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THE FIRST CONGRESS'S UNDERSTANDING OF ITS AUTHORITY OVER THE FEDERAL COURTS' JURISDICTION†

WILLIAM R. CASTO*

I. INTRODUCTION

Congress's control of federal court jurisdiction has been a favorite topic of debate for many years.¹ Commentary on the extent of this legislative power typically has involved two essentially separate analyses.² Power over the Supreme Court's jurisdiction has involved construction of a bafflingly simple phrase in article III of the Constitution establishing the Court's appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."³ Authority over the lower courts' jurisdiction turns upon a different provision dealing with "inferior Courts."⁴ Consistent with the Madisonian Compromise at the Constitutional Convention,⁵ the latter provision generally has been considered an appropriate basis for recognizing plenary congressional control over the lower courts' jurisdiction.⁶

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* Associate Professor of Law, Texas Tech University. B.A., 1970, J.D., 1973, University of Tennessee at Knoxville; J.S.D., 1983, Columbia University.

¹ Most of the scholarly commentary is collected in a mammoth footnote in Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 742-44 n.3 (1984) [hereinafter cited as Clinton, *Mandatory View*]. See also Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) [hereinafter cited as Gunther, *Guide*].

² See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 309-74 (2d ed. 1973) [hereinafter cited as HART & WECHSLER 2d].

³ U.S. CONST. art. III, § 2.

⁴ U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.").

⁵ The details of the Madisonian Compromise have been presented elsewhere. See, e.g., HART & WECHSLER 2d, *supra* note 2, at 11-12. See also Clinton, *Mandatory View*, *supra* note 1, at 763-64. In response to the Convention's approval of a motion that would have denied the national government authority to create lower federal courts, James Madison and James Wilson advanced and the Convention accepted a compromise plan that would postpone consideration of the issue. Instead of mandating lower courts, the Constitution would simply empower Congress to decide whether there should be lower federal courts. 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 124-25 (rev. ed. 1937) [hereinafter cited as FARRAND'S RECORDS]. See also 2 FARRAND'S RECORDS at 45-46.

⁶ See Gunther, *Guide*, *supra* note 1, at 912-14.

In recent years, Professor Julius Goebel⁷ and Professor Robert Clinton⁸ have challenged the historical accuracy of the traditional understanding of the Madisonian Compromise. The theses of these two scholars, however, are inconsistent with the enactment of the Judiciary Act of 1789.⁹ This brief note will consider the system of federal courts created by the first Congress, giving special emphasis to the private and public papers of Oliver Ellsworth¹⁰ and William Paterson,¹¹ the principal drafters of the Judiciary Act. These papers, together with the jurisdictional limitations contained in the Act and early interpretations by the Supreme Court and Attorney General Randolph demonstrate a general acceptance of extensive congressional control over federal court jurisdiction.

II. THE MANDATORY THESES

Professor Goebel's rejection of the Madisonian Compromise is based upon what appears to be a simple editorial revision of article III. The Committee of Detail draft of the Constitution as amended and referred to by the Committee of Style required "such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States."¹² During the last few weeks of the Convention, the Committee of Style rewrote this language to require "such inferior courts as Congress may from time to time ordain and establish."¹³ Professor Goebel concluded that this change was intended to rescind the Compromise and mandate the creation of a system of inferior courts vested with the complete judicial power of the United States.¹⁴ If Professor Goebel's thesis were adopted as constitutional doctrine, Congress would have no authority to limit the jurisdiction of the lower Federal courts.¹⁵ This conclusion has been criticized as "uncharacteristically thinly supported and unpersuasive."¹⁶

Professor Clinton presented a more sophisticated thesis. He concluded that the framers of the Constitution intended a definite linkage between the jurisdictions of the Supreme Court and the lower courts. Congress can limit any specific federal court's jurisdiction only so long as the aggregate combined original and appellate jurisdiction of the federal judiciary encompasses all cases within article III, section 2 of the Constitution.¹⁷ Under this theory of mandatory aggregate vesting, Congress is free to restrict

⁷ J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, 240-47 (1971).

⁸ Clinton, *Mandatory View*, *supra* note 1, at 750-54.

⁹ The Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) [hereinafter cited as Judiciary Act].

¹⁰ See W. BROWN, *THE LIFE OF OLIVER ELLSWORTH* (1905) [hereinafter cited as BROWN'S ELLSWORTH]; R. LETTIERI, *CONNECTICUT'S YOUNG MAN OF THE REVOLUTION: OLIVER ELLSWORTH* (1978) [hereinafter cited as LETTIERI'S ELLSWORTH].

¹¹ See J. O'CONNOR, *WILLIAM PATERSON LAWYER AND STATESMAN 1745-1806* (1979) [hereinafter cited as O'CONNOR'S PATERSON].

¹² 2 FARRAND'S RECORDS, *supra* note 5, at 575, quoted in J. GOEBEL, *supra* note 7, at 246.

¹³ 2 FARRAND'S RECORDS, *supra* note 5, at 600, quoted in J. GOEBEL, *supra* note 7, at 246.

¹⁴ J. GOEBEL, *supra* note 7, at 247.

¹⁵ "The discretion left to Congress was the authority to settle the institutional pattern at the lower level of judicial administration and to arrange how the jurisdiction conferred by section 2 of Article III was there to be disposed." *Id.*

¹⁶ HART & WECHSLER 2d, *supra* note 2, at 13 n.46. Most scholars concur in the rejection of Professor Goebel's analysis. See Clinton, *Mandatory View*, *supra* note 1, at 794 n.169; Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 61 (1975); Sager, *Constitutional Limitations On Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 34 n.47 (1981).

¹⁷ The thesis of mandatory aggregate vesting is summarized and resummarized in Clinton,

the jurisdiction of the lower federal courts only insofar as the Supreme Court is vested with appellate jurisdiction over state court adjudications of the excluded cases. Similarly, Congress may limit the Supreme Court's appellate jurisdiction to the extent that a lower federal court is vested with power over the excluded cases.

The thesis of mandatory aggregate vesting has some anomalous policy implications,¹⁸ but the theory is founded in history — not policy. The remainder of the present note suggests a significant weakness in Professor Clinton's — and incidentally Professor Goebel's — analysis. Although Professor Clinton has meticulously analyzed the records of the Constitutional Convention and the ratification process for material relevant to congressional control over federal court jurisdiction, the subsequent enactment of the Judiciary Act of 1789 receives comparatively cursory consideration.¹⁹ That Act, however, deserves more attention because many of the leading participants in the Constitutional Convention and the subsequent ratification process were members of the first Congress.²⁰

III. THE JUDICIARY ACT

Oliver Ellsworth and William Paterson were influential delegates to the Philadelphia Convention, and they later served together in the first Congress and on the Supreme Court. Ellsworth was a member of the Committee of Detail that prepared the first draft of the Constitution.²¹ Paterson is best known for his small states plan that resulted in the Great Compromise of the Convention: a Senate in which each state has equal representation.²² Both men were present when the Madisonian Compromise initially was struck,²³ but they left the Convention before the Committee on Style reported a number of changes in the last two weeks of the Convention.²⁴ Nevertheless, they kept in touch with the political ebb and flow in Philadelphia.²⁵

Mandatory View, *supra* note 1, at 749–54 & 841–45. A similar theory is presented in Sager, *supra* note 16, at 61–68.

¹⁸ For example, Professor Clinton's analysis seems to recognize a congressional power to limit the Supreme Court's power to the narrow original jurisdiction in article III as long as a system of lower federal courts is retained. But this absurd suggestion is so unlikely to be implemented that it cannot be taken as a serious criticism. Professor Clinton suggests, however, that elimination of the lower courts' diversity jurisdiction might be impermissible unless the Supreme Court is vested with appellate jurisdiction over state court diversity cases. Clinton, *Mandatory View*, *supra* note 1, at 854 n.369. Elimination of diversity jurisdiction is by no means an absurd proposition. One wonders about a constitutional theory that would require Congress to create a presumably discretionary appellate jurisdiction that the Supreme Court certainly would never use.

¹⁹ See *id.* at 846–51.

²⁰ See *ENCYCLOPEDIA OF AMERICAN HISTORY* 145 (R. Morris 6th ed. 1982); Sager, *supra* note 16, at 31 n.37.

