out of his reach—that no hope of additional favour, no attempt to caress could be reasonably expected, to influence their opinions, yet it is impossible for them ever to forget from whom they have received their present elevation. Hence I have always been of opinion, that it was wrong to give the nomination of judges to the president. It is however determined by the constitution, and while the right continues in him, it must in some degree have its influence, on the good wishes and influence of a judge in his favor. He cannot hear any thing respecting him in quite so unbiassed and impartial a manner, as he would; was the president unknown to him, or had he not received any favour from him. It is our duty to guard against any addition to his bias, which a judge from the nature of his appointment must inevitably feel in favour of [the] President. It is more particularly incumbent on us when we recollect that our judges claim the dangerous right to question the constitutionality of the laws; and either to execute them or not, as they think proper—a right in my judgment as unfounded, and as dangerous as any that was ever attempted in a free government—

they however do exercise it, and while they are suffered to do so, it is impossible to say to what extent it might be carried, what might be the consequences if the President could at any time get rid of obnoxious laws by persuading or influencing the judges to decide that they were unconstitutional, and ought not to be executed—it will be said that this is arguing as if all our officers were corrupt—that we should place no confidence in them and was truly taking the dark side of the picture—to this I answer that it is our duty to guard against every possibility of influence or corruption—hence springs the necessity of laws—if all our officers were perfect, and all our citizens honest and virtuous, there would be no occasion for them, but as it is the nature of men to err, and sometimes to be vicious, our laws are incompetent unless they are calculated to meet every contingency. . . .

[Document Source: “Charles Pinckney’s Speech to the United States Senate,” *Aurora*, March 5, 1800, in Marcus, et al., eds., *The Documentary History of the Supreme Court*, vol. 4, *Organizing the Federal Judiciary*, 630, 634–35.]

The Suability of States and the Origins of the Eleventh Amendment

During the ratification debates, leading Anti-Federalists warned that the new federal courts would have authority to issue judgments against states in suits brought by individuals. Despite the assurances of Hamilton and Madison, among others, that the Constitution would not interfere with the states' sovereign immunity, three state ratifying conventions recommended restrictions on suits against states. Neither the Judiciary Act of 1789 nor the proposed constitutional amendments adopted by Congress in September 1789 limited such suits.

The Supreme Court faced the controversy over suits against states after the heirs to a South Carolina merchant brought suit in 1791 in the U.S. Circuit Court for the District of Georgia to seek payment of a debt owed for provisions supplied to the Georgia state government during the Revolutionary War. In the circuit court, Justice James Iredell, sitting with District Judge Nathaniel Pendleton, decided that neither the Constitution nor the Judiciary Act of 1789 gave individuals the right to sue a state in the federal circuit courts. Iredell thought Article III granted the Supreme Court exclusive original jurisdiction over suits to which a state was a party. When Alexander Chisholm, executor for the South Carolina merchant's family, appealed to the Supreme Court, the Court on February 18, 1793, decided 4 to 1 (with Iredell dissenting) that the federal circuit courts did have jurisdiction to hear suits against states. Chief Justice Jay's opinion asserted that the people's right to bring suit against a state guaranteed uniformity of justice throughout the nation, and he likened the sovereignty of a state to the sovereignty of the people, neither of which would be compromised by an order to appear in federal court. Few state governments, however, were willing to accept the idea that popular sovereignty as embodied in the Constitution overrode the states' sovereign immunity.

The decision in *Chisholm v. Georgia* provoked an immediate wave of condemnation, none harsher than the resolution of the Georgia House of Representatives, which threatened to impose the death penalty on anyone carrying out any measures to enforce the Supreme Court's decision. Calmer but insistent calls for amendment of the Constitution came from across the political spectrum in the Congress and

in the legislatures of many states that offered resolutions in favor of limits on federal suits against states. Several states already faced such suits, and the *Chisholm* decision threatened to subject heavily indebted states to the demands of creditors and to expose states to challenges to land grants. Other supporters of a constitutional amendment feared that the grant of jurisdiction over suits against states would further the consolidation of federal power at the expense of state governments.

By March 4, 1794, the proposed Eleventh Amendment passed both houses of Congress with only a handful of dissenters. The requisite three-fourths of the states ratified the amendment by February 7, 1795, but delays in certification of the state votes postponed formal adoption of the amendment until January 1798.¹¹

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John Jay's Opinion, Chisholm v. Georgia, February 18, 1793

...The extension of the judiciary power of the *United States* to such controversies, appears to me to be *wise*, because it is *honest*, and because it is *useful*. It is *honest*, because it provides for doing justice without respect of persons, and by securing individual citizens as well as States, in their respective rights, performs the promise which every free Government makes to every free citizen, of equal justice and protection. It is *useful*, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the

11. Goebel, *History of the Supreme Court of the United States*, vol. 1, *Antecedents and Beginnings to 1801*, 723–36; Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 5, *Suits Against States*, 127–37.

weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that the people are the sovereigns of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of Constitutional law and Government can ensure the continuance and enjoyment of them. . . .

[Document Source: *Chisholm v. Georgia*, 2 U.S. 419, 479.]

Report of a Joint Committee of the Massachusetts General Court, June 20, 1793

The published resolutions of a committee in the Massachusetts legislature served as a model for numerous other resolutions passed by state legislatures that supported a constitutional amendment that would prohibit most federal suits against states. In the standard convention of the period, the state legislatures “instructed” the U.S. senators, who were elected by the legislature, and made recommendations to the popularly elected representatives in Congress.

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1. *Resolved*, That the same principles of the Constitution, which apply to the State of Georgia, apply equally to all the States which compose the Government of the United States.

2. *Resolved*, That it hath ever been the sense of the Citizens of this Commonwealth, that the Government of the United States is a *Federal Government*.

3. *Resolved*, That the idea of a *Federal Government* necessarily involves the idea of component parts, consisting of *distinct and separate Governments*.

4. *Resolved*, That a *Government* being liable to be sued by an individual Citizen, either of that, [or] of any other Government, is inconsistent with that sovereignty which is essential to all Governments, and by which alone any Government can be enabled, either to preserve itself, or to protect its own members, whether Citizens or Subjects.

5. *Resolved*, That the article in the Constitution which extends the Judicial Power to *controversies between a State and the Citizens of another State* as applied by the Judges of the Supreme Judicial Court in the case aforesaid, is in its principle subversive of the State Governments, inconsistent with the [ease] and safety of the body of Free Citizens; and repugnant to every idea of a *Federal Government*, and therefore it is

6. *Resolved*, That the Senators of this Commonwealth in the Congress of the United States, be, and they hereby are instructed, and the Representatives requested, to use their utmost influence that the article in the Federal Constitution, which refers to controversies between a State and the Citizens of other States, be either wholly expunged from the Constitution, or so far modified and explained as to give the fullest security to the States respectively against the evils complained of, and to remove their apprehensions on this highly interesting and important subject; more especially as this Legislature have the fullest assurance, that the late decision of the Supreme Judicial Court of the United States, hath given a construction to the Constitution, very different from the ideas which the Citizens of this Commonwealth entertained of it at the time it was adopted.]

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 5, *Suits Against States* (New York: Columbia University Press, 1994), 230–31.]

Governor Henry Lee to the Speaker of the Virginia House of Delegates, November 13, 1793

Lee recommended that the Virginia legislature support congressional legislation that “would forever crush the doctrine asserted by the Supreme Judiciary of the Union respecting the Suability of a State.” He wrote not only in response to the *Chisholm* decision but also in anticipation of the Supreme Court’s decision in a suit brought against Virginia by a private land company. Lee enclosed the resolutions of the Massachusetts legislature calling for a constitutional amendment, and the Virginia General Assembly went beyond Lee’s recommendation for a statute and also called on the Virginia members of Congress to seek an amendment restricting federal suits against states. In this excerpt of Lee’s message to the speaker of the

house of delegates, the governor argued that those who wrote the Constitution and voted for its ratification had opposed the consolidation of federal power that would surely follow if the federal courts had jurisdiction over suits against states.

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To form a right opinion with respect to the powers hereby granted to the Judiciary we must recollect what is not denied, that the people of the United States have chosen a political system for themselves composed of a General Government for general purposes and of State Governments for the management of those concerns which affect the States particularly. And we ought not to forget this important truth, that the duration of the General Government must very much depend on the Strict adherence in practice to this fundamental principle on which it was erected. A consolidation of the States was expressly disowned by the framers and by the adopters of the Constitution of the United States, because it was evident to the whole people, that such a political Union was by no means Suited to their circumstances and if ever established must soon issue in the separation of States, whose interest & inclination required and urged indissoluble Union.

In our enquiries therefore respecting the meaning and extent of any power delegated by the Constitution we must refer to the chief object of the same, which is a confederation of the States and not a consolidation.

If the right exercised by the supreme judiciary be constitutional, then certainly consolidation and not confederation must be acknowledged to be the influential principle of the constitution. But that this is not the case may be proved by a comparison of many parts of the constitution as well as for the reason before alledged which in my judgement is of itself conclusive.

If then the Constitution regards confederation only, it is certainly proper to construe its powers so as to render them Subservient to the object.

Admit that a State can be Sued and you admit the exercise of a right incompatible with Sovereignty and consonant to consolidation. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 5, *Suits Against States*, 334–35.]

Anonymous, *American Minerva*, February 3, 1794

Jay's opinion in *Chisholm* found little public approval. The Delaware Senate was one of the few institutions to declare that states, like any corporate entity, should be subject to orders from a federal court. In the first of five essays on the suability of states, this anonymous author from New York also challenged the very notion of sovereign immunity in a government based on popular sovereignty. In a more perfect republic, all institutions of government would be subject to suits in a court of law. The essay was in many ways a logical extension of Jay's argument in *Chisholm* that the people had a right to compel governments to provide equal justice.



What can be more surprising than the opposition made to this decision of the Supreme Court of the U. States! It is said the *sovereignty* and *independence* of a state is endangered by it. Just as well may an individual say, *I must not be liable to suits*—it will *abridge my liberty*. Is it then an abridgement of independence to be compellable to do justice? to be answerable for our moral conduct to an impartial tribunal? Is it a *rightful sovereignty* which puts an individual or a political body beyond the arm of legal and moral justice? Is it not rather a *false pride* and ideas derived from *regal prerogative* and *despotism*, that now call up an opposition to one of those articles in the Constitution of the United States, which does honor to the Convention that framed it, and if carried into effect, would be the *glory of the country*. It is an honor perhaps reserved for some future republic, more enlightened and more virtuous than our own, to make complete provision for submitting itself to the ordinary course of justice. Instead of clamoring for an amendment of our constitution, *true liberty* requires that provision be made for carrying into effect the judgements rendered against the States. Men can never be fully possessed of *legal freedom* and *right*, until *sovereign states* are as compellable to do justice, as individuals; until the rights of states and individuals are *reciprocal*.

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 5, *Suits Against States*, 250–51.]

The Judiciary Act of 1801

Within twelve years of the establishment of the federal judiciary, Congress approved a sweeping though short-lived reorganization of the nation's court system and significantly expanded federal jurisdiction. The Judiciary Act of 1801 established six circuit courts to replace those organized in each state. The act reduced the size of the Supreme Court from six justices to five, eliminated the justices' circuit duties, and removed the district judges from service on the circuit courts. To replace the justices and district judges on the circuit courts, the act established sixteen judgeships to serve exclusively on the circuit courts. The U.S. circuit courts gained jurisdiction over all cases arising under the Constitution and acts of the United States. The act relaxed the requirements for suits based on diversity of state residence, and in many categories of suits, notably those involving land, restrictions on jurisdictional amounts were removed. In other categories, the act reduced jurisdictional amounts and made it easier to transfer cases from state courts. The division of states to create additional circuit and district courts further encouraged citizens to rely on the federal rather than state courts.

In the spring of 1800, the U.S. House of Representatives had debated an even more dramatic reorganization of the judiciary in a bill that would have created thirty judicial districts, each with its own circuit court judge and drawn with little regard to state borders. The House voted to postpone consideration of the bill in April 1800 and resumed debate on a revised version following the election in which President John Adams and many Federalists in the Congress were defeated. The lame-duck Congress passed the Judiciary Act of 1801 in February, and, during his final days in office, John Adams nominated the so-called "Midnight Judges" to the new positions in the circuit courts.

At least two Supreme Court justices consulted with the authors of the first House bill presented in the spring of 1800. The final act answered the justices' plea to end circuit riding and reflected practical lessons from the first decade of the federal courts in operation. Above all, however, the Judiciary Act of 1801 represented the vision of the Federalists who believed that a federal court system with the full ju-

risdictional reach allowed under the Constitution was essential to the establishment of a strong national government. Gone were the compromises of 1789, when Congress granted the state courts a significant share of federal jurisdiction. The Federalist supporters of the 1801 act believed a strengthened and more extensive federal judiciary to be all the more urgent as a counter to the Republican control of the elected branches of the government and a protection against state court challenges to federal authority. Republicans, already suspicious of the federal courts in which critics of the Adams administration had been prosecuted for sedition, condemned the act for its alleged assault on state autonomy and for its apparent attempt to place Federalists in office following their defeat at the polls. Beyond these partisan disputes, the debates on the Judiciary Act of 1801 revealed starkly different ideas about the place of the judiciary within a constitutional system of government and portended a short life for the act, once Republicans took control of the executive and legislative branches.¹²

*“Cato Americanus,” Independent Chronicle,
Hampshire County, Massachusetts, October 1800*

This contributor to a western Massachusetts newspaper mocked the first draft of the judiciary bill that would have dissolved the state borders that hitherto had defined federal judicial districts. The whimsical names proposed for judicial districts masked the threat to the continuation of local legal procedures that many Americans believed to be the foundation of justice and a protection of their civil liberties. The multiplicity of judicial offices and the additional expense of the circuit courts were seen by many people as a warning of arbitrary government, detached from the people. Republicans feared that the goal of the bill’s authors was not just a reorganized judiciary, but “a new form of government.”

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By the act formed by your party, and urged upon Congress in the late session, it was to have been provided, that there should be a new division of the Districts, regardless of the several states, and state lines. These were to be *twenty-six in number*. In each of

12. Kathryn Turner, “Federalist Policy and the Judiciary Act of 1801,” *William and Mary Quarterly*, 3d ser., 22 (January 1966): 3–32.

which, one Judge was to reside, as a District Judge, subordinate to the Supreme Judicial Court at the seat of government.

These Districts are all named in the bill, carefully avoiding the names, as well as the limits of the states, one composed of a part of Newhampshire, and the upper section of Massachusetts is to be the District of *Worronock*, a mountain in the county of Berkshire. Another part of Newhampshire, and a part of Massachusetts, is to be the District of Merrimack. Another part of Massachusetts and a part of Rhode Island is to be the District of Narragansett. There is no necessity here for describing all the Districts; they are universally composed of different parts of different states, with names foreign to those of the states.

Should a court be holden in one of these, and proceed to the trial of a crime, how could the party be said to be tried in the state where the crime was committed? Or how could a court, in a civil cause, proceed upon the law of one state, when the district contains part of two? The laws of the states from whence the jurisdiction is made, are very different on the same subject. In Connecticut the negotiability of paper is not known; in Massachusetts it is. In the New-England states creditors of every denomination have an equal dividend of deceased debtor's property; in New-York the executor pays which he pleases, preferring those on sealed instruments, and leaves the others without payment. The penal laws for trespass, the regulation of interest, and the mode of satisfying executions; as well as the established modes of transfer of real estate, are very different, in the various governments composing the nation. The system attempted, would, for a while, bring on a stagnation of the powers of the government, open loud calls for legislative exertion, and plunge the nation into a dilemma, from whence nothing could extricate it, but a revolution, or, what would amount to the same thing, a vital change of the federal government, founded on a radical abolition of all the state constitutions.

The number of officers, the immense expense, the natural opposition, arising from a sensible disproportion between the energy of government, and the objects waiting for rule, would fix, what you, and your friends, have been seeking for evidence of, *that no government can be sufficiently magnetic without the steel in the hand of the magistrate*. The imbecility resulting from the confusion, thus artfully introduced, would be changed, of course, to the weakness

of an elective republic; and the *English constitution*, which no man has ever seen, or ever understood, would be again held up, as the only sample of a good government.

This bill is, in effect, the bringing all the principles of your party into substantial efficacy. It is in fact, giving to the people of America, *a new form of government by an act of legislation, without their privity or consent.* . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 657–58.]

“Leonidas,” *Columbian Centinel*, Boston,
Massachusetts, January 14, 1801

In Congress and in the public press, supporters of the Judiciary Act of 1801 frequently spoke of the court system in military terms, comparing the judiciary, as “Leonidas” does here, to a standing army. They saw the need for courts equal to the task of enforcing federal authority across an extended republic. After more than a decade of limited federal jurisdiction, the “disastrous” election of 1800 might finally convince Congress to establish the strong judiciary advocated by some Federalists as early as 1789.

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In order to point out the line of conduct, which the good sense and sound principles of the *Federalists*, will induce them to pursue, under the late disastrous change, I have proposed to consider: . . .

2dly. The *Judiciary* is the most important branch of the government, in relation to its effects on the habits and feelings of the people. Where there is no military force to awe the disorderly into quiet, and the rebellious into submission, the Judiciary ALONE is capable of making the people feel the authority and power of government. If free governments can ever be maintained without a *standing army* it can only be effected by a firm, independent, and extensive Judiciary, which shall bring the authority of the laws home, to the fireside of every individual. Indeed, what are your Legislators? What are the sanctions of your laws? What the weight of your Executive, unarmed with military force? They are but effigies; but the shadows of government without the Judiciary. Im-

pressed with these opinions, it has been the constant endeavour of the Federalists, to extend the protecting power of the Judiciary to every part of the Union, and to every case provided in the Constitution. Unhappily a mistaken timidity, and a disposition too prevalent, during the first years of the existence of our government, to conciliate the opposition, induced the First Congress not to invest the Federal Judiciary with the powers which the constitution authorized them to bestow. The error has been deeply felt and sincerely lamented. The Judiciary, the most imposing authoritative, and generally the most popular branch, has been scarcely *felt*. It only appears now and then, as phenomenon, which the people gaze at but which they consider as a foreign intruder rather “*than the venerable image of their country’s honor*.” The principle of Federalism has ever been, and yet is, to extend the force and influence of the Judiciary to all the cases, which are enumerated in the Constitution, and a Bill is now in agitation before the Congress to promote this valuable object. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 681–82.]

“A Citizen,” in the Washington Federalist

In three essays published in anticipation of Senate debate on the judiciary bill, a “Citizen” argued for “the necessity of extending the Judiciary of the United States.” The judiciary was the only branch of government in close contact with the mass of citizenry, and thus best suited to cultivate public respect for federal law and recognition of the government’s authority. Ten years’ experience demonstrated the error of vesting federal jurisdiction in state courts beholden to state governments that undermined federal authority. Only by increasing the number of federal courts and extending them to new parts of the nation could the federal government establish its authority and “check the incursions of the enemy.”

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Federal Judiciary No. I, January 26, 1801.

Every friend to the Government of the United States must see, that in the present crisis, it is important & necessary, to strengthen this government in the affections of the people; to draw their

hearts towards it; by bringing it nearer to their observation; and to improve its authority, by a commodious, constant, and salutary exercise of its power. Of all governments, the judiciary is that part, which most affects the happiness of the people, comes the nearest to their hearts and interest, and can most improve or corrupt the qualities of the government. Nothing has more contributed to correct, improve, and preserve the British Government, than its excellent judiciary; the exercise of which is carried into all parts of the country, and held up before the eyes of the people. It is a ruinous economy, which is exerted so as to defeat a due administration of any of the powers of government; and the most ruinous, if it defeat a due administration of justice. If anything can establish the government of the United States in the minds of the people, confirm its authority, and make its beneficial influence felt, it must be multiplying Courts, in which the administration of justice, under the laws of the United States, may be commodiously conducted in all parts of the Union, and the authority of those laws visibly exercised & impressed on the minds of the citizens.

The administration of federal laws in the state courts would effect the purpose of bringing the authority of the Federal Government to the feelings of the citizens. Whether the suspicions of rivalry or hostility between the Governments of individual states, and the United States, be so well founded, as to render a resort to the state courts hopeless and improper, can now be more decisively ascertained, than when the Federal Judiciary was organized. Then, an exercise of federal judicial power by the State Courts might reasonably be viewed as a proper measure. But we see now, in some state governments, hostility to the government of the United States, in important principles and measures, openly avowed; we see some important federal acts violently condemned, as unconstitutional, tyrannical, and pernicious; we see the friends of the Federal Government, as explained by an upright intelligent and patriotic administration, denounced as enemies to liberty, proscribed as objects of detestation, and excluded from state offices, and we see enmity to this government considered as a qualification for state favor, and a recommendation to state patronage and appointment. With such a spirit prevailing in state administration, to vest in state courts the administration of the Federal Judiciary, would be to defeat and destroy it. An useful and correct administration of

justice could not be expected from such a measure, and the powers of the government, would be perverted to its own destruction.

Federal Judiciary No. III, January 29, 1801.

The enemies of our civil and social state are many, active, zealous, and widely dispersed through the union. The courts of justice, the standing force of the laws, must extend their stations, to watch the motions, and check the incursions of the enemy. The laws of the United States ought not to be left friendless and unassisted in any part of the country. All embarrassments to their execution ought to be removed; new motives ought to be added, to assist their authority; and the number of those increased, whose interest and duty it is, to take care, that the laws of the United States be executed, respected, and obeyed. This measure will be an important support of the tottering frame of our government, against the fatal attacks of the corrupters of public opinion, the mad delusions of philosophy, and the systematic disorganization of anarchy. And without this measure, I see but little hope to support it. Every friend to federal principles will, I think, discern, that in extending the federal courts lies the safety of the federal government. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 697, 705–06.]

Debate in the U.S. House of Representatives, January 5, 1801

A motion to maintain Virginia as a single, unified judicial district prompted one of the most extensive reported debates in the House of Representatives during consideration of the judiciary bill. Supporters of the bill, which established two circuit courts for Virginia and other large states, argued that more federal courts were needed to enforce federal laws, to guarantee the collection of revenue, and, more generally, to establish the authority and utility of federal courts. Advocates of a single district pointed to the scarcity of judicial business in Virginia's federal courts and insisted "that the State courts were fully competent to discharge all the duties assigned to them." The Federalist proponents of the judiciary bill questioned the constitutionality of vesting federal jurisdiction in state courts with judges who did not have the constitutional protections of ten-

ure and who were not subject to congressional impeachment. (This excerpt is in the voice of the reporter of debates rather than the members of the House of Representatives.)

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Those who opposed the motion observed, that it became the Government of the United States to organize the Judiciary in such a way as to insure an obedience to its laws, and to insure the faithful collection of revenue; that this last object could only be attained by the institution of Federal courts, not so remote from each other, as to prevent the convenient attendance of prosecutors, parties, witnesses, and jurors at the seats of the courts; that the recovery of duties derived from this source could only be made before the Federal courts, and if the places at which infractions of the revenue laws took place were very remote, however ardent the patriotism of the citizens, they could not be expected to encounter the great expense and loss of time that would be required in attending a court three or four hundred miles distant; that the most solid objection to an extension of the courts was their expense; that in fact the extension would probably be an economical arrangement, as the facility of recovering dues to the public would be increased, . . . the little business alleged to have been brought before the Federal court of Virginia, was the most conclusive evidence of the inconveniences attending the present plan, whereby, owing to the remote situation of the greater part of the citizens, they were induced to prefer an appeal to the State, in preference to the Federal courts.

It was further declared to be very doubtful, on Constitutional ground, whether Congress could delegate judicial powers to the State courts; and if they could, it was a delicate question how far State Judges were amenable to the United States, for a faithful discharge of their duty, inasmuch, as, if they violated the laws of the United States, they were not Constitutional subjects of impeachment by Congress; that, at any rate, the effect might be the inexecution of the laws; from which an imbecility in the Government would arise, the more fatal as it affected the vital principle of the administration of justice; . . .

[Document Source: *Annals of Congress*, 6th Cong., 2d sess., 878–79.]

Representative Robert Goodloe Harper of South Carolina to His Constituents, February 26, 1801

With only a limited published record of congressional debate on the Judiciary Act of 1801, many citizens learned about the new judicial system from circular letters that members of the House of Representatives often distributed in their districts. Here one of the principal authors of the act, Robert Goodloe Harper, explains why he believed the court system established in 1789 was inadequate. Like many Federalists, Harper feared that the requirements of circuit riding would deter the most experienced and learned lawyers from serving on the Supreme Court. He also wanted to expand the jurisdiction of circuit courts that could more effectively enforce federal law and establish federal authority throughout the nation.

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The invariable tendency of such a system, must have been to degrade, ultimately, the supreme tribunal of the nation, by filling it either with young men of little character and experience, or with needy old men who would hold their seats for the sake of bread. Those seats must have been gradually abandoned by men who could live without them, and had attained the eminence and age necessary for filling them as they ought to be filled. Every sound politician will feel the necessity of changing a system, which must have produced such effects on the administration of justice.

The new system relieves the judges from this intolerable labour, reduces their number to five, and assigns them no other duty but that of holding the supreme court at the seat of government. The post will now become so eligible as to be accepted and retained by the most eminent characters in the nation; which will gradually render the supreme court of the United States what it ought to be, and what surely the pride of every American must induce him to wish that it may be, one of the first tribunals in the world, for the ability learning and dignity of its members.

The former system was not only thus inconvenient in practice, but wholly inadequate to the proper administration of justice. The circuit courts of the United States have cognizance, not only of civil actions and suits to a great extent and value, but of all offences against the laws of the United States. These courts therefore are of

great importance, and indeed of absolute necessity, to the support of the government; which can never be respected or obeyed, unless it holds in its own hands the means of punishing infractions of its laws. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 715–16.]

Representative John Fowler of Kentucky to His Constituents,
March 6, 1801

The Republican Fowler predicted that Congress would soon repeal the Judiciary Act, which, in his opinion, threatened the state governments and established sinecures for the defeated Federalists.

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. . . A law very extraordinary in its origin, and its end, passed this session; I mean the Judiciary Law, which you may recollect was introduced in the previous session, in an extravagant form. The features of it were softened down in this session, and it has passed both houses. This law I consider as one of those bold strokes which has unfortunately struck home. It created a host of judges, marshals, attorneys, clerks &c. &c. and is calculated if it could endure, to unhinge the state governments, and render the state courts contemptible; while it placed the courts of law in the hands of the vanquished. The insidiousness of its design has been answered by the shameless manner of its being carried into execution. The constitution disables any member of Congress from filling an office created during his period of service. The late President removed persons from other branches of the Judiciary to the offices created by this law, and then put members of congress into the thus vacated offices; this disgrace was continued to the latest hour of the late President's holding his office. . . This law can be considered in no other light than as providing *pensions* for the principals and adherents of a party. The evil however, will not I trust be durable, and that as it was founded in fraud, the return of a wiser system, will release the country from the shame and imposition. . . .

[Document Source: Marcus, et al., eds., *The Documentary History of the Supreme Court of the United States*, vol. 4, *Organizing the Federal Judiciary*, 721–22.]

The Repeal of the Judiciary Act of 1801

Within a few weeks of taking office as president, Thomas Jefferson confided to associates that he expected the new Congress to repeal the Judiciary Act of 1801. By summer of 1801, Jefferson was preparing a report on federal court business, and he anticipated that the findings would “immensely strengthen the reasons for repealing at least the late additions to the judiciary system, if not for simplifying the old part, & making it’s expense bear a more reasonable proportion to the business they have to do.” Jefferson delivered his report on federal caseloads along with his annual message on the state of the union when the Republican-dominated Congress convened in December 1801. By then, members of Congress had learned the extent of public opposition to the Judiciary Act and particularly to the appointment of the “Midnight Judges.”¹³

Jefferson’s close ally, Senator John Breckinridge of Kentucky, submitted a bill to repeal the Judiciary Act, and Congress embarked on its lengthiest debate ever on the federal judiciary. For two months, the Senate and then the House of Representatives engaged in a contentious discourse on the role of the federal judiciary under the Constitution. Republicans argued that the additional courts and judgeships created in 1801 were not justified by the limited number of suits filed in the federal courts. They also stressed the importance of circuit riding for educating Supreme Court justices about state law and for maintaining public confidence in the federal court system. The Constitution granted the Congress discretion to establish inferior federal courts “from time to time,” and Republicans argued such discretion necessarily extended to the elimination of courts that Congress no longer considered necessary for the general welfare. Federalists continued to defend the system established in 1801 and insisted that the constitutional protections of judicial tenure and salary prohibited Congress from terminating a judge’s service even if, as some allowed, Congress

13. Thomas Jefferson to Abraham Baldwin, July 13, 1801, in Barbara Oberg, ed., *The Papers of Thomas Jefferson*, vol. 34 (Princeton, N.J.: Princeton University Press, 2007), 559.

had authority to abolish a court. The Federalists warned of a legislative tyranny that would surely follow the abolition of judicial offices.

What began as a debate on the court system instituted in 1801 developed into a far broader exploration of judicial review, federalism, and popular sovereignty over the courts. The sharp and steady division between Federalists and Republicans in Congress reflected very different visions of constitutional government. In the wake of Republican victories in congressional and presidential elections, the judiciary assumed for Federalists an even greater importance as a check on what many of them considered to be the excesses of popular government. Republicans countered that each branch of the government must in some way be answerable to the people, who were the source of all governmental authority.¹⁴

Editorial, The Patriot, or, Scourge of Aristocracy, Stonington, Connecticut, December 18, 1801

As Republicans considered ways to make the judiciary more accountable to citizens, this contributor to a party newspaper in Connecticut presented the extreme position that the nation's courts should be served by judges elected for fixed terms. More widely shared was this writer's conviction that the Judiciary Act of 1801 was a partisan act intended to establish sinecures for loyal Federalists who could now exercise arbitrary power over citizens. Like Jefferson and many other Republicans, the writer thought that the limited number of suits brought in federal courts did not justify an expansion of the court system.



... Our Judiciary is not a system superior to the constitution, but dependent on it. All laws depend on the constitution, and the judiciary depends on the law that constitutes it. The body that created the Judiciary, can annul the law and create another. Indeed the law has always been imperfect, inasmuch as it gave a greater permanency to the judiciary than to other officers of trust and confidence.

14. George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801–15* (New York: Macmillan, 1981), 163–68; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004): 118–22, 138–44.

Every removal from a dependence on the people directly opens an inroad to aristocracy, and interests separate from those of the people. Judges should be elected for certain periods like other officers; the people are always found to regard talents and capacity;—and whenever judges are placed above the popular control, they will become the people's enemies. History has shewn this in all ages. Our own history, tho' short, has furnished hundreds of examples. The conduct of *Chase, Patterson, Ellsworth, Lee, &c.* cannot be surpassed by any example of the British Star Chamber, or of any other government pretending to proceed under forms of law.

Mr. Adams' judiciary was created for party purposes, and it has executed comparatively little else but party business since its institution. Let any man examine what this court has done, and compare the duty with the expence, and the *purposes* and *utility* of it will be seen. In a majority of the Districts thro' the whole Union, the new judiciary had to do, *just nothing*—but meet adjourn and receive their salaries; while the state courts were open & competent to the discharge of every function entrusted to them. We hope shortly to see the whole system altered, the number of judges reduced, and the powers of the courts limited and defined. In their present state they have assumed authorities equal to the Romish Inquisition.

[Document Source: *The Patriot, or, Scourge of Aristocracy*, December 18, 1801.]

Memorial of Inhabitants of Philadelphia, February 2, 1802

The House of Representatives received multiple copies of this memorial calling for repeal of the Judiciary Act of 1801. Dozens of Philadelphia citizens signed printed or handwritten copies that were circulated before being sent to Congress. The succinct message reflected the widespread belief that the reorganization of the court system had been a partisan grab for power. The Pennsylvania and North Carolina legislatures sent similar memorials calling on Congress to repeal the Judiciary Act.

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To the Senate and the House of Representatives of the United States of America, in Congress Assembled. The Memorial of the

Subscribers, inhabitants of the City and County of Philadelphia: Respectfully Shewith, That your memorialists viewed with deep concern the origin, progress, and final passing of the law, entitled, “An act for the more convenient organization of the courts of the United States.” The time it was brought forward; the manner in which it was conducted through its several stages; and more particularly the subsequent appointments under it; all excited their most fearful apprehensions: the obstinate refusal of its supporters at the time to suffer any alterations to be made in it, could not fail to encrease their fears; and the recent bold avowal of one of its most zealous friends, “*that all amendments were pertinaciously rejected*” most incontrovertibly evinces that their alarms were well grounded. Your memorialists view this law as originating rather in a disposition to extend and perpetuate the power of a party, than in the desire to promote the administration of justice, or the true interests of the country. To detail all the reasons for the repeal of the law, would be to recapitulate those given so ably by the republican senators, who have advocated the repeal. Your memorialists, therefore, deeming the said law improper and unnecessary, request your honorable body, that the same may be repealed. And your memorialists as in duty bound, will pray, &c.

[Document Source: RG 233 Records of the U.S. House of Representatives, Seventh Congress, Records of Legislative Proceedings, Petitions and Memorials, Committee of the Whole House, Organization of the Courts of the United States (HR7A-F5.2).]

Representation of Sundry Merchants and Traders of the City of Philadelphia, February 16, 1802

A large group of merchants and traders in Philadelphia sent Congress an appeal to preserve the judicial system established in 1801. In addition to the familiar arguments about the burdens imposed on Supreme Court justices who had been required to travel to the circuits, the merchants emphasized the commercial benefits likely to result from a more nearly uniform national court system. Other memorials and petitions in defense of the Judiciary Act of 1801 came from the chamber of commerce of New York City and a group of attorneys in New Jersey. The New York petition was drafted in part by Alexander Hamilton.

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Under the former organisation of the courts the parties who prosecuted or defended suits, were exposed to many inconveniences. The great distance which the Judges were obliged to travel in their attendance upon the courts, and the degree of duty imposed on them rendered their sessions too short for the transaction of the business brought before them. . . .

These inconveniences were increased by the constant change of the Judges who presided in the Courts. Those Gentlemen, though eminent for their abilities, their learning and probity, yet educated in states whose practice and principles of jurisprudence were greatly varient from each other, uniformity of opinion could not be expected. . . .

By the new organization of the judiciary, these inconveniences have been removed. The Judges not obliged to travel over a great extent of Country and not limited to time in the Sessions, are enabled to remain as long as business of the court may require. . . .

The nature of the questions usually agitated in the courts of the United States, and the uniformity of decision which their present organization will necessarily introduce, seem calculated to establish a system of general and commercial law, which will be of great benefit to the community in general, and particularly so to the commercial interest. . . .

[Document Source: RG 233 Records of the U.S. House of Representatives, Seventh Congress, Records of Legislative Proceedings, Petitions and Memorials, Committee of the Whole House, Organization of the Courts of the United States (HR7A-F5.2).]

Congressional Debate on Repeal of the Judiciary Act of 1801: U.S. Senate

Senator Gouverneur Morris of New York, January 8, 1802

Morris defended the Judiciary Act of 1801 as a necessary revision that would encourage the most qualified lawyers to accept appointment to a Supreme Court free from the obligations of circuit riding. Like many Federalists, he saw the ideal justice as an older and learned individual. Repeal would not only reinstate an impractical system, it would destroy the constitutional role of the courts as a check on the elected branches of government.

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Gentlemen say, recur to the ancient system. What is the ancient system? Six judges of the Supreme Court to ride the circuit of America twice a year, and to sit twice a year at the seat of Government. . . . Let me ask what would be the effects of the old system here? Cast an eye over the extent of our country, and a moment's consideration will show that the First Magistrate, in selecting a character for the bench, must seek less the learning of a judge than the agility of a post-boy. Can it be possible that men advanced in years, (for such alone can have the maturity of judgment fitting for the office;) that men educated in the closet – men who, from their habits of life, must have more strength of mind than of body; is it, I say, possible that such men can be running from one end of the continent to the other? Or, if they could, can they find time to hear and decide causes? I have been told by men of eminence on the bench, that they could not hold their offices under the old arrangement.

What is the present system? You have added to the old judges seven district and sixteen circuit judges. What will be the effect of the desired repeal? Will it not be a declaration to the remaining judges that they hold their offices subject to your will and pleasure? And what will be the result of this? It will be, that the check established by the Constitution, wished for by the people, and necessary in every contemplation of common sense, is destroyed. It had been said, and truly, too, that Governments are made to provide against the follies and vices of men. For to suppose that Governments rest upon reason is a pitiful solecism. If mankind were reasonable, they would want no Government. Hence, checks are required in the distribution of power among those who are to exercise it for the benefit of the people. Did the people of America vest all power in the Legislature? No; they had vested in the judges a check intended to be efficient – a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws – a check which might prevent any faction from intimidating or annihilating the tribunals themselves. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 38.]

Senator David Stone of North Carolina, January 13, 1802

Stone argued that legal knowledge and judicial skills were best acquired through practical experience and familiarity with the diverse legal cultures in the United States. A restoration of circuit riding would ensure that Supreme Court justices learned about state law and that their recognition of local rules and procedures would make the federal courts more accessible to common citizens.

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But it appears to me essential to the due administration of justice, that those who preside in our courts should be well acquainted with the laws which are to guide their decisions. And, I apprehend, that no way is so much calculated to impart this knowledge, as a practical acquaintance with them, by attending courts in the several States, and hearing gentlemen who are particularly acquainted with them, explain and discuss them. It is, therefore, absolutely necessary, in my mind, that the judges of the Supreme Court, whose power controls all the other tribunals, and on whose decisions rest the property, the reputation, the liberty, and the lives of our citizens, should, by riding the circuit, render themselves practically acquainted with their duties. It is well known, that the knowledge of the laws of a State is not to be suddenly acquired, and it is reasonable to conclude, that that knowledge is most correctly possessed by men whose whole lives have been devoted to the acquisition. It is also perfectly well known, that the knowledge of the modes and principles of practice in the different States, or of any State, is most effectually to be acquired in courts, where gentlemen of skill and experience apply those principles to use upon existing points. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 71.]

Senator Abraham Baldwin of Georgia, January 15, 1802

Baldwin, the president pro tem of the Senate, wanted to restore a judicial system that required Supreme Court justices to learn first-hand about local laws and procedures and that offered parties in the lower federal courts access to the wisdom of the highest court in the land. Like many Republicans, Baldwin wanted a federal judiciary rooted in local custom and accessible to citizens who could not afford to travel to Washington or to hire lawyers at the capital.

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...This had ever appeared to him a radical and vital failure in the new system; it deprives the judges of the opportunity of a full knowledge of local laws and usages, and destroys the possibility of uniformity; it is also a main artery of healthful circulation in the body politic. In giving a satisfactory administration of a Government over a country of this vast extent, the great object must be to avoid the necessity of dragging the people from the remote extremes, the distance of thousands of miles, to the seat of our Government, or far from their homes, where they cannot have the usual advantages in courts of justice. While two of the judges of the Supreme Court held a court in each State, this was almost entirely avoided, except in some of the largest States. The suits were rarely determined at the first court; at the second court, the judges were considered as bringing the sense of the Supreme Court on the subject; it seemed to give as satisfactory a conclusion to the business as if the parties had been themselves before the Supreme Court. Though gentlemen all appear to submit to the force of this argument, yet they suppose they defeat it by the vague and general declaration that experience has proved it to be impracticable; that we should have no more venerable judges; that men must be appointed for their agility rather than their wisdom, &c. He averred experience had determined no such thing; very venerable judges had gone through that duty from the beginning of the Government, without any apparent injury to their constitutions, with as few resignations as ordinarily take place among the State judges, and in fact, with less bodily labor than is required of many members of Congress for a much smaller compensation. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 102–03.]

Senator Nathaniel Chipman of Vermont, January 19, 1802

Judicial review of state and congressional legislation was one of the essential purposes of an independent federal judiciary, according to Chipman, who warned that the abolition of judicial offices would forever compromise the constitutionally defined role of the judiciary.

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...That Constitution is a system of powers, limitations, and checks. The Legislative power is there limited, with even more guarded caution than the Executive; because not capable of a check by impeachment, and because it was apprehended, that left unlimited and uncontrolled, it might be extended to dangerous encroachments on the remaining State powers. But to what purpose are the powers of Congress limited by that instrument? To what purpose is it declared to be the supreme law of the land, and as such, binding on the courts of the United States, and of the several States, if it may not be applied to the derivative laws to test their constitutionality? Shall it be only called in to enforce obedience to the laws of Congress, in opposition to the acts of the several States, and even to their rightful powers! Such cannot have been the intention. But, sir, it will be in vain long to expect from the judges, the firmness and integrity to oppose a Constitutional decision to a law, either of the national Legislature, or to a law of any of the powerful States, unless it should interfere with a law of Congress; if such a decision is to be made at the risk of office and salary, of public character, and the means of subsistence. And such will be the situation of your judges, if Congress can, by law, or in any other way, except by way of impeachment, deprive them of their offices and salaries on any pretense whatever. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 131.]

Senator James Ross of Pennsylvania, February 3, 1802

In his arguments on the unconstitutionality of repeal, Ross asserted that the judiciary should be a kind of first among equals because of its responsibility for one of the main purposes of a constitutional government—ensuring justice.

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Whatever its title may be, the bill itself is nothing less than an act of the Legislature removing from office *all* of the judges of *all* the circuit courts of the United States. It is a declaration that those officers hold their offices at your will and pleasure. That by law you signify your preference of other men, and that these shall serve you no longer.

This is a direct and palpable violation of the Constitution. After providing for the internal security of a nation, the great care of every legislator is directed towards the pure and prompt administration of justice. It is for the attainment of this great end, that government is principally instituted, and the people are happy, or miserable, as the Judiciary is pure, wise, and independent, or otherwise. The Executive, and Legislative authority, instead of being in their nature paramount, are rather auxiliary and subservient in promoting the free and irresistible operations of the judicial power. In our national Government these three great powers are clearly separated, and deposited in different hands. It is a Government of departments, each representing and exercising the sovereignty for a particular purpose, and each prohibited from encroaching upon or exercising the powers of another.

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 163.]

Congressional Debate on Repeal of the Judiciary Act of 1801: U.S. House of Representatives

Representative William Branch Giles of Virginia, February 18, 1802

In two lengthy speeches before the House, Giles articulated the most assertive Republican arguments in favor of repeal, and his remarks became a focal point for the debate that followed. The Constitution's limited provisions for the judicial branch indicated to Giles that the Framers intended for Congress and the executive to play the dominant role in defining the organization and jurisdiction of the federal courts. To argue otherwise, as the Federalists did, was, according to Giles, to undermine the fundamental principle of popular sovereignty upon which the government rested. The court system established in 1801 and the twice-yearly sessions of the Supreme Court were unnecessary and wasteful. This excerpt of Giles' speech was published in the voice of the reporter.

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He said he would now proceed to examine whether the repeal of the Judiciary law of the last session of Congress would in any

respect violate that salutary and practicable independence of the judges which was secured to them by the Constitution. He said the term *independence of Judges or of the Judiciary department* was not to be found in the Constitution. It was therefore a mere inference from some of the specified powers. And he believed in the meaning of gentlemen, and to the extent they carry it, that the term is not to be found either in the spirit, general character, or phraseology, of any article or section of the Constitution. He meant to give the Constitution the most candid interpretation in his power, according to the plain and obvious import of the English language

....

Thus, then, are formed two departments, their powers specified and defined, the times for extending their powers fixed, and indeed a complete organization for the execution of their respective powers, without the intervention of any law for that purpose. A third department, to wit: the Judiciary department, is still wanting. Is that formed by the Constitution? How is that to be formed? It is not formed by the Constitution. It is only declared that there shall be such a department; and it is directed to be formed by the other two departments, who owe a responsibility to the people. Here there arises an important difference of opinion between the different sides of this House. It is contended on one side that the Judiciary department is formed by the Constitution itself. It is contended on the other side, that the Constitution does no more than to declare that there shall be a Judiciary department, and directs that it shall be formed by the other two departments, under certain modifications. . . .

Mr. G[iles] concluded by observing, that, upon the whole view of the subject, feeling the firmest conviction that there is no Constitutional impediment in the way of repealing the act in question, upon the most fair and candid interpretation of the Constitution: – believing that principles advanced in opposition, go directly to the destruction of the fundamental principle of the Constitution, the responsibility of all public agents to the people – that they go to the establishment of a permanent corporation of individuals invested with ultimate censorial and controlling power over all the departments of the Government, over legislation, execution, and decision, and irresponsible to the people; believing that these principles are in direct hostility to the great principle of Representative

Government; believing that the courts formerly established, were fully competent to the business they had to perform, and that the present courts are useless, unnecessary, and expensive; believing that the Supreme Court has heretofore discharged all the duties assigned to it in less than one month in the year, and that its duties could be performed in half that time; considering the compensations of the judges to be among the highest given to any of the highest officers of the United States for the services of the whole year; considering the compensations of all the judges greatly exceeding the services assigned them, as well as considering all the circumstances attending the substitution of the new system for the old one, by increasing the number of judges, and compensations, and lessening their duties by the distribution of the business into a great number of hands, &c. . . . While acting under these impressions, he should vote against the motion now made for striking out the first section of the repealing bill.

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 584–86, 602.]

Representative James Bayard of Delaware, February 19, 1802

Bayard was frequently the leading spokesman for the Federalists on matters relating to the judiciary. In a speech that was widely distributed in published form, he responded to William Branch Giles and challenged Republican arguments that popular sovereignty required some legislative check on an independent judiciary. Popular sovereignty, Bayard said, would be served not by making the judiciary directly accountable and subservient to elected officials but by ensuring public confidence in the court system, and that confidence could be secured only by protecting the judiciary from partisan influence.

• • •

Let it be remembered, that no power is so sensibly felt by society, as that of the Judiciary. The life and property of every man is liable to be in the hands of the judges. Is it not our great interest to place our judges upon such high ground, that no fear can intimidate, no hope can seduce them. The present measure humbles them in the dust, it prostrates them at the feet of faction, it renders them the tools of every dominant party. It is this effect which I deprecate,

it is this consequence which I deeply deplore. What does reason, what does argument avail, when party spirit presides? Subject your bench to the influence of this spirit, and justice bids a final adieu to your tribunals. We are asked, sir, if the judges are to be independent of the people? The question presents a false and delusive view. We are all the people. We are, and as long as we enjoy our freedom, we shall be divided into parties. The true question is, Shall the Judiciary be permanent, or fluctuate with the tide of public opinion? I beg, I implore gentlemen to consider the magnitude and value of the principle which they are about to annihilate. If your judges are independent of political changes, they may have their preferences, but they will not enter into the spirit of party. But let their existence depend upon the support of the power of a certain set of men, and they cannot be impartial. Justice will be trodden under foot. Your courts will lose all public confidence and respect. The judges will be supported by their partisans, who in their turn will expect impunity for the wrongs and violence they commit. The spirit of party will be inflamed to madness; and the moment is not far off when this fair country is to be desolated by civil war. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 649–50.]

Representative John Rutledge, Jr., of South Carolina, February 24, 1802

The Federalist Rutledge, son of the former Supreme Court justice of the same name, saw the judiciary as “something exterior to the State” yet essential to the viability of a republican government. Like many Federalists, Rutledge was suspicious of the democratic elements of constitutional government and anticipated that an independent judiciary would protect what he saw as the larger interests of the citizenry against a system that placed people in legislative and executive office solely on the basis of popular votes.

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The advocates of this bill say, the people could not have meant to establish an independent Judiciary, because a permanent body of men, beyond all control, would prove hostile to the liberties of the people. Sir, we do not contend for any such establishment; we do not wish for a Judiciary permanent and beyond control. No, sir, all

we insist upon is, that the judges are liable to that sort of control only which the Constitution establishes; that “good behaviour” is the tenure by which they hold their office, and that they cannot be removed from it but by impeachment. That the Judicial authority was never designed to depend upon the Executive and Legislative power, but, in some sort, to balance them. That our federal judicature was meant to give to the Government a security to its justice against its power; it was contrived to be, as it were, something exterior to the State. . . . The understanding of the Convention, of the States, and of the people at large, was, that our Judiciary should be independent. They deemed this Constitutional check essential to the duration of the Government; and until the fourth day of last March, I believe the Judiciary was considered as sacred. The State Governments, and the people, and the friends of our Federal Union, revered it as the fortress and ark of their safety.

While this shield remains, it will be difficult to dissolve the ties which knit and bind the States together. As long as this buckler remains to the people, they cannot be liable to much or permanent oppression. The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe. Neither the President nor the Legislature can violate their Constitutional rights. Any such attempt would be checked by the judges, who are designed by the Constitution to keep the different branches of the Government within the spheres of their respective orbits, and say, thus far you shall legislate, and no farther. Leave to the people an independent Judiciary, and they will prove that man is capable of governing himself; they will be saved from what has been the fate of all other Republics, and they will disprove the position that Governments of a Republican form cannot endure. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 738–40.]

Representative Joseph H. Nicholson of Maryland, February 27, 1802

A leading Republican in the House of Representatives, Nicholson offered a firm defense of legislative prerogative to repeal a statute, though he did so in a far more temperate manner than William Branch Giles. According to Nicholson, the extraordinary constitutional protections offered federal judges and the reach of their authority required some check from the elected legislature if constitutional government was to be preserved.

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... I think no doubt can be entertained that the power of repealing, as well as of enacting laws, is inherent in every Legislature. The Legislative authority would be incomplete without it. If you deny the existence of this power, you suppose a perfection in man which he can never attain. You shut the door against a retraction of error by refusing him the benefit of reflection and experience. You deny to the great body of the people all the essential advantages for which they entered into society. This House is composed of members coming from every quarter of the Union, supposed to bring with them the feelings and to be acquainted with the interests of their constituents. If the feelings and the interests of the nation require that new laws should be enacted, that existing laws should be modified, or that useless and unnecessary laws should be repealed, they have reserved this power to themselves by declaring that it should be exercised by persons freely chosen for a limited period to represent them in the National Legislature. On what ground is it denied to them in the present instance? By what authority are the judges to be raised above the law and above the Constitution? Where is the charter which places the sovereignty of this country in their hands? Give them the powers and the independence now contended for, and they will require nothing more; for your Government becomes a despotism, and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country, differing essentially with us upon the great principles of government; and after being

clothed with this arbitrary power, they are beyond the control of the nation, as they are not to be affected by any laws which the people by their representatives can pass. If all this be true; if this doctrine be established in the extent which is now contended for, the Constitution is not worth the time we are spending upon it. It is, as it has been called by its enemies, mere parchment. For these judges, thus rendered omnipotent, may overleap the Constitution and trample on your laws; they may laugh the Legislature to scorn, and set the nation at defiance. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 823–24.]

Representative Samuel Whittlesey Dana of Connecticut, March 1, 1802

In the debates on the repeal of the Judiciary Act of 1801, Federalists placed a new emphasis on judicial review as a unique and essential function of the federal courts. They argued that the courts' authority to declare an act of Congress void because it violated the Constitution necessitated the judiciary's independence from the legislature. Dana warned that if the repeal act passed, Congress might just as easily deprive Supreme Court justices of their seats on the bench and thereby undo the effectiveness of judicial review. While only a few challenged judicial review, many Republicans, including Thomas Jefferson, asserted the right of each of the three branches of government to declare an act void on the grounds of unconstitutionality.

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It is a decisive reason against admitting the power now claimed over the Judiciary, if they are to judge whether the acts of Congress are conformable to the Constitution. This, however, has been denied by several of the gentlemen who advocate the present bill. It is said, that this question must be decided by Congress. And gentlemen would now decide, for the first time, that the Constitutional validity of the acts of Congress is to be determined only by the result of elections; and that the judges, as composing a Constitutional department, have nothing to do with such questions. We say, if Congress can pass any acts at pleasure, and there can be no judicial opinion as to their validity, Congress might destroy the Supreme Court altogether. As to this power of destroying judges, there is no

difference, in the principle, between those of the Supreme and those of inferior courts. The offices of the justices of the Supreme Court have been established by act of Congress. That act may be totally repealed as well as the act now in question. The present bill, therefore, in its principle, is a claim of power in Congress to divest the judges of the Supreme Court of their offices. This is a more serious claim of power than has been advanced before. Whatever may have been said of former administrations, they never claimed to command the whole powers of the Government through the Legislative body. Whatever might be said on the other topics, whatever questions might be made about the constitutionality of measures, there was one principle constantly admitted; and that was, to consider the judges of the United States, while behaving well, as placed beyond the reach both of the Legislature and the President. This gave a security to all parts of the community, against unconstitutional measures. For the judges, being independent of the Legislative and Executive departments, might, in the faithful discharge of their duty, refuse to give effect to acts contravening the Constitution. It was not pretended, that Congress, with the President, were authorized, at pleasure, to deprive the judges of the means of subsistence, by abolishing their offices. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 919–20.]

Representative Joseph Bradley Varnum of Massachusetts, March 3, 1802

Many in Congress wanted to encourage a uniformity of decision in the federal courts, but Republicans and Federalists disagreed about the best means of encouraging that uniformity. While Federalists argued that a system of permanently assigned circuit judges and a Supreme Court sitting as a court of last resort at the seat of government would support more uniform decisions, Republicans like Varnum argued that the circuit assignment of Supreme Court justices would encourage them to share information and establish regular communication among the regional circuit courts, where most cases were resolved.

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... The old system, which the friends of the present bill wish to see revived and continued in force, was adopted after much labor and investigation . . . as the most propitious mode of administering justice under the Federal Government which could be devised. I have always conceived it much better calculated to promote general justice, by producing a greater uniformity of decision in the different parts of the Union, than that adopted the last session; because the judges of the Supreme Court, after riding the circuits, have an opportunity, on their assemblage at the seat of Government, to compare their decisions, and, from time to time, agree on uniform principles, to be observed, both in the decision of great questions, and the forms to be pursued in the circuit courts. No such advantages can be derived from the system of the last session, the judges of each circuit are distinct; they have no immediate connexion with the judges of other circuits, or with the judges of the Supreme Court, and therefore their rules of procedure will vary according to the practice in the State courts, and will probably be different in each circuit; their decisions will probably be different in different parts of the Union, in many instances, where the questions are similar, which will cause additional appeals, produce a delay of justice, and subject the suitors to additional expense, trouble, and fatigue; and, in addition to the reasons which have been offered in favor of the old system, the saving of an expense of more than forty thousand dollars annually ought to have some weight with faithful Representatives of a free people, unless a public debt is in fact to be considered a public blessing. . . .

[Document Source: *Annals of Congress*, 7th Cong., 1st sess., 980–81.]

Federal Judges Respond to the Repeal of the Judiciary Act of 1801

Following repeal of the Judiciary Act of 1801, Congress in April 1802 passed an act eliminating the Supreme Court's June term and assigning the justices to serve on the circuit courts of the six reorganized judicial circuits. Although Republicans had previously attempted to limit the Supreme Court to a single annual term, Federalist James Bayard accused the majority of seeking to avoid any Supreme Court challenge to

the constitutionality of the repeal act and the removal of sitting circuit judges. Chief Justice John Marshall privately questioned the constitutionality of the requirement that justices serve as judges on circuit courts to which they had not been nominated and confirmed. Because the new act required the justices to preside in the circuit courts before they would convene as the Supreme Court, Marshall wrote his fellow justices to solicit their opinions on their new circuit duties and to assure them that he would act in accordance with the majority of them. Justice Samuel Chase, never one to avoid a confrontation, vowed to declare the repeal act unconstitutional if it came before the Supreme Court, and he thought the justices should refuse to serve on the circuit courts. Chase, like all other justices, had served on the circuit courts before passage of the Judiciary Act of 1801, and of the other four associate justices, at least three concluded that the established practice of circuit riding required them to accept a resumption of duties on the circuit courts. Marshall agreed, and his anticipation of continued partisan conflict and a waning of Federalist influence may have deepened his reluctance to challenge the repeal act and the new organization of circuit courts.

While the justices communicated in private, Federalist members of Congress met in the spring of 1802 and devised a strategy to challenge the constitutionality of the repeal act and to enlist judges and justices in their effort. They decided to challenge the transfer of cases from the old to the new circuit courts, they encouraged Circuit Judge Richard Bassett to publish a protest of the repeal act, and they coordinated a joint petition to Congress from the removed circuit judges who had been appointed by John Adams. Congress refused to act on the judges' petition, and, following several challenges to the jurisdiction of the reorganized circuit courts, the Supreme Court, in *Stuart v. Laird*, held that Congress had authority to transfer a case from a circuit court established in 1801 to a circuit court established by the act of 1802, thereby ending the legal challenge to the repeal act.

Through much of the nineteenth century, the Judiciary Act of 1801 stood as an example of the dangers of ignoring public sentiment in the organization of the federal court system. (A speaker in 1826 warned "the coiled adder lay in the ashes of the act of 1801." In 1848, a member of the House of Representatives explained that in 1801 "the judicial oligarchy was established upon paper over the heads of the people.") Even many who proposed an end to circuit riding or the es-

establishment of intermediate courts of appeals were quick to dissociate themselves from the Federalist measure of 1801. After the establishment of circuit courts of appeals in 1891 and the abolition of circuit riding in 1911, the act of 1801 developed a more favorable reputation as a precursor of the judicial system that emerged in the twentieth century.¹⁵

Chief Justice John Marshall to Justice William Paterson, April 19, 1802

In early April 1802, Marshall found congressional plans for circuit assignment of justices “less burdensome than heretofore,” and the act that passed in late April provided for the fixed assignments of justices to one circuit rather than the shifting assignments under the Judiciary Act of 1789. Marshall, however, expressed “some strong constitutional scruples,” and before the passage of the act, he wrote his fellow justices for reactions to the new assignment. The letter to William Paterson is the most extensive of those that survive.

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I hope I need not say that no man in existence respects more than I do, those who passd the original law concerning the courts of the United States, & those who first acted under it. So highly do I respect their opinions that I had not examind them & shoud have p[roceed]ed without a doubt on the subject, to perform the duties assignd to me if the late discussions had not unavoidably produced an investigation of the subject which from me it woud not otherwise have receivd. The result of this investigation has been an opinion which I cannot conquer that the constitution requires distinct appointments & commissions for the Judges of the inferior courts from those of the supreme court. It is however my duty & my inclination in this as in all other cases to be bound by the opinion of the majority of the Judges & I shoud therefore have proceeded to execute the law so far as that task may be assignd to me; had I not

15. Haskins and Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801–15*, 168–80; Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: W.W. Norton, 1971), 36–52; Jed Glickstein, “After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801” (April 13, 2011) (available at SSRN: <http://ssrn.com/abstract=1809207>).

supposd it possible that the Judges might be inclin'd to distinguish between the original case of being appointed to duties markd out before their appointments & of having the duties of administering justice in new courts imposd after their appointments. I do not myself state this because I am myself satisfied that the distinction ought to have weight, for I am not—but as there may be something in it I am inducd to write to the Judges requesting the favor of them to give me their opinions which opinions I will afterwards communicate to each Judge. My own conduct shall certainly be regulated by them.

This is a subject not to be lightly resolv'd on. The consequences of refusing to carry the law into effect may be very serious. For myself personally I disregard them, & so I am persuaded does every other Gentleman on the bench when put in competition with what he thinks his duty, but the conviction of duty ought to be very strong before the measure is resolv'd on. The law having been once executed will detract very much in the public estimation from the merit or opinion of the sincerity of a determination, not now to act under it. . . .

[Document Source: Charles F. Hobson, et al., eds., *The Papers of John Marshall*, vol. 6, *Correspondence, Papers, and Selected Judicial Opinions November 1800–March 1807* (Chapel Hill: University of North Carolina Press, 1990), 108–09.]

Justice Samuel Chase to Chief Justice John Marshall, April 24, 1802

Chase, who had served on the Supreme Court since 1796 and had earned the enmity of Republicans for his conduct of trials under the Sedition Act, stood alone in his determination to confront Congress on the repeal of the Judiciary Act of 1801 and the requirement that justices resume serving on the circuit courts. In his lengthy reply to Marshall's inquiry, Chase argued that the Constitution required Congress to establish inferior federal courts and that Congress did not have authority to abolish any federal courts established by earlier legislation. Chase also thought that the circuit assignment of justices was an unconstitutional expansion of the original jurisdiction of the Supreme Court. Here he explains why he thought the repeal act was unconstitutional and that the justices had a duty to refuse to act in any way that would enforce the act.

• • •

It has been the uniform opinion (until very lately) that the Supreme Court possess the power, and that they are bound in duty, to declare acts of Congress, or of any of the States, contrary to the Constitution, *void*; and the Judges of the Supreme Court have *separately* given such opinion. If the Supreme Court possess this power, the inferior Courts, must also have the same power; and of course ought to be as independent of Congress as the supreme Court; but the Judges of *both* Courts will not be independent of but dependent on, the Legislature, if they be not entitled to hold their *Offices* during *good behaviour*; or if they have not a fixed and certain provision for their support, that cannot be *diminished*; or if they can be *removed from Office*, (or which is the same thing) if their *Offices* can be taken from them by Congress. The Constitution has established *good behaviour* as the *tenure* by which all Federal Judges shall hold their *Offices*; and it has prescribed the mode, by which only, any of them can be removed from Office. By these wise provisions it evidently follows, that they cannot be removed, *directly*, or *indirectly* by Congress; and that they cannot be removed in any *other way* than by Impeachment: Every other mode is a mere subterfuge and evasion of the Constitution. It appears to me, that the repealing Act, *so far*, as it contemplates to affect the appointment, commission, and office, or Salary of any of the Judges of the Circuit Courts, is contrary to the Constitution, and is therefore, *so far*, void. If the Constitutionality of this Act could be brought before the Supreme Court, by action of assize of Office, or by action to recover the Salary, I should decide (as at present advised) that the Act is void; and I would, by the first action restore the Judge to his Office, and, by the latter, adjudge him his Salary: But by neither of these modes, nor by any other (as Mandamus, & Quo Warranto) could remedy be obtained. This *Defect of Remedy* to obtain a Right (which Justice abhors) will induce every Judge of the Supreme Court to act with the greatest caution; and he must, in my judgment, decline to execute the office of a Circuit Judge, if he apprehends that he shall, thereby, violate the Constitutional Rights of the Circuit Judges. . . .

[Document Source: Hobson, et al., eds., *The Papers of John Marshall*, vol. 6, *Correspondence, Papers, and Selected Judicial Opinions November 1800–March 1807*, 112–13.]

Justice William Cushing to Justice Samuel Chase, June 1802

Cushing recognized the practical limits of the justices' ability to challenge the new assignment of Supreme Court justices to service on the circuit courts. Like Justice Bushrod Washington, Cushing thought the earlier circuit service of justices left them with no choice but to resume circuit riding.

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I received your favor with a copy of your letter to the Ch Justice on the subject of the Judiciary containing much good sense & argument. But can we, after Eleven years practical exposition of the Laws & Constitution by all federal Judges, now say, that Congress has not power to direct a Judge of the Sup Court to act with a Dt. Judge in an inferiour Court, with or without a Commission, yet making one of the Sup bench to hold appellate Jurisdiction? I think we cannot. As to being instrumental (by taking the Circuits) in violating the rights of the Judges & the Constitution, I do not see that it carries that inference. It is not in our power to restore to them their Salaries or them to the exercise of their Offices. Declining the Circuits will have no tendency to do either. We violate not the Constitution. We only do duties assigned us by Constitutional authority. Suppose we apply or represent or remonstrate to the President; what can he say? "Gent There is the Law I cannot control Congress." And you & I know *We* cannot control the Majority.

[Document Source: Quoted in Hannah Cushing to Abigail Adams, June 25, 1802, Hobson, et al., eds., *The Papers of John Marshall*, vol. 6, *Correspondence, Papers and Selected Judicial Opinions November 1800–March 1807*, 116, n.5.]

Richard Bassett's Protest, August 14, 1802

Bassett's widely published protest took the form of a court opinion on the validity of the repeal act. Bassett, who had served as a judge on the U.S. Circuit Court for the Third Circuit, claimed to be acting in his "judicial character" when he pronounced the repeal act and the subsequent act reorganizing the judicial circuits to be "null and void." He turned to the public press, he said, because Congress had deprived him and the other circuit judges of any other means of carrying out their responsibility to disallow unconstitutional acts. His extended comments described the importance of a judicial indepen-

dence that rested on the secure tenure of judges, and he explained why he thought that the exclusive power of judicial review was all that would prevent constitutional government from descending into violence.

• • •

The people had to choose between the possible, but comparatively trifling inconvenience of maintaining the office of judges, when once appointed, until their decease, provided they behaved well; and the immense and never ceasing evils resulting to liberty and justice, from placing their judges under the control, and at the will of the legislative department. They well understood, that all the checks and limitations introduced into the charter of government, respecting the rights and obligations of the several states, or in favour of the citizens, would become nugatory the moment that the offices and compensations of the judges were to be holden at the pleasure of *majorities* in the *legislature*. It was easy to perceive, that a legislative body, which held in its hands the *offices and livings* of those who were to decide whether their acts were contrary to the constitutional law, would at any time command the constitution, and make it yield to their wishes and views. If their law was resisted by the judiciary, as violating the superior law of the constitution, there would be no difficulty in asserting, that the obnoxious judges were *unnecessary*, or too *expensive*, or that a *better system* could be framed: – And *judges* would soon be found more pliant to the governing powers.

Thus, all the advantages of an independent judiciary would be lost: lost to the people, and to the constitution. . . .

If we look only into the constitution for one moment, and see the various checks and limitations upon legislative power, and in favour of the states and citizens, all declared to be the supreme law of the land, and consider for a moment, the nature of the judicial power, to which is expressly delegated the right of deciding *all* questions arising under the *constitution and laws* of the United States; and that, without this power in the judiciary to extend to the states and citizens, the benefits of the constitution as a supreme law, they can only be obtained through force and blood; no rational doubt can be entertained, that it is the right, and indeed, the highest duty of the judges, if convinced that a law of congress is

opposed to the law of the people, as enacted in the constitution, to pronounce it, for that reason, a nullity and void. . . .

[Document Source: *The Protest of the Hon. Richard Bassett* . . . (Philadelphia: Bronson & Chauncey, 1802), 20–21, 34. (Originally published in the *Gazette of the United States*, August 21, 1802.)]

Petition of William Tilghman, Referred to the Committee of the Whole House, January 27, 1803

The House of Representatives and the Senate received nearly identical petitions from eleven of the circuit judges appointed by John Adams. Several of the former judges had met to coordinate an appeal to Congress, and they corresponded with the others who joined the effort. The petitioners presented themselves as federal judges waiting for further assignment by Congress, but the assertion of their constitutional right to continue in office betrayed their recognition that a majority of the Congress did not consider them sitting judges. The petitioners suggested that they would be satisfied if Congress submitted to a judicial panel, presumably the Supreme Court, the question of their right to office and salary.

The House of Representatives rejected the petitions after a debate in which Republicans said that if the former judges wanted a constitutional opinion from the Supreme Court, they should file a suit in the federal courts. The Senate referred the petitions to a committee chaired by Gouverneur Morris, who reported a resolution that the Senate ask the president to file a writ “for the purpose of deciding judicially on their claims,” and that resolution was defeated. In both houses, debate centered on Federalist claims that the federal courts had exclusive authority to determine the constitutionality of a congressional act.¹⁶

William Tilghman served as chief judge on the U.S. Circuit Court for the Third Circuit from 1801 to 1802. He served as chief justice of the Pennsylvania supreme court from 1806 to 1827.

• • •

By an act of congress passed on the thirteenth day of February in the year of our Lord one thousand eight hundred and one, entitled “An act to provide for the more convenient organization of the

16. Glickstein, “After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801.”

courts of the United States,” certain judicial offices were created, and courts established called Circuit Courts of the United States.

In virtue of appointments made under the constitution of the United States, the undersigned became vested with the offices so created, and received commissions, authorizing them to hold the same, with the emolument thereunto appertaining, during their good behaviour.

During the last session, an act of congress passed, by which the above mentioned law was declared to be repealed; since which no law has been made for assigning to your memorialists, the execution of any judicial functions, nor has any provision been made for the payment of their stipulated compensations.

Under these circumstances, and finding it expressly declared in the constitution of the United States, that “The Judges both of the supreme and inferior courts shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office,” the undersigned, after the most deliberate consideration, are compelled to represent it as their opinion, that the right secured to them by the constitution, as members of the judicial department, have been impaired.

With the sincere conviction, and influenced by a sense of public duty, they most respectfully request of congress to review the existing laws which respect the offices in question, and to define the duties to be performed by the undersigned, by such provisions as shall be consistent with the constitution, and the convenient administration of justice.

The right of the undersigned to their compensations, they sincerely believe to be secured by the constitution, notwithstanding any modification of the judicial department, which, in the opinion of congress, public convenience may recommend. This right, however, involving a personal interest, will cheerfully be submitted to judicial examination, and decision, in such manner as the wisdom and impartiality of congress may prescribe.

That judges should not be deprived of their offices or compensations, without misbehaviour, appears to the undersigned, to be among the first and best established principles of the American constitutions; and in the various reforms they have undergone, it has been preserved and guarded, with increased solicitude.

On this basis, the constitution of the United States has laid the foundation of the judicial department, and expressed its meaning in terms equally plain and peremptory.

This being the deliberate and solemn opinion of the undersigned, the duty of their stations requires that they should express it to the legislative body. They regret the necessity which compels them to make the representation, and they confide that it will be attributed to a conviction, that they ought not voluntarily to surrender rights, and authorities, intrusted to their protection, not for their personal advantage, but for the benefit of the community.

[Document Source: Petitions and Memorials, Committee of the Whole House, Organization of the Courts of the United States, Records of the U.S. House of Representatives, RG 233, National Archives and Records Administration, 7th Cong., 2d sess., (HR7A-F5.2).]

Representative Joseph H. Nicholson of Maryland, January 27, 1803

In debate on the petitions of the former circuit judges and the proposals to submit their appeal for a judicial opinion, Joseph Nicholson dismissed the claims to judicial review and suggested to his colleagues that the voting public was the ultimate arbiter of constitutionality.

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In his opinion, Mr. N. said the best method of trying the right of Congress to repeal the judiciary act had been for some time, and was yet in operation. The people constituted the great tribunal before whom the constitutionality of all laws of Congress should be brought, and by them this question will be decided. Some of them have decided, and the remainder will decide by their elections. It is an impartial tribunal, to whom we may all appeal, and their judgment will bind us. To their decision it is already referred, and with them he was willing to leave it rather than to any court of justice.

[Document Source: *Annals of Congress*, 7th Cong., 2d sess., 438.]

Senator James Ross of Pennsylvania, February 3, 1803

As the Republican majority in Congress dismantled much of the Federalists' legislative legacy, including the Judiciary Act of 1801, some Federalists, like Ross, found in judicial review the only effective check on what they feared were the excesses of majority rule. In this excerpt, Ross argued in favor of the proposal to seek a judicial resolution of the former judges' claim to their offices and salaries. Ross's assertion of the judiciary's prerogative to determine constitutionality, like the similar claims in Bassett's protest, exceeded the judicial authority described by John Marshall in *Marbury v. Madison*, which the Supreme Court issued later in February 1803.



It is manifest, from the Constitution, that its authors were aware of danger from attempts of the Legislature to abuse their great powers. Experience had admonished them on this subject in almost every State. Therefore, Congress was expressly restrained from passing laws imposing duties upon exports, *expost facto* laws, bills of attainder, laws affecting emigration, or certain rights of individual States. . . . Suppose such laws passed in direct violation of the Constitution, where is the remedy if the gentleman's doctrine of Legislative supremacy be right? Not in Congress, for they are the wrongdoers; not in the President, for he is the organ to execute, not to interpret, the laws; not in the States, for they might so differ that no two would exactly agree, and this would lead to the most furious and destructive disputes; not in the people, for there is no mode of collecting their opinions. The Judiciary, then, seems to be the only body to which we could look for protection from such laws; their agency becomes necessary to give the laws complete effect upon individuals. The Constitution is the supreme law: it is the duty of a judge to compare acts of the Legislature with this great charter, and pronounce whether the special delegated power has been exceeded or not. The Constitution expressly directs them to take cognizance of all cases arising under the Constitution and laws of the United States. . . .

[Document Source: *Annals of Congress*, 7th Cong., 2d sess., 70.]

Impeachment and the Trial of Justice Samuel Chase

The debates on the repeal of the Judiciary Act of 1801 exposed very different conceptions of judicial tenure and the constitutional provisions for judicial independence. For Federalists, the twin protections of tenure and salary shielded the judiciary from the reach of popular opinion, while Republicans emphasized the federal judges' ultimate accountability to the people, who were the source of all governmental authority. At the same time, the election of the first Republican president, faced with a government filled entirely with Federalist-appointed officeholders, led to a more general debate on the tenure of presidential appointees and the provisions for removal of incumbent appointees. Following the abolition of the new circuit judgeships and the presidential removal of various district attorneys and customs collectors, some Republicans suggested that impeachment might be the proper means of removing federal judges whom they believed were unfit for office. By 1802, reports circulated of Republican plans to impeach the most partisan of federal judges, Justice Samuel Chase.