²¹ 2 *FARRAND'S RECORDS*, *supra* note 5, at 97.

²² See generally C. ROSSITER, 1787: THE GRAND CONVENTION ch. 10 (1966); O'CONNOR'S PATERSON, *supra* note 11, ch. 7.

²³ The Madisonian Compromise was approved initially on June 5 and finally on July 18, 1787. See HART & WECHSLER 2d, *supra* note 2, at 11–12. Paterson left the Convention on July 23, 1787. 3 *FARRAND'S RECORDS*, *supra* note 5, at 589. Ellsworth left sometime between August 23 and August 27, 1787. *Id.* at 487. The Convention concluded its business on September 17, 1787. *Id.* at 641–50.

²⁴ The Committee on Style submitted its report on September 12, 1787. 2 *FARRAND'S RECORDS*, *supra* note 5, 582. Paterson and Ellsworth left in late July and August. See *supra* note 23.

²⁵ See, e.g., Letter from fellow New Jersey Delegate David Brearley to William Paterson (Aug. 21, 1787), reprinted in 3 *FARRAND'S RECORDS*, *supra* note 5, at 73; Letter from William Paterson to Oliver Ellsworth (Aug. 23, 1787) (inquiring, "What are the Convention about? When will they

Although Paterson did not participate in the subsequent ratification process,²⁶ Ellsworth played a significant role in Connecticut. Before the Connecticut ratification convention was convened, Ellsworth began writing a series of influential essays²⁷ entitled, *The Letters of a Landholder*.²⁸ In *Landholder VI*, he responded to George Mason's complaint that the system of federal courts authorized by the Constitution would "absorb and destroy the judiciaries of the several states."²⁹ Ellsworth flatly rejected any notion that the complete judicial power must be vested in the federal judiciary: "nothing hinders but . . . that all the cases, except the few in which [the Supreme Court] has original and not appellate jurisdiction, may in the first instance be had in the state courts and those trials be *final* except in cases of great magnitude."³⁰ Ellsworth's political ally and mentor,³¹ Roger Sherman, voiced this same view in more detail.³²

rise?"), reprinted in 4 FARRAND'S RECORDS, *supra* note 5, at 73. When the final version of the Constitution was complete, Paterson returned to Philadelphia and signed the document. 2 FARRAND'S RECORDS, *supra* note 5, at 664.

After the Convention was over, Ellsworth met with Roger Sherman, a fellow Connecticut delegate, to draft a formal report to Connecticut's Governor Huntington. 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 351-52 (M. Jensen ed. 1978) [hereinafter cited as JENSEN'S DOCUMENTARY HISTORY]. The next day, their report was sent to the Governor. Letter from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), reprinted in 3 JENSEN'S DOCUMENTARY HISTORY, *supra*, at 352. Sherman was present throughout the Convention and signed the proposed Constitution. 3 FARRAND'S RECORDS, *supra* note 5, at 590. One may reasonably assume that Ellsworth discussed the business of the Convention on this and other occasions. For Ellsworth's and Sherman's understanding of congressional power over the lower courts' jurisdiction, see *infra* notes 27-32 and accompanying text.

²⁶ "There is no indication that Paterson played any role in winning support for the ratification in New Jersey, but there was no significant opposition to be worried about." O'CONNOR'S PATERSON, *supra* note 11, at 161 (footnote omitted). Accord 3 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 117-97 (exhaustive analysis of the ratification process in New Jersey). During this time, Paterson was successfully staving off financial ruin. His ne'er-do-well brother had listed him as guarantor on a number of obligations. O'CONNOR'S PATERSON, *supra* note 11, at 165-68.

²⁷ See 13 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 562. Rufus King declared that "the *Landholder*' will do more service our way than the elaborate works of Publius [the Federalist Papers]." Letter from Rufus King to Jeremiah Wadsworth (Dec. 23, 1788), quoted in 13 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 562.

²⁸ Ellsworth, *The Letters of a Landholder* (Nov. 1787-Mar. 1788), reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 135-202 (P. Ford ed. 1892) [hereinafter cited as *Landholder*; for convenience, both the letter number and the Ford pagination are indicated]. On Ellsworth's authorship of these letters, see 13 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 561-62. See also ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 137 (P. Ford ed. 1892).

²⁹ Mason, *The Objections of the Hon. George Mason, to the Proposed Federal Constitution* (1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 329-30 (P. Ford ed. 1888).

³⁰ *Landholder VI*, *supra* note 28, at 164-65 (emphasis added). James Iredell also wrote a response to Mason's objection. Iredell explained that, "it is impracticable to define everything [in respect to the federal courts' jurisdiction]. [Therefore] we must depend upon our future legislature in this case as well as others." Iredell, *Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention* (1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 343 (P. Ford ed. 1888).

³¹ See BROWN'S ELLSWORTH, *supra* note 10, at 47-48 (Ellsworth once stated that he had consciously modeled himself after Sherman). See also LETTIERI'S ELLSWORTH, *supra* note 10, at 43; F. McDONALD, E. PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776-1786, 178 (1965) (in the Continental Congress, Ellsworth had been "the alter ego of Roger Sherman").

³² The wording of Sherman's analysis is remarkably similar to Ellsworth's and clearly rejects Professor Clinton's thesis:

After the Constitution was ratified, Ellsworth and Paterson were selected to represent their states in the Senate.³³ On April 7, 1789, the day after a quorum first was attained in the Senate, both men were appointed to the committee designated "to bring in a bill for organizing the Judiciary of the United States."³⁴ A senator from each state was appointed to the committee,³⁵ presumably because everyone agreed that the creation of a federal judicial system was important and controversial. Anyone who has drafted a complex document will understand that the actual drafting of the judiciary bill must — of necessity — have been accomplished by a comparatively small subgroup.³⁶ Most of the committee's work was done by Oliver Ellsworth, William Paterson, and Caleb Strong of Massachusetts. Ellsworth was the father of the legislation and its moving force.³⁷ Paterson acted as his principal lieutenant, and Strong played a comparatively minor support role.³⁸ Ellsworth and Paterson had been allies in the struggle at the Convention to assure small states protection in Congress,³⁹ and both men were ardent federalists.⁴⁰

It was thought necessary in order to carry into effect the laws of the Union, to promote justice, and preserve harmony among the states, to extend the judicial powers of the United States to the enumerated cases, under such regulations and with such exceptions as shall be provided by law, *which will doubtless reduce them to cases of such magnitude and importance as cannot safely be trusted to the final decision of the courts of particular states*; and the constitution does not make it necessary that any inferior tribunals should be instituted, but it may be done if found necessary.

Sherman, *Observations on the New Federal Constitution (A Citizen of New Haven, II)* (Dec. 25, 1788) (emphasis added), reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 240–41 (P. Ford ed. 1892). See also Sherman, *Observations on the Alterations Proposed as Amendments to the Federal Constitution (A Citizen of New Haven, I)* (Dec. 4, 1788), reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 235 (P. Ford ed. 1892). Clinton Rossiter thought that Sherman was one of the most influential members of the Convention and was "probably the most useful and certainly the most valuable delegate from Connecticut." C. ROSSITER, *supra* note 22, at 249.

³³ Paterson was the overwhelming choice of the New Jersey legislature. O'CONNOR'S PATERSON, *supra* note 11, at 168. In Connecticut, Ellsworth was unopposed. 2 *THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS* 28 (G. DenBoer ed. 1984).

³⁴ 1 *ANNALS OF CONG.* 18 (J. Gales ed. 1789). The standard accounts of the legislative process leading to the creation of the federal judicial system are Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *HARV. L. REV.* 49 (1923) [hereinafter cited as Warren, *New Light*], and J. GOEBEL, *supra* note 7, ch. XI. See also F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 4–14 (1928).

³⁵ There was a conscious decision to have each state represented on the committee. 1 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA* 14 (Senate Journal) (L. DePauw ed. 1972) [hereinafter cited as *DEPAUW'S SENATE JOURNAL*]. Half of the members of the committee also had been delegates to the Constitutional Convention: Oliver Ellsworth, William Paterson, Caleb Strong of Massachusetts, Richard Bassett of Delaware, and William Few of Georgia. See 3 *FARRAND'S RECORDS*, *supra* note 5, at 586–90.