Chase was appointed to the Supreme Court by George Washington in 1796 and served as the circuit justice in some of the most controversial trials in the young republic. He presided over the treason trial of Jacob Fries, leader of the anti-tax revolt in Pennsylvania, and over the sedition prosecutions of Thomas Cooper and James Callender. In each of these trials, Chase, a brilliant but often confrontational judge, had limited the defendants' ability to present evidence and witnesses, and he narrowly defined the role of the jury. On or off the bench, he made no attempt to hide his support for the Federalists, and he campaigned openly for the reelection of John Adams in 1800.

In May 1803, in the U.S. Circuit Court for Maryland, Chase presented a grand jury charge that immediately incited a partisan firestorm and demands for his removal. Since the inauguration of the government, federal judges frequently referred to political affairs in their grand jury charges, but these political commentaries in court became increasingly controversial as partisan tensions heightened in the late 1790s and as Federalist-appointed judges presided over the sedition trials of Republicans. In the charge to the Maryland grand

jury in 1803, Chase decried the abolition of the circuit judgeships and condemned a recent change in the Maryland constitution that extended the suffrage to all adult, white males in the state. According to Chase, these actions threatened the “security for property, and personal Liberty” and portended “Mobocracy, the worst of all possible Governments.” President Jefferson read a published copy of the charge and immediately forwarded it to a Republican leader of Congress, asking if such remarks ought to go “unpunished.” Jefferson considered the charge far more than an inappropriate remark from a judge; it was, he said, “a seditious & official attack on the principles of our constitution” as well as on the legitimate proceedings of a State government.

Congressional leaders privately debated the grounds for impeachment, but no formal action regarding Chase was taken until January 1804 when John Randolph of Virginia presented the House of Representatives with a motion to establish a committee of inquiry into the official conduct of Chase. The House of Representatives had already voted to impeach a U.S. district judge, John Pickering of New Hampshire, on March 2, 1803. Although many Federalists suspected that the Pickering impeachment was but a prelude to the move against Chase, the Pickering proceedings raised fewer questions about the judicial impeachment power because Pickering’s mental illness and alcoholism rendered him so clearly incapable of carrying out his duties. In early 1801, Federalists in New Hampshire had approached government officials, including then-Secretary of State John Marshall, seeking legislation to remove Pickering from the bench because of the judge’s “madness.” Under the resulting provision of the Judiciary Act of 1801, which authorized the replacement of disabled district judges, U.S. Circuit Judge Jeremiah Smith assumed the duties of Pickering, who continued to receive his salary. The repeal of the Judiciary Act of 1801, however, abolished both the disability policy and the judgeship of Jeremiah Smith, so Pickering resumed his seat on the district court.

Federalist senators argued that Pickering’s disabilities did not constitute the “high crimes and misdemeanors” required by the Constitution for impeachment and removal, but Republican senators provided the two-thirds majority vote to convict Pickering on March 12, 1804. On the same day, the House of Representatives voted to impeach Justice Samuel Chase after a debate that more directly engaged the criteria

for a House investigation of judges and the constitutional grounds for impeachment.¹⁷

Nathaniel Macon to Joseph H. Nicholson, August 6, 1803

After receiving President Jefferson's suggestion that the House of Representatives consider action to "punish" Chase for his grand jury charge, Representative Joseph H. Nicholson of Maryland conferred with other Republican congressional leaders, including Speaker of the House Nathaniel Macon of North Carolina. After asking for some time to reflect on the question, Macon offered Nicholson his several concerns about pursuing impeachment of Justice Chase. In other correspondence, Macon was highly critical of Justice Chase's delivery of the charge, but here he questioned whether the House's impeachment powers extended to these political comments, and he suggested that a free press would counter the "monarchical" opinions of Chase and others. Although he questioned the wisdom of impeachment in this case, Macon, like Jefferson and many others, considered the grand jury charge to be the most troubling of Chase's actions from the bench.

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... I have thought a little on Judge Chase's charge and submit for your consideration the following queries,

1. ought a Judge to be impeached for a charge to a grand jury because it contains matter of which the G.J. have not cognizance
2. ought a Judge to be impeached for a charge to a Grand Jury, not legal but political
3. ought a judge to be impeached, for delivering in his charge to the Grand Jury, political opinions which every man may freely enjoy & freely express

17. Ellis, *Jeffersonian Crisis*, 67–107; Haskins and Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801–15*, 205–45; Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America: 1635–1805* (New Haven, Ct.: Yale University Press, 1984); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999), ch. 2.

4. ought a Judge to be impeached for delivering his political opinions in a charge to the Grand Jury, and which any member of Congress might deliver to the house of which he was a member,

5. ought a Judge to be impeached because he avows monarchical principles in his charge to G.J.

Is error of opinion to be dreaded where enquiry is free; Is the liberty of the press of any real value, when the political charges of a Judge are dreaded; What effect have they produced (judicial political charges) in the United States.

If a Judge ought to be impeached for avowing monarchical principles to the Grand jury in his charge, what ought to be done with those who appoint them, who actually supported them in the field; I must stop or weary you with enquiries, perhaps was I more of the lawyer and less of the planter I might see that none of those questions touched the case, although the same principle is involved in the whole of them, it does not seem improper to examine each, because if either of them embrace the questions it deserves the most serious consideration before a single step be taken. Change the scene & suppose Chase had stretched as far on the other side, and had praised where no praise was deserving, would it be proper to impeach, because by such conduct he might lull the people to sleep, while their interest was destroyed. I have said this much, to hear your opinions on some of the points; nor can I quit without expressing to you, my firm conviction, that you, if any attempt be made to impeach ought not to be the leader.

[Document Source: Joseph Hopper Nicholson Papers, Manuscripts Division, Library of Congress.]

House of Representatives Debate

John Randolph's motion to appoint a committee to investigate the conduct of Justice Chase prompted a debate on the constitutional responsibilities inherent in the House of Representatives' impeachment authority. Randolph included no charges in his motion and cited only the remarks made during the last Congress by a Pennsylvania congressman who raised questions about Justice Chase's official conduct. (Randolph was referring to John Smilie, who in February 1803 had

opposed the assignment of Chase to the Pennsylvania circuit court because of popular anger about the judge's role in the treason trial of Jacob Fries.) Federalists like James Elliot responded to Randolph's motion by arguing that judicial independence limited the House to inquiries only in response to credible and specific charges against a judge. Elliot claimed that an inquiry would itself damage the judge's reputation and undermine public respect for the judiciary.

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Representative James Elliot of Vermont, January 5, 1804

. . . I am as deeply convinced as the gentleman from Virginia that the streams of justice should be preserved pure and unsullied. I am also sensible that the Judicial department ought to attach to itself a degree of independence. I am of opinion that this House possesses no censorial power over the Judicial department generally, or over any judge in particular. They have alone the power of impeaching them; and when a judge shall be charged with flagrant misconduct, and when facts are stated which shall induce them to believe those charges true, I shall be at all times prepared to carry the provisions of the Constitution into effect, in virtue of which great transgressors are punishable for their crimes. The basis of this resolution is, that a gentleman from Pennsylvania, at the last session, stated that the judge named in it had been guilty of improper conduct. Of these charges I am uninformed, and every new member must be uninformed. It is astonishing to me that we are called upon to vote for an inquiry into the character of a judge without any facts being adduced to show that such an inquiry should be made. If the resolution pass in its present form, it appears to me that we shall thereby pass a vote of censure on this judge, which neither the Constitution nor laws authorize. If the judge be guilty, I should suppose the first step proper to be taken would be for some person aggrieved, or for members having personal knowledge, to exhibit facts on which the House may act. . . .

[Document Source: *Annals of Congress*, 8th Cong., 1st sess., 807.]

Representative William Findley of Pennsylvania, January 6, 1804

For Findley, judicial independence was necessary to protect citizens' access to justice, and it was the particular duty of the House of Representatives, as the body closest to the people, to maintain public confidence in the judiciary by investigating any allegations of judicial misconduct. The privileges of judicial tenure came with the understanding that judges were subject to public scrutiny.

Findley's remarks followed the House's decision to charge the committee of inquiry with investigation of the conduct of Judge Richard Peters as well as Justice Chase. Peters had sat with Chase in the trial of Fries and in the sedition trial of Thomas Cooper. The committee did not recommend any action against Peters.

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Gentlemen object to the resolution because of the indelicacy of implicating the character of a judge. They seem to believe the character of a judge to be sacred and immaculate. But are not judges men? Are they not men subject to like passions and like feelings as other men? Judges and other official characters voluntarily surrender a part of the rights they enjoyed in common with other citizens, in return for the honors and emoluments of office; others have a right to the privilege of trial by jury, in the decision of all charges against them; but public officers, by accepting of office, subject themselves, under this Government, to trial by impeachment. Subjecting judges to impeachment, indicates, unequivocally, a Constitutional opinion that judges would be even more liable to transgress than other citizens, and might transgress in a more aggravated manner than mere citizens. This mode of trial, however, in this country, is become almost a harmless thing; it is deprived of more than half its terrors. It does not reach life or property, but only the official character.

Mr. F said he was a friend to the independence of judges, but that all independence in all Governments had its limits and restraints. It was not provided for the aggrandizement of the judges, but for the protection of the citizens. So far as it is applicable to this purpose, it is necessary, but any further, it is injurious and subjected to restraint. Under no Government with which we are acquainted are the judges rendered so independent as that of the United States. . . .

To inquire into the conduct of the judges when confidence in them is evidently wanting, is the only true way to secure the respectability of the Judiciary. If that necessary confidence is withdrawn without cause, an official inquiry will restore confidence and the usefulness of the judges. This observation is supported by precedent and parliamentary usage. . . .

. . . If the judges mentioned in the resolution had done their duty, their characters would be vindicated by the inquiry, and the public confidence in their integrity restored; if they were guilty, and not entitled to confidence, they ought to be removed from office, and neither the one nor the other could be done unless the inquiry proposed was authorized. . . .

[Document Source: *Annals of Congress*, 8th Cong., 1st sess., 829–30, 832.]

Representative Peter Early of Georgia, January 7, 1804

Early challenged the Federalist arguments about the importance of judges' individual reputations by arguing that the reputation of the government, and especially that of the courts, required thorough investigation of any allegations of corruption.

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The official conduct of the judges I view as more delicate and important than that of any other description of officers; for, on their impartiality the whole people of the United States depend for obtaining justice in ordinary cases, and individuals depend, in the last resort, for the preservation of their lives. Their official conduct should, therefore, not only be correct, but likewise free from suspicion. Simply to be charged ought to produce an inquiry; . . .

Another view, by no means unimportant, which may be taken, is that the reputation of the Government, of which the judges are a component part, demands the inquiry in question. Will any gentleman pretend to say that reputation is not at stake? that it is not affected at home or abroad by the charges which have been so long and so loudly made? I presume not. Whether those charges are true or not, is not the question; for, whether true or not, so long as they are generally believed the reputation of the Government is affected; its reputation for impartial justice is affected, and deeply

too. To refuse this inquiry would be to give weight to this impression abroad – to add to the suspicion, at home and abroad, that impartial justice is not done to all men. Let us, then, make the inquiry, and restore the reputation of the Government, by inflicting a proper punishment upon these officers, if guilty, and, if innocent, by proving the charges against them calumnies.

[Document Source: *Annals of Congress*, 8th Cong., 1st sess., 862.]

Representative Samuel Whittlesey Dana of Connecticut,
January 7, 1804

Dana reminded the House of Representatives that the Constitution authorized impeachment of judges but not the kind of regular oversight that Congress exercised over the executive branch. Judges, he asserted, could not carry out their proper duties if they were forced to defend themselves against vague or secret allegations.

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The gentleman has also stated that a committee was appointed by the last Congress to investigate the accounts of the officers of Government, merely upon common report. But it should be remembered that those officers were officers of the Executive Departments. It is the acknowledged duty of such officers – it is made their duty by law to give information to Congress, whenever required, upon any of their public transactions. And it is the peculiar right of the House of Representatives, as guardians of the Treasury, at any time, to inquire into the expenditures of public money. But are the judges of the United States placed in the same situation with the Executive officers? Are they to be under the same control, and equally dependent? You may indeed impeach the judges, if guilty of impeachable offence. But what other power over them is given you by the Constitution? . . .

The gentlemen who advocate the resolution in its present form fail in their efforts to support it, notwithstanding all the aid which they have sought from “the leading-strings and crutches of precedents.” (to use the language of the gentleman from Virginia.) On general principles, on the broad basis of universal right, the resolution is condemned; and no precedent is adduced which can justi-

fy it. I do not wish to shield any public officers, whether judges or others, who may merit impeachment; but I wish the House, when acting as public accusers, to proceed in such a manner as not to do injury to any individual. Justice is due to the individual as well as to the public. No public duty can require this House to adopt a resolution of general reproach, yet stating no public offence. And it but illy accords with the principles of justice to subject the judicial officers of the Union to all the inconvenience, vexation, and expense, of being obliged to vindicate themselves against secret accusations, which it may be more difficult to discover than to overthrow. . . .

[Document Source: *Annals of Congress*, 8th Cong., 1st sess., 868, 870.]

The Senate Trial of Samuel Chase

The House of Representatives overwhelmingly approved the appointment of a committee of inquiry, which recommended that Justice Chase be impeached. After delaying a vote until the next session of Congress, the House of Representatives, on December 4, 1804, approved eight articles of impeachment against Chase and appointed managers for the trial in the Senate. Five of the articles cited allegedly improper procedural rulings in the trial of James Callender, and another article cited several decisions by which Chase had deprived Jacob Fries of his constitutional rights during his treason trial. The seventh article claimed that Chase abused his judicial authority and threatened public confidence in the federal courts when he refused to dismiss a grand jury in Delaware until it repeatedly investigated a printer whom Chase claimed was guilty of sedition. The final article asserted that Chase's grand jury charge of May 1803 was "an intemperate and inflammatory political harangue" which threatened to turn the citizens of Maryland against their state and federal government, or, in other words, as Jefferson had written, it was seditious in its intent.

Chase was defended in the Senate trial by several accomplished Federalist lawyers, who proved far superior to John Randolph, the leader of the House managers. The mercurial Randolph had little training in the law and was increasingly at odds with other Republicans. Throughout the twenty-two-day trial, large crowds of spectators filled the specially constructed galleries in the Senate chamber. The witness-

es included Chief Justice John Marshall, who had attended the Callender trial and acknowledged that some of Chase's procedural decisions did not follow the usual rules of Virginia courts. Witnesses recounted the trials at the center of the impeachment articles, while the attorneys also presented their conflicting interpretations of the constitutional authority to impeach and remove federal officials.¹⁸

Response of Justice Samuel Chase, February 4, 1805

Chase's lengthy response, delivered in person on the opening day of the trial, exhaustively challenged each article of impeachment, but it also argued that judges could not be impeached for errors in judgment or interpretation of the law. Chase insisted that the Constitution only permitted impeachments for indictable offenses, and not for errors or incompetence. His lawyers would all repeat this argument in one form or another.

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And this respondent further answering, saith, that according to the Constitution of the United States, civil officers thereof, and no other persons, are subject to impeachment; and they only for treason, bribery, corruption, or other high crime or misdemeanor, consisting in some act done or omitted, in violation of some law forbidding or commanding it; on conviction of which act, they must be removed from office; and may, after conviction, be indicted and punished therefor, according to law. Hence, it clearly results, that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law: and that no evidence can be received on an impeachment, except such as on an indictment at law, for the same offence, would be admissible. That a judge cannot be indicted or punished according to law, for any act whatever, done by him in his judicial capacity, and in a matter of which he has jurisdiction, through error of judgment merely, without corrupt motives, however manifest his error may be, is a principle resting on the plainest maxims of reason and justice, supported

18. For narrative of the Senate proceedings, see William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: William Morrow and Company, 1992).

by the highest legal authority, and sanctioned by the universal sense of mankind. He hath already endeavored to show, and he hopes with success, that all the opinions delivered by him in the course of the trials now under consideration, were correct in themselves, and in the time and manner of expressing them; and that even admitting them to have been incorrect, there was such strong reason in their favor, as to remove from his conduct every suspicion of improper motives. . . .

[Document Source: *Annals of Congress*, 8th Cong., 2d sess., 116.]

Opening Statement of John Randolph, a Manager from the House of Representatives, February 9, 1805

Randolph denied the Constitution required an indictable offense for removal by impeachment or else the Congress would be unable to remove judges who were incapable of carrying out their most basic responsibilities.

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But, sir, we are told that this high Court is not a court of errors and appeals, but a Court of Impeachment, and that however incorrectly the respondent may have conducted himself, proof must be adduced of criminal intent, of wilful error, to constitute guilt. The *quo animo* is to be inferred from the facts themselves; there is no other mode by which, in any case, it can be determined, and even the respondent admits that there are acts of a nature so flagrant that guilt must be inferred from them, if the party be of sound mind. But this concession is qualified by the monstrous pretension that an act to be impeachable must be indictable. Where? In the Federal courts? There, not even robbery and murder are indictable, except in a few places under our exclusive jurisdiction. It is not an indictable offence under the laws of the United States for a judge to go on the bench in a state of intoxication – it may not be in all the State courts; and it is indictable nowhere for him to omit to do his duty, to refuse to hold a court. But who can doubt that both are impeachable offences, and ought to subject the offender to removal from office? . . .

[Document Source: *Annals of Congress*, 8th Cong., 2d sess., 163.]

Joseph Hopkinson, Counsel for Justice Chase, February 21, 1805

Hopkinson, who would later serve as a U.S. representative from Pennsylvania and as a U.S. district judge, argued that impeachment for errors in judgment or for inappropriate demeanor would destroy the judicial independence on which depended the success of constitutional government. Only a stable judiciary, protected from shifting and unpredictable popular majorities, could secure a foundation for republican government. Like many Federalists, Hopkinson believed that government officials, though ultimately accountable to the people, must have the independence and security to carry out their duties based on their own judgment.

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... It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent Judiciary is very necessary in a monarchy to protect the people from the oppression of a Court, yet that, in our republican institution, the same reasons for it do not exist; that it is indeed inconsistent with the nature of our Government that any part or branch of it should be independent of the people from whom the power is derived. And as the House of Representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges were more essentially important in a Monarchy or a Republic, I should certainly say, in the latter. All governments require, in order to give them firmness, stability, and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions. Nothing can be relied upon; no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion. If, however, the Judiciary is stable and independent; if the rule of justice between men rests upon known and permanent principles, it gives a security and character to a country which is absolutely necessary in its intercourse with the world and in its own internal concerns. This independence is further requisite as a security from oppression. . . .

I have considered these observations on the necessary independence of the Judiciary applicable and important to the case before this honorable Court, to repel the wild idea that a judge may be impeached and removed from office although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong – propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character; if by such a standard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our Judiciary. In opposition to this reasoning I have heard (not from the honorable Managers) a sort of jargon about the sovereignty of the people, and that nothing in a Republic should be independent of them. No phrase in our language is more abused or more misunderstood. The just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment that all power originally emanates in some way from them, and that all responsibility is finally in some way due to them; and whether this is acknowledged or not, they have, if driven to the last resort, a physical force, to make it so. But, sir, this sovereignty does not consist in a right to control or interfere with the regular and legal operations and functions of the different branches of the Government at the will and pleasure of the people. Having delegated their power; having distributed it for various purposes into various channels, and directed its course by certain limits, they have no right to impede it while it flows in its intended directions. Otherwise we have no Government. . . .

[Document Source: *Annals of Congress*, 8th Cong., 2d sess., 363–64.]

Robert Goodloe Harper, Counsel for Justice Chase, February 25, 1805

Harper was a Baltimore attorney who had formerly served as a U.S. representative from South Carolina and had been a principal supporter of the Judiciary Act of 1801. In his defense of Chase, Harper insisted that the Senate must follow fixed procedures and precedents like any judicial court if it was to assure the public that it was acting in accordance with the Constitution rather than political expediency. Impeachment and removal must be limited to criminal offenses or judges would be subject to arbitrary removal.



But it is not to the party accused, to the nation, to posterity, and to the interests of free Governments that the observance of settled Constitutional principles in cases of impeachment, is alone important. It is equally so to the character and feelings of those appointed to judge. Is there any member of this honorable Court, who would wish, nay, who would consent, in deciding this cause, to be set free from the restraints of the law, or, more properly speaking, to be deprived of its guidance, and left to the influence of his own passions, feelings, or prepossessions? Were causes like this to be determined on expediency, and not on fixed principles of law, to what suspicions might not the judges be liable, of having sought the indulgence of some animosity, or the attainment of some selfish end, instead of consulting for the public good? But when they are known to be governed by the settled rules of law, and are considered as merely its organs, their motives will be more respected, and their conduct less liable to suspicion or reproach? . . .

In every light, therefore, in which this great principle can be viewed, whether as a well-established doctrine of the Constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those whose lot it may be to sit under the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow-citizen guilty; it will equally claim, and I cannot doubt that it will receive the sanction of this honorable Court, by whose decision it will, I trust, be established so as never hereafter to be brought into question, that an impeachment is not a mere inquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal, but a criminal prosecution, for the support of which the proof of some wilful violation of a known law of the land is known to be indispensably required. . . .

[Document Source: *Annals of Congress*, 8th Cong., 2d sess., 513–14.]

Representative Joseph H. Nicholson of Maryland, a Manager from the House of Representatives, February 26, 1805

One of the principal advocates of the Chase impeachment and a leading Republican spokesman for matters related to the judiciary,

Nicholson thought that the Congress had the authority and responsibility to determine if judges met the constitutional requirement for good behavior. Congress could remove a government official, including a judge, not only for the high crimes and misdemeanors mentioned in the Constitution but also for failure to carry out the duties of the office.

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The Constitution declares, that “the judges both of the supreme and inferior courts shall hold their commissions during good behaviour.” The plain and correct inference to be drawn from this language is, that a judge is to hold his office so long as he demeans himself well in it; and whenever he shall not demean himself well, he shall be removed. I therefore contend that a judge would be liable to impeachment under the Constitution, even without the insertion of that clause which declares, that “all civil officers of the United States shall be removed for the commission of treason, bribery, and other high crimes and misdemeanors.” The nature of the tenure by which a judge holds his office is such that, for any act of misbehaviour in office, he is liable to removal. These acts of misbehaviour may be of various kinds, some of which may, indeed, be punishable under our laws by indictment; but there may be others which the law-makers may not have pointed out, involving such a flagrant breach of duty in a judge, either in doing that which he ought not to have done, or in omitting to do that which he ought to have done, that no man of common understanding would hesitate to say he ought to be impeached for it. . . .

[Document Source: *Annals of Congress*, 8th Cong., 2d sess., 563.]

Representative Caesar A. Rodney of Delaware, a Manager from the House of Representatives, February 26, 1805

On the last day of arguments before the Senate, Rodney, who would serve as U.S. attorney general from 1807 to 1811, emphasized the constitutional limits on judicial tenure. The people, acting through the Constitution, granted judges tenure on the condition of good behavior, and it was the Congress—“the grand inquest of the nation”—that had been delegated by the people to be the arbiters of judicial behavior.

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... No man can seriously say that for a judge to continue in the exercise of his authority and the receipt of his salary, after any acts of misbehaviour, is not a violation of this essential provision of the Constitution. He holds his office explicitly and expressly during good behaviour. The instant he behaves bad he commits a breach of the tenure by which he holds the possession, and the office becomes forfeited. The people have leased out the authority upon certain specified terms. So long as he complies with them, and not a moment longer, is he entitled to exercise the power which was not intended for his individual advantage but for their benefit. But, sir, who is to take notice of these acts of misbehaviour? How are they to be ascertained, and what shall be considered as such? Are the people in their individual capacity, *ipso facto*, on the commission of the act to declare the office forfeited, and is a judge then to cease from his labors? Or must it not be officially, or rather judicially ascertained? This, I conceive, would be the proper mode of procedure. Has the Constitution provided no tribunal for this purpose? I answer it has, most indubitably. By the Constitution the Senate, as the Court, and jury too in cases of impeachment, has the sole power of removing from offices those who hold them by the tenure of good behaviour. If a judge misbehave he ought to be removed, because agreeably to the plainest provision he has forfeited his right to hold the office. The Constitution having established this single mode of removal, and having declared that a judge shall hold his office only during good behaviour, it becomes the duty of the Representatives of the People, as the grand inquest of the nation, vested with the general power of impeachment, when they know, of their own knowledge, or from the information of their constituents, that acts of misbehaviour have been committed, to present the delinquent to this high tribunal, whose powers are competent to inquire into the case and apply the remedy; whose authority is co-extensive with the complaint, commensurate with the object, and adequate to the redress of the evil. . . .

[Document Source: *Annals of Congress*, 8th Cong., 2d sess., 597.]

Outcome of the Chase Trial

On March 1, 1805, the Senate votes on each of the eight articles of impeachment fell short of the two-thirds of the members required for conviction, although a majority of the senators voted to convict Chase on three of the articles. The article concerning the charge to the Maryland grand jury received the highest number of votes. That grand jury charge had prompted Jefferson's extraordinary suggestion of congressional action, and popular criticism of Chase's political commentary in the charge seemed to have a lasting impact on Chase and the other justices. Political commentary largely disappeared from the grand jury charges in the U.S. circuit courts, and the justices became much more hesitant to engage in any kind of public political discussion. Chase's acquittal marked the end of Republican efforts to impeach Federalist judges and signaled a tacit acknowledgment by members of Congress that judicial impeachment would be limited to judges guilty of an indictable offense. Although Chase had avoided removal from office, the trial effectively established limits on the acceptable behavior of judges and conditions on judicial independence. Judges would be protected from removal by shifting popular majorities, but they would also withdraw from overtly partisan activity.

Judicial Tenure

On the same day that Justice Samuel Chase was acquitted in his Senate impeachment trial, House Manager John Randolph introduced in the House of Representatives a constitutional amendment authorizing the removal of federal judges by the president on the address of a majority of both houses of Congress. By a vote of 68 to 33, the House decided to debate the proposed amendment, but after two postponements the measure excited less interest as Congress worked to complete its business at the close of its next session. Randolph, who blamed the House's earlier hesitancy for the failure to remove Chase, urged his fellow Republican representatives to act quickly before they lost all of the resolve they had displayed in repealing the Judiciary Act of 1801. The Chase proceedings demonstrated to Randolph that the constitutional provisions for impeachment left judges free of all accountability to the other branches of the government or to the people. Randolph's proposed amendment was the first in what would be a steady, and steadily unsuccessful, series of amendments to facilitate the removal of federal judges or to institute a fixed term of judicial tenure.¹⁹

Representative John Smilie of Pennsylvania, February 24, 1806

Before the House of Representatives voted to postpone consideration of John Randolph's proposed amendment on judicial tenure, John Smilie urged his colleagues to devote a substantive debate to the problems created by the constitutional obstacles to impeachment. Smilie acknowledged that he supported the proposed amendment, and he reminded the House that the proposed removal mechanism, far from a radical change, was the same as that long in practice in Great Britain, and, he might have added, several states.

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... For my part, I am so sensible that that part of the Constitution which relates to the power of impeachment is a nullity, that I see the utmost necessity for an amendment. From what we have seen,

19. *Annals of Congress*, 9th Cong., 1st sess., 499–508.

I do religiously believe that we cannot convict any man on an impeachment. The resolution before you goes to place the Judges of the United States on the same independent footing with those of Great Britain. Whether our situation requires that they should stand upon higher ground, is a proper subject for discussion. I am rather inclined to think they ought not. It is contended, it is true, that, as they have, according to the opinion of some gentlemen, the right of sitting in judgment on our laws, they ought to be placed beyond the reach of a majority of Congress. This subject must, at some time or other, be considered, and some amendment in the Constitution must take place. When the delays and various vexations, attendant on an impeachment are considered, it will be evident that they will generally discourage the House from taking this step; and when it is likewise considered that a conviction can only take place on the votes of two-thirds of the Senate, let gentlemen say whether there is any chance of making the Constitutional provision effectual. I despair it. . . .

[Document Source: *Annals of Congress*, 9th Cong., 1st sess., 503.]

Editorial, Virginia Argus, December 4, 1807

The acquittal of former Vice President Aaron Burr on treason charges, and particularly Chief Justice John Marshall's decision in the U.S. circuit court to restrict the evidence that the jury could consider in the trial, renewed and intensified Republican criticism of the federal judiciary and the Federalist-appointed judges who still dominated the bench. Marshall's rulings on the evidence made it effectively impossible to convict Burr on the charges related to his alleged conspiracy to establish a separate confederation of western states. For months, Republican newspapers were full of writings condemning Marshall's handling of the Burr trial and calling for new restrictions on judicial tenure, whether through congressional removal or limited terms of office. Typical was this piece from a Richmond newspaper that sought to define a kind of judicial independence that would be compatible with popular sovereignty and offered a specific proposal for removal of judges by the Congress.

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The extraordinary proceedings in the case of AARON BURR, . . . clearly shew that an *independent* Judiciary (that is to say, a Judiciary not controled by the laws, and above the fear of violating them) is a very pernicious thing. That the federal Judiciary is, in this sense of the word, *independent*, is perfectly certain; since no power at present exists by which it is probable a Judge could be punished, even for palpable treachery to his country and wilful perversion of the law; a trial before the supreme court of impeachments being only a solemn and expensive farce.

Every friend of a free government must wish the members of the Judiciary to be independent of all improper influence; to be free from the smallest suspicion of being governed by fear, favor, or affection; and to enjoy salaries sufficient to set them far above the temptation of bribery or corruption.

But this desirable independence of the Judges is very different from that which places them above the law; enabling them not only to legislate by their decisions, but to vary from and dispense with those decisions, whenever it suits their purposes.

It is evident that in delivering his opinions in the case of *Burr*, Judge *Marshall* must have known that he possessed the latter of these two species of independence; that he felt himself to be *legislating* on the subject of treason, and even dispensing with the law which the supreme court of the United States had previously declared on the same subject; that as he looked down with contempt on the opinions of the people, so also he was conscious of being above the reach of punishment.

But such a state of things ought not to be tolerated in a free country. No person should be above the law; - and, especially, those who interpret and apply it to the cases of others should be compelled to obey it strictly themselves. True it is that a Judge ought not to be *punished* for an error of opinion, where that error is not produced by an improper bias. But where the opinions of a Judge are found to be continually or systematically hostile to the liberties of the people, or injurious to their safety, even though no proof of corrupt motives can be exhibited against him, he ought to be *removed from office*.

Offices ought not to be considered as the property of *individuals*, but of the *public*; and those who fill them are only trustees for the general good. They do not hold their honors and salaries for their

own sakes; that they may live at ease and fatten on the treasury; but merely for the purpose of performing useful and laborious duties, for which they are entitled to, and ought to receive, an adequate compensation. A *removal from office* ought not therefore to be considered as a *punishment* for a crime; neither ought it to take place in those cases only where a *crime* has been committed. . . .

It is time, therefore, that an amendment should be proposed authorising and requiring the President to remove any Judge from office at the request of a majority of both houses of Congress. Such an amendment could not have the effect of producing any improper influence on the minds of the Judges, or of diminishing their *legitimate* and *useful independence*. A good Judge would never be prevented from doing justice by the fear of losing his place, and a bad one ought to be subject to the wholesome control of his country. The opinion of the majority of both houses of Congress would generally be on the side of justice; and, if it sometimes erred, it is better in a free country that the will of the people should prevail, (the government being instituted *for them* and to be administered according to *their wishes*) rather than the will of a few persons, whose interest (being in conflict with that of the great body of the community,) will much oftener lead them to do wrong. . . .

[Document Source: *Virginia Argus*, Richmond, Va., December 4, 1807.]

“Another Patch upon the Constitution!” by *Freeman’s Friend*

In November 1807, the General Assembly of Vermont approved a resolution in support of a constitutional amendment authorizing the president to remove a judge from office on a vote by a majority of the House of Representatives and two-thirds of the Senate—essentially the provisions for impeachment without the requirement for a trial. The Vermont Assembly requested that the state’s governor forward the resolution to the Vermont delegation in Congress and also to the governors of all other states, “that the same may be laid before their several Legislatures, for their cooperation in procuring said amendment.” Thus began a nationwide debate on federal judicial tenure and the constitutional provisions for impeachment. This writer in a Connecticut newspaper warned that ratification of the

amendment proposed by the Vermont legislature would render federal judges the “pliant” agents of partisan factions.

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If any one section of our Constitution is valuable above another, it is that which guarantees the independence of the Judiciary. In turbulent times, which frequently occur in elective governments, the Judiciary is the city of refuge, the strong hold which faction hesitates to assail. Destroy that, and where can the oppressed flee from powerful oppressors? Let this single amendment be ratified, and the Supreme Judicial Court of the United States *is no longer an independent tribunal!* Should any man, who may have incurred the displeasure of the heads of an administration, be arraigned at the bar, it will no longer afford him sanctuary. He has no refuge from their vengeance. The moment a decision takes place militating against the wishes of the powers that be, if the Judge is *rash* enough to prefer an approving conscience and the applause of good men, to the honors and emoluments of office, if he scorns bending to the will of those by whose good pleasure he holds his seat, one of more *pliant mould* will supply his place. . . .

The Judges of our courts hold their offices during good behavior – not placed above, but always amenable to the laws for any violation of the sacred duties which devolve upon them. Is not this a sufficient terror to evil doers? The tenure by which they hold their offices is the best guarantee of their integrity which can be devised – and places them beyond the reach of power, as well as above the cabal and calumny of disappointed, factious combinations. If they do wrong, and those whose duty it is to guard our rights, and preserve the purity of the judiciary, delay to apply the constitutional corective, they participate in the guilt, and are equally criminal.

[Document Source: *Connecticut Herald*, New Haven, Conn., December 22, 1807.]

Report of the Committee Appointed to Consider Constitutional Amendments, Pennsylvania Senate, January 28, 1808

In Pennsylvania, a committee of the state senate commended the proposal of the Vermont General Assembly but determined that the amendment would not go far enough to remedy the “defects” of the Constitution. The committee recommended that the Pennsylvania senate propose a constitutional amendment to remove federal judges on the vote of a majority of the members present in both houses of Congress, and that judges hold their offices “for a term of years.” The Pennsylvania senate and house of representatives approved the resolution, which “instructed” the state’s U.S. senators and requested the state’s U.S. representatives to support such an amendment to the Constitution. In this excerpt from its report, the Pennsylvania senate committee asserted that provisions for removal by a simple majority of Congress and for fixed terms were necessary to protect the rights of juries and to ensure public confidence in the federal courts.

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... The committee therefore believe, that no good reason can be given why a majority of the Senate and House of Representatives may not remove a Judge, whom they believe disqualified for the trust; when they can decide the most important national questions, the President consenting; or why one Member more than a third of the Senate, should control the whole House of Representatives, and a majority of that body; or why, the Senate and House of Representatives addressing the President, he should have the power to retain a Judge? An opposite doctrine may be convenient to those who are, or those who may become Judges; but, to the people, such doctrine must appear monstrous and absurd. They therefore believe the public good would be promoted by making the Judges removable by a vote of the majority of the Members present, of the Senate and the House of Representatives; but the committee believe they would be wanting in their duty, if they did not bring into the view of the Senate a further amendment; which, in their opinion, would secure the substantial ends of justice, and would remove, in a great measure, the necessity of impeachments, and removals by address. That the judicial tribunals should have the

confidence of the citizens, is so obviously necessary, that to secure it, ought to be the sole aim in proposing amendments to the Constitution. If a Judge once loses that confidence, even though he may have done no wrong, he can no longer render that service, which he could before have done; and some means ought to exist, by which a Judge in this situation might be dismissed, without subjecting him to the criminations inseparable from a removal by address. This the committee believe could be obtained, by subjecting Judges, like other officers, to hold their offices for a term of years. That very great evils have already been felt from the want of responsibility in the Judges, will not be denied. Their extravagant independence must always favor an encroachment, by them, on the rights of juries. These encroachments have already assumed an alarming aspect; and ought to warn us of the danger there is, in a total subversion of the inestimable trial by jury. The existence of jury trial is, perhaps, the most indubitable evidence of the necessity there is for a people to retain a principal part of the administration of justice in their own hands. How dangerous must it be, in such a country as the United States, for six men, who hold their offices during good behavior, or for life, to have the power to meet out justice as their passions or interests may incline them? To oppose the introduction of a principle so abhorrent to freedom, it is constitutionally declared, that justice shall be administered by a portion of the citizens, who being suddenly assembled with due regard to disinterestedness, who can have no bias, but to judge as they would wish to be judged. Whenever a disposition appears in a Judge to invade the rights of juries, the proper department ought to be able to remove him; and no removal will be so effectual, or so eligible, as a periodical termination of his office. . . .

[Document Source: *Journal of the Senate of the Commonwealth of Pennsylvania*, vol. 18, (Lancaster: W.C. Smyth, 1807), 168–69.]

Representative George Washington Campbell of Tennessee, January 30, 1808

Campbell, who had served as one of the House managers in the impeachment trials of John Pickering and Samuel Chase, presented the U.S. House of Representatives with the resolution of the Tennessee

house of representatives, which endorsed the Vermont assembly's call for a constitutional amendment. In his accompanying remarks, Campbell agreed that the impracticality of removal by impeachment and conviction rendered federal judges free from the kind of public responsibility that he saw as essential to the spirit of the Constitution.

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It has always been my opinion that in a free Government like ours, every department ought to be responsible for its conduct. The Constitution of the United States was evidently framed on this principle, and the preservation and security of the rights and liberties of the citizens and the due execution of the laws will be found to rest, in a great degree, on rendering public agents sufficiently and practicably responsible for their conduct to the nation. That this is not the case with the Judiciary of the United States has been proved by experience. Your judges once appointed are independent of the Executive, the Legislature, and the people, and may be said to hold their offices for life. They are removable only on conviction by impeachment of high crimes and misdemeanors, and this mode of proceeding has been found in practice totally inefficient, and not to answer the purpose for which it was intended – that of rendering your judges duly responsible for their conduct. They may therefore be considered as independent of the rest of the nation, (and they seem to think so themselves.) as if this provision in the Constitution, relative to impeachment, did not exist. No matter how erroneous their opinions – how dangerous to the public weal – how subversive of the interest of the people – how directly opposed to the laws of your country; yet, as it is neither a high crime or misdemeanor to hold erroneous opinions, which they seem conscientiously to believe, they cannot be removed by impeachment – they are independent of the rest of the nation. . . .

[Document Source: *Annals of Congress*, 10th Cong., 1st sess., 1525.]

Speech of General William Eaton in the Massachusetts House of Representatives, March 1, 1808

Eaton, better known for his military career than for his short service in the Massachusetts legislature, was sick when the legislature voted to endorse the Vermont resolution, but his later remarks were published and widely reprinted. Like Campbell, he insisted that judicial independence should never absolve judges of their responsibility to the people or of their obligation to recognize constitutional protections for defendants. Eaton's reference to the arbitrary powers of a sultan or bashaw recalled his celebrated service in the Barbary Wars and his victory at the Battle of Derna, on the "shores of Tripoli."

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... The tenure by which the United States' judges hold their offices, under the constitution, is dangerous; they are too far removed from responsibility. If you will vest a man with power, and shield him from responsibility, you create a tyrant, who, if he possess not an uncommon share of virtue, will lash you into repentance for a misplaced confidence. Such has human nature always displayed itself when elevated above accountability.

It is argued that removal by impeachment for misdemeanor is a sufficient check on the bench. What is misdemeanor? Who has ever seen it defined? Is there found in this indefinite provision of the constitution a remedy against the incapacities resulting from age, infirmity, or the torpor of excess? A battle lost by incapacity of the chief to direct it, is the same in effect to the country as if lost by cowardice. Does the provision in the constitution secure us against error in judgment? No, sir; whether the error arises from a misconstruction of the laws or from a criminal bias, there exists no remedy against its effects in the supreme federal courts. But error may work as much injury as corruption. The man who is unjustly condemned finds no consolation in the apology that the judge is old; or imbecile; or, if corrupt, too good a manager to be convicted of a misdemeanor.

Who can read the tragi-comedy in the trial of Fries, of the farce in the trial of Burr and Blannerhasset, and not yield an involuntary assent to the necessity of this amendment? Or shall we, through

dread of change, persevere in wrong, and content ourselves in seeing judges, shielded by the breast-plate of irresponsibility, lounge securely on their bench, like a sultan or a bashaw on his throne, and put death into commission by a nod, or exculpate treason by a hiss! Fries may have merited death by the laws. But this gave the judge no authority to deny him any of the rights of defence: nor can it justify him in the unblushing political partiality he suffered to influence his demeanor towards the criminal.

[Document Source: *The Speech of Gen. Wm. Eaton. Delivered in the House of Representatives of Massachusetts. The First Day of March. 1808.* (Portland: nd.), 7–8.]

Thomas Jefferson to James Pleasants, December 26, 1821

Congress failed to act on any of the memorials and instructions submitted by the six state legislatures that endorsed Vermont's proposal for a constitutional amendment authorizing the removal of judges on a vote of the Congress. Over the next decade, several members of Congress proposed similar amendments but to no effect. Some Republicans, notably Thomas Jefferson, remained convinced that the constitutional protections of tenure during good behavior and the impracticality of impeachment were antithetical to a government based on popular sovereignty. Jefferson's hostility to the judiciary was unabated during his retirement, and in private correspondence he frequently criticized the Marshall Court. In a letter of 1820 to Richmond newspaper editor Thomas Ritchie, Jefferson referred to the judiciary as a "subtle corps of sappers & miners constantly working under ground to undermine the foundations of our confederated fabric." In this letter to one of Virginia's sitting U.S. senators, Jefferson proposed a fixed term for all federal judges and a role for the House of Representatives in reappointment of judges.

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... A better remedy I think, and indeed the best I can devise would be to give future commissions to judges for six years (the Senatorial term) with a re-appointability by the president with the approbation of both houses. That of the H. of Repr. imports a majority of citizens, that of the Senate a majority of states, and that of both a majority of the three sovereign departments of the existing

government, to wit, of its Executive & legislative branches. If this would not be independence enough, I know not what would be such, short of the total irresponsibility under which they are acting and sinning now. The independence of the judges in England on the King alone is good; but even there they are not independent on the Parliament; being removable on the joint address of both houses by a vote of a majority of each, but we require a majority of one house and 2/3 of the other, a concurrence which, in practice, has been, and ever will be, found impossible; for the judiciary perversions of the constitution will forever be protected under the pretext of errors of judgment, which by principle, are exempt from punishment. Impeachment therefore is a bug bear which they fear not at all. But they would be under some awe of the canvas of their conduct which would be open to both houses regularly every 6th year. It is a misnomer to call a government republican, in which a branch of the supreme power is independent of the nation. . . .

[Document Source: The Thomas Jefferson Papers, Series I, General Correspondence, 1651–1827, Manuscripts Division, Library of Congress.]

Senator Richard M. Johnson of Kentucky, February 10, 1825

From 1818 to 1831, Congress received no formal proposals to restrict judicial tenure, but the judges' tenure during good behavior often became a subject of debate as members of Congress considered the various proposals to extend circuit riding. Many, like Johnson, explicitly linked the requirement for the justices' service on circuit courts with the privileges inherent in the constitutional protections of tenure and salary. Johnson offered these comments in the debate on his proposal to expand the number of justices on the Supreme Court to ten so that the U.S. circuit courts in all of the states could be served by a justice. Johnson in principle disapproved of a judicial tenure that had for all practical purposes become a life term for most judges, but he also acknowledged that the Constitution and long-standing custom stood in the way of any likely revisions in the terms of judicial service. As long as the justices exercised nearly unchecked power over state and federal laws, Johnson thought it imperative that they be familiar with local law and the concerns of parties in the federal trial courts. In numerous debates on the reorganization of the circuit courts, members of Congress repeated the

argument that tenure during good behavior imposed on the justices an obligation to serve on the highly visible trial courts throughout the country. In a similar debate in 1855, Senator William Fessenden of Maine said that “averse as I am to changing the tenure, I should much rather have the Constitution altered in such a way as to limit the tenure by which the Judges of the Supreme Court hold their office, than to consent to have such a court” serving only in the nation’s capital.²⁰

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I confess, I have my doubts on this subject, whether it would not be best, for the people and the Judges too, that the latter should hold their office for a term of years, eligible to re-appointment. It might prevent the convulsive and heart-rending feelings which have already distracted some of our states, and broken asunder the strongest ties of friendship. I am convinced that the judicial tenure, by which Judges of the Courts of the United States sustain their offices, is too strong. It is inconsistent with the principles of liberty. I hope it is not necessary for me to assert, that this opinion is communicated upon general principles, and with a particular reference to the effects which have resulted from the power vested in the Federal Judiciary. I allude, sir, to the complaints which have been made, from time to time, by a majority of the states of this Union, agitating them, and destroying the confidence which should always be exercised towards the judiciary of our free and high-minded country. This opinion is confirmed by this reflection, that our nation has ever been blessed with a most distinguished Supreme Court, that this Court is eminent for moral worth, intellectual vigor, extensive acquirements, and profound judicial experience and knowledge. If, under such propitious circumstances, we have witnessed such discontent and commotion, what must become of us when we may not be able to boast of such virtues, such talents, such integrity. My opinion has not been founded on an opinion that would underrate our judiciary. I honor their exalted worth. The independence of a Judge depends upon the sternness of his integrity. Yet may not this absolute independence create occasion for alarm – with an ability and resolution to perform his

20. *Congressional Globe*, 33d Cong., 2d sess., January 9, 1855, 214.

duty, I am content, that, during the term of his office, he have an ample salary, which shall not be diminished. That I am willing to see the Judges independent, receiving a reasonable and liberal compensation, my exertions in this body, and in the House, ought to convince the most credulous, and must prove that against the Federal Judiciary, I have not the least malignant emotion. My objection is to the permanent tenure of the office. But finding that the tenure sanctioned by our constitution places it beyond our control, or any other control, excepting a proof of corruption in the discharge of official duty; viewing, too, as I must, the alarming extent of the judicial power given by our Federal Constitution, and as exercised by our Judges themselves; contemplating with sadness of heart the dreadful evils which this jurisdiction threatens, extending, as it does, alike to national and municipal objects, involving the laws of the Union, and the constitutionality of the laws and local policy of each state, I object – I cannot but object, to the plan proposed in opposition to this bill. I ask, why must the circuit system be separated from the Supreme Court, by which the Judges are located in Washington, and confined to seven in number? I urge the superior claims of the plan which I have the honor to present by this bill. Let the number of Judges be augmented to ten, and let them be compelled to perform circuit duties in every state throughout the Union. This will render them familiar with the local policy in every part of our country. By the united discharge of sectional and national service, they will become acquainted with the concerns of our whole confederacy. . . .

[Document Source: *Register of Debates*, 18th Cong., 2d sess., 531–32.]

Defending Judicial Tenure on the Federal Courts

In the thirty years preceding the Civil War, Congress received few proposals to make federal judges removable on a vote of both houses of the Congress or to establish fixed judicial terms, but during those same three decades the states moved overwhelmingly to adopt the popular election of judges on the state courts and to limit the tenure of state judges. By 1861, twenty-one out of thirty-four states had adopted judicial elections for all of their courts, and twenty-three

states had established fixed terms on their state courts.²¹ Congressional debates on the judiciary frequently referred to the popular support for judicial elections, and supporters of the Constitution's protection of judicial independence reaffirmed the importance of tenure during good behavior in an increasingly democratic political culture.

In two of the era's most widely read commentaries on law and the courts in the United States, the authors emphasized that tenure protections were more important than ever in the federal judiciary. Justice Joseph Story, in his *Commentaries on the Constitution*, warned that few individuals had the fortitude to withstand the pressure of popular opinion. In a political world beset by "turbulent factions," "passions," and "torrents," Story believed only independent judges could ensure the continuity of the rule of law. Timothy Walker, who studied under Story at Harvard Law School, became known as the American Blackstone for his authorship of the basic text of legal education in the middle decades of the nineteenth century. In his description of judicial tenure in the first edition of *Introduction to American Law*, Walker also argued that only independent judges, serving over time and elevated above the tumult of politics, could reach impartial judgments. (Walker was a professor at Cincinnati College, and referred to the fixed terms of Ohio state court judges.)



Joseph Story, "Judiciary – Tenure of Office"

... In free governments, therefore, the independence of the judiciary becomes far more important to the security of the rights of the citizens, than in a monarchy; since it is the only barrier against the oppressions of a dominant faction, armed for the moment with power, and abusing the influence, acquired under accidental excitements, to overthrow the institutions and liberties, which have been the deliberate choice of the people.

In the next place, the independence of the judiciary is indispensable to secure the people against the intentional, as well as unintentional, usurpations of the executive and legislative depart-

21. William S. Carpenter, *Judicial Tenure in the United States, with Especial Reference to the Tenure of Federal Judges* (New Haven: Yale University Press, 1918): 168–86; Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Cambridge, Mass.: Harvard University Press, 2012), see esp. Appendix A, 276–77.

ments. It has been observed with great sagacity, that power is perpetually stealing from the many to the few; and the tendency of the legislative department to absorb all the other powers of the government has always been dwelt upon by statesmen and patriots, as a general truth, confirmed by all human experience. If the judges are appointed at short intervals, either by the legislative, or the executive department, they will naturally, and, indeed, almost necessarily, become mere dependents upon the appointing power. If they have any desire to obtain, or to hold office, they will at all times evince a desire to follow, and obey the will of the predominant power in the state. Justice will be administered with a faulting and feeble hand. It will secure nothing, but its own place, and the approbation of those, who value, because they control it. It will decree, what best suits the opinions of the day; and it will forget, that the precepts of the law rest on eternal foundations. The rulers and the citizens will not stand upon an equal ground in litigations. The favourites of the day will overawe by their power, or seduce by their influence; and thus, the fundamental maxim of a republic, that it is a government of laws, and not of men, will be silently disproved, or openly abandoned. . . .

The truth is, that, even with the most secure tenure of office, during good behaviour, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day. In a monarchy, the judges, in the performance of their duties with uprightness and impartiality, will always have the support of some of the departments of the government, or at least of the people. In republics, they may sometimes find the other departments combined in hostility against the judicial; and even the people, for a while, under the influence of party spirit and turbulent factions, ready to abandon them to their fate. Few men possess the firmness to resist the torrent of popular opinion; or are content to sacrifice present ease and public favour, in order to earn the slow rewards of a conscientious discharge of duty; the sure, but distant, gratitude of the people; and the severe, but enlightened, award of posterity.

[Document Source: Joseph Story, *Commentaries on the Constitution of the United States* . . . (Boston: Hilliard, Gray, and Company, 1833), 3:470–71, 476–77.]

Timothy Walker, "Tenure of Office," 1837

... We have seen, that a salutary republican jealousy has limited the legislative and executive functionaries to short and fixed terms of service. But various reasons seemed to justify a departure from this policy, in relation to judicial officers. *First*, no danger is to be apprehended from a long term, because judicial power, from its nature, cannot enslave the people. *Secondly*, a proper discharge of judicial duty requires vast learning and experience, which a short term of service would furnish neither an adequate motive nor opportunity for acquiring. And *thirdly*, integrity, firmness, and independence, so indispensable to a well organized judiciary, can only be secured by an independent tenure of office. Accordingly, in imitation of the best governments in Europe, and the best of our state constitutions, the federal constitution declares that "the judges both of the supreme and inferior courts, shall hold their offices during good behaviour." The consequence is, that they are removable only by impeachment. They are thus placed beyond the reach of fear or favour, and have nothing to consult but the monitor within. The waves of popular commotion cannot reach them; and they have no occasion to court the favour of the other departments. From the secure elevation on which they are thus placed, all disturbing influences being removed, they are left to the calm and fearless exercise of their unbiassed judgments; and there is a life before them in which to perfect themselves for duty.

But here, again, our state constitution offers a contrast. Our judges are elected for only seven years, and our justices of the peace for only three. And is it probable, with such a tenure of office, that they will be as independent, or as well qualified, as with the tenure of good behaviour? There can be but one answer; and yet when we look to some of our sister states, we have reason to be thankful that we have not annual elections.

There is a provision in some of the state constitutions, making judges removable, on the address of both branches of the legislature. And such a proposition was made with respect to the federal judges, but the convention wisely rejected it. . . .

[Document Source: Timothy Walker, *Introduction to American Law* (Philadelphia, 1837), 112–13.]

Renewed Debates on Impeachment—the Case of Judge James H. Peck

The acquittal of Samuel Chase in his Senate impeachment trial had quieted political pressure to impeach unpopular judges, but the Chase trial left unresolved the debates on the constitutional criteria of high crimes and misdemeanors. In April 1830, the House of Representatives impeached Judge James H. Peck of the U.S. District Court for Missouri on charges of abusing his contempt authority. Peck, in a case of great interest to land investors and associated political factions in Missouri, had in 1826 rejected a land claim based on a questionable and undocumented grant allegedly issued by the Spanish government when it controlled Missouri. While the ruling was pending appeal to the Supreme Court, Peck published in a St. Louis newspaper an account of his decision. After Luke Lawless, attorney for the appellant, responded with publication of a critique of Peck's decision and a list of the judge's supposed errors, Peck cited Lawless for contempt, sentenced him to a day in jail, and suspended his right to practice in the federal courts.

For several years, Lawless petitioned the House of Representatives to impeach Peck, and, in 1830, Judiciary Committee Chairman James Buchanan reported the committee's recommendation that the House vote to impeach the judge. Peck's hastily submitted memorial in his own defense prompted debate on the proper procedures for impeachment as well as the definitions of high crimes and misdemeanors. The House on April 24, 1830, approved the single article of impeachment by a vote of 123 to 49. During the six-week trial in the Senate, much of the discussion focused on the particular charge against Peck and more generally on the contempt power of federal judges, but the attorneys and members of Congress continued to debate the proper criteria for judicial impeachment. The Senate in a vote of 22 to 21 on January 31, 1831, acquitted Peck. On March 3, 1831, the Congress approved an act that limited the contempt power of federal courts to the punishment of misbehavior in the presence of the courts or so near a court as to obstruct the judicial process.²²

22. 4 Stat. 487–88.

Representative George McDuffie of South Carolina, in the Senate Impeachment Trial, December 21, 1830

McDuffie was the first of the House managers to present the prosecution's argument in the Senate trial of Judge Peck. In this excerpt, McDuffie insisted that the constitutional protections of judicial tenure required a kind of transparency and public accountability that could only be ensured by unfettered press coverage of a judge's official conduct. Without a watchful press, impeachment would be the only check on judicial misconduct.

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... If any public functionary ought to be held responsible to the press, which was the organ, the only true organ, of the people, it was the judges, who alone held their offices during good behavior. If you would preserve the independence of the judiciary, make them do their duty, and punish them for transgressing it. In this age, when tyrants were overwhelmed, and thrones overturned, for violating the liberty of the press, would you suffer your judges to trample upon it with impunity? He had always been in favor of the independence of the judiciary, and against the rotatory principle; but if the doctrine that the judges were not liable to the animadversion of the public press, be established, God forbid that he should permit the independence of the judiciary to continue for a moment longer than he could help. A judge was as impalpable as air, if you could not reach him through the public press. You must permit him to go on with his outrages, without complaint, until you could bring him before this august tribunal. You might bring him to account here, but no where else. Had we come to this, that we may not call a judicial tyrant by his right name; that we may not call him to account for his crimes and misdemeanors? . . .

[Document Source: *Register of Debates in Congress*, 21st Cong., 2d sess., 17–18.]

Representative James Buchanan of Pennsylvania, in the Senate Impeachment Trial, January 28, 1831

In his argument during the Senate trial, James Buchanan returned to the challenge of defining the good behavior required of judges

by the Constitution. Buchanan, like many, rejected the assertion of Justice Chase's attorneys that only an indictable offense rendered a judge liable to impeachment and removal. An abuse of a rightful judicial power, such as the punishment of contempt, should also be grounds for impeachment. Buchanan thought a free press and public opinion could serve as a check on the abuse of judicial authority and in many cases make impeachment unnecessary. The high regard for the Supreme Court, in spite of frequent and vituperative published criticism of its decisions, demonstrated that no court had need of the expansive contempt authority exercised by Judge Peck.

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What is an impeachable offence? This is a preliminary question, which demands attention. It must be decided, before the Court can rightly understand what it is they have to try. The constitution of the United States declares the tenure of the judicial office to be "during good behaviour." Official misbehaviour, therefore, in a judge is a forfeiture of his office. But when we say this, we have advanced only a small distance. Another question meets us. What is misbehaviour in office? In answer to this question, and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the constitution, or some known law of the land. This I think was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offence impeachable, it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be as criminal, as the usurpation of a power which has not been granted. . . .

A gross abuse of granted power, and an usurpation of power not granted, are offences equally worthy of and liable to impeachment. If therefore the gentleman could establish, on the firmest foundation, that the power to punish libels as contempts may be legally exercised by all the courts of the United States, still he would not have proceeded far towards the acquittal of his client. . . .

If a judge be corrupt or partial in his judicial conduct, or should chance to be a fool, (a case which sometimes happens) it is not only the right but the bounden duty of his fellow-citizens to expose his errors. If a man should be notoriously incompetent for the judicial station which he occupies, though this may be no ground for an impeachment, yet it is a state of things on which the force of public opinion may rightfully be exerted, for the purpose of driving him from the bench. I admit that the case ought to be an extreme one to justify such a resort. But then, if this power to punish libels does exist, a judge may decide as he pleases without regard either to honesty or law; and then silence the public press in relation to his conduct, by denouncing fine and imprisonment against all those, who shall dare to expose the errors of his opinion. In such a case, upon the hearing before the judge, the greater the truth, the greater would be the libel. A weak judge, when his capacity is called in question, would always be the most cruel and oppressive.

As I have already referred to the Supreme Court of the United States, let me do it again. That illustrious tribunal, in the honest and fearless discharge of its duties, has come into collision with many of the states of this Union,—with Pennsylvania, with Virginia, with Georgia, with Massachusetts, with New York, and with Kentucky. It has been abused and vilified from one end of the continent to the other. This has been its history since the foundation of the Federal Government. Has any man ever heard that the judges of this court claimed the power of punishing these revilers in a summary manner by fine and imprisonment? Have we, at any period of its history, heard the slightest intimation to that effect from any of these men? Not one. That court has often been in the storm. It has been assailed by the winds and the waves of popular opinion; but it has gone on in an honest and fearless course, and trusted for a safe deliverance to the good sense and patriotism of the American people. That tribunal needs no such power as has been claimed by this Judge in Missouri, and has never thought of resorting to the arbitrary and vindictive conduct, which has brought him to your bar. . . .

[Document Source: Arthur J. Stansbury, comp., *Report of the Trial of James H. Peck* . . . (Boston: Hilliard, Gray and Co., 1833), 427–28, 449–50.]

Arguments of William Wirt, Counsel for the Respondent in the Senate Impeachment Trial, January 25, 1831

William Wirt, a former Attorney General of the United States and one of the most celebrated courtroom advocates of the early republic, was the lead defense attorney for Judge Peck. His remarks before the Senate court of impeachment extended over several days and attracted large audiences to the Senate galleries. Much of his argument rested on a recitation of English and American precedents for a court's broad contempt power. He also insisted that a judge could be impeached for errors in judgment only if malicious intent were proven. In his closing remarks, Wirt quoted from a published article by Peck's accuser, Luke Lawless, who proposed that if impeachment failed, the alternative should be the institution of fixed, limited terms for all federal judges. The question before the Senate, Wirt concluded, thus became less the fate of one judge than the future of judicial independence.

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And this, sir, is the liberty of the press! And if this impeachment shall find favor here, such is to be the condition of the judges of our country. I make no farther comments, sir, on this inhuman article; I leave it to make its own, and to find such favor as it may, among the good and the wise. . . .

The question before you, sir, is not that of Judge Peck alone. It is the question of the independence of the American judiciary. It is in his person that that independence is sought to be violated. Is this Court prepared to suspend the sword by a hair over the heads of our judges, and constrain them to the performance of their duties amidst fear and trembling from the terrors of an impeachment? Or will you not rather, by your decision, maintain them in that firm, enlightened, and honest discharge of their duties, which has heretofore so pre-eminently distinguished them? Can you sacrifice such a man as Judge Peck to such a man as Lawless? Can you, by such a precedent strike a panic throughout the American bench, and fill the bosoms of all the reflecting, the wise and good, with dismay and despair? Sir, there is not a considerate man who has not long regarded a pure, firm, enlightened judiciary as the great sheet-anchor of our national constitution. Snap the cable that binds us to that, and farewell to our Union and the yet

dawning glories of our Republic. I commit the subject to you, sir, without any apprehension of so dreadful a catastrophe from a tribunal like this.

[Document Source: Stansbury, comp., *Report of the Trial of James H. Peck . . .*, 573.]

Judicial Review and Federalism

In the half century following the Supreme Court's decision in *Marbury v. Madison*, debates on the power of judicial review focused almost exclusively on the Supreme Court's authority to review state court decisions, as defined by Section 25 of the Judiciary Act of 1789, rather than on the Court's authority to review congressional acts as asserted in the *Marbury* opinion. Judicial review, as described by many members of Congress, was considered an "awesome" power precisely because of its effect on highly contested definitions of federalism, and particularly on the jurisdictional balance of state and federal courts. In the years between passage of the Judiciary Act of 1789 and the outbreak of the Civil War, the courts of seven states denied the constitutionality of the authority of the Supreme Court of the United States to decide cases based on writs of error to the highest court in a state. Eight state legislatures passed resolutions to the same effect, while Congress considered proposals to repeal Section 25 and to establish alternative procedures to consider challenges to state court decisions. Although opposition to Section 25 came from states throughout the nation, the controversies over judicial review generally arose in response to the Supreme Court's reversal of a particular state court decision, and at no time did a broad coalition of states unite in determination to repeal Section 25. Instead, there emerged by the 1830s a consensus in Congress that national union depended on judicial review of state court decisions, and that the exercise of that authority needed to be tempered by the service of the Supreme Court justices on the federal trial courts in each state, where they would be schooled in the states' unique legal cultures. Calls for repeal of Section 25 subsided after 1831 as the critique of judicial review became increasingly, though never exclusively, associated with an assertion of state rights by the slave states of the South. In one notable exception to that trend, Wisconsin's legislature in 1859 challenged federal judicial review of that state's protection of fugitive slaves, and in so doing demonstrated the fragility and contingency of popular

support for federal judicial authority in an era when the nature of the Union itself remained in doubt.²³

United States v. Peters, Olmsted, and Pennsylvania's Challenge to the Federal Judiciary

In the first decade of the nineteenth century, Pennsylvania's state government repeatedly defied the orders of federal courts and in 1809 authorized the use of the state's militia to block the U.S. marshal's enforcement of an order of the U.S. district court. The armed confrontation came in response to the Supreme Court's decision in *United States v. Peters* (9 U.S. 115), in which Chief Justice John Marshall upheld a prize claim dating back to the Revolutionary War. In 1778, Gideon Olmsted and three other persons had submitted in a Pennsylvania admiralty court a prize claim to a British ship that they overtook after they had been taken captive. A jury in the Pennsylvania court awarded the Olmsted group only one quarter of the proceeds from the sale of the British ship, with the remainder going to a rival claim submitted by the captain of the Pennsylvania ship that brought Olmsted into safe harbor. Olmsted appealed to the commission established by the Continental Congress to settle conflicting prize claims, and after the commission declared that Olmsted and his party were entitled to the full award, the judge in the Pennsylvania court, with the support of the state legislature, refused to pay. Following several unsuccessful attempts to secure his award through Pennsylvania courts, Olmsted in 1802 filed a claim in the U.S. district court, but again a judgment in his favor was rebuffed by the Pennsylvania governor and the state legislature. When the Su-

23. Mark A. Graber, "James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25," *Oregon Law Review* 88, no. 1 (2009): 95–155; Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-fifth Section of the Judiciary Act," *The American Law Review* 47, January–February 1913, 1–47, March–April, 161–89. In the years between the founding of the federal government and the Civil War, the Supreme Court regularly heard cases involving the constitutionality of congressional acts, and the Supreme Court disallowed some portions of congressional statutes or limited provisions of acts passed by Congress. This judicial review of Congress in the first half of the nineteenth century did not, however, prompt the kind of debates that followed the Court's judicial review under Section 25. See Keith E. Whittington, "Judicial Review of Congress Before the Civil War," *The Georgetown Law Journal* 97, no. 5 (June 2009): 1257–332.

preme Court in February 1809 ordered U.S. District Judge Richard Peters to serve process on the heirs of the Pennsylvania official who had custody of the contested funds, the governor ordered the militia to block the marshal. Pennsylvania's armed resistance soon collapsed in the face of popular disapproval, and payment to Olmsted was authorized by the state legislature, but not before the incident became the subject of national debate about the authority of the federal courts.²⁴

Resolutions of the Legislature of Pennsylvania, April 3, 1809

In the midst of the standoff between Pennsylvania and the federal courts in 1809, the state's legislature approved these resolutions asserting the right of state governments to resist what they considered to be an unconstitutional exercise of federal judicial power. The Republican majority in the legislature identified the federal courts as inherently biased in favor of the consolidation of national power and saw the states as the necessary protectors of the "reserved" rights on which the liberties of the people depended. Over the previous decade, Pennsylvania's legislature had approved resolutions denying federal jurisdiction in several cases and another proposing a constitutional amendment to abolish the federal courts' diversity jurisdiction. In 1803, the same legislature had enacted a statute to prevent the state from paying the federal court's judgment in favor of Olmsted. In the resolutions of April 1809, the legislature proposed the establishment of a special tribunal to supplant the Supreme Court as the mediator of disputes between the national and state governments.

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Resolved by the Senate and House of Representatives of the Commonwealth of Pennsylvania, &c. That, as a member of the Federal Union, the Legislature of Pennsylvania acknowledges the supremacy, and will cheerfully submit to the authority of the general government, as far as that authority is delegated by the constitution of the United States. But, whilst they yield to this authority, when

24. Haskins and Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801–15*, 322–31; M. Ruth Kelly, *The Olmsted Case: Privateers, Property, and Politics in Pennsylvania, 1778–1810* (Selinsgrove: Susquehanna University Press, 2005); Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, and Company, 1922), 374–87. (Olmsted's name is frequently spelled as "Olmstead" in court reports and contemporary newspaper accounts.)

exercised within Constitutional limits, they trust they will not be considered as acting hostile to the General Government, when, as *guardians of the State rights*, they can not permit an infringement of those rights, by an unconstitutional exercise of power in the United States' courts.

Resolved, That in a government like that of the United States, where there are powers granted to the general government, and rights reserved to the states, it is impossible, from the imperfections of language, so to define the limits of each, that difficulties should not some times arise from a collision of powers: and it is to be lamented, that no provision is made in the constitution for determining disputes between the general and state governments by an impartial tribunal, when such cases occur.

Resolved, That from the construction the United States' courts give to their powers, the harmony of the states, if they resist encroachments on their rights, will frequently be interrupted; and if to prevent this evil, they should, on all occasions yield to stretches of power, the reserved rights of the States will depend on the arbitrary power of the courts.

Resolved, That, should the independence of the states, as secured by the constitution, be destroyed, the liberties of the people in so extensive a country cannot long survive. To suffer the United States' courts to decide on STATE RIGHTS will, from a bias *in favor of power*, necessarily destroy the FEDERAL PART of our Government: And whenever the government of the United States becomes consolidated, we may learn from the history of nations what will be the event. To prevent the balance between the general and state governments from being destroyed, and the harmony of the States from being interrupted,

Resolved, That our Senators in Congress be instructed, and our Representatives requested, to use their influence to procure an amendment to the Constitution of the United States, that an impartial tribunal may be established to determine disputes between the general and state governments; and, that they be further instructed to use their endeavors, that in the meanwhile, such arrangements may be made, between the government of the Union and of this State, as will put an end to existing difficulties. . . .

[Document Source: Herman V. Ames, ed., *State Documents on Federal Relations* (Philadelphia: University of Pennsylvania Press, 1900), 2:47–48.]

Reply of the General Assembly of Virginia to Pennsylvania,
January 26, 1810

The actions of the Pennsylvania legislature found no support from other state legislatures, and at least ten state legislatures formally rejected the principles set out in the Pennsylvania resolutions. This response of the Virginia General Assembly offered a strong defense of the founders' vision of the Supreme Court and admirably cited Hamilton's famous phrase about the "least dangerous" branch. According to the Virginians' resolution, Pennsylvania's vague proposal for a new tribunal presented the threat of an arbitrary panel, governed by personal prejudice and unchecked by the discipline of the law. But the politics of the judiciary could change in the wake of a decision from the federal courts. Within a few years of the approval of this resolution, the members of the Virginia General Assembly and other political leaders in the state would emerge as the most vociferous critics of the Supreme Court of the United States, and particularly of that court's exercise of judicial review under the authority of Section 25 of the Judiciary Act of 1789.

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The members of the Supreme Court are selected from those in the United States who are most celebrated for virtue and legal learning; not at the will of a single individual, but by the concurrent wishes of the President and Senate of the United States, they will therefore have no local prejudices and partialities.

The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal and several state courts together, and with the admirable symmetry of our government.

The tenure of their offices enables them to pronounce the sound and correct opinions they may have formed, without fear, favor, or partiality.

The amendment to the constitution proposed by Pennsylvania seems to be founded upon the idea that the federal judiciary will, from a lust of power, enlarge their jurisdiction to the total annihilation of the jurisdiction of the state courts, that they will exercise their will instead of the law and the constitution. This argument, if it proves anything, would operate more strongly against the tribunal proposed to be created which promises so little, than against the Supreme Court, which for reasons given before had every

thing connected with their appointment calculated to ensure confidence. What security have we, were the proposed amendments adopted, that this tribunal would not substitute their will and their pleasure in the place of law?

The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution; they hold neither the *purse* nor the *sword*, and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of the duty which they owe to themselves and their country, become corrupt, and transcend the limits of their jurisdiction, would the proposed amendment oppose even a probable barrier in such an improbable state of things? The creation of a tribunal, such as is proposed by Pennsylvania, so far as we are enabled to form an idea of it from a description given in the resolutions of the legislature of that state, would, in the opinion of your committee, tend rather to invite than prevent a collision between the federal and state courts. It might also become, in process of time, a serious and dangerous embarrassment to the operations of the general government.

Resolved therefore, That the legislature of this state do disapprove of the amendment to the constitution of the United States, proposed by the legislature of Pennsylvania. . . .

[Document Source: Herman V. Ames, ed., *State Documents on Federal Relations* (Philadelphia: University of Pennsylvania Press, 1900), 2:49–50.]

“Olmstead’s Case,” *Aurora*, April 6, 1809

As the leading Republican newspaper of the Jeffersonian era, the *Aurora* had been a persistent critic of Federalist proposals for a strong national judiciary and of the alleged partisanship of federal judges appointed by President John Adams. Pennsylvania’s resistance to the court’s order in the Olmsted case, however, convinced the editors of the *Aurora* that a lone state’s assault on the proper independence of the federal judiciary would lead to the dissolution of the Union. An allusion to Massachusetts was a reference to the recent legal challenges to the Embargo Act of 1807. The chief justice of the Massachusetts Supreme Judicial Court had publicly offered his opinion that the act was unconstitutional, and leading Massachusetts attorneys had argued the same position in the U.S. district court. Judge

John Davis rejected their argument, but the high-profile challenge to the authority of the federal courts, like that in Pennsylvania, alarmed many Republicans who now relied on the courts to enforce the laws and policies of the Republican majority.²⁵



The question of Olmstead's case is no longer one depending on mere matter of evidence as to fact – it has nothing now to do with what the lawyers did, or the courts did, or the juries did, or the evidence of interested parties said 30 years ago; . . .

The plain question now is – *shall the laws of the Union be violated or maintained?*

We have heard much talk about the *independence of the judiciary*, from those who wish to create a tyranny under the name of that independence – and by others who knew not what they themselves meant. But here is a point at which the *independence of the judiciary*, in its strict and constitutional sense exists, and demands to be supported and maintained, and in which it must be maintained, or there is an end to government.

It is not the “old sow eating up the litter of pigs,” which Fenno predicted; but the pigs eating up the old sow; Massachusetts, only about a third or fourth in size of the litter, grunted a little, and set the *wise men* of congress into the panics, but here Pennsylvania displays *her tusks*, and threatens to rip up her bowels. . . .

[Document Source: *Aurora*, Philadelphia, Pa., April 9, 1809.]