³⁶ On May 11, the committee selected a subcommittee to draft a bill. W. MACLAY, *THE JOURNAL OF WILLIAM MACLAY* 29 (C. Beard ed. 1927) [hereinafter cited as *MACLAY'S DIARY*]; Letter from Caleb Strong to Robert Paine (May 24, 1789) (available at Massachusetts Historical Society, Boston, Massachusetts). Neither Maclay nor Strong give the subcommittee membership.

³⁷ Warren, *New Light*, *supra* note 34, at 59–60; J. GOEBEL, *supra* note 7, at 459–60. After the House passed an amended version of the Senate bill, Ellsworth, Paterson and Pierce Butler were appointed to a special committee to consider the House amendments. See *infra* note 42. Analysis of a hand written draft bill in the National Archives (see *infra* note 41) indicates that the first nine sections of the draft were written by Paterson, sections 10–23 by Ellsworth, and section 24 by Strong. Warren, *New Light*, *supra* note 34, at 50.

³⁸ Warren, *New Light*, *supra* note 34, at 59–60; J. GOEBEL, *supra* note 7, at 459–60. See also *supra* note 37.

³⁹ See O'CONNOR'S PATERSON, *supra* note 11, ch. 7. See also the very warm, informal, and chatty

On June 12, 1789, about two months after Ellsworth's drafting committee was formed, a bill was reported to the Senate.⁴¹ After lengthy debate and numerous amendments, the legislation was approved by both houses on September 27 of that year.⁴² The bill⁴³ reported by the Senate committee, and the legislation eventually enacted, contained

letter from Paterson to Ellsworth (Aug. 23, 1789), *reprinted in 4 FARRAND'S RECORDS*, *supra* note 5, at 73.

⁴⁰ "From the day when every doubt of the right of the smaller states to an equal vote in the Senate was quieted, they — so I received it from the lips of Madison, and so it appears from the records — exceeded all others in zeal for granting powers to the general government. Ellsworth became one of its strongest pillars. Paterson was for the rest of his life a federalist of federalists." 2 G. BANCROFT, *HISTORY OF THE FORMATION OF THE CONSTITUTION* 88 (1882). *Accord*, BROWN'S ELLSWORTH, *supra* note 10, ch. V-VII; O'CONNOR'S PATERSON, *supra* note 11, ch. 8, 11 & 12.

⁴¹ 1 ANNALS OF CONG. 46 (J. Gales ed. 1789). *See also* MACLAY'S DIARY, *supra* note 36, at 72. There is a minor dispute regarding the precise wording of the bill that was reported out of committee on June 12. Professor Warren, through careful investigation, was able to locate a handwritten copy of the bill in the National Archives and concluded that this relic was the bill actually reported on June 12. Warren, *New Light*, *supra* note 34, at 49-50. *Accord*, DEPAUW'S SENATE JOURNAL, *supra* note 35, at 67 n.34. The handwritten bill is in a collection of papers entitled "A Bill to establish the Judicial Courts of the United States." National Archives, Senate Files, Sen. 1A-B1. Professor Goebel compared this handwritten bill with the bill printed on June 16 by Thomas Greenleaf, the Senate printer, and found substantial differences. J. GOEBEL, *supra* note 7, at 465-66. He concluded that the handwritten draft in the National Archives actually is a mature but not final working draft and that the Greenleaf printed version reflects the language that actually was reported out of committee on June 12. *Id.* at 463-66.

Professor Goebel's analysis would seem compelling except that the back of the final page of the handwritten draft found by Professor Warren has the following endorsement:

1st Sess L. 1st Con

A Bill to establish ye judicial
Courts of the United States

Read June 12, 1789.

[?] Monday June 22.

assigned for the 2d reading.
as reported

Page 12 of the handwritten bill (which is the final page in Paterson's handwriting) has a similar endorsement. Perhaps the handwritten draft was the bill actually reported, but members of the committee made a few changes between June 12 when the bill was reported and June 16 when printed copies were available. Except for the Assignee Clause (*see infra* notes 96-105 and accompanying text), none of the judiciary measures discussed in the present article are significantly different in the two bills.

⁴² The Senate passed a bill on July 17, 1789. 1 ANNALS OF CONG. 50 (J. Gales ed. 1789). This Senate bill was referred to the House which passed an amended version on September 17, 1789. *Id.* at 894. The House version immediately was referred to the Senate where a three person committee (Ellsworth, Paterson, and Pierce Butler) reviewed the House amendments. *Id.* at 80. On September 19, 1789, Ellsworth recommended that the Senate agree to most of the House amendments, and the Senate passed a resolution endorsing Ellsworth's recommendation. DEPAUW'S SENATE JOURNAL, *supra* note 35, at 179. On September 21, 1789, the House agreed without debate to the Senate resolution, 1 ANNALS OF CONG. 904 (J. Gales ed. 1789), and the bill was signed by the Speaker of the House and the Vice President the next day, September 22, 1789. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 222-23 (L. DePauw ed. 1977) (House Journal); DEPAUW'S SENATE JOURNAL, *supra* note 35, at 183-84.

⁴³ A Bill to Establish the judicial Courts of the United States (undated) (printed by Thomas

a number of substantial limitations upon the subject matter jurisdiction of the Supreme Court and the lower federal courts.⁴⁴ Because all debates in the first Senate were secret,⁴⁵ there is some difficulty in piecing together a complete history of the act.⁴⁶ Nevertheless, the Rutgers University Library at New Brunswick has William Paterson's notes of the Senate debates (Paterson's Notes)⁴⁷ and a manuscript of a speech (Paterson's Speech)⁴⁸ he wrote for the Senate debates. The New York Public Library's Bancroft Collection contains additional notes and a working draft of Paterson's Speech.⁴⁹ Legal scholars have paid little attention to these materials. Paterson's Speech and his notes of the Senate debates are particularly important because the Judiciary Act originated in the Senate and he was one of the principal drafters.

A. Paterson's Speech and Notes

The Senate debates began on June 22, 1789.⁵⁰ As the first order of business the Senate agreed that some lower courts should be established.⁵¹ Senator Lee then moved "[t]hat the jurisdiction of the Federal courts should be confined to cases of admiralty and maritime jurisdiction."⁵² Senator Lee and his allies argued that an extensive system of lower federal courts was unnecessary and an insult to the state judges.⁵³ Paterson jotted down his preliminary thoughts in response to Lee's motion⁵⁴ and then redrafted his thoughts into a speech to be delivered the next day.⁵⁵

Greenleaf) [hereinafter cited as Committee Bill], reprinted in EARLY AMERICAN IMPRINTS N. 45657 (published by Readex Microprint Corp.). Although two candidates have been nominated as the committee's final proposed bill (see *supra* note 41), the widely available Readex Microprint will be used in the present article. Readex lists the Committee Bill as a House document, but the bill clearly is the original Senate bill. Compare MACLAY'S DIARY, *supra* note 36, at 86, 87 (section in the first part of bill providing for affirmation by Quakers is broadened by striking the reference to Quakers), with Committee Bill, *supra*, at 4 (ninth unnumbered section: affirmation by Quakers). The microprint Committee Bill is identical to the original Senate bill now in the New York Public Library.

⁴⁴ See, e.g., *infra* notes 71-95, 123-34 and accompanying text (diversity and alienage jurisdiction); *infra* notes 96-105 and accompanying text (Assignee Clause).

⁴⁵ See J. GOEBEL, *supra* note 7, at 444 n.163.

⁴⁶ MACLAY'S DIARY, *supra* note 36, gives some insights but generally is not very helpful. Senator Maclay was an adamant opponent of the Judiciary measure. See Warren, *New Light*, *supra* note 34, at 96-97, 109. Indeed, supporters of the measure consciously kept him in the dark. See MACLAY'S DIARY, *supra* note 36, at 97-98.

⁴⁷ See Paterson's Notes, *infra* Appendix C.

⁴⁸ See Paterson's Speech, *infra* Appendix B.

⁴⁹ See Paterson's Draft Speech, *infra* Appendix A.

⁵⁰ 1 ANNALS OF CONG. 47 (J. Gales ed. 1789). Apparently there had been some preliminary discussion on June 12, 1789. See MACLAY'S DIARY, *supra* note 36, at 72.