“The Sleeping Spirit of Virginia” and the Defiance of Federal Judicial Authority

As decisions of the Marshall Court, especially many of those issued between 1819 and 1821, expanded the national authority of the federal judiciary, the political and judicial leadership in Chief Justice Marshall's home state of Virginia defied the high Court and offered a bold assertion of state rights. While many Virginians, notably Thomas Jefferson and William Branch Giles, had long advocated restraints on the

25. Warren, *The Supreme Court*, 341–49, 379–80.

authority of the federal judiciary, Virginia's opposition to the Supreme Court's judicial review under Section 25 of the Judiciary Act of 1789 gained momentum in response to the Court's 1816 decision in *Martin v. Hunter's Lessee*. That decision reaffirmed an earlier Supreme Court order that Virginia recognize the property claims of a British subject whose lands had been confiscated by the state during the Revolutionary War. Joseph Story's opinion in *Martin* denied the assertion of the Virginia court of appeals that Section 25 was unconstitutional and the state court's associated claim that it had no obligation to carry out an order from the Supreme Court of the United States. Story said the Constitution was "crowded with provisions which restrain or annul the sovereignty of the states," and he insisted that with respect to federal powers, the state judges "are not independent; they are expressly bound to obedience by the letter of the constitution." Virginia and other states, however, would continue to ignore selected Supreme Court orders over the next decade and to challenge the constitutionality of Section 25.

John Marshall acknowledged that his 1819 opinion in *McCulloch v. Maryland*, which declared unconstitutional a state tax on a branch of the Bank of the United States, had "roused the sleeping spirit of Virginia – if indeed it ever sleeps." Public figures in Virginia emerged as the leading critics of the Marshall Court, even as other state legislatures and the press in various parts of the country joined in denouncing major decisions of the Supreme Court. The leading intellectual architect of the extreme state rights critique of the Marshall Court was John Taylor of Caroline. Taylor served various terms in the Virginia Assembly and the U.S. Senate, but he was best known as a writer on political theory. Spencer Roane, judge on the Virginia court of appeals, was strongly influenced by Taylor and published pseudonymous letters, occasionally in direct dialogue with Marshall, in response to *McCulloch v. Maryland* and the *Cohens v. Virginia* decision of 1821. In private correspondence with leading figures of Virginia and the nation, former President Thomas Jefferson expressed his growing apprehension about the expansion of federal judicial authority and his approval of the public critiques written by Taylor and Roane. Virginia's General Assembly and the state's representatives in Congress also proposed limiting the authority of the Supreme Court or establishing alternative means of settling disputes regarding state supreme court decisions.

Legislators in other states, including Ohio and Kentucky, offered similar proposals.²⁶

John Taylor, *Construction Construed, and Constitutions Vindicated*, 1820

In the midst of the controversies over the Marshall Court's decisions disallowing state laws or overturning state court decisions, John Taylor published one of his most widely read commentaries on constitutional government. Taylor offered in *Construction Construed* a summary of his compact theory of the constitutional union, which he insisted was created by the people acting in their collective capacity as states rather than as a collection of all of the people in the United States. The people had delegated certain powers to their state governments and certain powers to the national government, and the courts of the state and federal governments had authority only within their respective and exclusive "spheres of action." Taylor's phrasing was a pointed rejoinder to John Marshall's statement in *McCulloch v. Maryland* that the Supreme Court could disallow any state law that prevented the exercise of legitimate federal powers because "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere."

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... I cannot imagine a power more inconsistent with republican principles in general, and with ours in particular, than that claimed over the state laws, and consequently over the state constitutions, by the supreme federal court. It is under no obligation or responsibility of any kind to respect either. If it should violate its legitimate federal or spherical duties, it violates its oath; and is liable to trial and removal from office. But, in virtue of its supposed supremacy over the state courts, it might be tempted to annul state laws, to advance the power of congress, by whom it is paid and tried; and it might alter the institutions of the people according to its own pleasure, without even breaking an oath. . . .

26. Warren, *The Supreme Court*, vol. 1, 541–64; *idem.*, "Legislative and Judicial Attacks on the Supreme Court of the United States," 6–14; Haskins and Johnson, *History of the Supreme Court of the United States*, vol. 2, *Foundations of Power: John Marshall, 1801–15*, 357–65.

But cannot judges declare unconstitutional laws void? Certainly. Constitutions are only previous supreme laws, which antecedently repeal all subsequent laws, contrary to their tenor; and the question, whether they do or do not repeal or abrogate such subsequent laws, is exactly equivalent to the question, whether a subsequent repeals a previous law. Therefore, judges, juries and individuals have a correspondent power of deciding this question in all legitimate occurrences. But the constitutionality of state laws cannot legitimately be decided by the federal courts, because they are not a constituent part of the state governments, nor have the people of the state confided to them any such authority. They have confided it to the state courts, under the securities of an oath, and of various modes of responsibility. The people also have confided to the federal courts a power of declaring an unconstitutional federal law void, under similar securities; but where such a power is neither bestowed by the people, nor any security against its abuse provided, its assumption by inference is repelled by the absence of every regulation for moderating its exercise. In fact, the spheres of action of the federal and state courts are as separate and distinct, as those of the courts of two neighbouring states. Because the judges of each state are empowered under certain regulations to declare a law of their own state void, it does not follow, that the judges of another state can abrogate it. The federal judges owe no allegiance to the state governments, nor are more a component part of them, nor are more responsible to them, than the judges of a different state. . . .

[Document Source: John Taylor, *Construction Construed, and Constitutions Vindicated* (Richmond, Va.: Shepherd & Pollard, 1820), 135–36.]

Letters of Algernon Sydney (Spencer Roane), “On the Lottery Decision,” May 25, 1821

The Supreme Court’s *Cohens v. Virginia* decision of 1821 enflamed many Virginians, who responded with dire predictions of the demise of state governments. The Cohen brothers had been convicted in a Virginia court of violating a state law that prohibited the sale of lottery tickets not authorized by the state. The Cohens appealed to the Supreme Court under Section 25 of the Judiciary Act of 1789, arguing that a congressional statute authorizing lotteries in the Dis-

trict of Columbia gave them the right to sell lottery tickets anywhere in the nation. The Supreme Court upheld the Cohens' conviction, but in a preliminary and far more controversial decision, a unanimous Court denied Virginia's motion to dismiss the case based on the Eleventh Amendment's prohibition on suits against states in the federal courts. Marshall, in one of his strongest defenses of federal judicial supremacy, said that the Constitution's grant of federal jurisdiction in "all Cases" arising under the Constitution or federal law was not limited by the Eleventh Amendment as long as a suit against a state involved a federal question.²⁷

The most widely read critique of the *Cohens* decision came from Spencer Roane, a judge on the Virginia court of appeals from 1795 to 1822. Under a pseudonym, Roane turned to the press to criticize the Supreme Court's decision in *Cohens*, just as he had in response to *McCulloch v. Maryland*. Here, following a review of infamous decisions of English courts, Roane warned that Marshall's decision threatened state sovereignty and pre-empted the people's exclusive right to amend the Constitution. Elsewhere in the "Algernon Sydney" essays, Roane proposed establishing the Senate as a tribunal for hearing appeals from state supreme courts.

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The judgment now before us, will not be less disastrous, in its consequences, than any of these memorable judgments. It completely negatives the idea, that the American states have a real existence, or are to be considered, in any sense, as sovereign and independent states. It does this, by claiming a right to reverse the decisions of the highest judicial tribunals of those states. That state is a non-entity, as a sovereign power, the decisions of whose courts are subjected to such a revision. It is an anomaly in the science of government, that the courts of one independent government, are to control and reverse the judgments of the courts of another. The barriers and boundaries between the powers of two sovereign and independent governments, are so high and so strong, as to defy the jurisdiction, justly claimed by a superior court, over the judgments of such as are inferior. This decision also reprobates the idea, that our system of government is that of a confed-

27. G. Edward White, *History of the Supreme Court of the United States*, vols. 3–4, *The Marshall Court and Cultural Change, 1815–35* (New York: Macmillan, 1988), 504–24.

eration of free states. *That* is no federal republic, in which one of the parties to the compact, claims the exclusive right to pass finally upon the chartered rights of another. In such a government, there is no common arbiter of their rights, but the people. If this power of decision is once conceded, to either party, the equilibrium established by the constitution is destroyed, and the compact exists, thereafter, but in name. This decision also claims the right, to amend the federal constitution, at the mere will and pleasure of the supreme court. The constitution is not the less changed or amended, because it is done by construction, and in the form of a decree or judgment. In point of substance, its effect is the same: and this construction becomes a part of the constitution, or of the fundamental laws. It becomes so, because it is not in the power of the ordinary legislature to alter or repeal it. This construction defies all power, but that of the people, in their primary and original character, although, in effect, it entirely changes the nature of our government. This assumption of power is the less excusable, too, fellow-citizens, because no government under Heaven, has provided so amply as ours, for necessary amendments of the constitution, by the legitimate power of the people. . . .

[Document Source: *Richmond Enquirer*, Richmond, Va., May 25, 1821.]

“Mr. Stevenson’s Resolution,” Commentary on a Proposal to Repeal Section 25 of the Judiciary Act of 1789, September 1822

In April 1822, Representative Andrew Stevenson of Virginia introduced in the House of Representatives a resolution to repeal Section 25 of the Judiciary Act of 1789. Stevenson told his colleagues that he and the Congress had a duty to discuss recent controversies between the federal and state governments and to repeal Section 25 if they determined that it “was not justified by the Constitution.”²⁸ A writer in the *United States Law Journal, and Civilian’s Magazine* responded to Stevenson by arguing that the Framers, though committed to limited government, recognized that a national court with final authority was an indispensable counter to the “disconnected and independent” state courts. The resulting constitutional provision extending federal judicial authority to “all Cases” arising under the Constitu-

28. *Annals of Congress*, 17th Cong., 1st sess., April 26, 1822, 1681–82.

tion and federal law gave the Supreme Court the same supremacy over state courts that the president and the Congress exercised over their counterparts in the states. Published briefly in New Haven, Connecticut, and distributed in several neighboring states, the law journal was one of the first legal periodicals published in the United States.

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That the judicial department of the government of the United States was established in the greatest wisdom; that it is indispensable to the existence of the government, none at this day are found to deny. It is admitted too, on all hands, that the cases, over which its jurisdiction was extended, were defined upon the soundest views that could be formed of the operation of the new Constitution. Experience has verified the results of their political sagacity, who conceived that this jurisdiction was necessary to the free movement of the great machinery of the government. But those sages were very little disposed to extend the jurisdiction of the national judiciary beyond the limits necessary for securing that great object, and protecting the rights and interests acquired under its laws and treaties. Every body knows that the prevailing jealousy, at that period, was, of the extent of every power of the general government. But the deplorable consequences to result from leaving questions arising under the Constitution and laws and treaties of the United States, to the adjudication of an indefinite number of disconnected and independent tribunals, overcame even that jealousy, and the wisdom of great minds for once prevailed. A national tribunal was erected, as a dernier resort in all those cases. We are unable in this to discover any thing of a genius and spirit repugnant to the appellate jurisdiction in question. The words of the Constitution embrace *all cases*; the reason of the provision, collect it in what way you will, embraces *all cases*, without distinction of courts; and from these we deduce the “genius and spirit and tenor” of the Constitution in this respect. The idea is gratuitous and fanciful altogether, that the Constitution has manifested any reluctance, any delicacy, in this particular, with regard to national, operating upon State authorities. It is not to be found in any part of the Constitution. The National executive acts, as in case of calling out the militia, and is obliged to act directly on the State executive. The

National legislature acts directly in a revisory manner, on the State legislatures, with regard to their legislation on certain subjects of national concern. Then whence is this argument drawn, of the repugnance of this appellate jurisdiction to the “genius and spirit and tenor of the Constitution”? . . .

We are arrived, then, at one of the first questions which must be made upon this resolution of Mr. Stevenson, whenever it shall become a subject of serious debate. That question is no other than this: whether Congress is to control the Supreme Court in its expositions of the Constitution? or whether that tribunal is something more, in this matter, than the mere organ of the will and voice of a co-ordinate department of the government? This is the true question that presents itself at the threshold, and it is impossible to veil this resolution so as to make it appear otherwise. When we say this, we take it for granted, that the ground and only ground on which the repeal of this section of the Judiciary Act is attempted, is its unconstitutionality. Then we have here an attempt to overturn by an act of the legislature, two solemn decisions of the Supreme Court upon a constitutional question, confessedly within its proper cognizance. Where is this to end? What is the limit assigned to the operation of this principle? . . .

[Document Source: *United States Law Journal, and Civilian's Magazine* 2, no. 2 (September 1822): 225–26, 239.]

Proposed Alternatives to Section 25

In the 1820s, Congress considered multiple proposals to repeal Section 25 of the Judiciary Act of 1789 or to establish alternative means of settling appeals from the state courts to the Supreme Court of the United States. The Pennsylvania legislature in 1809 first proposed a constitutional amendment establishing a tribunal for the resolution of disputes between a state government and the federal government, and the Virginia General Assembly considered a similar proposal in 1819. In 1821, Senator Richard M. Johnson of Kentucky brought the idea to the Congress when he proposed a constitutional amendment making the Senate a tribunal for judicial disputes between states and the federal government, and the influential newspaper, *Nile's Register*, endorsed the proposal. The more common proposal in Congress was to require

a super-majority of justices for any decision in cases brought to the Supreme Court under Section 25. Most of these proposals were submitted in response to a series of Supreme Court decisions, beginning with *Martin v. Hunter's Lessee* in 1816 and continuing with such cases as *McCulloch v. Maryland* (1819), *Cohens v. Virginia* (1821), *Green v. Biddle* (1821 and 1823), and *Osborn v. Bank of the United States* (1824). These landmark decisions of the Marshall Court, which variously declared state laws unconstitutional, overturned state court decisions, or limited states' protections under the Eleventh Amendment, dramatically expanded the authority of the federal judiciary over state governments. Proposals for repeal or revision of Section 25 came primarily from the states adversely affected by these decisions, and none of the proposed bills won majority support in the Congress.

Senator Richard M. Johnson of Kentucky, January 14, 1822

Johnson offered his proposal to the Senate in December 1821, following the Supreme Court's first decision in *Green v. Biddle*, which overturned Kentucky statutes—the so-called “Occupant Claimant laws”—that offered settlers protection and compensation for improved land that was reclaimed by absent titleholders from Virginia. The decision provoked enormous popular opposition in Kentucky, and the Supreme Court agreed to hear rearguments in the case in 1822. In the meantime, over two days in January 1822, Johnson presented his Senate colleagues with a lengthy commentary on the difficulties of balancing state and federal jurisdiction. Johnson recounted the “frequent and alarming” conflicts between the federal judiciary and the states, and asserted that the people had delegated exclusive powers to both the federal and state governments. He denied that the Supreme Court had an exclusive authority to determine the constitutionality of acts passed by Congress and signed by the president, but he identified the “principal danger” to be the Court's judicial review of state laws.

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... If a judge can repeal a law of Congress, by declaring it unconstitutional, is not this the exercise of political power? If he can declare the laws of a State unconstitutional and void, and, in one moment, subvert the deliberate policy of that State for twenty-four years, as in Kentucky, affecting its whole landed property, even to

the mutilation of the tenure upon which it is held, and on which every paternal inheritance is founded; is not this the exercise of political power? All this they have done, and no earthly power can investigate or revoke their decisions. If this is not the exercise of political power, I would be gratified to learn the definition of the term, as contradistinguished from judicial power. If the exercise of such tremendous powers be legitimate, their acts, like those of all other trustees of power, should be subject to the sanction or revocation of the people; if not by a direct responsibility, yet by an appeal to a tribunal that is responsible. . . .

. . . The principal danger arises from a collision of the Federal judiciary with the State sovereignties. The judges have exercised some caution in relation to acts of Congress. They have generally acted upon the laws as they received them, leaving it with the members to account to their constituents for their measures. Nor have they had any temptations to do otherwise. The support of federal authority must, from the very nature of their situation, be a point for them to maintain rather than abandon. The Supreme Court has even decided that Congress is sole judge of the measures necessary to carry into effect the specific powers delegated by the Constitution. Had the same delicacy been observed by that tribunal when State laws have been the subject of construction, it is probable the examination of judicial encroachment upon their sovereignties might never have been commenced. But a comparison of the cases will show a disposition widely different in the revisal of State laws, which proves the strong bias of the Federal judiciary in support of federal power. A bias equally strong may probably exist on the other side in the State tribunals; and, in case of disagreement, which tribunal shall prevail? So far as my observation extends, the superior courts of the States would not be disgraced by a comparison with the Supreme Court of the United States, in capacity, integrity, and legal acquirements. It, therefore, appears to me that justice requires an intermediate tribunal to decide between them. I know of no clause in the Federal Constitution that gives the power to the Judiciary of declaring the laws and constitution of a State repugnant to the Constitution of the United States, and, therefore, null and void. No express grant, nor fair construction, contains it; and, I presume, every gentleman, in and out of Congress, will agree with me, that the States never designed so

to impair their sovereignty as to delegate this power to the Federal judiciary. But they have assumed it, and, to counteract the evils which must result from this assumption, a responsible tribunal of appeal should be provided. . . .

[Document Source: *Annals of Congress*, 17th Cong., 1st sess., 75, 80–81.]

Representative Charles Anderson Wickliffe of Kentucky,
May 3, 1824

The Supreme Court withdrew its original decision in *Green v. Biddle* and in February 1823 issued another decision that also disallowed Kentucky's occupant claimant laws. The Court's more detailed and cautious description of its decision did nothing to allay popular criticism of the opinion in Kentucky, and the lead opinion endorsed by only three of the seven justices further provoked public criticism of what many characterized as a minority decision. In February 1824, Representative Robert Letcher of Kentucky presented the U.S. House of Representatives with the remonstrance of the Kentucky legislature and in May of the same year introduced a resolution calling for a bill to require a super-majority of justices and separate opinions from each for any Supreme Court decision calling into "question the validity of any part of the constitution of a State, or of any act passed by the Legislature of a State." His Kentucky colleague, Charles Anderson Wickliffe, found that the bias of the Supreme Court against the states was so great as to require special precautions to ensure public respect and, ultimately, to preserve the Union.²⁹

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The ill fate which has befallen my State, in that court, induced me to make some little examination into the "current of decisions," where the rights of States were directly or collaterally drawn in question; and, sir, I find them, like the needle, which always directs us to the same pole, invariably tending to the amplification of the powers of the General Government, and a corresponding restriction of State sovereignty. Georgia, Pennsylvania, Virginia, New York, Ohio, and Kentucky, have shared, each in their turn, the same fate. I do not recollect a single case before that court, in which the ques-

29. Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-fifth Section of the Judiciary Act," 20–34.

tion of State power, in conflict with the supposed powers of the General Government, was involved, where the decision has been in favor of the power claimed by the State. I will not undertake to say that the whole of these opinions were wrong. I must be permitted to say that the States have been extremely unfortunate before that enlightened tribunal. At the rate they have heretofore progressed, it will not take long to fritter down the State governments to “mere petty corporations,” acting by the authority and permission of the General Government – I should have said the weakest department of that Government. It is time for the States to inquire into the cause of this state of things; and in order, at least, to inspire greater confidence in the opinions of that tribunal, which shall declare null and void their constitutions, and the solemn acts of their legislatures, they should cause a greater volume of intellect to flow into the judicial channel. The powers which the Supreme Court possesses under the Constitution, to be exercised in the manner prescribed by the 25th section of the judiciary act are tremendous; such as, if abused, from ignorance or by design, may, one day or other, shake this confederative Republic to the very centre. Let us provide, then, by law, as far as we have the power, against the chances of such an event. . . .

[Document Source: *Annals of Congress*, 18th Cong., 1st sess., 2534–35.]

Report of the House of Representatives Committee on the Judiciary on the Proposal to Require Super-Majority of Justices in Supreme Court Decisions Regarding State Laws and Constitutions, January 2, 1829

As chair of the House Committee on the Judiciary, Virginia Representative Philip Pendleton Barbour, a future district judge and Supreme Court justice, presented yet another bill to require a super-majority in any Supreme Court case calling into question the validity of a state constitution or law. The committee’s accompanying report emphasized the multiple sources of popular approval on which any law or, especially, a constitution rested. Any decision to overturn these expressions of popular sovereignty needed a large majority of the Court if the public were to accept the judiciary’s authority.

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It will be recollected, that, in controversies originating in the State Courts, a question concerning the validity of a State law, or Constitution, cannot be brought before the Supreme Court of the United States until it shall have been adjudicated by the highest State tribunal, nor unless the decision of that tribunal shall have been in favor of its validity. Before, then, the Supreme Court can pass upon such a question, in any case, the validity of the law, or Constitution, as the case may be, must have received the most authoritative stamp of approbation in the State in which it arose. If it relate to the validity of a law, it must have been approved of by both the branches of the Legislature; if it relate to that of a constitution, it must have been approved of by the people of the State, in the exercise of their sovereign power, in their primary assembly, as a Convention; and it must, in controversies originating in State Courts, also have been decided in favor of, by the court of dernier resort in the State. In this posture of the subject, if a bare majority of the Supreme Court of the United States should decide against the validity, the State, whose Constitution or law was thus nullified, can scarcely acquiesce without a murmur; especially when it is considered, that, besides the concurring approbation of its Convention or Legislature, and its Judiciary, it might be sustained by that also of the three remaining members of the Court; and when it is remembered, too, that the question must always be, whether the State has, or has not, transcended the limits of its reserved rights, growing out of its compact with another party, to wit: the Federal Government, and that the Supreme Court of the United States are the tribunal of that other party. The concurrence, then, of a greater number than a bare majority of that tribunal will tend to produce a greater spirit of acquiescence, to quiet heart-burnings, and thus add a strong cement to that union which we all desire to be indissoluble and perpetual. . . .

[Document Source: H. Rep., No. 34, 20th Cong., 2d sess., 1829, 2.]

Reports on the Proposed Repeal of Section 25, 1831

In January 1831, the House of Representatives voted overwhelmingly to reject a proposed repeal of Section 25, and thus ended until the early twentieth century all serious congressional debate on that section

of the Judiciary Act of 1789. The vote reflected a growing appreciation for the Supreme Court's unique role in protecting all branches of the federal government as well as popular national policies against challenges from individual state governments. At the same time the vote signaled what would be an enduring sectional divide of opinions on the Supreme Court's judicial review of state law. Forty-five of the fifty-one votes for repeal came from representatives of slave-holding states, where officeholders were increasingly suspicious of any assertion of national authority that might portend interference with slavery. The vote also came against the background of debates in South Carolina on the doctrine of nullification, with its radical challenge of all federal authority, including that of the courts.

The House of Representatives moved quickly and with little debate to defeat the proposal by a vote of 138 to 51, but representatives then entered into a much longer debate on the merits of printing 6,000 copies of the committee reports, which had already been widely reprinted in newspapers. Representative Thomas Crawford of Pennsylvania acknowledged concern about allowing the states to be "agitated and distracted" by a proposal that would "inflict a fatal wound upon the character of our common rights," but he and a large majority of the House voted to print the additional copies.³⁰

Report upon the Judiciary, by Mr. Davis, of South Carolina, from the Committee on the Judiciary

The majority report of the Judiciary Committee, presented by Representative Warren R. Davis of South Carolina, largely ignored the complicated debates on divided sovereignty and compact theories of the Constitution that had been displayed in earlier congressional discussions of Section 25. This report simply asserted that the Supreme Court had no constitutional authority over the state courts. The committee majority drew that conclusion largely by inference from the Federal Convention's rejection of the proposed Council of Revision that would have had the authority to disallow state legislation on the recommendation of the Congress. The state courts and the Supreme Court were parallel sovereign authorities, according to the committee, and Section 25 was unconstitutional precisely be-

30. Graber, "James Buchanan as Savior?"; Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States," 161–64.

cause it gave the Supreme Court unchecked power over what was a coordinate institution of government.

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... That the Constitution does not confer power on the Federal Judiciary, over the judicial departments of the States, by any express grant, is certain from the fact that the State judiciaries are not once named in that instrument. On the contrary, it declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish; thus giving power to organize a judicial system capable of exercising every function to which the judicial power of the United States extended, "and intending to create a new judiciary, to exercise the judicial powers of a new Government," unconnected with, and independent of, the State judiciaries.

It is no more necessary to the harmonious action of the Federal and State Governments that the federal courts should have power to control the decisions of State courts by appeal, than that the Federal Legislature should have power to control the legislation of the States, or the Federal Executive a State Executive, by a negative. It cannot be that when a direct negative on the laws of a State was proposed in convention, as part of the Federal Constitution, and rejected, that it was intended to confer on the federal courts, by implication, a power subjecting their whole legislation, and their judgments and decrees on it, to this negative of the federal courts. It cannot be, that this prostration of the independency of the State judicatories, this overthrow of the State Governments as co-ordinate powers, could be left to any implication of authority.

The committee are, therefore, of opinion that the power to enact the 25th section above recited is not expressed in the Constitution of the United States, nor properly an incident to any express power, and necessary to its execution. That, if continued and acquiesced in as construed by the Supreme Court, it raises the decision of the judiciary above the authority of the sovereign parties to the Constitution; may be a warrant for the assumption of powers not delegated in the other departments, not carried by the forms of the Constitution before the judicial department; and whose decisions

would be equally authoritative and final with the decisions of that department. . . .

[Document Source: H. Rep., No. 43, 21st Cong., 2d sess., January 24, 1831, 8, also in *Register of Debates*, 21st Cong., 2d sess., Appendix, lxxix.]

Counter Report upon the Judiciary, House of Representatives,
January 24, 1831

The report for the minority of the Judiciary Committee, written by James Buchanan, argued that Section 25 was essential for the protection of the very purpose of the Federal Constitution. The Supreme Court's judicial review of state laws and court decisions ensured the uniformity of law and the equal protection of citizens of various states, both of which had been absent under the Articles of Confederation. Buchanan insisted that the Constitution established the supremacy of the federal government, and Section 25 gave the Supreme Court the authority to enforce the Constitution's direct connection with, and responsibility to, the people rather than through the state governments as intermediaries.

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The Supreme Court, considering the elevated character of its judges, and that they reside in parts of the Union remote from each other, can never be liable to local excitements and local prejudices. To that tribunal our citizens can appeal with safety and with confidence, (as long as the 25th section of the judicial act shall remain upon the statute book,) whenever they consider that their rights, under the Constitution and laws of the United States, have been violated by a State court. Besides, should this section be repealed, it would produce a denial of equal justice to parties drawing in question the Constitution, laws, or treaties of the United States.

In civil actions, the plaintiff might then bring his action in a federal or State court, as he pleased, and as he thought he should be most likely to succeed; whilst the defendant would have no option, but must abide the consequences, without the power of removing the cause from a State into a federal court, except in the single case of his being sued out of the district in which he resides; and

this, although he might have a conclusive defence under the Constitution and laws of the United States.

Another reason for preserving this section is, that, without it, there would be no uniformity in the construction and administration of the Constitution, laws, and treaties of the United States. If the courts of twenty-four distinct, sovereign States each possess the power, in the last resort, of deciding upon the Constitution and laws of the United States, their construction may be different in every State of the Union. That act of Congress which conforms to the Constitution of the United States, and is valid, in the opinion of the Supreme Court of Georgia, may be a direct violation of the provisions of that instrument, and be void, in the judgment of the Supreme Court of South Carolina. A State law in Virginia might in this manner be declared constitutional, whilst the same law, if passed by the Legislature of Pennsylvania, would be void. Nay, what would be still more absurd, a law or treaty of the United States with a foreign nation, admitted to be constitutionally made, might secure rights to the citizens of one State, which would be denied to those of another. Although the same Constitution and laws govern the Union, yet the rights acquired under them would vary with every degree of latitude. Surely the framers of the Constitution would have left their work incomplete, had they established no common tribunal to decide its own construction, and that of the laws and treaties made under its authority. They are not liable to this charge, because they have given express power to the judiciary of the Union over "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."

The first Congress of the United States have, to a considerable extent, carried this power into execution by the passage of the judicial act; and it contains no provision more important than the 25th section.

This section ought not to be repealed, because, in the opinion of the minority of the Committee on the Judiciary, its repeal would seriously endanger the existence of this Union. The chief evil which existed under the old confederation, and which gave birth to the present Constitution, was, that the General Government could not act directly upon the people, but only by requisition upon sovereign States. The consequence was, that the States either obeyed

or disobeyed these requisitions, as they thought proper. The present Constitution was intended to enable the Government of the United States to act immediately upon the people of the States, and to carry its own laws into full execution, by virtue of its own authority. If this section were repealed, the General Government would be deprived of the power, by means of its own judiciary, to give effect either to the Constitution which called it into existence, or to the laws and treaties made under its authority. It would be compelled to submit, in many important cases, to the decisions of State courts; and thus the very evil which the present Constitution was intended to prevent would be entailed upon the people. The judiciary of the States might refuse to carry into effect the laws of the United States; and without that appeal to the Supreme Court which the 25th section authorizes, these laws would thus be entirely annulled, and could not be executed without a resort to force.

[Document Source: H. Rep., No. 43, 21st Cong., 2d sess., January 24, 1831, 14–15, also in *Register of Debates*, 21st Cong., 2d sess., Appendix, lxxxiii–lxxxiv.]

In Defense of Judicial Review: “Who is the Final Judge or Interpreter in Constitutional Controversies,” from Joseph Story’s Commentaries on the Constitution, 1833

The emerging consensus on judicial review of state laws, like so many widely shared assumptions about a national judiciary, was succinctly summarized by Justice Joseph Story in his *Commentaries on the Constitution*. Story took it for granted that judicial review was a defining characteristic of a court’s power, and the only remaining question was whether that authority to determine constitutionality extended to review of state laws. Story concluded that the judicial review of state law authorized by the Congress in Section 25 and exercised by the Supreme Court was essential to the viability of a single, uniform Constitution. Without that judicial review, citizens would be subject to as many different interpretations of the Constitution as there were states, and within each state subject to the decisions of shifting public majorities.

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... The constitution is the supreme law; the judicial power extends to all cases arising in law and equity under it; and the courts of the United States are, and, in the last resort, the Supreme Court of the United States is, to be vested with this judicial power. No man can doubt or deny, that the power to construe the constitution is a judicial power. The power to construe a treaty is clearly so, when the case arises in judgment in a controversy between individuals. The like principle must apply, where the meaning of the constitution arises in a judicial controversy; for it is an appropriate function of the judiciary to construe laws. If, then, a case under the constitution does arise, if it is capable of judicial examination and decision, we see, that the very tribunal is appointed to make the decision. The only point left open for controversy is, whether such decision, when made, is conclusive and binding upon the states, and the people of the states. The reasons, why it should be so deemed, will now be submitted.

§ 377. In the first place, the judicial power of the United States rightfully extending to all such cases, its judgment becomes *ipso facto* conclusive between the parties before it, in respect to the points decided, unless some mode be pointed out by the constitution, in which that judgment may be revised. No such mode is pointed out. Congress is vested with ample authority to provide for the exercise by the Supreme Court of appellate jurisdiction from the decisions of all inferior tribunals, whether state or national, in cases within the purview of the judicial power of the United States; but no mode is provided, by which any superior tribunal can re-examine, what the Supreme Court has itself decided. Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. . . .

... Let us look for a moment at the consequences, which flow from the doctrine on the other side. There are now twenty-four states in the Union, and each has, in its sovereign capacity, a right to decide for itself in the last resort, what is the true construction

of the constitution; what are its powers; and what are the obligations founded on it. We may, then, have, in the free exercise of that right, twenty-four honest, but different expositions of every power in that constitution, and of every obligation involved in it. What one state may deny, another may assert; what one may assert at one time, it may deny at another time. This is not mere supposition. It has, in point of fact, taken place. There never has been a single constitutional question agitated, where different states, if they have expressed any opinion, have not expressed different opinions; and there have been, and, from the fluctuating nature of legislative bodies, it may be supposed, that there will continue to be, cases, in which the same state will at different times hold different opinions on the same question. Massachusetts at one time thought the embargo of 1807 unconstitutional; at another a majority, from the change of parties, was as decidedly the other way. Virginia, in 1810, thought that the Supreme Court was the common arbiter; in 1829 she thought differently. What, then, is to become of the constitution, if its powers are thus perpetually to be the subject of debate and controversy? What exposition is to be allowed to be of authority? Is the exposition of one state to be of authority there, and the reverse to be of authority in a neighbouring state, entertaining an opposite exposition? Then, there would be at no time in the United States the same constitution in operation over the whole people. Is a power, which is doubted, or denied by a single state, to be suspended either wholly, or in that state? Then, the constitution is practically gone, as a uniform system, or indeed, as any system at all, at the pleasure of any state. If the power to nullify the constitution exists in a single state, it may rightfully exercise it at its pleasure. Would not this be a far more dangerous and mischievous power, than a power granted by all the states to the judiciary to construe the constitution? Would not a tribunal, appointed under the authority of all, be more safe, than twenty-four tribunals acting at their own pleasure, and upon no common principles and co-operation? . . .

[Document Source: Joseph Story, *Commentaries on the Constitution of the United States*, 1:348–49, 352–53.]

Resolutions of the Wisconsin Legislature, March 19, 1859

The sectional disputes over slavery that tested the bonds of Union undermined the consensus on judicial review in surprising and unpredictable ways. In the years following the 1831 debates in the U.S. House of Representatives on Section 25, challenges to the Supreme Court's authority of judicial review came primarily from the slave states of the South, and those challenges were part of an increasingly cohesive critique of all federal authority over the states. The federal courts' enforcement of fugitive slave laws, however, and particularly the Supreme Court's 1859 decision in *Ableman v. Booth*, overturning the Wisconsin Supreme Court's order to release a person held in federal detention following conviction for aiding a fugitive slave, brought from a northern state a sharp challenge to federal judicial authority. The Wisconsin legislature, in resolutions approved by the governor, denied the exclusive authority of the federal government to judge the extent of its own powers. According to the legislature, using language similar to that of southern state rights advocates, the Constitution was established through a compact of "sovereign and independent" states that retained the right to determine constitutional violations.³¹

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Whereas, The Supreme Court of the United States has assumed appellate jurisdiction in the matter of the petition of Sherman M. Booth for a writ of habeas corpus, presented and prosecuted to final judgment in the Supreme Court of this State, and has, without process, or any of the forms recognized by law, assumed the power to reverse that judgment in a matter involving the personal liberty of the citizen, asserted by and adjusted to him by the regular course of judicial proceedings upon the great writ of liberty secured to the people of each State by the Constitution of the United States:

And, whereas, Such assumption of power and authority by the Supreme Court of the United States, to become the final arbiter of the liberty of the citizen, and to override and nullify the judgments of the state courts' declaration thereof, is in a direct conflict

31. Carl B. Swisher, *History of the Supreme Court of the United States*, vol. 5, *The Taney Period, 1836–64* (New York: Macmillan, 1974): 656–64.

with that provision of the Constitution of the United States which secures to the people the benefits of the writ of habeas corpus: therefore,

Resolved, The Senate concurring, That we regard the action of the Supreme Court of the United States, in assuming jurisdiction in the case before mentioned, as an arbitrary act of power, unauthorized by the Constitution, and virtually superseding the benefit of the writ of habeas corpus and prostrating the rights and liberties of the people at the foot of unlimited power.

Resolved, That this assumption of jurisdiction by the federal judiciary, in the said case, and without process, is an act of undelegated power, and therefore without authority, void, and of no force.

Resolved, That the government, formed by the Constitution of the United States was not the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

Resolved, That the principle and construction contended for by the party which now rules in the councils of the nation, that the general government is the exclusive judge of the extent of the powers delegated to it, stop nothing short of despotism, since the *discretion* of those who administer the government, and not the *Constitution*, would be the measure of their powers; that the several states which formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a *positive defiance* of those sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument, is the rightful remedy.

[Document Source: Herman V. Ames, ed., *State Documents on Federal Relations* (Philadelphia: University of Pennsylvania Press, 1906), 6:64–65.]

Circuit Riding in an Expanding Nation

Between 1802 and the Civil War, the congressional debates on the merits and the practicalities of circuit riding were the era's most far-ranging public dialogue on the place of the judiciary within the nation's constitutional order. As new states entered the Union, Congress confronted the difficulties of extending the circuit court system to serve an expanding republic. The federal court system established in 1789 and reaffirmed in 1802 relied on state boundaries for the organization of judicial districts and consequently for the assignment, or allotment, of Supreme Court justices to service on the circuit courts. As early as 1789, Congress recognized limits to the geographical range that six Supreme Court justices could reasonably serve, and the first Judiciary Act excluded Kentucky and Maine, neither yet states, from the circuit court system. The U.S. district courts in Kentucky and Maine exercised the trial jurisdiction of circuit courts, and appeals from those courts went directly to the Supreme Court. When Vermont entered the Union in 1791, Congress established a circuit court in the state and incorporated it within an existing circuit served by the justices. Kentucky, however, remained without a circuit court when it entered the Union in 1792, as did Tennessee and Ohio when they became states in 1797 and 1803, respectively.

Congress in 1807 established a Seventh Circuit encompassing Kentucky, Tennessee, and Ohio, and authorized the appointment of a seventh Supreme Court justice who would serve on new circuit courts established for those states. Congress, however, was slow to establish circuit courts for new states after 1807. Of the nine states admitted to the Union between 1807 and 1837, only Maine gained a circuit court upon statehood. In the other new states, district courts exercised the trial jurisdiction of circuit courts, and appeals went to the Supreme Court. Nearly every session of Congress after 1815 saw some proposal to extend circuit riding or to establish new circuit courts with their own judges. In 1819, the Senate passed a bill to repeal the justices' circuit duties and to authorize the appointment of judges to serve circuit courts throughout the nation, but the House of Representatives failed to approve the bill. Congress in 1825–1826 and again in 1830

engaged in lengthy debates on the need for additional circuits, but no proposal won the approval of both houses of Congress. Only in 1837 did Congress authorize the appointment of two more Supreme Court justices who could serve the circuit courts in an eighth and a ninth circuit. Although Congress in 1855 established a California circuit court with its own circuit judge, it did not establish circuit courts in any other new states until 1862.

Citizens in the states without circuit courts repeatedly protested that they were denied access to the same system of justice available in other states. The practical costs of taking a case to the Supreme Court in Washington deprived many parties of a realistic opportunity to appeal a district court decision. Monetary limits on appeals to the Supreme Court prevented still more parties in the district courts from gaining a rehearing of their case. When in 1802 Congress provided a right of appeal for any case that was the subject of divided opinions in a circuit court, those states without a circuit court were further disadvantaged.

The most serious and frequent complaint from the states without circuit courts was that those jurisdictions enjoyed none of the benefits of regular contact with a justice of the Supreme Court. Supreme Court justices were widely assumed to bring to the bench learning and experience superior to the talents of the district judges. As rates of appeals to the Supreme Court demonstrated, the losing parties in suits were more likely to be satisfied with the decision of a federal trial court if a justice participated. The public visibility of justices on circuit and their participation in the federal trial courts became an important foundation of public respect for the federal judicial system and were seen by many as essential for teaching the justices about the diversity of legal cultures in the states as well as about the particular context of cases appealed to the Supreme Court.

The recurring debates on the circuit system often widened into discussions of the tensions between judicial independence and public accountability, and the importance of both for ensuring public confidence in the federal court system. Proposals for expansion or reorganization of the circuit courts also raised questions about the proper qualifications for justices and judges, the accessibility of federal courts, the right of appeal, and the balance of federal and state jurisdictions. Running throughout the debates were strong memories of the Judiciary Act of 1801 and the midnight judges, a history lesson that for many

members of Congress taught the perils of instituting a court system unacceptable to a broad public.³²

Justice Henry Brockholst Livingston on Circuit Court Duties of the Supreme Court Justices, September 13, 1817

In a criminal trial in the U.S. Circuit Court for the Southern District of New York, the defendant's attorneys challenged the jurisdiction of the court because the presiding judge, Justice Henry Brockholst Livingston, had been nominated and commissioned as a Supreme Court justice, but not as a judge of the circuit court. In an extraordinary (and nonbinding) section of his opinion, Justice Livingston announced that he considered the circuit duties of the justices to be unconstitutional. Congressional assignment of judicial duties not prescribed by the Constitution was, according to Livingston, a threat to the judiciary's independence from the legislative branch, as well as a practical burden that prevented justices from meeting their constitutional responsibilities on the Supreme Court. Livingston found it inconceivable that the authors of the Constitution intended to authorize the justices' service on trial courts and especially on courts hearing criminal cases over which the Supreme Court had almost no jurisdiction.

In a later section of the opinion, Livingston acknowledged that the Supreme Court, in its 1803 decision in *Stuart v. Laird*, had acceded to the circuit assignments without ruling on their constitutional merits, and on the basis of that precedent he affirmed the jurisdiction of the circuit court in this case. The justice then delivered the sentence of death by hanging. Livingston's public doubts about circuit riding echoed the private doubts of other justices, notably John Marshall and his colleagues serving when Congress reestablished the circuit duties in 1802, but few offered this argument publicly. In the coming debates on the circuit system, a few members of Congress shared Livingston's doubts but almost all accepted that the long-standing practice rendered the constitutional question moot.

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32. Curtis Nettels, "The Mississippi Valley and the Federal Judiciary, 1807–1837," *Mississippi Valley Historical Review*, 12 (September 1925): 202–26; Swisher, *History of the Supreme Court of the United States*, vol. 5, *The Taney Period, 1836–64*, 248–74; Warren, *The Supreme Court in United States History*, 1:652–85.

On the other ground of objection relating to the jurisdiction, the judge said that his private opinion was decidedly in favor of the objection. The act of Congress directing the justices of the Supreme Court of the United States to hold Circuit Courts was unconstitutional, and not binding on the judges. The Supreme Court was created by the Constitution, and its powers and duties were therein defined. The legislature, therefore, could neither add to the one nor to the other. This precaution was highly proper, as it respected the appellate court of the federal judiciary. If, besides the duties prescribed for it by the Constitution, the legislature were at liberty to add to them such others, not only in their own court but in courts with which they had no connection, there would be an end of that independence which should ever exist between co-ordinate branches of the same government; and so long as such power shall continue to be exercised, and be acquiesced in, the Supreme Court will be kept in a State of dependence on the legislature, which could never have been contemplated by those who framed the Constitution. It is a fact that the labor of holding Circuit Courts has become much more burdensome to the judges of the Supreme Court than the discharge of their regular, appropriate, and constitutional functions in the court for which they are commissioned. It may be added, for so the fact is, that the business of the Supreme Court is much impeded by the attention of the judges to their circuit duties, to the very great inconvenience and heavy expense of the suitors therein. Congress have a right to ordain and establish, from time to time, such inferior courts as they may think fit; but they have no power to commission the judges of such courts, nor to appoint any judge by law. If they thought proper, therefore, that a Circuit Court should consist of a district and another judge, such other judge should have been appointed, as well as the district judge, on the nomination of the President, and by and with the consent of the Senate. He should have been commissioned during good behavior, and have received a compensation for his services. But no commissions have ever been granted to the justices of the Supreme Court constituting them judges of the Circuit Court, nor have they taken any oath of office as such; and instead of receiving a compensation for these heavy and expensive duties, their salaries as justices of the Supreme Court have been greatly diminished by them. The inconvenience of the system as it respects

the administration of justice may also tend to show that the Constitution in this respect has not been pursued. It could never have been intended that the judges of a court, whose principal duties are of an appellate nature, should ever form a constituent part of those inferior tribunals whose decisions they were to revise. The disadvantages of such a system in practice can hardly be estimated, except by those who have had some experience in them. It is certainly desirable that judges of an appellate court should form no opinion in an inferior tribunal; and when sitting separately on questions which are to come before them in a court of appeals, or otherwise, the benefit of consultation, so important to a suitor, and of a judgment resulting from such consultation, without any previous bias, will be in a great measure lost. So very inconsistent are these duties that if the President had been left, as he ought to have been, to nominate and commission a judge of the Circuit Court, it would hardly have occurred to him to offer such commission to a judge of the Supreme Court; and if he had, and it had been accepted, such judge must certainly have resigned the one which he before held.

It will be seen, also, by the Constitution, that the judges of the Supreme Court have not only a very limited original jurisdiction, but little or none of a criminal nature; and yet the most extensive criminal cognizance, extending even to the capital offenses, is given to them as members of the Circuit Courts. Now, if Congress cannot extend the original jurisdiction of the Supreme Court beyond the bounds limited by the Constitution, and so that court has decided, it is not seen how they can extend the jurisdiction of the several judges of that court to cases over which the court itself has neither original nor appellate jurisdiction; or how, because the Constitution and their commissions have made them judges of the Supreme Court, Congress can, without their consent, make them judges of an inferior court. . . .

[Document Source: *United States v. Jacobson*, U.S. Circuit Court, Southern District of New York. Reported in Albert Brunner, *Reports of Cases Argued and Determined in the Circuit Courts of the United States* (San Francisco: Sumner Whitney & Co., 1884).]

Jeremiah Mason to Daniel Webster, December 29, 1823

Mason, a former senator from New Hampshire and close confidant of Daniel Webster and Justice Joseph Story, recognized that the persistent popular opposition to the Judiciary Act of 1801 narrowed the options for any meaningful reorganization of the federal court system. His dissatisfaction with state courts and with the performance of federal district judges convinced Mason that an effective federal judiciary would require the appointment of circuit judges and an expansion of federal jurisdiction to encompass all cases arising under the Constitution. Mason, however, understood that the debates on the judiciary were in large part about the balance of state and federal authority, and that the defenders of state rights would always oppose the energetic judiciary he envisioned. Here he commented on a recent report of the House of Representative's Committee on the Judiciary, of which Webster was the chair.

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... I prefer the second project in the report, which is to create circuit courts on the plan of those of 1801. The only objection against that mentioned in the report, is that those courts were tried and abolished. This rests wholly on party feelings. Whether those feelings have subsided sufficiently to do away the force of this reason, I cannot judge. The reason then urged, that the courts were unnecessary, cannot now apply with equal if with any force. Since the repeal of the act creating those courts, the population of the United States has doubled, and the litigation in the courts more than twice doubled.

Something like this plan must, I think, in the end be adopted, and if it would be done now it would be better than to postpone to a later period or introduce it by degrees. I think this desirable for many reasons. The jurisdiction of the courts of the United States ought to be enlarged to the extent of the Constitution, except in small cases of trivial importance. The courts are the only source from which the nation can hope for a system of jurisprudence worthy of it. From the States' courts nothing can be expected. The vacillating policy of our little petty States, leading to such frequent changes in the organization of their courts and more frequent changes of judges, forbids all hope of system or consistency in ad-

judications. Of this the judicial history of New England for thirty years past furnishes sufficient evidence.

The late resolution in New York tends to the conclusion that the large States have no better foundation for hope. For the business that ought to be done in the national courts, the present establishment does not afford a sufficient number of judges. I make no account of the district judges. When brought to act in matters of serious importance, as members of the circuit court, none of them, as far as I know, have been, or are of any value. Out of their own district courts they do nothing. This leaves the whole labor and weight to be borne by the seven judges of the Supreme Court. In my opinion, they ought not to be made to bear either. . . .

More courts and judges are also wanted for the purpose of enabling them better to defend themselves and their jurisdiction. In all the attacks on the judiciary, the judges of the Supreme Court, alone and unaided, have been obliged to fight the battle. The poor district judges have never been thought of in the attacks, or felt in the defense, — a larger corps of judges would afford more strength and stability.

This course tends obviously to the extension and more thorough establishment of the judicial power of the national government, and for this reason will be apt to meet with opposition from those who are hostile to that power. . . .

[Document Source: George Stillman Hillard, ed., *Memoir and Correspondence of Jeremiah Mason* (Cambridge, Mass.: Riverside Press, 1873), 279–80.]

Memorial of the Members of the Bar of Nashville, January 4, 1825

Although Tennessee gained a circuit court in 1807 and an additional circuit court the following year, the bar in the state's capital decried the organization of the circuits and the consequent allotment of justices that favored the states of the northeast and the Atlantic seaboard. The infrequent attendance of justices in the circuit courts of Tennessee and other western states, as well as the lack of circuit courts in many new states, undermined popular confidence that the Supreme Court justices understood the legal proceedings arising in those states. In this memorial submitted to both houses of the Congress, the members of the Nashville bar presented familiar arguments about the volume of business in newer states and the

misallocation of Supreme Court justices to circuit courts with little business. The western states needed to be organized into at least two and probably three judicial circuits, with a justice assigned to each. Only by more regular service on the federal courts in Tennessee, these lawyers insisted, would the Supreme Court justices learn about “the peculiar systems of jurisprudence” found in the state.

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When the extensive grant of judicial power was made by the Constitution, to the Federal Government, it became the duty of that Government to provide for the exercise of those powers in a mode equal in its operation, and by courts fully competent, by their ability, learning, and knowledge of the laws which they were to administer. At present there exists a great inequality in the exercise of this power – in states where there is, comparatively, little or no business, a Judge of the Supreme Court is associated in the administration of justice with the District Judge. The questions presented are decided by a court which, almost, ensures correctness and satisfaction; or, if the question is difficult, and worthy of a more solemn examination, by a division of opinion in the court it may be brought before the Supreme Tribunal, when the amount in controversy, or, the situation of the litigants, would not otherwise allow this to be done. In other states, where the dockets are crowded with business, where property, to an immense amount, is in dispute, and where questions of the greatest moment, to the parties and the community, are to be decided, the courts are, sometimes, as we have been informed, composed only of a District Judge, of inferior talents, whose judgment, no matter how palpably erroneous, if the amount is under two thousand dollars, is irreversible beyond examination, and carries with it disaster and utter ruin to the suitor; and if the amount is such as allows of a writ of error, it is too often impossible for the injured party, either from poverty or want of friends, to purchase the expensive and instant remedy. But, if it should be a criminal prosecution, by an error, in which the character, or liberty, or property, or life of the citizen is to be affected, then he must bow, in submission to the erroneous judgment of a single Judge. And if, instead of imbecility, the District Judge is endowed with great talents and learning, yet, there can be no division of opinion, which is of such infinite importance in criminal causes,

and in those where no writ of error is allowed: and, in the decisions of all questions, there is not so great a probability of correctness as if he was assisted by another Judge of equal or superior ability. . . .

. . . To acquire an adequate knowledge of the state laws, the Judge must devote much of his time to their study; he must be acquainted with the country and its citizens; he must know the situation of their land titles; he must hear their legal principles and their peculiar systems of jurisprudence examined and discussed by the resident lawyers, by men to whom those principles and systems are familiar, who can correct any erroneous opinions which may exist in regard to any part of them. His mind must be imbued from the fountain head. This can only be done by the Judge holding the courts in the several states, and applying his mind, exclusively, to acquiring a knowledge of the laws of the two or three states, in the courts of which he may preside. A man of vigorous mind, thus situated, and thus employed, will carry into the Supreme Tribunal of the Nation a competent knowledge of the laws which are to govern their examination and decisions; and if the appeal is to correct an error committed by himself he bears with him the light which will enable his associates to detect such error, and rectify what was probably, a mistake occasioned by the hurry of trial, which will sometimes occur to the ablest men. . . .

[Document Source: "Memorial of the Members of the Bar of Nashville in The State of Tennessee" (Washington: Gales & Seaton, 1825).]

Senator Isham Talbot of Kentucky, February 16, 1825

As Congress debated a bill to create an additional three circuits and to authorize a total of ten justices on the Supreme Court, Senator Talbot argued that "this widely extended empire" required the attendance of the justices in the federal courts of each state. Like the members of the Nashville bar and many other supporters of circuit riding, Talbot considered the local federal courts to be a "fountain head" of legal wisdom. The "observation," "experience," and "social intercourse" of the circuit courts stood in contrast to Talbot's almost monastic image of a small Supreme Court confined to the ten-mile square of the nation's capital.

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... The great desideratum in the members of this tribunal, acknowledged on all hands to be so important, is a knowledge, perfect and complete, of the constitutions, the laws, statutory as well as the common law, the unwritten as well as that which is written, with the various customs and usages of the different states of the Union, as well as of the numerous judicial decisions of the state tribunals, by which certain fixed constructions and interpretations have been given to the constitution and laws of each. How is this knowledge, so essential, so indispensable, to be obtained? And is this mass of information upon points so essential to the discharge of the judicial functions in the distribution of justice in individual controversies, and of such infinite consequence to the happiness, prosperity, and harmony of the Union, more easily to be acquired by a small number of Judges, composing this tribunal, created within the favorite precincts of this ten miles square, employed in the exercise of appellate functions only; or by a number of Judges equal to that proposed by the present bill, discharging not only those appellate duties, as under the present system, but also traversing by sections as allotted amongst them, every portion of this widely extended empire; some one of them passing into and presiding in the National tribunal in every state, and thus, by constant observation, successive experience, by the arguments of enlightened counsel, reared and educated in the bosom of the states respectively, as well as from daily social intercourse, making constant and successive acquisitions from the highest source, from the fountain head, and, from thence communicating to their brethren of this bench, a complete and perfect knowledge of the code of each individual state, with all the diversities and modifications of each. And it is in this mode alone, that the Judges of your Supreme Tribunal are to continue, as they have heretofore, in the active and constant discharge of their functions of Judges of the courts of original jurisdiction, by presiding in the Circuit Courts, that they will come imbued with a knowledge of the constitutions, laws, and usages of the several states, the history of their birth, the causes of those successive changes, the objects of the modifications which they may have successively undergone, and the sense which has been assigned by successive adjudications of the tribunals of the states, by the interpretations which they have given to the various clauses of those laws and constitutions which have for

ages constituted the safeguard of the citizen, the guarantee of all his rights, and which contains the charter of all his civil liberties. . . .

[Document Source: *Register of Debates*, 18th Cong., 2d sess., 610–11.]

Representative Daniel Webster of Massachusetts, January 4, 1826

Daniel Webster, as chair of the House of Representatives' Committee on the Judiciary, took a lead in advocating the extension of circuit riding to new states. Although he had previously supported withdrawing the justices from the circuit courts, he now saw circuit riding as an essential foundation of public confidence in the judiciary and professional respect for the Supreme Court justices. In addition to providing practical knowledge of state law and procedure, the justices' duties as presiding judge in a trial court ensured a kind of public accountability and individual responsibility without compromising the independence of the justices.

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In the first place, it appears to me that such an intercourse as the Judges of the Supreme Court are enabled to have with the Profession, and with the People, in their respective Circuits, is itself an object of no inconsiderable importance. It naturally inspires respect and confidence, and it communicates and reciprocates information through all the branches of the Judicial Department. This leads to a harmony of opinion and of action. The Supreme Court is, itself, in some measure, insulated; it has not frequent occasions of contact with the community. The Bar that attends it is neither numerous, nor regular in its attendance. The gentlemen who appear before it, in the character of counsel, come for the occasion, and depart with the occasion. The Profession is occupied mainly in the objects which engage it in its own domestic forums; it belongs to the States; and their tribunals furnish its constant and principal theatre. If the Judges of the Supreme Court, therefore, are wholly withdrawn from the Circuits, it appears to me there is danger of leaving them without the means of useful intercourse with other Judicial characters, with the Profession of which they are members, and with the public. But, without pursuing these general

reflections, I would say, in the second place, that I think it useful that Judges should see in practice the operation and effect of their own decisions. This will prevent theory from running too far, or refining too much. We find, in legislation, that general provisions of law, however cautiously expressed, often require limitation and modification; something of the same sort takes place in judicature: however beautiful may be the theory of general principles, such is the infinite variety of human affairs, that those most practised in them, and conversant with them, see at every turn a necessity of imposing restraints and qualifications on such principles. The daily application of their own doctrines will necessarily inspire Courts with caution; and, by a knowledge of what takes place upon the Circuits, and occurs in constant practice, they will be able to decide finally, without the imputation of having overlooked, or not understood, any of the important elements and ingredients of a just decision. . . .

. . . The Supreme Court exercises a great variety of jurisdictions; it reverses decisions at common law, in equity, and in admiralty; and with the theory and the practice of all these systems, it is indispensable that the Judges should be accurately and intimately acquainted. It is for the Committee to judge how far the withdrawing them from the Circuits, and confining them to the exercise of an appellate jurisdiction, may increase or diminish this information. But, again, Sir, we have a great variety of local laws existing in this country, which are the standard of decision where they prevail. The laws of New England, Maryland, Louisiana, and Kentucky, are almost so many different codes. These laws are to be construed and administered, in many cases, in the Courts of the United States. Now, is there any doubt, that a Judge, coming on the Bench of the Supreme Court, with a familiar acquaintance with these laws, derived from daily practice and decisions, must be more able, both to form his own judgment correctly, and to assist that of his brethren, than a stranger who only looks at the theory? This is a point too plain to be argued. Of the weight of the suggestion the Committee will judge. It appears to me, I confess, that a Court remotely situated, a stranger to these local laws in their application and practice, with whatever diligence, or with whatever ability, must be liable to fall into great mistakes.

May I ask your indulgence, Mr. Chairman, to suggest one other idea: With no disposition, whatever, to entertain doubts as to the manner in which the Executive duty of appointments shall at any time hereafter be performed, the Supreme Court is so important, that, in whatever relates to it, I am willing to make assurance doubly sure, and to adopt, therefore, whatever fairly comes in my way, likely to increase the probability that able and efficient men will be placed upon that bench. Now, I confess, that I know nothing which I think more conducive to that end, than the assigning to the members of that Court, important, responsible, individual duties. Whatsoever makes the individual prominent, conspicuous, and responsible, increases the probability that he will be some one possessing the proper requisites to be a Judge. It is one thing to give a vote upon a bench, (especially if it be a numerous bench,) for plaintiff or defendant, and quite another thing to act as the head of a Court, of various jurisdiction, civil and criminal – to conduct trials by Jury, and render judgments in law, equity, and admiralty. While these duties belong to the condition of a Judge on the bench, that place will not be a sinecure, nor likely to be conferred without proofs of proper qualifications. For these reasons I am inclined to wish that the Judges of the Supreme Court may not be separated from the Circuits, if any other suitable provision can be made. . . .

[Document Source: *Register of Debates*, 18th Cong., 2d sess., 877–79.]

Representative Charles Fenton Mercer of Virginia, January 6, 1826

Mercer envisioned a Supreme Court accountable only for the soundness of its legal opinions, as assessed by members of the legal profession. Like his Federalist predecessors, Mercer wanted to free the Supreme Court justices from circuit duties so that they could pursue their legal studies and be insulated from the popular expectations that would inevitably arise from their frequent appearance in the regional trial courts of the federal judiciary. Far from encouraging public visibility and social interaction with the bar, Mercer wanted to protect the justices in the social isolation that he claimed they preferred in the nation's capital.

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Swell their numbers from seven to ten, from ten to twenty, and still, what proportion will that number bear to ten millions of People? Let them traverse the country by day and night, and study wherever they go the popular feeling, and what harvest would they reap, but of contempt, if, studying the popular favor, they sacrifice to it one scruple of that justice, which has its duties on earth, but is fastened to the throne of the Eternal by an adamant chain?

The merit of the Supreme Court of the United States is manifested by its written opinions; by its learning, its truth, and its consistency – the certain pledge and firm assurance of its diligence, ability, and integrity. Between the knowledge of these qualities and the People, the only link of connection consists of that profession trained to the study and practice of the law, competent to estimate justly the merit derived from the most eminent portion of their own body, and set above them, to be their light and counsel. Even their knowledge of a Judge cannot be deduced from familiar intercourse, but from the perusal and examination of his opinions. In the intervals of leisure, Judges, like other men, prefer any other topic of mere conversation to the dry and laborious duties of the bench. Of the peculiar investigations depending, or likely to come before them, a circumspect and vigilant sense of duty imposes upon them even studied silence; and it is not a small evidence of this, that the Judges of the very Court of which I am speaking, debar themselves of most of the pleasures of social intercourse, in obedience to a sacred regard for their high and solemn duties. And so far from this separation having impaired, it must, wherever known and justly appreciated, augment their reputation. Were your Judges, sir, admitted, at an earlier age, upon the bench of the Supreme Court, it might, indeed, impair their usefulness; but surely, at the age of forty-five or fifty years, and sooner no man should ascend that bench, they will have acquired a sufficient stock of general knowledge, in relation to all the ordinary interests of society, to avail themselves of the analogies which common sense supplies to learning, in the investigation of practical legal truth. . . .

[Document Source: *Register of Debates*, 18th Cong., 2d sess., 901–02.]

Senator Martin Van Buren of New York, April 7, 1826

After the House of Representatives approved a bill to enlarge the Supreme Court and establish ten judicial circuits, Martin Van Buren, as chair of the Senate Committee on the Judiciary, opened debate on the same bill in the Senate. Van Buren thought the public interest required not only the service of justices on the circuit courts in each state but also the permanent residence of the justices outside of Washington. Respect for the authority of the Supreme Court, and its often difficult and unpopular decisions, was protected by the visibility and familiarity of the justices in their home communities.



... No reflecting man can doubt, that the residence of the Judges of the Supreme Court in the States, being subject in their persons, family, and estates, to the laws of the State – portions of their families, as is frequently the case, members of the State Governments, and themselves only temporally absent – going in and out before the People of the States, and commanding their confidence by the purity of their lives, and the modesty of their demeanor – enforcing and expounding their own decisions in the face of the different classes of the community at the Circuits, and in free and familiar intercourse with those who have such great influence in giving a proper direction to public opinion on legal subjects – must have an infinitely greater tendency to enable the judges to sustain themselves in the honest discharge of their high duties, than if they were cut off from all connection with the States. Greater than if they were settled in this metropolis, and to the great mass of the People of the States unheard and unseen, but felt in their power, through the remotest borders of the Union – and how felt, sir? Not as is the case with the other branches of the Government – in extending favors, in munificent grants, and all the various measures of relief – no, sir, always on one side, and not unfrequently on all sides, their measures are regarded as harsh and vindictive. Their business is to punish the guilty, to restrain the vicious, to curb power, and to correct its excesses. Such acts are necessary to the well-being, to the very existence of society, but are not those which have the strongest tendency to conciliate popular favor. It is to effect this object, in part,

that the friends of the bill, as I cannot but think wisely so, zealously resist every measure which will or may separate the Justices of the Supreme Court from the Circuits, and bring them to this city. . . .

[Document Source: *Register of Debates*, 19th Cong., 1st sess., 419–20.]

Senator John M. Berrien of Georgia, April 13, 1826

For many members of Congress like Berrien, the imposition on the federal judiciary of any notion of representation, even the representation of regional legal cultures, would compromise the independence and authority of the Supreme Court. Like many Federalists of an earlier generation, Berrien thought the high court must be composed of a small number of elite legal thinkers. A large Court, with frequent appointments, would soon give people the impression of a representative body and pave the way for judicial elections, which Berrien suspected was the goal of many supporting the extension of the circuit court system.

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What I most fear is, that this multiplication of Judges will take from this high tribunal its judicial character – will, in the event, strip it of its independence, by destroying the permanency of official tenure, giving in its stead a crowd of Judges, periodically appointed by the Executive, yielding obedience to its mandates, and furnishing the color of legal authority to its encroachments. I know it to be the favorite opinion of some of the politicians of the present day, that the Judges of the Supreme Court, like other public functionaries, should hold their offices for a term, and be periodically accountable to their constituents. Any direct attempt to advance this doctrine against the opposite and settled conviction of the public mind, would be harmless. But if you can introduce the idea of representation, under the suggestion that the different parts of this Union ought to contribute their respective proportions of legal information in that tribunal, especially if you can fix the principle upon us by extending it to meet the growing exigencies of the country, you will give to this Court the air and the character of a popular assembly. We shall cease to look to it with the rever-

ence which we have been accustomed to yield to the selected few who have hitherto composed it. We shall familiarize ourselves to consider it in connection with the notions of representatives and constituents, and the distinguishing property of representation, the periodical accountability of the representative to his constituents, will naturally follow. . . .

[Document Source: *Register of Debates*, 19th Cong., 1st sess., 536–37.]

Representative James K. Polk of Tennessee, January 20, 1830

In 1826, the House and Senate approved versions of a bill to authorize appointment of three additional Supreme Court justices who would serve on circuit courts in the states admitted to the Union since 1807, but the bill failed after the two houses could not reach agreement on the organization of the circuits. Succeeding Congresses debated similar proposals, such as that reported from the House Judiciary Committee by Representative James Buchanan in 1830. Here another future president supported that bill to expand the circuit courts served by Supreme Court justices. A Tennessee-trained lawyer, Polk insisted that practical experience on the federal trial courts was the only realistic means by which justices would learn the intricacies of state law and procedure. Polk's remarks also reflected an increasingly bold assertion that judges appointed for life and removable only by impeachment for indictable crimes needed assignment to the federal trial courts in the states as a check against corruption and an inevitable concentration of federal judicial power if their duties were confined to Washington.

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. . . What judge permanently located at Washington, however vigorous his intellect, and however profound his knowledge of the fundamental principles of the law may be, but who never presided over the trial of an ejection in Kentucky or Tennessee, if left to grope his way unaided by the argument of counsel from that quarter of the Union, can ever understand or properly expound the intricate local laws of these States? What judge can understand the *lex loci* of Louisiana, where the principles of the civil law obtain? In a word, what one man, wholly relieved from the trial of causes

in the court below, can or will ever understand the separate and distinct codes of these twenty-four States? Even by the present circuit court system, in those States to which it has been extended, no single judge has an accurate knowledge of the statutory codes of all these States; but when assembled in the Supreme Court, they bring together an aggregate of legal information, which no one singly possesses, and which could not be possessed by any, if they were withdrawn from their circuits. If the judges of the Supreme Court are required to preside only in the Supreme Court, they will have nine or ten months of leisure in the year, which they can, and probably will, employ in more pleasing pursuits than in poring over musty volumes of statutes. . . .

. . . By withdrawing the judges of this court from the view of the people, and constituting them a corporation of dignitaries at the seat of Government, clothed in the robes of office, with immense power, holding their offices for life, with no direct responsibility to the people, and only liable to punishment for gross crimes and misdemeanors, there is danger that public confidence in their integrity may be weakened – that they may become odious, and their decisions cease to be regarded with that respect and submission which it is desirable they should be. Of the increased danger of corruption, if they were permanently located here, constantly subject to be operated on by the federal influence concentrated here, and constantly inhaling the vapors of this district, I can add nothing to what has been said by the gentleman from Pennsylvania. But I will say, that the tendency of this court to enlarge, by construction, the powers of the Federal Government at the expense of the State sovereignties, is already sufficiently strong, and I fear, if they were permanently located here, that tendency would be increased. . . .

[Document Source: *Register of Debates*, 21st Cong., 1st sess., 549–50.]

Representative James Butler Bowlin of Missouri, March 6, 1848

Nearly a half century after its repeal, the Judiciary Act of 1801 remained a potent symbol of unchecked judicial power. Throughout the first half of the nineteenth century, the debates on circuit courts

were filled with references to the unpopular act, and even those who wanted to end the justices' circuit-riding duties and appoint circuit judges dissociated themselves from President Adams' appointment of the midnight judges. For Bowlin and many others, any attempt to remove the Supreme Court justices from the circuit courts, and thus to separate them from the people, was an attack on popular sovereignty, state rights, and the "beautiful system" of courts established in 1789.



This struggle to separate the judges from the people commenced under the Administration of the elder Adams, and had upon it the odium of the midnight judges. After a mighty struggle of the two great parties of that day to overthrow the beautiful system given to us by our ancestors, and which had descended to us unimpaired so far, the Administration party succeeded, and reorganized the whole judicial system upon the basis of the present scheme of consolidation. They carried their favorite measure: the judicial oligarchy was established upon paper over the heads of the people. What was the reception in the country of the new system of a permanent court? Almost one unanimous condemnation from Maine to Georgia. The people met it with one almost united outburst of indignation. Such was the odiousness of the system with the people, that though it stood a law upon the statute book for about a year, no man had the hardihood to dare to attempt to put it into operation. It stood a dead letter upon the statute book, until the season came round for its repeal, when it was abolished, and the old system again reestablished upon its ruins. In that great struggle against a central, permanent, and consolidated court, Mr. Jefferson, at the head of the Republican party of that day, stood foremost in the fight. Times had changed, but this question had undergone no change. It was the same question to-day that it was then – involving the same principles and jeopardizing the same rights. It was a question then of concentrating the rays of judicial power, so as to make it a more potent instrument of mischief to the people and the States, over whom it had the exercise of a constitutional jurisdiction. And it was precisely the same question to-day. There was no change in the question, no change in its effects upon our free institutions, though there might be a change in men professing the

same political opinions of our ancestors, who overthrew the whole Federal scheme. . . .

[Document Source: *Congressional Globe*, Appendix, 30th Cong., 1st sess., 352.]

Attorney General Caleb Cushing’s “Analysis of the Existing Constitution of the Judicial System of the United States, and Suggestions of Desirable Modifications Thereof,” February 4, 1854

In response to the proposal of President Franklin Pierce in his annual message of December 1853, Congress asked Attorney General Cushing to present a plan for the reorganization of the federal judiciary. Cushing found that the circuit riding system established in 1789 had long since exceeded its practical limits, with new states regularly denied the benefits of a circuit court and many justices unable to fulfill their circuit responsibilities. To meet his goal, shared by Pierce, of establishing a uniform system of federal justice while preserving public confidence in the judiciary, Cushing proposed the appointment of circuit judges who could preside in circuit courts in each judicial district and relieve the district judges of their dual responsibilities. Acknowledging the value of regional ties for Supreme Court justices, Cushing provided for the continued service of the justices on the circuit courts, but the logic of his plan and the omission of any requirement for regular attendance suggest the perpetuation of circuit riding would be more symbolic than real.

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To avoid these evils, and to provide for the equal administration of justice in all parts of the Union, and to have the circuit business everywhere, both in fact and in law, in the present or in any other form of organization, performed by justices of the Supreme Court unaided and alone, and to expand the system from time to time as the Union expands by the aggregation of new States, – to effect all these combined results, continual additions must be made to the number of the justices of the Supreme Court, which thus becomes transformed irresistibly from a court into a senate.

On these premises, the considerations of public welfare, and of regard for the equal rights of the States, involved in the question

of so modifying the details of the judicial system of the United States as to give it universality of application, and uniformity and efficaciousness in all parts of the Union, far outweigh any possible objections to such modification.

Undoubtedly it is desirable, so far as it is materially possible, to have the justices of the Supreme Court continue to be radicated, by local residence and by official relation, in the respective States. The general sense of this it is, which has obstructed the introduction of proper improvements in the judicial system. It seems to me that the time has arrived to meet the question frankly, rather than to continue an organization of the circuits, which goes on by temporary expedients, imperfectly applied to the newly arising wants of the public service; an organization in which the circuit courts are, by theory but not by law, required to be held by some person other than the district judge, or in which though the presence of some judge other than the district judge is contemplated by law, it is of course imperfectly had, in consequence of the increased amount of that portion of public business, which must by constitutional necessity be discharged by the Supreme Court.

A change is felt on all hands to be desirable, if not necessary. And there is a form of experimental change which can easily be made, and easily returned from if it fail to receive the public confidence on trial; which, in my judgment, unites most of the advantages, and avoids the disadvantages, of either of the other plans; which does not involve any complex legislation; and which is respectfully proposed as a solution of the problem.

It is to have, at present, nine, and prospectively, ten circuits; to rearrange the existing nine circuits, so as to comprehend within them all the judicial districts except those of California; to appoint nine assistant circuit judges, one for each circuit; to preserve unimpaired the jurisdiction of the circuit courts, in all the districts, as well those now within the circuits as those without; to withdraw the circuit powers from the district judges, and revest them in the proper circuit court exclusively; to have the ordinary circuit court holden as it is in each judicial district, and composed of the justice of the Supreme Court residing in the circuit, as now, but to associate with him an assistant circuit judge, so that the court shall be holden by a justice of the Supreme Court and the assistant circuit judge, or either of them, instead of the district judge, the latter

being left to his proper district duties, and there being a real and effective circuit court even in case of the necessary occasional absence of the justice of the Supreme Court.

This plan furnishes the additional personal force requisite for the prompt dispatch of the enlarged judicial business of the country. It does not, so far as the suitors and the public at large are concerned, derange any of the relations of judicial business. It calls for no present enlargement of the number of judges of the Supreme Court. It secures unity of system by giving a proper circuit court to all the districts. It retains untouched the place of business of the circuit courts and of the district courts, each to be holden, as now, within their appropriate States. It makes competent provision to have the circuit business performed in fact, as well as in theory, by a circuit judge, and thus effectually cures the great defect of the existing organization. It continues the justices of the Supreme Court in the practice of immediate contact with the people of the States, but relieves them by law from the disagreeable necessity of seeing themselves constrained, from time to time, either to leave much of the circuit business unperformed or performed only by the district judge, or else to fail in the complete discharge of the proper duties of the Supreme Court. . . .