⁵¹ MACLAY'S DIARY, *supra* note 36, at 83.

⁵² *Id.* (quoting Lee's motion). The precise words of Senator Lee's proposed amendment apparently were:

That no subordinate federal jurisdiction be established in any State, other than for Admiralty or Maritime causes but that federal interference shall be limited to Appeals only from the State Courts to the supreme federal Court of the U. States.

National Archives, Senate Files, Sen. 1A-B1, chit number 28. Since the Supreme Court was not vested with complete appellate jurisdiction (see *infra* notes 119-34 and accompanying text), Lee's motion was inconsistent with any theory of mandatory jurisdiction. In any event, the Senate rejected the motion and proceeded to enact a judiciary system with a number of significant jurisdictional limitations.

⁵³ See Paterson's Initial Notes, *infra* Appendix A, lines 1-23.

⁵⁴ See *id.* lines 24-142.

⁵⁵ See Paterson's Speech, *infra* Appendix B.

Consistent with the traditional understanding of the Madisonian Compromise, Paterson did not even hint in his speech that the Constitution restricts congressional power to limit the lower courts' jurisdiction.⁵⁶ After some obligatory but uninspiring introductory rhetoric,⁵⁷ he began:

Ever since the Adoption of the Constⁿ I
have considered federal Courts of subordinate
Jurisdⁿ and detached from state Tribunals as
inevitable.
The Necessity, the Utility, the Policy
of them strikes my Mind in the most forcible Manner.⁵⁸

He continued in this prudential vein by advancing cogent reasons of policy for creating lower federal courts.⁵⁹ Paterson's unifying theme was that it is unwise to entrust all federal matters to state judges dependent upon the individual states.⁶⁰

Later on that same day, Lee's motion to limit the lower courts' jurisdiction to admiralty cases was defeated. The Senate then considered the composition of the Supreme Court.⁶¹ On the next day, June 24, the Senate debated whether to establish the unusual system of circuit courts proposed by Ellsworth's committee.⁶² The principal topic of debate was "whether there should be circuit courts or courts of *nisi prius*."⁶³ Paterson's

⁵⁶ Paterson's initial notes include the isolated statement that, "The constⁿ, points out a number of articles, which the federal courts must take up." Paterson's Initial Notes, *infra* Appendix A, lines 165-67. The origin of this statement is unclear (*see infra* text following note 174), and there is no comparable passage in Paterson's Speech. *See* Paterson's Speech, *infra* Appendix B.

In any event, the statement is fraught with ambiguity. Perhaps the phrase, "a Number of Articles," refers to substantive provisions of the Constitution rather than the list of cases and controversies in article III, section 2. Furthermore, the verb "must take up," may be hortatory: Congress has plenary power over the courts' jurisdiction, but prudential considerations are so overwhelming that the Congress "must" exercise its discretion in favor of jurisdiction. Even if the statement represents a theory of mandatory jurisdiction, the cases that "the federal courts must take up" may be the few cases within the Supreme Court's mandatory original jurisdiction. *Cf. Landholder VI*, *supra* note 28, at 164-65, (Oliver Ellsworth notes the Supreme Court's original jurisdiction as the only mandatory jurisdiction under the Constitution) (*see supra* note 30 and accompanying text for quotation).

⁵⁷ *See* Paterson's Speech, *infra* Appendix B, lines 1-17.

⁵⁸ *Id.* lines 17-21.

⁵⁹ *See infra* note 60.

⁶⁰ *See, e.g.,* Paterson's Speech, *infra* Appendix B, lines 68-70 ("However I may value a Man, yet if he be dependent upon another, I should not like to submit to his Decision a Dispute in which that other is concerned."). *See generally id.* lines 22-97.

⁶¹ MACLAY'S DIARY, *supra* note 36, at 86. Paterson's Notes on this portion of the Senate's consideration are obscure. *See* Paterson's Notes, *infra* Appendix C, lines 1-14. *See infra* notes 119-32 and accompanying text for a discussion of the pertinent provisions for Supreme Court appellate jurisdiction.

⁶² *See generally* J. GOEBEL, *supra* note 7, at 471-80. The circuit courts were three judge courts consisting of the federal district judge of the state where the court sat and at least one Supreme Court Justice. Judiciary Act, *supra* note 9, § 4. These courts were given appellate jurisdiction over appeals from the district courts. *Id.* §§ 11, 21-22. The circuit courts also were given an important original jurisdiction. *Id.* §§ 11-12.

⁶³ MACLAY'S DIARY, *supra* note 36, at 86. To most twentieth century attorneys, *nisi prius* is a generic concept, but in the eighteenth century this phrase referred specifically to the manner in which the three English superior courts of common law exercised their original jurisdiction. The courts sat en banc at Westminster to decide all pretrial issues. Individual judges then would go on circuit to preside over the trial of factual issues at *nisi prius* in the appropriate venue throughout

Notes provide the gist of what was said, concentrating on the comparative advantages of a *nisi prius* system.⁶⁴ Sometime after the *nisi prius* debates, a third alternative remarkably similar to the present original jurisdiction of the federal courts was mentioned: "Why should not the Jurisd^t of the Dist^t Court be complete & extend to all Cases at Law and in Equity, with an Appeal, limiting the same."⁶⁵ If this third alternative had been adopted, the district courts would have been the principal federal trial courts, and presumably neither the circuit courts nor a *nisi prius* system would have been enacted for the trial of cases. There is some evidence that the drafting committee previously had also considered vesting the federal trial courts with "complete" jurisdiction.⁶⁶

Paterson's Notes do not suggest the significance or context of the comprehensive district court proposal. Instead, the notes immediately turn to the jurisdiction of the circuit courts and begin by considering the amount in controversy limitation. Paterson recorded:

If a small sum, it
may involve a Question of Law
of great Importance, and
should be liable to be removed.
Hambden [sic], his a Cause of 20 s/.
— Sum of 500 D^r small enough.

...

Def^t but how as to the Plt^f.
Concurrent Jurisd^{ns}.

...

The Farmers in the New England
States not worth more than
1,000 D^r on an Average.⁶⁷

Following this consideration of the amount in controversy limitation, the Senate discussed the types of cases that would be tried by the circuit courts. The principal business of the federal trial courts would be to adjudicate commercial cases involving "Money. Merchandize. Land bought and sold. . . . Where Titles are held under different States, each State will endeavor to protect its own Grant. they should be tried in the federal Court."⁶⁸ The rest of Paterson's Notes are given over to the Senate's consideration of the procedure to be used in the lower federal courts, especially the adoption of equity procedures for law cases.⁶⁹

England. After a verdict, post-trial issues would be decided, and a judgment would be entered by the court, en banc, at Westminster. See RADCLIFFE & CROSS' *THE ENGLISH LEGAL SYSTEM* 182-87 (G. Hand & D. Bentley 6th ed. 1977); 3 W. BLACKSTONE, *COMMENTARIES* *57-59.

⁶⁴ See Paterson's Notes, *infra* Appendix C, lines 15-51.

⁶⁵ See *id.* lines 52-57.

⁶⁶ Professor Warren notes the existence of an anonymous letter "from a gentleman in New York to his friend in Virginia" that was written at the time of the drafting process and reports, "[t]hat . . . [the circuit] Court . . . was to have cognizance of all cases of federal jurisdiction, whether in law or equity above the value of five hundred dollars." Warren, *New Light*, *supra* note 34, at 61. The letter is reprinted in the State Gazette of North Carolina, July 30, 1789.

⁶⁷ Paterson's Notes, *infra* Appendix C, lines 58-73.

⁶⁸ See *id.* lines 74-82.

⁶⁹ See *id.* lines 83-172.

B. Jurisdictional Limitations In The Judiciary Act

Consistent with the traditional understanding of the Madisonian Compromise, Paterson clearly thought that Congress had legislative discretion to limit the jurisdiction of the lower federal courts. He forcefully argued against proposals to limit the District Courts' jurisdiction to admiralty matters, but his arguments were prudential — not constitutional. To Paterson, Senator Lee's admiralty proposal simply was unwise; Paterson assumed that Congress had discretionary authority over the federal courts' jurisdiction.⁷⁰ The bill he helped draft and the Act Congress passed certainly contained major limitations upon the courts' jurisdiction.