Permit me, in conclusion, in order to corroborate the opinion that some change should be attempted, to call to mind the trite, but not less cogent consideration, that the general interests of society at large, in time of peace, are but indirectly or lightly affected by the political action of government; while its judicial action is vital, actually or contingently, to the interests of all men. Their property, their honor, their lives, are constantly dependent on the wisdom and the virtue of the courts of justice. To guard and preserve these our dearest rights, we need, not only a magistracy of competent character, but also one of competent organization. And certain it is, that the existing judicial organization is altogether insufficient for the obvious necessities of the people even of the present United States.

[Document Source: C.C. Edwards, ed., *Official Opinions of the Attorneys General of the United States* (Washington: Robert Farnham, 1856), 6:281–84.]

Senator Stephen A. Douglas of Illinois, January 5, 1855

The bill introduced in the Senate in response to Cushing's plan would have relieved the Supreme Court justices of all regular circuit court duties and appointed eleven circuit judges to preside with the district judge in a circuit court in each judicial district. Debate on the bill focused largely on a substitute offered by Douglas, who argued that public respect for the judiciary depended on the continued service of Supreme Court justices on some kind of regional court. Douglas proposed the establishment of nine circuit courts of appeals on which all of the district judges within a circuit would sit once a year with a presiding Supreme Court justice to hear appeals from the district courts. Douglas would have abolished the circuit courts, consolidated all federal trial jurisdiction in the district courts, and required that the justices serve on a different court of appeals each year. Most cases could still be appealed to the Supreme Court, but Douglas hoped that the establishment of uniform rules for each circuit and the presence of a justice on the intermediate courts of appeals would reduce the Supreme Court's appellate caseload. The Senate failed to vote on either the original proposal or Douglas's substitute.

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... I think the Supreme Court ought to have other jurisdiction. I think it is for the good of the country, and for the good of that court, that its judges should be required to go into the country, hold courts in different localities, and mingle with the local judges and with the bar. I think that, if the judges of that court be released from all duties outside the city of Washington, and stay here the whole year round, they will become, as a Senator remarked to me a moment ago, mere paper judges. I think they will lose that weight of authority in the country which they ought to have, just in proportion as they lose their knowledge of the local legislation, and of the practice and proceedings of the courts below. I believe, therefore, that the theory of the original plan in which our judiciary system was formed, was right. In consequence of the increase of the judicial business of the country, some modification of that plan has become necessary in order to preserve the same principle, and render it applicable to our present condition. . . .

... Having released the Judges of the Supreme Court from the necessity of going into every district in each State – and where there are three districts in a State, as in Tennessee, and other States, that must be a great labor – the question is, how much of this local duty can we devolve upon them without depriving them of the opportunity of performing all their duties at the seat of Government? It occurred to me that this point could be settled in the manner which I have proposed in my amendment. That is, to divide the whole United States into nine judicial circuits, and provide that there shall be held, once a year, in each of those circuits, a court of appeals, to be composed of the district judge of each district within the circuit, together with one of the Judges of the Supreme Court of the United States, who should preside. . . .

This system would, it seems to me, have very great advantages, and would remedy several evils which we have known to grow up under our present system. You now find that, in one district the rules of practice are one way, and in another district entirely different. One district judge decides a controverted principle in one way, and another in another way. If all the district judges in a circuit could come together once a year to review their own decisions, it would tend to bring about uniformity of thought and uniformity of practice within those districts. To secure this object, my substitute provides that the court of appeals in each circuit shall prescribe the rules of practice for the district courts within the circuit. You thus infuse uniformity into all the district courts within the same circuit, acting under the same rules; and the consequence would be, that very few appeals would be taken from the court of appeals to the Supreme Court of the United States. . . .

[Document Source: *Congressional Globe*, 33d Cong., 2d sess., 194.]

Senator James A. Bayard, Jr., of Delaware, January 10, 1855

Douglas's proposal prompted yet another debate on the circuit duties of Supreme Court justices. Senator Bayard, whose father in 1802 led the opposition to the repeal of the Judiciary Act of 1801 in the House of Representatives, here argued that the proposals to require the service of Supreme Court justices on trial or regional appellate

courts all rested on an assumption that the justices should in some way be responsive to popular opinion. A government of laws, according to Bayard, depended on the justices' study and knowledge of precedent and legal commentaries, and not on their experience making quick decisions in trial courts.

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It has been said, that if you withdraw your judges from circuit duties, you will make them mere "paper judges." That is the language which has been used. I do not profess to understand the precise import of that phrase, but I cannot understand it in any other sense than this: Do gentlemen mean, by calling a man a "paper judge," to tell us that his power to decide causes rightly must depend, not upon investigation and knowledge of the principles of law, and upon the constant study which is requisite for that purpose, but upon studying the mere will of the hour, and watching the current of political and sectional prejudice, and adapting his decisions to the impressions he may have of the existing popular will, whether local or general? The effect of that, Mr. President, would be to turn your Government into a despotism – a popular despotism, I admit; but still a despotism; for a Government of will, whether it is the will of one man or of millions, is not a Government of laws, is not a free Government. I am not denying the sovereignty of the people. I am one of them, and I admit their sovereignty as freely and as fully as any man around me; but I hold that a Government of will is a despotism and that a Government of laws is alone a Government of liberty.

Or is it meant to be suggested, by this appellation of "paper judges," that a judge of a court of last resort, who must always be supposed to be a man of mature mind, at the time of his appointment, educated so as to have a thorough knowledge of the principles which he is to decide, can better retain and amplify that knowledge, and make a beneficial use of it for judicial purposes by traveling over a country as extensive as ours, and imbibing, by popular intercourse, the mere temporary impressions of the hour, than he can by the study of those books from which he must extract, and which must keep fresh in his mind the great principles which are to enable him to decide the particular cases which come before him? I would not have a judge "a case hunter;" but I hold that no

man without learning is fit to be a judge. A judge without learning is, in my opinion, as objectionable as a judge without capacity; and, in proportion to the extent of what may be called his talents, the greater would be the danger of his going astray. He would undertake (what no human mind can do judiciously and properly) to establish by his own individual opinion, and reason out with his own unaided intellect, the general principles which should control the different cases that might come before him. There is uncertainty enough in the administration of justice, even under its most perfect forms. The diversity in human organization and human intellect inevitably leads to that result. But what would the uncertainty be if your judges were to throw their books aside, abandon the restraining influence of all precedents, and rely upon their own unaided investigation and reflection while traveling through the different circuits for the purpose of deciding questions which came before them? They would give, at best, what are known as *nisi prius* decisions – nothing more – hasty decisions made without reading, without a comparison of opinions, and without attempting to elaborate principles from previous decisions of acknowledged authority. The wisdom of their predecessors would be useless to them. The result would be, that decisions in the courts of justice would depend more on counsel's understanding the character and temper of mind of the presiding judge, than upon any known principles which any man who studied the law as a science would be able to ascertain. . . .

[Document Source: *Congressional Globe*, 33d Cong., 2d sess., Appendix, 87–88.]

Civil War and the Reorganization of the Federal Judiciary

The outbreak of Civil War in the spring of 1861 forever altered debates on the organization and jurisdiction of the federal courts. The secession of eleven states and the questionable loyalty of many citizens in other states presented grave challenges to the functioning of decentralized and highly independent federal courts at the same time that the preservation of the Union demanded an effective judicial process. Mobilization of the military and the protection of domestic security, even in the northern states, soon led the Lincoln administration and the Congress to impose new responsibilities on the federal courts. The expansion of jurisdiction and a general increase in litigation contributed to the growth of caseloads in every type of federal court. Congress and the president recognized the pressing need to establish circuit courts in every state and to reorganize judicial circuits to ensure a more nearly uniform system of justice and a more equitable balance of geographical regions. Throughout the Civil War and Reconstruction, citizens seeking protection of rights and property, local attorneys, and individual judges appealed to Congress for changes in the jurisdiction and organization of the federal courts. These various demands, the changing goals of war, and the need to restore federal authority in the South led to frequent legislation reorganizing the judicial circuits, defining the jurisdiction of the courts, and increasing then reducing then again increasing the number of seats on the Supreme Court. The close regulation of every aspect of the federal courts often redefined the relationship between the three branches of government. By the end of Reconstruction, however, with the grant of full federal question jurisdiction and the establishment of circuit judgeships, the federal judicial system was more fully national in its scope and authority than ever before, and the federal courts were able to exercise an unprecedented supremacy over the states.³³

33. Kermit L. Hall, "The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts," *Prologue: The Journal of the National Archives* 7, No. 3 (Fall 1975): 177–86; Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968); William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863–1875," *The American Journal of Legal History* 13 (1969): 333–59.

Abraham Lincoln, First Annual Message to Congress, December 3, 1861

Lincoln's message to Congress identified the fundamental challenges that secession and Civil War presented to the federal judiciary. The organization of the federal circuits and the appointment of Supreme Court justices were so dependent on notions of geographical balance that the "revolt" of eleven states made it impossible for Lincoln to follow customary practices in selecting nominees for the three vacancies on the Supreme Court. Those vacancies furthermore raised the controversial subject of the South's disproportionate influence on the Supreme Court. Lincoln understood that he needed to balance his own support for the appointment of more justices from the northern states against his recognition that the eventual reintegration of the southern states would depend on southerners' confidence in the Supreme Court.

The growing burdens of circuit riding, exemplified by Justice McLean's service on the circuit courts of the rapidly growing states in the Old Northwest, further complicated the selection of new Supreme Court justices. Like many others, Lincoln found the circuit organization and the absence of circuit courts in many states to be unjust and impractical. His succinct outline of three options for reorganizing the federal judiciary gave little sense of the divisions of opinion that would delay congressional action for another thirty years.



There are three vacancies on the bench of the Supreme Court – two by the decease of Justices Daniel and McLean and one by the resignation of Justice Campbell. I have so far forbore making nominations to fill these vacancies for reasons which I will now state. Two of the out-going judges resided within the States now overrun by revolt, so that if successors were appointed in the same localities they could not now serve upon their circuits; and many of the most competent men there probably would not take the personal hazard of accepting to serve, even here, upon the Supreme bench. I have been unwilling to throw all the appointments northward, thus disabling myself from doing justice to the South on the return of peace; although I may remark that to transfer to the North one which has heretofore been in the South would not, with reference to territory and population, be unjust.

During the long and brilliant judicial career of Judge McLean his circuit grew into an empire – altogether too large for any one judge to give the courts therein more than a nominal attendance – rising in population from 1,470,018 in 1830 to 6,151,405 in 1860.

Besides this, the country generally has outgrown our present judicial system. If uniformity was at all intended, the system requires that all the States shall be accommodated with circuit courts, attended by Supreme judges, while, in fact, Wisconsin, Minnesota, Iowa, Kansas, Florida, Texas, California, and Oregon have never had any such courts. Nor can this well be remedied without a change in the system, because the adding of judges to the Supreme Court, enough for the accommodation of all parts of the country with circuit courts, would create a court altogether too numerous for a judicial body of any sort. And the evil, if it be one, will increase as new States come into the Union. Circuit courts are useful or they are not useful. If useful, no State should be denied them; if not useful, no State should have them. Let them be provided for all or abolished as to all.

Three modifications occur to me, either of which, I think, would be an improvement upon our present system. Let the Supreme Court be of convenient number in every event; then, first, let the whole country be divided into circuits of convenient size, the Supreme judges to serve in a number of them corresponding to their own number, and independent circuit judges be provided for all the rest; or, secondly, let the Supreme judges be relieved from circuit duties and circuit judges provided for all the circuits; or, thirdly, dispense with circuit courts altogether, leaving the judicial functions wholly to the district courts and an independent Supreme Court. . . .

[Document Source: James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents, 1789–1897* (Washington: Government Printing Office, 1897), 6:49.]

A Proposal to Reorganize the Supreme Court

For many Republicans at the beginning of the Civil War, the Supreme Court represented the most dangerous manifestation of the southern states' historical influence on the federal government. Between 1837 and 1862, five of the nine circuits consisted entirely of slave states,

and justices appointed from those circuits ensured a majority for the South. The *Dred Scott* decision of 1857, which declared unconstitutional a statute that restricted slavery in the territories and held that African Americans possessed no legal rights as citizens, was the most extreme in a series of pro-slavery decisions by the Supreme Court that convinced many anti-slavery leaders that the federal courts as then organized would make it difficult to impose any limits on the spread of slavery. Throughout the Civil War and Reconstruction, the lingering mistrust of the Supreme Court would affect legislation regarding the judiciary, even as Republican members of Congress recognized the potential of the federal courts to assist the cause of Union and later to protect the rights of freed slaves.

One of the most radical proposals regarding the Supreme Court was the resolution of Senator John P. Hale of New Hampshire to abolish the sitting Court and to establish “instead thereof, another Supreme Court.” Hale offered his proposed resolution in December 1861 as the Senate considered its response to Lincoln’s Annual Message. Hale had served as the presidential candidate of the Free Soil Party in 1852 and was a committed abolitionist. Although the Senate quickly approved a more general resolution instructing the Committee on the Judiciary to consider Lincoln’s comments on the judiciary, the brief debate on Hale’s proposed resolution reflected the depth of animosity toward the Supreme Court. Hale’s resolution would be followed by numerous proposals to limit the power of the Court and to eliminate the possibility of any future domination of the Court by southern justices.

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Senator John P. Hale of New Hampshire, December 9, 1861

... I undertake to say that the Supreme Court of the United States, as at present established, has utterly failed. It is bankrupt in everything that was intended by the creation of such a tribunal. It has lost public confidence; it does not enjoy public respect, and it ought not. I believe to-day as truly as I stand here, that if that faction that is now in armed resistance against this Government were to succeed, and the Federal flag should be supplanted, our soldiers now in arms on the soil of Virginia for the maintenance of the Constitution would be judicially pronounced by this very

Supreme Court trespassers and rioters. That I believe; and, sir, they are not entirely to blame for it. The way in which that court has been filled up from time to time has been such as tended, if it was not calculated, to demoralize both them and the tribunal. Men have not been put there because they were learned in the law, but because they were not learned, and were never likely to be. They have been put there as politicians. This Supreme Court has been a part of the machinery of the old Democratic party, just as much as the Baltimore conventions were; and the result is that it stands to-day before the community wanting in public confidence.

Such being the case, I ask Congress to look this thing right in the face, right in the eye, and march up to their duty and establish a Supreme Court as the Constitution requires them to do "from time to time;" yes, sir, "from time to time." I know this has not been so read by gentlemen. They have got their notions of the Supreme Court from the British Constitution. They have inherited them. My idea is that the time has come; that this is one of the very times the framers of the Constitution contemplated. One of those times was at the adoption of the Federal Constitution, and the other time has now arrived. . . .

[Document Source: *Congressional Globe*, 37th Cong., 2d sess., 26.]

Senator Lafayette S. Foster of Connecticut, December 9, 1861

However much Foster may have shared Hale's concerns about the sectional and political bias of some Supreme Court justices, he cautioned his fellow senators not to politicize further the federal courts or to attempt by legislation what could only be changed by constitutional amendment. Foster emphasized the need to strengthen public confidence in the judiciary at a time when the authority and even the viability of the federal government faced such formidable threats.

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If the system on which our judiciary is based is a false and improper one, and can be remedied by legislation, no doubt we are bound to furnish the remedy; but the evil of which the Senator complains, if I understand him, is that the judges of the Supreme Court have been improperly selected. Men, he says, notoriously

unfit for their positions have been appointed. I suppose, Mr. President, we cannot remedy that by legislation. He says the Constitution has not been correctly read, and that members are mistaken in supposing that we cannot abolish the Supreme Court by legislation. It may be that we can abolish it, though I doubt it and deny it; however that may be, I take it to be very clear that we cannot by legislation change the mode by which the judges of that court are appointed. They must be nominated by the President of the United States and confirmed by this body before they can be judges of that tribunal, and we by legislation can make no change of that system. If by legislation we can get rid of this court and legislate these judges out of office, a new set of judges will be appointed in the same manner that the old ones were; and they will be appointed by a fallible President, and their confirmation or rejection will be voted on by a fallible Senate; and we shall be subject, I apprehend, to very much the same evils that we have been subject to for eighty years past. I know not why we shall not be subject to the same evils, unless human nature, instead of being depraved, is all at once reformed, and we, and all those connected with the appointing power, and all who may be appointed, have all become pure, upright, capable, and honorable men, which I fear is not quite the case yet, and will not be for some time to come.

I do not believe, Mr. President, we shall remedy any existing evils by denunciations, however violent; by attempting to shake the confidence of the people of the country in any department connected with this Government. I think now is the time of all other times when we should act unitedly, and endeavor, at all events, to strengthen what is weak and to purify what is corrupt, without putting forth general broadcast denunciations which tend to destroy all trust and confidence between man and man, so that the moment we approach any other man we should button up our coats, for fear that our pockets are going to be picked. I believe that now is the time for mutual confidence and mutual respect among the loyal men of this country, and that we must act unitedly, with energy; have faith in and not distrust of each other, or our country is on the road to its ruin, and that a short road. . . .

[Document Source: *Congressional Globe*, 37th Cong., 2d sess., 27.]

“The Supreme Court,” *New-York Daily Tribune*, December 12, 1861

As Congress considered proposals to bring the federal judiciary in line with the realities of civil war, Horace Greeley’s *Tribune* called on legislators to enact a sweeping reorganization and reform of the court system. The long-standing sectional imbalance of membership on the Supreme Court and the need for additional circuit courts in various northern and western states contributed to a compelling argument for expanding the size of the Supreme Court bench and establishing new circuits in regions of economic and population growth. The *Tribune* writer was less interested in the details of judicial reorganization than in the scope and ambition of any plan for the courts. For many supporters of the Union, the demands of fighting the Civil War made clear the need to bring greater energy and capability to every part of the federal government.

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... As at present constituted and organized, the Federal Judiciary is not only inadequate to the discharge of its ordinary duties, but is, and long has been, grossly and offensively sectional in its character. The interests and convenience of suitors at its bar, and the safety and stability of free institutions, demand that this department of the Government should be thoroughly renovated, remodeled, and reformed. Even if there were no rebellion in the country, and the old order of things were restored, the number of Supreme Judges in the Northern States would not be more than half enough to transact the business of the Circuits, while at the South there would be twice as many as were necessary for this purpose. The present is a favorable opportunity to restore a just equilibrium between the sections, and, at the same time, bring back public confidence to the Court by placing men upon its bench who believe that one of the original objects of the Constitution was “to secure the blessings of liberty to ourselves and our posterity.” Of the five recent Southern Judges, three remain – Taney, Wayne, and Catron. They are abundantly able to perform all the business which, even in the most prosperous times, has ever been transacted in the Circuit Courts of the Slaveholding States. Of the four recent Northern Judges, three remain – Nelson, Clifford, and Grier. Five more are needed for Circuit duty in the Free States. Another Judge is needed

in New-England; one would find ample employment in this city and its environs alone; two are wanted in the large Circuit made vacant by the death of Judge McLean, and one may wisely be stationed on the Pacific coast. These additions to the bench would, of course, render necessary a new organization of the Circuits – a measure of the last importance. If eleven were deemed too large a number of Judges to hold the Court in banc, it would be easy to designate a smaller quota for that duty.

But, waiving all minor matters of mere detail and arrangement, our sole object now is to impress upon Congress the transcendent importance of embracing this opportunity to thoroughly reform our Federal Judiciary.

[Document Source: *New-York Daily Tribune*, December 12, 1861, 4.]

Calls for Judicial Reorganization

The first step in reorganizing the federal judiciary during the Civil War came in July 1862 when Congress, with only brief debate and little controversy, established new circuit courts in six states and re-drew the geographical boundaries of all but three of the nine judicial circuits, thereby reducing the number of circuits made up entirely of slave states. One year later, Congress established a tenth circuit to include California and Oregon and authorized the appointment of a tenth justice on the Supreme Court. The new circuit organization was also intended to expedite the vastly expanded business of the federal courts. Congress received various entreaties to address the increase in caseloads in every type of federal court. War-related court business, such as the enforcement of new revenue acts, compounded the caseload burden arising out of new areas of federal jurisdiction and the growth of interstate commerce.

Judge Richard Stockton Field to Senator Lyman Trumbull of Illinois, February 8, 1864

Judge Richard Stockton Field of the district court of New Jersey wrote the chair of the Senate Committee on the Judiciary, Lyman Trumbull of Illinois, explaining why he and other federal judges were petitioning Congress for an increase in judicial salaries. Field

emphasized how much an increase in caseloads, the addition of jurisdictional responsibilities, and the expanded duties in the circuit courts had transformed the job of district judges in recent years. (Until 1891, district judge salaries varied from district to district, according to congressional estimates of expected caseloads. In 1867, Congress increased the minimum salary from \$1,200 to \$3,500. Field's salary on the New Jersey district court rose from \$1,500 to \$4,000.)

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I enclose a Memorial to Congress by the District Judges of the United States asking for an increase of their salaries. It is signed, as you will see, by the Judges of the Northern District of Illinois, the Southern District of Illinois, Iowa, Wisconsin, and New Jersey. Similar Memorials signed by the Judges of other Districts will be forwarded to Washington and presented to Congress. The grounds upon which we ask for increased compensation are briefly stated in the Memorial. One of these grounds is, the increase in the business of the Courts, and the new duties imposed upon the Judges. But to understand the full extent of the addition which of late years has been made to our duties and labors, it will be necessary to go a little more into detail. Originally the District Court was designed to be chiefly a Court of Admiralty. Few causes of any other kind found their way into it. It had little or no criminal jurisdiction. But all this is changed. Its criminal jurisdiction has been enlarged, and made co-extensive in all cases, save those which are capital, with the Circuit Court. The consequence is, it has become the great criminal tribunal of the Federal Government. Few Indictments are now tried in the Circuit Courts. These offences too against the United States are rapidly multiplying, and new ones constantly created by Congress. Counterfeiting for instance has heretofore usually been an offense against the State, but with a national currency you can understand that hereafter it will more generally be an offense against the United States. The Internal Revenue Act, the Enrollment Act, besides many others, create a large number of new offenses. Criminal business now therefore occupies much of the time of the District Courts.

Then on the civil side you can have no idea what an immense mass has been added to it, by recent acts of Congress. Between

three and four hundred suits have been brought into my Court within the last year under the Internal Revenue Act alone. In fact more business has been done, more suits commenced, more causes tried, since I have been on the Bench, than during the whole twenty years of my predecessor administration.

But what adds more than all perhaps, to the labors of the District Judges remains to be stated. In providing that a Circuit Court might be held by a District Judge, the law undoubtedly meant only to meet special exigencies, arising under extraordinary circumstances. But what was intended as a rare exception, has become of late years almost the rule. A very large portion of the business of the Circuit Courts is now performed by the District Judge alone. This is a necessary result of the enormous accumulation of business in those Courts. Why the Patent cases alone in some of the Circuits are sufficient to occupy all the time which the Circuit Judge can spare from his attendance on the Supreme Court. . . .

And now, my dear Sir, just look at the paltry salaries we receive! There are no other officers of the Government half so poorly paid, taking into account the dignity of the office and the importance of the duties assigned to it. There is no reason, justice or propriety in it. Why, for instance, should I receive only \$2000, while the Judges of the State Courts in N. Jersey received in salary & fees at the least \$3500 and some of them more, the Chancellor more than twice that amount! And these State Judges are now asking the Legislature to increase their Salaries, and it will probably be done. My salary does not pay one half of my expenses of living, and if I had not a little something besides, I should have to resign. Were I to do so, there is not a lawyer in the State fit for it who would accept it. It would have to be given to some broken down lawyer without practice. I am sure you will agree with me that this state of things should no longer exist. We are all interested in elevating and strengthening the Judiciary, and securing for the Bench the best men at the Bar. . . .

[Document Source: Petitions, Memorials, and Resolutions of the State Legislatures referred to the Committee on the Judiciary, Records of the U.S. Senate, RG 46, National Archives and Records Administration, 38th Cong., 1st sess., 38A-H8.2, Folder 5.]

A Senate Bill to Establish Courts of Appeals, 1866

In 1865, several members of Congress, including the influential Senator Lyman Trumbull, introduced legislation to establish intermediate courts of appeals and to merge the two types of federal trial courts. The most frequently cited goal of this proposed legislation was the reduction of the Supreme Court's caseload, but the various plans also sought to establish more effective federal judicial authority on the district and circuit levels. In the early days of the Thirty-Eighth Congress, which convened in December 1865, Senator Ira Harris of New York introduced his bill to establish courts of appeals in each of the ten judicial circuits and to combine all trial jurisdiction in the district courts, and the Senate in April 1866 approved a slightly revised version of the bill, also submitted by Harris. Under the bill passed by the Senate, each court of appeals would have been presided over by a panel composed of the district judges within the circuit and the Supreme Court justice allotted to the circuit. Although the House of Representatives never considered the Senate-passed bill, the debate on Harris's proposal reflected how the Civil War and the challenges of Reconstruction gave special urgency to a judicial reorganization that would enhance the federal courts' capacity to adjudicate disputes arising out of the increased authorities of the national government. The proposals to restrict appeals to the Supreme Court and to remove the justices from service on trial courts met the same opposition that such plans encountered in the 1850s, and that opposition would delay for another twenty-five years approval for intermediate appellate courts with any kind of final jurisdiction.

"The Proposed Change in the Judiciary System of the United States," New York Times, December 24, 1865

As revealed by the *New York Times* commentary responding to Harris's proposed bill, the justices' service on federal courts throughout the nation and their "mingling" with "the strifes of jury trials" continued to be important sources of public confidence in the nation's judiciary. The *Times* also noted that the consolidation of trial jurisdiction in the district courts, each of which had a single judge, would exacerbate the district judges' burdens, such as those described in Richard Stockton Field's letter to Lyman Trumbull. The second version of the bill, which was passed by the Senate, limited appeals to

the Supreme Court to cases involving amounts of \$10,000 or more, thus answering the *Times*' criticism of unlimited appeals.

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The first question which suggests itself is as to the necessity or reason of any such change in our judiciary system. It has existed now about three-quarters of a century. Has any such defect been found in its working as to require the substitution of a new system? We are not aware that this is the fact. And we are led to surmise that this proposed change has its origin rather in the increase of judicial labor, especially upon the Judges of the Supreme Court, for we see that the main effect of this bill will be to relieve those Judges from almost all the work which they now have to do in the Circuit Courts.

But it must not be overlooked that this is not the only effect of the proposed change. In the first place it largely increases the business. Now there is but one appeal in actions commenced in the Circuit Courts, and for even this appeal the amount of two thousand dollars must be involved. The proposed change of system gives two appeals in every such case. And moreover, the bill in its present shape allows an appeal to the Supreme Court at Washington in every case, however small the amount, and from every order in a cause which involves a substantial right. Most of this increase in the business, it will be noticed, is thrown upon the District Judges. But whether the Supreme Court Judges have too much to do or not, no one ever claimed that the District Judges had too little to do, in this State at any rate. On the contrary, we do not hesitate to state, as our opinion, that it would be found impossible, under the proposed change, to transact the business of the Federal Courts in this city. Now we are able to have the Circuit and District Courts both open at the same time, by calling into one of them the services of a Judge from another district. But we cannot have two District Courts sitting in the same district at the same time, and to throw upon our District Court, in addition to its present heavy load, all the business now done in our Circuit Court would swamp it at once. If the proposed change of system is carried out some provision must be made for the business of this city, or there will be great injustice wrought. . . .

We cannot help doubting the wisdom of any change which shall remove the Judges of the Supreme Court entirely from the trial of causes. It was the idea upon which the present system was founded that they should not be exclusively judges of an Appellate Court, but that they would by going among the people and mingling somewhat in the strifes of jury trials be made, on the whole, better Judges, less apt to become hidebound, more sensitive to the human interests and feelings involved in the questions which come before them. . . .

[Document Source: *New York Times*, December 24, 1865, 4.]

Senator James Guthrie of Kentucky, April 2, 1866

Guthrie, a former Secretary of the Treasury and president of the Louisville and Nashville Railroad, recommended incremental steps in the reorganization of the judiciary in the wake of the Civil War and in the midst of efforts to reestablish federal authority throughout the former Confederacy. The Massachusetts senator to whom Guthrie referred was Charles Sumner, the Radical Republican leader who warned that “justice promises to fail here in the Supreme Court” if the justices were not relieved of their duties on regional courts. Like many who discussed the justices on circuit duty, whether in trial courts or in courts of appeals, Guthrie acknowledged that any type of circuit riding would eventually need to be abandoned as impractical, but Congress should delay that change until the Union was more secure.

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I have considered this subject somewhat, and I recollect that some ten or twelve years ago a very strong effort was made to relieve the judges of the Supreme Court entirely of circuit court duties. The effort failed because members of Congress were not prepared to take that step, and because they believed it was better for the judges of the Supreme Court to attend the *nisi prius* practice, and understand the facts and how things were done in the circuits. I am in favor of this bill. I believe we can carry it out. I think it is all that we can do now. I believe that it will be a great advantage to the business of the circuits. I believe the time will come when we shall have to relieve the judges of the Supreme Court from the

duty of attending the circuit courts and make circuit judges attend to that business.

The gentleman from Massachusetts has got an idea that they must be relieved altogether at once, and he is not willing to agree to this bill because all the good will not come from it that he desires to attain. If you were to agree with him in that, it might be ten years again before anything would be done on this subject. Ten years ago there was a very strong and earnest movement made to relieve these judges and to relieve the circuits of the difficulties they had and the compulsion to bring every case to the Supreme Court. I believe good policy and good judgment require that we should pass this bill now, leaving to the next Congress or the Congress after that, as the necessity proves itself, to relieve the judges of the Supreme Court altogether of circuit duty. I do not think this is exactly the time for bringing in circuit judges and turning out all the district judges. I do not think it would be desirable that we should have to do it now, and I fear we should not do it very harmoniously if we had it to do. We are too near the effects and dissatisfactions that have grown out of the rebellion. I think we can do this much more beneficially to the country, and I hope we shall do it. Very few of us have ever done as much in regard to any measure as we thought ought to be done. We have taken what we could get. I trust we shall pass this bill and see how this circuit court system works, so that we can know something of it practically.

[Document Source: *Congressional Globe*, 39th Cong., 1st sess., 1716–17.]

Senator Lyman Trumbull of Illinois, April 2, 1866

Reversing the familiar argument against restrictions on the right of appeal to the Supreme Court based on the amount in controversy, Trumbull insisted that the courts of appeals' final authority in cases with an amount in controversy below \$10,000 would protect the rights and interests of poor or modest litigants, who could not afford multiple appeals and the costs of presenting a case in Washington, D.C. Trumbull emphasized that one of the Supreme Court justices, with their knowledge and experience, would be part of each court of appeals, where the parties would be "as likely to obtain justice" as in the Supreme Court. Limits on the amount in controversy required for Supreme Court appeals would be a controversial aspect of future proposals for intermediate courts of appeals.

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... What is the object of courts? It is to afford parties the means of establishing their rights. This intermediate court of appeals, in my judgment, will be just about as likely to do justice as your Supreme Court here. You give a party two trials. He has a trial, in the first place, in the district court, or the court which corresponds to our present circuit court, and then he has the right of appeal to the court of appeals, which is a court composed of one justice of the Supreme Court and all the district judges of his circuit, amounting probably on an average to five persons—one justice of the Supreme Court and four district judges. They meet together and constitute the court of appeals. I submit to the Senator, is it not better to stop the litigation there than to allow another appeal from this court of appeals to the Supreme Court of the United States?

When Senators talk about allowing a party who wishes to do so, to take his case from one court to another, they should not forget that it may happen that one of the parties to a suit is a poor man and the other is a rich man, and if you allow these appeals first from the district court to the court of appeals, and then from the court of appeals to the Supreme Court of the United States, here at Washington, you provide the means of oppression on the part of the rich upon the poor. A poor man had better give up his claim than litigate with a rich person, first in his own State where the district court sits, then go to the court of appeals, perhaps, in some adjoining States, and then from that court of appeals to Washington to get his rights. A man who has the means to take all these appeals, if you give them, will have it in his power to prevent justice being obtained by a man of smaller means. I think you will be as likely to obtain justice in the court of appeals as you will in the Supreme Court of the United States. . . .

[Document Source: *Congressional Globe*, 39th Cong., 1st sess., 1717.]

Senator Reverdy Johnson of Maryland, April 2, 1866

Johnson warned that the establishment of courts of appeals in each of the ten judicial circuits might threaten the uniformity of decision ensured by appeals to the Supreme Court. Johnson was concerned that conflicting decisions would not only adversely affect commerce

but that they would undermine the state courts' deference to federal decisions. Johnson, a prominent Maryland attorney and U.S. Attorney General under President Zachary Taylor, had been a leader in the efforts to keep Maryland in the Union, and he served in the peace convention that sought to avoid the outbreak of sectional hostilities in the spring of 1861. Although a Democrat, Johnson as a senator supported some of the Reconstruction legislation submitted by Republicans, and he continued his efforts to reestablish the bonds of Union.

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There is another practical inconvenience arising from this bill. I shall vote for it because it does relieve the Supreme Court to some extent, and will, I think, be productive of public good. It is all-important that the law of the United States should be uniform in the courts of the United States. To have one system of laws in one circuit and another system in another circuit is very much to be deprecated. The effect of authorizing an appeal to the Supreme Court of the United States is to produce that uniformity; and one of the principal advantages of that tribunal has been not only that it has settled the constitutional questions which from time to time have arisen, but that it has settled the commercial law of the country, and settled the common law of the country as far as questions existing under the common law have been brought to the Supreme Court of the United States.

But now we are about to constitute ten separate courts of appeal, and they are to have exclusive jurisdiction in all cases under \$10,000. I can readily see, such is the pride of opinion, and such is our frailty, if frailty it may be called, that there will be found, in the course of time, as many different systems in these several circuits as there are circuits; and the result will be the same uncertainty, the same multiplication of systems that existed before the Constitution of the United States was established and courts were organized under that Constitution. The effect of an appeal to the Supreme Court of the United States in commercial cases where there is no authoritative efficacy in the decision upon the courts of the States, has yet been a very salutary one, because of the character of the tribunal. I do not speak of the tribunal as it exists with a view to disparage it, for certainly I have no such purpose, nor do I think it could be prop-

erly disparaged; but looking to the tribunal as it has heretofore existed from the beginning of the Government up to the present time, there has been a general confidence upon the part of the courts of the States and upon the part of the professional men of the several States in the judgments of that tribunal, and the operation of that confidence is that the State courts have conformed their decisions in a great measure to the decisions of the Supreme Court, especially upon all questions of commercial law; and in a country like the United States, every Senator will at once see that it is exceedingly desirable that there should be that uniformity. . . .

[Document Source: *Congressional Globe*, 39th Cong., 1st sess., 1718.]

The Impact of Reconstruction and Congressional Government

While the Senate debated and then approved the establishment of circuit courts of appeals, the House of Representatives passed a bill to reduce the number of justices and circuits to nine, thus addressing a widespread concern about the risk of tied votes on the Supreme Court. As revised by the Senate and then enacted by Congress in July 1866, the legislation provided for the eventual reduction of Supreme Court seats, through retirement or death, until there would be seven justices. The immediate effect of the act was to nullify President Andrew Johnson's nomination of Henry Stanbery to the Supreme Court. In private correspondence with justices and members of Congress, Chief Justice Salmon Chase indicated his expectation that a reduction in the number of Supreme Court seats would make it more likely that Congress would approve a salary increase for the justices. The act also conformed to the long-standing belief of Chase and others that a smaller Supreme Court, less tied to notions of geographical representation, would ease sectional tensions. The act of 1866 reorganized six of the nine circuits, redrawing the circuit boundaries so that only two circuits were composed entirely of former slave states and only one of those circuits was composed exclusively of former Confederate states.³⁴

34. Kutler, *Judicial Power and Reconstruction Politics*, 48–63.

Whatever the motivation for the reduction in the size of the Supreme Court, many Radical Republicans in Congress remained suspicious of the court that had issued the *Dred Scott* decision and that could potentially disallow the ambitious legislative agenda for Reconstruction. The lingering mistrust of the Supreme Court was evident in the House of Representatives debates in January 1868 on a proposal to require a two-thirds majority of justices for any decision declaring a congressional statute unconstitutional. The Senate had already approved a bill requiring a quorum of five justices, even when the membership on the Supreme Court would reach seven justices, and the House of Representatives debated a proposal to amend the Senate bill to include the two-thirds requirement for decisions on the constitutionality of congressional acts. At one point the House debated another amendment to require unanimous votes in constitutional decisions. The House overwhelmingly rejected the proposal for unanimous decisions, but approved the two-thirds proposal. Although the House amendment received strong support from some Republican Senate leaders like Charles Sumner, the amended bill never reemerged from the Senate Judiciary committee. The proposals for a super-majority of justices in certain types of cases echoed similar proposals debated in the 1820s in regard to Section 25 of the Judiciary Act of 1789.