1. Amount in Controversy

From the beginning of the drafting process, Ellsworth's committee apparently agreed that the non-admiralty civil jurisdiction of the lower courts should be limited to cases in which the amount in controversy exceeded five hundred dollars.⁷¹ This limitation was enacted by Congress.⁷² Professor Clinton concedes that Congress thereby limited federal jurisdiction but dismisses the excluded litigation as "cases involving a trivial federal supremacy interest."⁷³

The members of the Senate, however, clearly did not consider the five hundred dollar limitation to be trivial. During the debates and in the specific context of a jurisdictional amount limitation, the point was made, "If a small Sum, it may involve a Question of Law of great Importance . . . Hambden [sic], his a Cause of 20 s/."⁷⁴ The reference to John Hampden's refusal to pay Charles I's Ship Money tax emphasizes that this was not a casual theoretical consideration. Although only twenty shillings were

⁷⁰ Based solely upon remarks of William Smith in the House of Representatives, Professor Clinton asserts "it is reasonably clear that federalist supporters of the Judiciary Act believed that Congress . . . had no discretion to decide whether to invest the federal courts with the entirety of the judicial power of the United States." Clinton, *Mandatory View*, *supra* note 1, at 850. Although Senator Maclay advanced an argument similar to Smith's in the Senate debates (MACLAY'S DIARY, *supra* note 36, at 83, 85), neither legislator's analysis is entitled to significant weight. Both men espoused the notion that concurrent state court jurisdiction of causes within article III is unconstitutional. MACLAY'S DIARY, *supra* note 36, at 85; 1 ANNALS OF CONG. 801 (J. Gales ed. 1789) (Smith's speech). This is the argument that Hamilton destroyed in Federalist No. 82 and that was rejected in numerous ratification conventions. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 488 (1928). Furthermore, Congress itself gave the back of its hand to the Smith-Maclay analysis by enacting the Judiciary Act. Neither Maclay nor Smith had been delegates to the Philadelphia Convention, and Maclay did not participate in the Pennsylvania ratification convention. 3 FARRAND'S RECORDS, *supra* note 5, at 558-59; 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 326-27 (Pennsylvania ratification). Apparently Smith attended the South Carolina convention, but there is no indication in Elliot's Debates that he ever said anything. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 339 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

⁷¹ See, e.g., Letter from Oliver Ellsworth to Richard Law (April 30, 1789), reprinted in F. WHARTON, STATE TRIALS OF THE UNITED STATES 37-38 n.1 (1849). See also Letter From a Gentleman in New York to his Friend in Virginia (1789), discussed in Warren, *New Light*, *supra* note 34, at 61.

⁷² Judiciary Act, *supra* note 9, § 11 (original jurisdiction); *id.* § 12 (removal jurisdiction). See generally Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299 (1984).

⁷³ Clinton, *Mandatory View*, *supra* note 1, at 850.

⁷⁴ Paterson's Notes, *infra* Appendix C, lines 58-62. See *supra* note 67 and accompanying text.

involved, the King sued Hampden to recover the amount due,⁷⁵ and the litigation became a test for the King's constitutional authority to rule England without a Parliament.⁷⁶ The common law judges barely sustained the King's position.⁷⁷ The closeness of the decision was a serious political defeat for the King and is generally considered an important antecedent to the English Civil War.⁷⁸ The reference in the Senate debates to the *Ship Money* case highlights the Senate's understanding that the five hundred dollar limitation might exclude cases of major national significance.⁷⁹

When the Judiciary Act was passed, the rights of British creditors against American debtors was a good example of small monetary claims implicating a major issue of national concern. Payment of these debts had been an important consideration in negotiating the Definitive Peace Treaty concluding the Revolution.⁸⁰ The treaty provided, "[i]t is agreed that Creditors on either Side shall meet with no lawful Impediment to the recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."⁸¹ The state governments' failure to assist in implementing this treaty obligation was an open scandal.⁸² Paterson's Notes contain no reference to this issue, but he,

⁷⁵ The proceedings are reported in *Rex v. Hampden*, 3 Howell's State Trials 826 (Exch. 1637) (The Case of Ship Money). For a legal analysis of the *Ship Money* case, see 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 49-55 (2d ed. 1937); Keir, *The Case of Ship Money*, 52 L. Q. REV. 546 (1936).

⁷⁶ "If [Ship Money] could be established as a regular tax which the King was entitled to collect without Parliamentary consent, the fundamental constitutional issue of the century would be decided in favor of the Monarchy." C. HILL, THE CENTURY OF REVOLUTION 55 (1961). See generally *id.* at 54-56; G. AYLMER, 1603-1689: THE STRUGGLE FOR THE CONSTITUTION 82-85 (1963); C. WEDGWOOD, THE KING'S PEACE Bk 2, ch. II (1955); Keir, *supra* note 75.

⁷⁷ The vote was 7-5. *Rex v. Hampden*, 3 Howell's State Trials 826 (Exch. 1637).

⁷⁸ G. AYLMER, *supra* note 76, at 84-85; C. HILL, *supra* note 76, at 55-56.

⁷⁹ The Senate's concern in this regard also is reflected in its subsequent rejection of a House proposal to add a provision to the Bill of Rights restricting the Supreme Court's appellate jurisdiction to cases in which the amount in controversy is one thousand dollars or higher. See DEPAUW'S SENATE JOURNAL, *supra* note 35, at 154 (House proposal rejected by the Senate). Madison explained, "It will be impossible I find to prevail on the Senate to concur in the limitation on the value of appeals to the Supreme Court, which they say is unnecessary, and might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount." Letter from James Madison to Edmund Pendleton (Sept. 23, 1789) (emphasis original), reprinted in 12 THE PAPERS OF JAMES MADISON 418-20 (R. Rutland ed. 1979) [hereinafter cited as MADISON PAPERS]. See also Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), reprinted in 12 MADISON PAPERS, *supra*, at 402-03. Madison's understanding of the Senate's objection to a constitutional amount in controversy limitation on jurisdiction probably was based upon his discussions with Ellsworth, Paterson, and Senator Carroll, the Senate managers at the committee of conference on the proposed Bill of Rights. See J. GOEBEL, *supra* note 7, at 454.

⁸⁰ See, e.g., Letter from John Adams to John Jay (Aug. 25, 1785), reprinted in 8 THE WORKS OF JOHN ADAMS 302-10 (C. Adams ed. 1853). See also S. BEMIS, JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY (2d ed. 1962); D. HENDERSON, COURTS FOR A NEW NATION 72-75 (1971).

⁸¹ Definitive Treaty of Peace, Art. 4, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES 151 (H. Miller ed. 1931).

⁸² See 1 A. DECONDE, A HISTORY OF AMERICAN FOREIGN POLICY 40-41 (3d ed. 1971); D. HENDERSON, *supra* note 80, at 74; 4 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 176-79, 190-93, 370-71 (1926) (Chief Justice Marshall's biography of Washington). During the Pennsylvania ratification debates, James Wilson lamented, "the truth is, and I am sorry to say it, that in order to prevent the payment of British debts, and from other causes, our treaties have been violated . . ." 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 517. Oliver Ellsworth made the same point in the Continental Congress and in the Connecticut ratification debates. See Madison's Notes of Debates in the Continental Congress (Jan. 16, 1783), reprinted in 6 MADISON PAPERS, *supra* note 79, at 46-

Ellsworth, and the rest of the Senate surely were aware of the problem.⁸³ Paterson was counsel for British interests after the Revolution and had the most extensive debt collection practice in New Jersey.⁸⁴ Ellsworth had specifically referred to the problem of British debts in the Connecticut ratification debates.⁸⁵ In particular, a great part of the aggregate British debt was for individual sums of less than five hundred dollars.⁸⁶ Therefore the amount in controversy limitation effectively precluded a significant group of British creditors from having a federal court vindicate rights secured by the most important treaty in United States history.⁸⁷ Congress could not conceivably have viewed

47; 3 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 544. See also the colloquy between Edmund Lee and Chief Justice Marshall in *Dunlop v. Ball*, 6 U.S. (2 Cranch) 180, 182-83 (1804) (both men agreed, "The fact was notorious, that [at the time the Judiciary Act was passed] it was the general opinion of the inhabitants of the state, and of the juries that a British debt could not be recovered"). Notwithstanding Wilson's concern for this problem and the pertinent jurisdictional limitations in the Judiciary Act, he approved the Act. See MACLAY'S DIARY, *supra* note 36, at 98, 100.

⁸³ There is evidence to suggest that the five hundred dollar amount in controversy limitation was placed in the Act to deprive specific British creditors of a federal forum. In 1801, there was a proposal to reduce the jurisdictional amount from \$500 to \$400. Representative Nicholas, in opposition to the proposal:

stated that the estate of Lord Fairfax, with quit rents due thereon, had been confiscated during the Revolution by the State of Virginia; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their rights, which the assignees contended remained unimpaired. It might be their wish to prosecute in a Federal court, expecting to gain advantages in it which could not be had from the courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the Circuit Courts to sums beyond the amount of quit rents alleged to be due by any individual.

10 ANNALS OF CONG. 897 (1801). Furthermore, "As most of the business of the British merchants in Virginia had been of retail nature, dispersed by local factors, a great part of the debts was composed of separate sums under \$500." S. BEMIS, *supra* note 80, at 436.

The treaty obligation of the United States to British creditors was discussed in the House debates of the Judiciary Act. Representative Sedgwick forcefully argued:

The United States, after a glorious and successful struggle, in which they displayed a valor and patriotism astonishing the Old World, secured their independence! and a single concession was the price of an honorable peace. The discharge of *bona fide* debts due from the citizens of America to the subjects of Britain was all that Britain required. Now, is it not obvious to every man, that this honorable stipulation ought by all means to be considered the supreme law of the land?

1 ANNALS OF CONG. 806 (J. Gales ed. 1789). See also *id.* at 813-14 (Rep. Jackson); *id.* at 822 (Rep. Vining).

⁸⁴ See generally R. Haskett, William Paterson, Counsellor at Law (1952) (Ph.D. dissertation, Princeton Univ.). During the seven year period 1783-1790, Paterson was counsel in 947 cases in his four busiest counties. At least 544 of these were debt cases, and he represented the creditor in 455. O'CONNOR'S PATERSON, *supra* note 11, at 120-21.

⁸⁵ See *supra* note 82.

⁸⁶ Based upon a study of the records of the British Foreign Office, Professor Bemis concluded that a great part of the British debts involved specific sums below \$500 and that technical problems of proof were major impediments to recovery. S. BEMIS, *supra* note 80, at 436-37. Accord, C. RITCHESON, AFTERMATH OF REVOLUTION 66-67 (1969) (discussing debts owed to two Glasgow firms); Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. 511, 518 (3d Ser. 1962).

⁸⁷ In 1802, the fourth article of the Definitive Treaty of Peace was reaffirmed in the Convention of Jan. 8, 1802. See Definitive Treaty of Peace, art. II, reprinted in 2 H. MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 488 (1931). A group of British merchants petitioned Congress to remove the five hundred dollar limitation so that the United States' obligation could be fully implemented. They complained:

this treaty obligation to Great Britain as unimportant.⁸⁸

Even when viewed strictly in terms of dollars and cents, the five hundred dollar limitation was significant.⁸⁹ The comment in the Senate debates that, "[t]he Farmers in the New England States [are] not worth more than 1,000 D^r on an Average,"⁹⁰ surely was proffered as an objection to the limitation. These farmers — and more important their out-of-state creditors — were effectively denied the protection authorized by the Constitution's diversity provision.

The five hundred dollar amount in controversy limitation also effectively barred virtually all common law tort actions from the federal trial courts.⁹¹ During the closed Senate debates, the apparent point was made that the lower courts' jurisdiction would extend to "Money. Merchandize. Land bought and sold. . . . Where Titles are held under different States, each State will endeavor to protect its own Grant. they should be tried in the federal Court."⁹² Tort actions are notably absent from this list. Oliver Ellsworth understood that the amount in controversy limitation proposed by his committee would be a significant barrier to tort claims. He had served upon the highest appellate court in Connecticut for four years and knew that tort judgments in excess of five hundred dollars were rare.⁹³ Nevertheless, he proposed and Congress enacted a five hundred

a number of small debts are due from individuals, widely dispersed throughout the State of Virginia, to British creditors . . . and that . . . they and their agents are exposed to much trouble, incur a heavy expense, and frequently with the eventual and entire loss of debts, supported by such documents and principles as have, in a number of similar cases, insured them a recovery in the federal circuit court. That . . . these [state] courts do not in practice respect the decisions of the Circuit Court and the Supreme Court of the United States, on the construction of the said fourth article of the British treaty, in relation to British debts.

AM. STATE PAPERS Misc. 189 (1805) (quoting the petition; emphasis added). In the penultimate paragraph of the congressional committee's report on the petition, the committee refused to consider whether the state courts were properly implementing the treaty obligation. The committee concluded that the petition should be denied on general principles. *Id.*

⁸⁸ See, e.g., *supra* note 83 (Rep. Sedgwick's reference to "the supreme law of the land"). To the chagrin of our national leaders, the British had seized upon American violations of the treaty's debt provision as an excuse for failing to comply with other provisions favorable to the United States. See, e.g., Letter from George Washington to John Jay (Aug. 15, 1786) ("What a misfortune it is, that Britain should have so well founded a pretext for its palpable infractions!"), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (J. Johnston ed. 1891). See generally F. MARKS, INDEPENDENCE ON TRIAL 5-15 (1973); R. MORRIS, JOHN JAY, THE NATION AND THE COURT ch. III (1967). Oliver Ellsworth made the same point at the Connecticut ratification convention. 3 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 544.

⁸⁹ Contemporaneous with the enactment of the Judiciary Act, Congress approved the Bill of Rights, including the seventh amendment guaranteeing trial by jury in civil cases. See J. GOEBEL, *supra* note 7, ch. X. There was a concern, however, not to extend this constitutional right to cases involving insignificant amounts of money. See *id.* at 34-35, 450. Accordingly, the right was limited to cases involving more than twenty dollars (U.S. CONST. amend. VII) — a sum far less than five hundred dollars.

⁹⁰ Paterson's Notes, *infra* Appendix C, lines 71-73. See *supra* note 67 and accompanying text.

⁹¹ Professor Tachau has studied the federal trial court's docket in Kentucky for the years 1789 to 1816. During that period only five actions for trespass were filed. M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 158-59 (1978). See also D. HENDERSON, *supra* note 80, at 86 (noting a similar experience in Virginia).

⁹² Paterson's Notes, *infra* Appendix C lines 74-82.

⁹³ During the period that Oliver Ellsworth was on the Connecticut bench, there is no report of damages being awarded in excess of \$500.00 in a tort case. The largest reported award was \$249.75

dollar limitation. One would assume that those "local Prejudices"⁹⁴ that alienage and diversity jurisdiction were designed to remedy⁹⁵ would be particularly virulent in tort actions.

2. The Assignee Clause

In addition to a general jurisdictional amount in controversy, Ellsworth's committee proposed⁹⁶ and Congress enacted⁹⁷ a special limitation with respect to promissory notes. If a note had been assigned, there would be no jurisdiction unless the court would have had jurisdiction of a suit commenced by the payee. While this Assignee Clause served to prevent collusive assignments to create diversity jurisdiction,⁹⁸ the clause also had an undesirable impact upon interstate commerce. As a practical matter, a New York merchant might be reluctant to take a note between two Rhode Islanders because the New York merchant would have to resort to Rhode Island state courts to collect on the note.⁹⁹

involving assault and battery. *Wilford v. Grant*, 1 Kirby 114, 114 (Conn. 1786). All other judgments were for less than \$100.00. *See Barker v. Wilford*, 1 Kirby 232, 232 (Conn. 1787) (mentioning \$66.60 judgment in related tort action); *Thomson v. Church*, 1 Kirby 212, 212 (Conn. 1787) (\$0.01); *Kimball v. Munson*, 2 Kirby 3, 5 (Conn. 1786) (\$36.63); *Bill v. Scott*, 1 Kirby 62, 62 (Conn. 1786) (\$13.32, judgment reversed). During this period, damages were awarded in pounds and shillings. A New England pound was worth \$3.33 in 1789 dollars. F. McDONALD, *THE PRESIDENCY OF GEORGE WASHINGTON* 83 n.3 (1972).