Representative Samuel Scott Marshall of Illinois, January 13, 1868

Marshall thought the proposal to require unanimity in decisions voiding an act of Congress was proof of the Radical Republicans' intent to establish legislative supremacy. Marshall warned that this violation of the judiciary's constitutionally protected independence would expose the Republicans to popular disapproval.

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If the House and Senate are absolute, if they may override the will of the people, override the will of the Executive, override the deliberate judgment of the Supreme Court of the United States, then we have already established a despotism in our country, and the free institutions of our fathers are no longer in existence; not a despotism of one man, but of a usurping Congress acting outside of and in defiance of the Constitution. It is assertion of absolut-

ism the people must and will repudiate, unless they have made up their minds to submit to any and every aggression upon the institutions of their country.

Consider for a moment the proposition now before the House. The Constitution provides that there shall be three coordinate departments of the Government – legislative, executive, and judicial; the legislative to make the laws, the executive to execute them, and the judicial to construe them. The Constitution also provides that the Constitution shall be the supreme law of the land; and every court when called upon to decide questions involving the right of citizens, whether of person or property, is compelled to ascertain and decide what the law is, and it is for that reason that they must first look into the Constitution; for if it applies it is the paramount, supreme law, and the decision must be given in conformity thereto. . . .

. . . A more monstrous proposition, I submit with all due respect, has never been brought before any deliberative body. And I say to gentlemen here that the very bringing forward of this proposition, coupled with the fact that there is a probability of its passage, amounts to a plea of guilty on the part of the majority of this Congress to the charge so often preferred against them. It is a confession of guilt, a committal of suicide, an admission that they dare not allow acts passed by them to be brought before the supreme judicial tribunal of the country. That is the way the people will understand it, and I say it with all respect to the gentlemen on the other side that this measure is hurried through here this morning to prevent an adjudication upon the validity of their motley reconstruction acts by that great tribunal, honored by the learning and ability of the distinguished men who have occupied seats on that bench. I repeat, that the very bringing forward of a bill of this kind at this time is a confession of guilt on the part of the majority. It is evident that they feel and know in their hearts that their legislation will not bear investigation by a legal tribunal, made up now principally of members of their own party, placed there by their own favored President. . . .

[Document Source: *Congressional Globe*, 40th Cong., 2d sess., 479–80.]

Representative Rufus P. Spalding of Ohio, January 13, 1868

Spalding offered an expansive view of congressional authority to organize and regulate the Supreme Court, and he noted the many historical precedents for defining quorums and prescribing administrative operations of the Court. Although Congress had not set the minimum votes needed for a decision, Spalding thought that power was provided by the common law and consistent with other legislation governing the Supreme Court.

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The first judiciary act ever passed contained a provision that four judges out of a full bench of six judges, that is, two thirds of the court, should constitute a quorum. That Congress at more times than one has prescribed the number of judges that should form a quorum I knew very well. No one doubts the power of Congress to so proscribe. But I think there is no legislation in respect to the majority making a decision. That, I think, is derived from the common law rule; that is all there is of it.

But, sir, the law-making power has always had in its hands the power to say whether a mere majority should be sufficient, or whether two thirds or three fourths or the whole number of judges should be required to render a decision. There can be no doubt on that subject. The Supreme Court must adjudicate under the legislation of Congress. We proscribe the manner in which that court shall adjudicate. We frame laws which govern nine tenths of its proceedings, the Constitution prescribing only that there shall be a Supreme Court. For everything except its official life that tribunal must look to an act of Congress. Without the authority of an act of Congress it could have no clerks, it could have no power to administer oaths. Although the Constitution gives to the courts of the United States jurisdiction in certain cases as between citizens of different States Congress steps in and says that if in a claim by a citizen of one State against a citizen of another State the sum involved be less than five hundred dollars the case shall not be brought in a United States court at all. If Congress can adopt such a provision as that it certainly can say that in a decision upon a high constitutional question the concurrence of a certain number of judges more than a bare majority shall be necessary. I do not

doubt the right of Congress to require the concurrence of every member of the court; but I do not deem it expedient under the circumstances to require the concurrence of more than two thirds. I think this a very convenient number, and I shall vote for the bill as reported by the Judiciary Committee.

[Document Source: *Congressional Globe*, 40th Cong., 2d sess., 482–83.]

Representative John A. Bingham of Ohio, January 13, 1868

For Bingham, the *Dred Scott* decision was a lasting scar on the reputation of the Supreme Court and served as a reminder of the imperative of maintaining some kind of popular sovereignty over every branch of government, including the judiciary. The Constitution gave the Congress the authority to organize the Supreme Court in whatever way it determined would serve the popular will, particularly in regard to cases “which may deny the people’s rights and violate the people’s laws.” Bingham labeled Chief Justice Roger Taney, the author of the *Dred Scott* decision, the “American Jeffreys,” in reference to the notorious Lord Chief Justice George Jeffreys, who presided over the “Bloody Assizes” in England in 1685. Jeffreys’ role in the execution of several hundred prisoners and the transportation of many more made him a powerful symbol of judicial tyranny for Americans as well as the British.

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Now, sir, I recur again to the responsibility of the Supreme Court to the people. It will be a sad day for American institutions and for the sacred cause of representative government among men, when any tribunal in this land created by the will of the people shall be above and superior to the people’s power. The Supreme Court, sir, disgraced not only itself as a tribunal of justice, but it disgraced our common humanity, when it mouthed from that high seat sacred to justice the horrid blasphemy that there were human beings either in this land or in any land who had no rights which white men were bound to respect. . . .

. . . I say, Mr. Speaker, from that action of the Supreme Court of the United States an appeal was taken to the public opinion of this country – that public opinion which creates Congresses and courts and ordains and establishes constitutions. The people, sir,

from the furthest East, where the citizens of the Republic keep watch at the gates of the morning, to the furthest West, where they keep watch at the going down of the sun, pronounced such a decree of condemnation upon this atrocious judicial utterance as had never before been pronounced anywhere upon the face of the earth, save in that day two centuries ago, when the brave people from whose loins we are descended compelled that judicial monster, Jeffreys, who boasted his three hundred judicial murders, to besmear his face in lamp-black and call upon the train-bands to trundle him through the streets of London and shield him within the walls of the tower from the outraged intellect and conscience of England's heroes, who had in keeping England's glory, England's honor, and England's equal and impartial justice!

The American people by the silent majesty but omnipotent power of the ballot pronounced just such a judgment of condemnation upon your American Jeffreys. That judgment of condemnation is struck into the adamant of the past, and no question of order raised here or elsewhere can ever strike it out. There it is, and there it will be forever. That just, solemn decree of condemnation is irrevocable. The rights of the people of this country are to be respected, and those whom they send to this Congress are clothed by the Constitution with power to compel even the Supreme Court to respect those rights, and to that end, if need be, to reduce that court to a single person, if you please, and thereby compel unanimity at least in a decision which may deny the people's rights and violate the people's laws. It will not do for any man who ever read the Constitution of the United States and understands the plainest words of our mother tongue to rise in his place here and say that the Congress of the United States cannot reduce that tribunal to a single judge, or, if you please, to but two or three judges. Who is ready to rise in his place here and say, in the light of the text of the first section of the third article of the Constitution, which declares that the judicial power shall be vested in a Supreme Court and in such inferior courts as Congress may establish, that by law you may not declare it shall consist of three? And when you have done that is not the two-third rule established?, or to two, and then must not the decision be unanimous? In such a case if the judges were not all present could any judgment be pronounced at all, and if both judges be present could there be judgment without unanimity?

And if by law you may so organize this court that there must be unanimity may you not by law establish the two-third rule in judgments affecting the nation's right to make laws? What objection is there to it? . . .

[Document Source: *Congressional Globe*, 40th Cong., 2d sess., 483.]

The Crisis of Caseloads and the Creation of Circuit Judgeships

The restructuring of the judicial circuits and changes in the size of the Supreme Court did nothing to alleviate the growing burden of cases in every type of federal court, and the greatest concern continued to be the delays in the business of the Supreme Court. In March 1869, in the closing days of the session, Congress with surprising dispatch approved the most significant change in the judiciary since the short-lived Judiciary Act of 1801, but outgoing President Andrew Johnson rejected the legislation through a pocket veto. Within days the bill was reintroduced in the new Congress, which passed an act that restored a ninth seat on the Supreme Court, reduced the requirements for circuit riding, and established new judgeships to serve on the circuit courts in each of the nine circuits. In an effort intended to bring greater energy and efficiency to the courts, the act for the first time provided for the retirement on salary of federal judges who met the specified criteria of age and tenure.

Lyman Trumbull, who as chair of the Senate Judiciary Committee introduced the legislation, cited the need for more effective administration of justice "particularly in the late rebel States," but the debates revealed an awareness of the pressing judicial business throughout the country. Trumbull explained that rather than just increasing the number of federal district courts or eliminating circuit riding, as some proposed, he and the other Judiciary Committee members hoped to make judiciary-wide changes that would preserve some token of the justices' service on the trial courts while freeing the justices to focus on the business of the Supreme Court. That goal required the authorization of a new category of judges who could assist the justices and the district judges in the circuit courts.

Petition of George W. Williams et al., Referred to the House of Representatives Committee on the Judiciary, May 11, 1868

A group of attorneys from Kentucky explained to members of Congress the practical challenges faced by federal courts in the aftermath of the Civil War, particularly in regions where recently freed slaves and other African Americans found little protection from state and local courts. Like federal courts in every part of the country, the Kentucky district court also faced increasing numbers of cases related to the revenue acts passed during the war and continued in effect until 1872. The Bankruptcy Act of 1867 placed even greater responsibilities on the district courts, and a series of Supreme Court decisions extended federal admiralty jurisdiction to internal rivers, thus further increasing the business of district courts like that in Kentucky. This petition was endorsed by the U.S. attorney, the clerk of court, and the marshal from the district. Although Congress would not establish a second district court in Kentucky until 1901, this and many similar petitions asking for new judicial districts in various parts of the country contributed to congressional awareness of a caseload crisis that extended well beyond the obvious backlog in the Supreme Court.

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The undersigned petitioners would respectfully represent that the public interest absolutely demands the division of Kentucky into two Federal Judicial Districts and the establishment of another District Court. Indeed so obvious and urgent is the necessity for the measure that in our opinion there is no alternative but the practical denial of justice to a large class of our citizens. The colored people, forming a large element in our population, are persistently denied under the laws of the State the right of testifying in the State Courts and must look alone to the Federal Courts for the redress of grievances and protection in their personal rights. With this class of cases and the Revenue, Admiralty, Bankrupt and counterfeiting cases, the number of which has greatly increased it is manifestly impossible for one Court to do the business that is pressing upon it and it is entirely impracticable with a single Court to hold sessions at such convenient points in the interior of the State as to bring it within the reach of those who need its protection so as to place the people in direct contact with Federal justice and power and command their respect for the national authority.

The increase of revenue which would be secured to the Government by the better enforcement of the Revenue law would very greatly exceed the cost of maintaining another Court. In a word therefore we believe that the interests of the Government and the security of our citizens alike require the creation of such a Court and we respectfully ask that it may be done without unnecessary delay.

[Document Source: Records of the U.S. House of Representatives, 40th Congress, Petitions and Memorials referred to the Committee on the Judiciary, National Archives and Records Administration, RG 233, HR40A – H10.3, folder 6.]

Senator William Morris Stewart of Nevada, February 23, 1869

As the Senate, near the end of its session, debated the bill to establish circuit judgeships and to restore a ninth seat on the Supreme Court bench, Stewart urged his colleagues to dispense with any fine-tuning of a bill that he thought needed to be enacted swiftly if the federal courts were to meet the new demands placed upon them. Stewart summarized how the impact of the Civil War and the demands of Reconstruction compounded and accelerated the already brisk growth in federal judicial business.

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... At present it is impossible to have the judicial business of the country performed. We have constant applications for the creation of new judicial districts, growing out of the accumulation of business, and there are a great many new questions growing out of reconstruction which are necessary to be attended to at this time. The country in this particular, in the accumulation of business in the United States courts growing out of the war, has grown more rapidly than in almost any other. It is possible that but for the war we might have gone on for years under the old system; but this country is growing so rapidly that we should soon be compelled to increase the force in any event. But now we have applications from all parts of the country, I believe if we give to the South a judiciary who can perform the duties devolving upon them it will do more to settle that country, do more to establish law, order, and peace, than anything else. If you could have a judiciary of that character there that the people would have confidence in, and

they could have sufficient confidence to do all the duties that we have devolved on those courts, it would be the best reconstruction measure that could be adopted. It is a pressing necessity. Senators who have not paid special attention to it would be surprised at the want of proper judicial force in the South to discharge the duties. . . .

[Document Source: *Congressional Globe*, 40th Cong., 3d sess., 1486.]

Senator Lyman Trumbull of Illinois, March 23, 1869

After reintroducing the bill that had passed in the previous Congress, Trumbull explained the “very simple” provisions of the act designed to equip the federal courts to assist in the goals of Reconstruction and to process more efficiently the growing caseloads. At a time of enormous change in so many areas of the government, the plan for the judiciary preserved those elements of the system that were familiar to attorneys throughout the nation.

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It was important also, or supposed to be by many, that we should have circuit courts held throughout the reconstructed States of the South and those still unreconstructed by a circuit judge, who should go from State to State and from district to district administering and enforcing the laws of the United States. Perhaps nothing would do more to give quiet and peace to the southern country than an efficient enforcement of the laws of the United States in the United States courts. That cannot be done and is not done by the district courts as at present organized. But it was thought and believed that by putting into each circuit a circuit judge who should have no other duties to perform than to hold circuit courts in connection with district judges who are also to hold circuit courts – for this bill as it is reported does not excuse district judges from holding circuit courts as they now do, but leaves them to hold circuit courts and gives the additional assistance of a judge who will have nothing else to do but to attend to circuit court duties throughout the circuit – it was thought that in this way the districts overloaded with business might be somewhat relieved, and that the Supreme Court of the United States would be relieved also by the provision which only makes it the duty of the justices of that

court, as often as once in two years, to go into the different districts of the United States. Insomuch as they are relieved from performing circuit duties they will have the more time to attend to their duties in the Supreme Court of the United States.

The bill, as proposed, also adds one justice to the Supreme Court. The United States at present are divided into nine judicial circuits, but by a law passed some few years ago it was declared that as vacancies occurred upon the bench of the Supreme Court they should not be filled until the number was reduced to six associate justices and one Chief Justice, making seven. The bench has not yet been reduced to that number. It now consists of seven associate justices and the Chief Justice, making eight judges. This bill provides for adding one, so that there will be a justice of the Supreme Court assigned to each circuit in the United States. The vacancy which exists is in the circuit formerly presided over by Mr. Justice Wayne, who died some few years since.

The bill is very simple in its provisions. I believe I have stated the effect of it. There are many other provisions in regard to the judicial system which it would be desirable to enact into a law, but it was thought by the committee that the simpler we could make this bill the better, and we could supply the other defects afterward. It leaves the judicial system of the United States just as we found it. It simply gives additional force upon the circuit courts throughout the United States and places one more justice upon the Supreme bench, which does not interfere with the existing order of things. The profession throughout the United States understand the courts as they are now organized and the mode of proceeding in the various courts, and the bill that we have reported does not interfere with it. It is simple, and understood by a bare statement of it. . . .

[Document Source: *Congressional Globe*, 41st Cong., 1st sess., 208.]

Senator William Morris Stewart of Nevada, March 23, 1869

Stewart reminded his colleagues that the greatest challenge for the federal judiciary remained its role in reestablishing respect for the government's authority in the states of the former Confederacy. A "high and honorable" federal bench would set a model for public life and self government in the South. For the judges to carry out that

civic mission, the changes in the court system needed to engender broad-based support among practicing attorneys and members of Congress.



There is no class of officers in this Government who do so much to mold public opinion, to correct public morals, and give us peace in the country as a strong judiciary. It is the arm of the Government by which we instruct the people in the principles of law and justice and fair dealing and make them fit to govern themselves. It is not only for the mere matter of dealing out private rights, but the courts of your country are institutions of learning, through the means of which the Government teaches to the people the rights of man; and where you have a high and honorable judiciary you have a bar that will strive to be honorable, and you will have a people that will be improved constantly. In the South they need a judiciary of this kind; and the committee, feeling this need, have endeavored to perfect the best scheme practical that has met with the most general consent of the bar and of the bench and of the two Houses of Congress, for this bill passed at the last session with very little opposition. It may be that gentlemen may prefer other schemes; but I apprehend that there is no other scheme which will not meet with more opposition than this; and the importance of legislation on this question, in the present condition of the South particularly, is very great. I hope the bill will pass. . . .

[Document Source: *Congressional Globe*, 41st Cong., 1st sess., 210.]

Retirement Provisions for Judges

After the Senate approved the reintroduced bill, the House of Representatives passed the bill with an amendment to provide for the retirement of judges. Judges aged seventy or older, with at least ten years' service on a federal court, would be able to retire on their current salary, and upon their retirement the president would be authorized to appoint a successor. Although the Senate agreed to this retirement provision, it rejected the other House provisions for the appointment of an additional judge to courts served by disabled or elderly judges who did not retire. The House amendment would have authorized the

appointment of an additional judge to serve on any court with a sitting judge certified as disabled by a justice of the Supreme Court. The president would also have been authorized to appoint a new judge to any court with a sitting judge who met the criteria for retirement but stayed on the bench after reaching the age of seventy. (A similar provision would reappear in a 1914 proposal of Attorney General James Mc Reynolds and in President Franklin Roosevelt's controversial "Court-packing" proposal of 1937.)

Although some implied that the retirement statute was part of an effort to remove judges unfriendly to Reconstruction, Representative Horace Maynard of Tennessee insisted that the legislation had "been conceived in a spirit of liberality and of generosity toward" the judiciary. Senator Charles Sumner said the purpose of the act was "to give to judges who have earned an honorable retreat what they have earned, and to secure complete efficiency to the courts."

Representative John A. Bingham of Ohio, March 29, 1869

Bingham, as chair of the House Committee on the Judiciary, introduced the retirement amendment and explained the need for justices and judges sufficiently fit and able to carry out their prescribed duties. A Supreme Court of nine justices would not be adequate if several members of the court were infirm. The justice whom Bingham described as unable to reach the bench under his own strength was Robert Grier, who in January 1870 would retire under the provisions of the new act.

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It is well known that at least two of the present justices of the Supreme Court of the United States, although they may live for years, will not long be able, by reason of the infirmities of age, to take their places upon the Supreme bench. It is well known that one of the most eminent members of that bench is not able to-day to reach the bench without being borne to it by the hands of others. It is but fit and proper that such a man should be given the opportunity to retire upon his salary, carrying with him his honors of office and holding his commission until the day of his death. I do not say that he will retire. But this amendment will give him the authority to retire, and it will be giving him notice that it is the will of a great people that he should be permitted in his old age to

retire with his commission and be entitled by the will of a grateful people to his full salary during his life.

In this way we will be able to secure for the people, from time to time as the emergency may arise, a Supreme Court capable physically as well as mentally of meeting the requirements of the Constitution and discharging all the trusts reposed by the Constitution in the Supreme Court of the United States, and also in the inferior courts created by your laws. The House will please consider that the demand made by the Senate for nine additional circuit judges, one for each circuit of the United States, is an acknowledgment of the wants of the American people. It is a declaration that the courts as now organized are not adequate to the public wants, and that to refuse to reform the judiciary will be simply a denial of justice. It is utterly impossible for the courts as now organized to meet the requirements of the country, to do justice between the several citizens of the country in matters cognizable, and alone cognizable, if you please, in the courts of the United States. . . .

[Document Source: *Congressional Globe*, 41st Cong., 1st sess., 337–38.]

Representative Michael Crawford Kerr of Indiana, March 29, 1869

Kerr reminded his House colleagues of the unprecedented nature of the judicial retirement provision, which he found antithetical to the principles of republican government.

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I have, however, several objections to the substitute offered on behalf of the Committee on the Judiciary. The first objection is that it undertakes, as a pioneer measure, as an initial enactment, to introduce into our system of government the practice of pensioning retired officers. It proposes to pension judges not only of the Supreme Court, but of the circuit and district courts, whether State or territorial, to pension all of them after they shall have served in a judicial capacity for ten years. It is the first attempt, so far as I know, to organize in this country a civil list, a pension list of retired officers; and that, too, upon full pay. I think it is intrinsically a pernicious and a vicious proposition. I think it is not in harmony with

the principles of our Government, with the principle of representative, elective, republican government. . . .

. . . Judicial service and any kind of official service in this country is rendered upon the basis of a contract which the officer may at any time terminate. If he believe that from any cause, whether insufficiency of salary or ability to do better elsewhere, it is his duty to himself to resign, he is always at liberty to do so. Offices in this country do not belong to and were not created for the benefit of the officeholders, but the people, and the holding of office is always voluntary. The life tenure given to the judges of the Federal courts is no exception to this truth, but is wisely provided in order to secure their complete independence of the other departments while engaged in the discharge of judicial duties. . . .

[Document Source: *Congressional Globe*, 41st Cong., 1st sess., 341.]

Representative Daniel Voorhees of Indiana, April 8, 1869

The proposal for some kind of judicial retirement policy found broad support in Congress in 1869. Disagreement focused on the proposal to authorize appointment of an additional judge whenever a sitting judge declined to retire at seventy and on the proposal to offer retirement at seventy, regardless of length of service. In the last days before passage of the act, Voorhees argued for the essential fairness of some kind of retirement provision for long-serving judges as long as the measure did not compromise their discretion to serve as long as they wished.

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When this measure was brought here first, and it was suggested after a judicial officer had served long and faithfully he should be retired when he thought it necessary with the payment of his salary for the rest of his life, it struck me with favor, for there is no calling of life which excludes a man from the usual avenues of gain as that of the judiciary. A man may serve his country faithfully for a quarter of a century as a judicial officer and make no gain out of his salary, and when the wintry time comes with him, when the opportunity to make money and his power to do so have gone by, I see no impropriety in making provision to retire him with the

payment of his salary for the rest of his life. On the contrary, I see every propriety in doing so.

But it was suggested to me when the bill was under discussion before that it was somewhat compulsory in its nature. If there be no provision making it compulsory, still it will be a delicate thing for judges to remain in office after the passage of this bill. I would not vote for a measure that makes it an indelicate matter for a judge after seventy years to remain on the bench, because there are many of them who have their powers unimpaired after that period of life. But I will vote for a measure that leaves it to the judge himself to say when after that time he is willing to retire and be supported. . . .

[Document Source: *Congressional Globe*, 41st Cong., 1st sess., 647.]

Expanding Federal Jurisdiction: The Jurisdiction and Removal Act of 1875

In 1875, Congress enacted the broadest extension of federal jurisdiction since the quickly repealed Judiciary Act of 1801. The act of 1875 granted the U.S. circuit courts jurisdiction in all cases involving questions about the Constitution, laws, or treaties of the United States, as long as the amount in controversy was more than \$500. The act also permitted any party in a suit, regardless of residence, to remove the case from a state court to a U.S. circuit court if a federal question was involved.

The Judiciary Act of 1789 permitted removal from a state to a federal court only for defendants sued in a state of which they were not resident. In the 1806 Supreme Court case *Strawbridge v. Curtiss*, Chief Justice John Marshall established the principle of “complete diversity,” which held that federal courts had jurisdiction in a suit only when all of the parties on one side of a case were of different state citizenship from all of the parties on the other side. In the years before the Civil War, Congress had only occasionally extended the right of removal, usually in response to emergencies and to protect certain agents of the federal government, such as customs or revenue officers. During the Civil War and especially during the early years of Reconstruction, Congress took several steps to extend further the right of removal, often as part of an effort to protect the rights of African Americans and Union supporters in the former Confederate states. Congressional acts of 1866 and 1867 recognized the right of removal in “separable controversies,” meaning that portion of a suit related to an out-of-state defendant, even if not all members of that defendant’s party were citizens of a different state from the other party. In 1874, the Supreme Court, in the *Case of the Sewing Machine Companies*, sharply restricted the right of removal as defined by those acts.

Soon after that decision in 1874, Representative Luke Poland of Vermont introduced a bill to reestablish a right of removal in state cases involving parties from different states. After the House rejected Poland’s proposal and passed a more modest bill related to some removal procedures, Senator Matthew Carpenter of Wisconsin offered an amendment that restored the expansion of the right of removal and

added the grant of full federal question jurisdiction. Congress in March 1875 approved the Senate version with surprisingly little debate about the dramatic changes that would fundamentally transform the role of the federal courts and greatly expand caseloads. Much of the debate in Congress focused on the question of separable controversies and the traditional division of litigation between state and federal courts.³⁵

Representative Clarkson Nott Potter of New York, May 27, 1874

Like other opponents of the expanded right of removal in separable controversies, Potter feared that the change in the long-standing procedures of the federal courts would, as his colleague Representative Charles Eldredge of Wisconsin said, lead to “trick or fraud.” Representative Benjamin Butler of Massachusetts had already warned the House of Representatives that the legislation was necessary precisely because of the existing tricks and frauds. “In the South,” said Butler, “I am informed by gentlemen from there, when they want to get a northern man within the jurisdiction of the State court they insert a defendant to keep him out of the United States Court.”³⁶ Nevertheless, Potter and others saw the proposed change as a “revolution” in the role of the federal courts.



Yes, sir; as the gentleman from Wisconsin suggests, a plaintiff wanting for any reason to take his case out of the ordinary jurisdiction of the State court might procure some person outside of the State, with some real or fancied claim on the property, to be made a defendant, and thus enable the defendant in his interest to oust the State court of its jurisdiction. Any number of like instances in which the jurisdiction of the Federal court would be extended over a controversy substantially between citizens of the same State may be reasonably supposed. It seems to me there could be few

35. Charles Fairman, *History of the Supreme Court of the United States*, vol. 7, part 2, *Reconstruction and Reunion, 1864–88* (New York: Macmillan, 1978): 424–33; Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968): 143–60; William M. Wiecek, “The Reconstruction of Federal Judicial Power, 1863–1875,” *The American Journal of Legal History* 13 (1969): 333–59.

36. *Congressional Record*, 43d Cong., 1st sess., 1641.

more dangerous propositions than to change the practice of the country for the last seventy-five years, and put the jurisdiction of all ordinary suits into the Federal courts whenever a non-resident is made a defendant. Nothing, it seems to me, could in this respect be more dangerous than just the first section of this bill.

It was before the House on a former occasion, and was referred back to the Judiciary Committee because of this particular clause. It is now here again. The House, so far as I am concerned, may as well consider it at one time as another. But it is in fact a revolution in what has been the judicial practice of the country; a revolution not only without cause, but it seems to me in the interest of injustice; for it will alike deprive parties entitled to the benefit of the courts of their own State of that benefit in many cases, but will so crowd and clog the Federal courts as in effect to amount to a denial of all justice.

[Document Source: *Congressional Record*, 43d Cong., 1st sess., 4302.]

Representative Ebenezer Rockwood Hoar of Massachusetts, May 27, 1874

Hoar served as the lead attorney for the appellants in the recent case in which the Supreme Court had restricted the right of removal as defined by the statutes of 1866 and 1867. In the House of Representatives, he argued that the particular problems in the state courts of the South would soon be alleviated, and that the Congress should not alter a fundamental element of the judicial system to achieve a temporary policy goal.

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Mr. Speaker, I am as much opposed to this bill on the ground of policy as I am of constitutional power. I can see that in some of the States which participated in the late rebellion, and where some classes of citizens claim that they do not have justice done them in the State courts, there may be a strong pressure to provide by special legislation for their relief. I hope we are going to have that system of things soon come to an end. But I cannot be in favor of extending all over this country a system which takes from State tribunals and from State domination what properly belongs to it, for

the purpose of remedying what I hope is to be a temporary evil. We are in danger always of sacrificing great principles of government, of violating the lines which are drawn between State and national authority by reason of some temporary and particular exigency. I am in favor of protecting up to the line of the power of the General Government every citizen of this country against injustice or against inequality before the law. But I do not believe that we are to change our judicial system in such an important particular with a view to that. If remedies are necessary for such a state of things, I hope we shall afford them by more speedy and direct means. I hope very much more than that: that the condition of the country may soon be such as to need no remedy whatever.

[Document Source: *Congressional Record*, 43d Cong., 1st sess., 4303.]

Representative Benjamin F. Butler of Massachusetts, May 27, 1874

After a motion to strike out all but the procedural provisions of the removal bill, the former Union general and always controversial Ben Butler argued for the essential fairness of a law protecting access to a federal court for parties sued in a state court in states of which they were not resident. Butler's examples of abuses came from former slave states, but he and other representatives understood the implications for litigation in every state. Some, like George Washington McCrary of Iowa, feared that the already busy U.S. circuit courts would be overwhelmed with new cases. Others, like Henry Scudder of New York, argued that the frequency of interstate business in many parts of the country would result in "a vast multitude of actions" moving from the state courts to the federal courts. The House approved the motion to omit the broad right of removal.

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... I look upon it as a bill of great consequence to many portions of the country and being no harm anywhere. I cannot doubt that where two people in different States have a controversy with each other, that must be a controversy between citizens of different States, although joined in the controversy are two people of the same State. Therefore I have no difficulty about the constitutional

question. But had I such a difficulty, I can only say that the courts have not yet decided it, although the case brought before them by my colleague [Mr. E. R. HOAR] gave them an opportunity to decide it if they had chosen to do so on that ground; but they did not. If we are wrong and have no constitutional power to do this, then we do no harm to anybody.

Now, what is the exact thing that is desired to be done? It is where, as in many States, in order to get control of the person of the defendant within the jurisdiction of the State court, parties come forward with their suits and join in them nominal defendants. The defendant never can join plaintiffs; the plaintiff always has charge of the litigation, and can bring into it whom he pleases. And when he catches a non-resident in his State, in order to keep the case in the State court, he may please to join him with a nominal party resident of the State, and keep him there until the case comes before a jury and then strike him out, when it is too late for the defendant. In that way great wrong is done. From Kentucky, Tennessee, Alabama, Georgia, South Carolina, the cry comes up to us for relief. Under the guise of State laws, parties in this way get around our removal acts. It is in answer to that cry that the Committee on the Judiciary after full consultation came to the conclusion that this bill ought to pass.

I have been asked will not this allow a plaintiff who has a claim to bring his debtor into the Federal courts in foreign states? By no means. It is a question of joining on the other side. They must have somebody who will conspire to do that, and that is most difficult. It is very easy to join a nominal party, without a conspiracy on either side. I hope that this first section will remain a portion of the bill.

[Document Source: *Congressional Record*, 43d Cong., 1st sess., 4304.]

Senator Thomas F. Bayard of Delaware, June 15, 1874

Senate debate focused on the substitute bill to grant the right of removal when any of the parties in a case were of different state citizenship and to grant full federal question jurisdiction to the circuit courts. In this exchange between Bayard and the bill's chief sponsor, Senator Matthew Carpenter of Wisconsin, Bayard referred to the Ju-

diciary Act of 1789 as a kind of founding document akin to the Constitution and cited the importance of preserving judicial traditions. Bayard was particularly concerned that the judiciary continue to embody what he called “the general principle that under our system makes personal actions local.”³⁷

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Mr. BAYARD. Then the question will come for the Senate to consider between the wisdom of the law of 1789 -

Mr. CARPENTER. And the wisdom of the Constitution.

Mr. BAYARD. The wisdom of the law of 1789 and the wisdom of the Senator from Wisconsin who now proposes to amend it. That is the difference between the two. The law of 1789 requires one of the parties to be a resident in the district where the suit is brought, and the Senator from Wisconsin in his anxiety to increase the Federal jurisdiction proposes that neither of the parties may be a resident of the district but that they shall be citizens of the different States. That is all.

Mr. CARPENTER. That is all the Constitution requires.

Mr. BAYARD. The Constitution requires that; but I say the law of 1789 was built by wise men. It has been the law of this country until to-day. The action under it has been satisfactory by requiring one of the parties to be a resident of the district where the suit is brought. It was a wise restriction. It has been tested by the experience of time. And what cause is there for uprooting this and other venerable landmarks of the past? I do put the wisdom of the Senate of 1789 against the wisdom of the Senator of Wisconsin of to-day, and it is no disparagement to him to say that this law having stood the test of time should not be lightly changed.

You are now allowing a man to sue his defendant in a district where the defendant does not reside, and in a district where he himself does not reside. He follows him until he finds both of them in a strange country; and there, where neither is known, where less opportunity for a just trial exists than the law of 1789 required, the suit may be commenced and may be commenced in this excessively unreal, highly constructive method of summoning him not personally but by some man who is called his agent. Even the

37. *Congressional Record*, 43d Cong., 1st sess., 4980.

word “authorized” is not inserted before “agent.” The agency is of the most shadowy character. He may be his agent by the merest conversation. He may be alleged to be his agent only, and then proved to be his agent perhaps by the man himself if the agent can prove his authority; and that is to deprive a man of his property to the extent of his entire fortune, or it may be of that which is more value to him in the shape of his character.

[Document Source: *Congressional Record*, 43d Cong., 1st sess., 4986.]

Senator Matthew Hale Carpenter of Wisconsin, June 15, 1874

Carpenter considered the bill he presented as the fulfillment of the Constitution’s requirements for the federal judiciary. Far from embodying the intentions of the Founders, the Judiciary Act of 1789, according to Carpenter, “was substantially in contravention of the Constitution.” The Constitution, Carpenter reminded the Senate, extended federal jurisdiction to all cases between citizens of different states. Carpenter cited the Supreme Court’s 1816 decision in *Martin v. Hunter’s Lessee*, in which Justice Joseph Story held that the Constitution required the federal courts to exercise full federal question jurisdiction. (Carpenter mistakenly recalled *Martin* as *Cohens v. Virginia*, a John Marshall decision of 1821.) Whatever practical challenges may have impeded diversity jurisdiction in 1789 were now long erased, and “a roving, traveling people” like the Americans of 1874 needed access to a full grant of diversity and federal question jurisdictions.

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... The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story – I do not recollect now in what celebrated case it was, whether *Cohens vs. Virginia* or some of those famous cases – said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal court, and if they may withhold a part of it they may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution.

The Constitution of the United States declares that the judicial power of the United States shall extend to all controversies between citizens of different States. A controversy between the Senator and myself is a controversy between citizens of different States. If we both happen to meet in New York, it is a controversy between citizens of different States, and by the Constitution I may sue him in the Federal court in New York, because the controversy between us is between citizens of different States. The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does. This bill confers that right, and why have we done so? The act of 1789 was undoubtedly a wise act for that time; but the thirteen States which then constituted the Union have grown now to thirty-seven; our commerce that was streaming up and down the Atlantic coast crosses the continent; our people have become totally changed in their methods of doing business; we are a roving, traveling people; the New Yorker is as much at home in California as he used to be in Massachusetts; he does not feel farther away from his fireside when he sits down by the billows of the Pacific than he used to when he was at Cape Cod, and in fact he is not, because he can return as quickly. The whole circumstances of the people, the necessities of business, our situation, have totally and entirely changed.

As the law now stands – I speak of the law Federal and State – if there is a difficulty between the Senator from Delaware and myself, and we both meet in New York, he can sue me there in the State court. What does this bill do? It authorizes him to sue me there in the Federal court. Is that hardship? Is the Congress of the United States to say that the Federal courts in New York cannot be trusted as well as the State courts of New York? This bill gives precisely the power which the Constitution confers - nothing more, nothing less. The Senator from California proposes to limit the constitutional jurisdiction and restrict it because it was restricted in 1789. In that day to find a man two or three hundred miles or in two or three States away from his home and sue him was a hardship. It has ceased to be a hardship now, because we are nearly always away from home, we are roving and changing and traveling. The whole circumstances of the case are different, and the time has

now arrived it seems to me when Congress ought to do what the Supreme Court said more than forty years ago it was its duty to do, vest the power which the Constitution confers in some court of original jurisdiction. Our circuit court is the only one of original jurisdiction in civil causes, and there it properly belongs. . . .

[Document Source: *Congressional Record*, 43d Cong., 1st sess., 4986–87.]

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