During the period immediately after Ellsworth left the Connecticut bench, the trend of small tort judgments continued. *See Church v. Dewolf*, 2 Root 282, 283 (Conn. 1795) (\$29.64); *Waters v. Waterman*, 2 Root 214, 214 (Conn. 1795) (\$49.95); *Allen v. Dyon*, 2 Root 213, 213 (Conn. 1795) (\$19.98); *Lambert v. Parmelee*, 2 Root 181, 183 (Conn. 1795) (\$66.60); *Canday v. Lambert*, 2 Root 173, 174 (Conn. 1795) (\$19.98 judgment replaced by \$1.00 judgment); *Adgate v. Stores*, 2 Root 160, 161 (Conn. 1794) (\$0.83); *Burlingham v. Wylee*, 2 Root 152, 153 (Conn. 1794) (\$49.95); *Granger v. Hancock*, 2 Root 88, 88 (Conn. 1794) (\$1.67); *Kelly v. Riggs*, 2 Root 13, 13 (Conn. 1793) (\$3.33); *Webb v. Fitch*, 1 Root 544, 544 (Conn. 1793) (\$39.96); *Davidson v. Fowler*, 1 Root 358, 359 (Conn. 1792) (\$33.30); *Lewis v. Niles*, 1 Root 346, 346 (Conn. 1791) (\$29.97); *Johnson v. Stanley*, 1 Root 245, 246 (Conn. 1791) (\$49.95); *Merrills v. Goodwin*, 1 Root 209, 209 (Conn. 1790) (\$4.99); *Dixon v. Pierce*, 1 Root 138, 138 (Conn. 1789) (\$2.33); *Hall v. Hall*, 1 Root 120, 120 (Conn. 1789) (\$49.95). The only exception was *Burrows v. Pixley*, 1 Root 362, 362-63 (Conn. 1792), in which damages of \$999.00 were awarded for the total destruction of a prosperous business.

⁹⁴ Paterson's Speech, *infra* Appendix B, line 105.

⁹⁵ *See Frank, Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3 (1948); *Friendly, supra* note 70; *Yntema & Jaffin, Preliminary Analysis of Concurrent Jurisdiction*, 79 *U. PA. L. REV.* 869 (1931).

⁹⁶ Committee Bill, *supra* note 43, at 5 (eleventh unnumbered section). The Assignee Clause appears in two separate places in the handwritten draft discovered by Professor Warren. *See National Archives File, Draft Bill at 15* (marginalia beside description of circuit courts' jurisdiction); *id.* at 29 (miscellaneous section in later part of the bill). Both are marked out. There probably was some indecision about where this clause should go, and the printer finally was directed to insert it in the section defining the circuit courts' jurisdiction.

⁹⁷ Judiciary Act, *supra* note 9, § 11. The Senate somewhat narrowed the limitation by excepting "cases of foreign bills of exchange."

⁹⁸ *See* 10 *ANNALS OF CONG.* 897-99 (1801) (discussing the purpose and desirability of the Assignee Clause). During the ratification of the Constitution, the anti-federalists had been concerned about the collusive creation of diversity jurisdiction. *See* 3 *ELLIOT'S DEBATES, supra* note 70, at 526 (George Mason complains specifically that debts might be assigned collusively). *See also* J. GOEBEL, *supra* note 7, at 475-76.

⁹⁹ *See* J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 539 (1834); H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* Pt. 2, ch. II, § 21 (1836). *See also Pennoyer v. Neff*, 95 U.S. 714 (1878).

One may assume that the first Congress fully understood this problem when the clause originally was enacted.¹⁰⁰ This type of case also was excluded from the Supreme Court's appellate jurisdiction.¹⁰¹ Therefore, the Assignee Clause is quite inconsistent with a constitutional theory mandating the aggregate vesting of the complete judicial power of the United States.

The constitutionality of the Assignee Clause was considered during oral argument in *Turner v. Bank of North America*.¹⁰² The bank's counsel argued that "the judicial power, is the grant of the constitution; and congress can no more limit, than enlarge the constitutional grant."¹⁰³ Oliver Ellsworth, who was then Chief Justice, replied incredulously:

How far is it meant to carry this argument?
Will it be affirmed, that in every case, to which
the judicial power of the United States extends,
the federal courts may exercise a jurisdiction,
without the intervention of the legislature, to
distribute, and regulate, the power?¹⁰⁴

Justice Chase emphatically rejected the notion.¹⁰⁵

If the original understanding of the Constitution was that the complete judicial power must be vested, the bank's counsel raised a serious issue. The Judiciary Act

¹⁰⁰ As reported by the drafting committee, the Committee Bill had no exceptions. Committee Bill, *supra* note 43, at 5 (eleventh unnumbered section). During the Senate debates, however, the Assignee Clause was amended to exclude "cases of foreign bills of exchange." Judiciary Act, *supra* note 9, § 11. See J. GOEBEL, *supra* note 7, at 495.

In 1801, Congress vested the federal courts with jurisdiction over "all actions, or suits, matters or things cognizable by the judicial authority of the United States, under and by virtue of the Constitution thereof." Act of Feb. 13, 1801, ch. IV, § 11, 2 Stat. 89, 92. The Assignee Clause, however, was retained. *Id.* § 16. In the congressional debates, the opponents of the Assignee Clause clearly understood the provision's impact upon interstate commerce: "The effect of the amendment [to retain the Assignee Clause] would be to shut out from the Federal Courts all persons of this description, whose claims would be as much affected by local passions and prejudices, as though they had not been assigned." 10 ANNALS OF CONG. 898 (1801). Apparently someone contended during the debate that the Constitution required that the federal courts be vested with complete diversity jurisdiction. *Id.* at 899. But the record of this aspect of the debate is too scanty to draw any conclusions.

¹⁰¹ See *infra* notes 119-21 and accompanying text.

¹⁰² 4 U.S. (4 Dall.) 8 (1799).

¹⁰³ *Id.* at 10. William Paterson was present, but there is no report of any comments that he may have made. The *Turner* case was considered in August Term of 1799. "Cushing and Iredell, Justices, were prevented by indisposition from taking their seats on the bench, during the whole term." See *New York v. Connecticut*, 4 U.S. (4 Dall.) 1, 1 n.a. (1799). Therefore Paterson's presence was necessary in *Turner* to achieve a quorum. See Judiciary Act, *supra* note 9, § 1.

¹⁰⁴ *Turner*, 4 U.S. (4 Dall.) at 10 n.a.

¹⁰⁵ *Id.* Justice Chase stated:

[I]f congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.

Id. (emphasis added). Justice Chase's forceful language perhaps should be qualified by the fact that he had strongly opposed ratification of the Constitution. See Dillard, *Samuel Chase*, in 1 THE JUSTICES OF THE SUPREME COURT 1789-1969, 185-97 (L. Pollack ed. 1969). Nevertheless, his statement is quite consistent with Ellsworth's rhetorical question. See *supra* note 104 and accompanying text.

provided that neither the lower federal courts nor the Supreme Court had jurisdiction. At the very least, one would expect a casual aside to the effect that the congressionally imposed limitation did not implicate any significant federal supremacy interest. Instead the argument was met with incredulity.

3. General Federal Question Jurisdiction

In retrospect, the most remarkable limitation upon the lower courts' jurisdiction was the absence of general federal question jurisdiction over civil cases. The Senate considered granting the district courts "complete [jurisdiction] . . . extend[ing] to all Cases at Law and in Equity."¹⁰⁶ In addition, Professor Warren noted that an anonymous letter written at the time of the drafting process "from a gentleman in New York to his friend in Virginia" reported: "That Inferior Courts [referring to the circuit courts] . . . shall take cognizance of all cases of Federal jurisdiction, whether in law or equity above the value of 500 dollars."¹⁰⁷ The bill reported by the committee, however, did not vest the federal courts with general civil federal question jurisdiction.

Instead, the circuit courts were vested with jurisdiction keyed to the nature of the parties rather than the nature of the dispute:

[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of (500) dollars and the United States are plaintiffs or petitioners; or a foreigner or citizen of another state than that in which the suit is brought, is a party.¹⁰⁸

This language was enacted with a few changes not pertinent to the present discussion.¹⁰⁹ Thus, the Senate considered vesting the courts with "complete" jurisdiction but eventually decided against a broad grant of general power. In contrast, the federal courts were given general jurisdiction to try federal crimes.¹¹⁰

The legislative decision not to vest the lower courts with a general federal question jurisdiction barred at least three important categories of cases from the lower courts. Perhaps the most surprising aspect of the lower courts' limited jurisdiction was the

¹⁰⁶ Paterson's Notes, *infra* Appendix C, lines 54-55. See *supra* note 65 and accompanying text.

¹⁰⁷ Letter from a Gentleman in New York to his Friend in Virginia (1789), quoted in Warren, *New Light*, *supra* note 34, at 61. The letter is reprinted in the *State Gazette of North Carolina*, July 30, 1789.

¹⁰⁸ Committee Bill, *supra* note 43 (eleventh unnumbered section). The blank after "(500) dollars" presumably was included in case the Senate desired to change the amount.

¹⁰⁹ Judiciary Act, *supra* note 9, § 11. The statute provided, in pertinent part:

That the circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum . . . of five hundred dollars, and the United States are plaintiffs, or, petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Id. (emphasis added to indicate changes).

¹¹⁰ The district courts' jurisdiction extended to "all crimes and offenses that shall be cognizable under the authority of the United States" with a maximum jurisdiction of thirty lashes, 100 dollars, and six months imprisonment. Judiciary Act, *supra* note 9, § 9. The circuit courts' general criminal jurisdiction did not extend the courts' original jurisdiction to the limits of the Constitution. See, e.g., Act of Feb. 4, 1815, 3 Stat. 195, 198 (removal of state criminal cases against federal officers).

relegation of the United States, itself, to the state courts. If the United States had a small civil claim against a citizen, the national government was barred from its own courts.¹¹¹ The Copyright Act of 1790¹¹² provides another example of an action arising under federal law barred from the federal courts. Section 6 of the Act created a "special action on the case founded upon this act" to recover damages for copyright infringement.¹¹³ Instead of vesting the federal courts with jurisdiction, the Copyright Act simply provided that the action could be initiated "in any court having cognizance thereof."¹¹⁴ Finally, the Patent Act of 1790¹¹⁵ similarly restricted suits for patent infringement to the state courts.¹¹⁶

All three of these restrictions on jurisdiction involved important federal interests. Litigation in which the United States is a plaintiff may implicate a significant federal supremacy interest even though the actual amount in controversy may be small.¹¹⁷ Similarly, there was and is a clearly perceived federal interest in a uniform national system of patent and copyright laws.¹¹⁸ Nevertheless, Congress decided not to vest the federal courts with general federal question jurisdiction and thereby relegated the bulk of this litigation to the state courts.

¹¹¹ The circuit courts' jurisdiction over suits by the United States was subject to the five hundred dollar amount in controversy limitation. See *supra* note 108 and accompanying text. The district courts were given concurrent jurisdiction over suits at common law — but apparently not in equity — by the United States. This jurisdiction was limited to suits in which the matter in dispute was one hundred dollars. Judiciary Act, *supra* note 9, § 9. If the dispute was less than one hundred dollars, the government's case would have to be tried in state court. This strange loophole was mentioned in the House debates. 1 ANNALS OF CONG. 824 (J. Gales ed. 1789) (Rep. Stone).

¹¹² Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790). William Paterson was on the Senate committee appointed to study the bill that became the Copyright Act. B. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 199 n.65 (1967).

¹¹³ Copyright Act of 1790, ch. 15, § 6, 1 Stat. 124, 125–26 (1790).

¹¹⁴ *Id.*

¹¹⁵ Patent Act of 1790, ch. 7, 1 Stat. 109 (1790).

¹¹⁶ See HART & WECHSLER 2d, *supra* note 2, at 845. Section 4 of the Patent Act provided that infringers "shall forfeit and pay . . . damages . . . which may be recovered in an action on the case founded on this act." 1 Stat. at 111 (emphasis added). This forfeiture action arguably fell within the district courts' exclusive jurisdiction "of all suits for penalties and forfeitures incurred, under the laws of the United States." Judiciary Act, *supra* note 9, § 9 (emphasis added). The word "forfeiture," however, was a term of art referring to the practice of seizing a wrongdoer's property — a practice commonly used in the enforcement of eighteenth century customs laws. See *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 136–53 (1943) (extensive discussion of the eighteenth century concept of forfeiture). Therefore, the provision in the Judiciary Act most likely was intended to encompass seizures of property. In contrast, the infringement action created by the Patent Act was drafted in terms that explicitly disavowed the accepted legal meaning of forfeiture. See Patent Act of 1790, ch. 7, § 4, 1 Stat. 104, 111 ("shall forfeit and pay . . . damages").

¹¹⁷ See *supra* notes 74, 79 and accompanying text.

¹¹⁸ See generally B. BUGBEE, *supra* note 112. The framers considered a national system of patent and copyright law sufficiently important to vest Congress with specific legislative authority in this area. U.S. CONST. art. I, § 8. See generally Fenning, *The Origin of the Patent and Copyright Clause in the Constitution*, 17 GEO. L.J. 109 (1929). President Washington urged Congress to enact copyright legislation, noting, "there is nothing which can better deserve your patronage than the promotion of science and literature," 1 ANNALS OF CONG. 932–34 (J. Gales ed. 1790), and a Senate committee responded, "Literature and Science are essential to the preservation of a free Constitution: the measures of Government should, therefore, be calculated to strengthen the confidence that is due to that important truth." *Id.* at 935–36.

4. The Supreme Court's Jurisdiction

Professor Clinton's thesis of mandatory aggregate vesting would permit significant limitations upon the original jurisdiction of the lower Federal courts as long as the excluded cases are cognizable in a state court with an appeal to the United States Supreme Court. This would assure that the federal courts in the aggregate are vested with the full judicial power of the United States. But the first Congress understood article III in a different way. In addition to placing substantial limitations upon the lower federal courts' original jurisdiction, the first Congress substantially limited the Supreme Court's appellate jurisdiction.

The Judiciary Act of 1789 restricts the Court's appellate jurisdiction over cases decided by the state courts to three categories:

1. Where the validity of a treaty, statute, or authority of the United States is drawn into question and the state court's decision is against their validity.¹¹⁹
2. Where the validity of a state statute or authority is challenged on the basis of federal law and the state court's decision is in favor of their validity.¹²⁰
3. Where a state court construes a United States constitution, treaty, statute, or commission and decides against a title, right, privilege, or exemption under any of them.¹²¹

It is evident from this delineation of jurisdiction that Congress made no attempt whatsoever to mesh the Supreme Court's appellate jurisdiction with the limitations on the lower courts' original jurisdiction. Except for admiralty cases and federal crimes, the lower courts' jurisdiction was keyed to the parties involved. In contrast, the Supreme Court's appellate jurisdiction over the cases excluded from the lower courts' jurisdiction was defined in terms of three types of federal questions. If the idea of aggregate vesting is historically accurate, one would expect Congress to have made some effort to coordinate the federal courts' jurisdictions. No such effort was made.

Under the Judiciary Act of 1789, cases could arise that clearly fall within the judicial power of the United States but that were excluded from the combined appellate and original jurisdiction of the federal courts. Suppose, for example, a state court erroneously voided a state statute for violation of the federal Constitution.¹²² Perhaps this could be dismissed as a situation not involving a federal supremacy interest, but surely there is at least an interest in uniformity of decision in respect to the meaning of the Constitution. Furthermore, what if a Connecticut court were to void a Rhode Island statute as contrary to the federal Constitution? There is a clear federal supremacy interest in granting the Supreme Court appellate jurisdiction to referee such a dispute between two states over the meaning of the Constitution. Nevertheless, Congress denied the Court jurisdiction in such a case.

A far more significant omission in the Court's appellate jurisdiction relates to the absence of jurisdiction on the basis of alienage — specifically, the problem of British creditors. In the Pennsylvania ratification proceedings, James Wilson¹²³ was adamant

¹¹⁹ Judiciary Act, *supra* note 9, § 25.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See, e.g., *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911). After the *Ives* decision, Congress expanded the Supreme Court's appellate jurisdiction to include such cases. See F. FRANKFURTER & J. LANDIS, *supra* note 34, at 188-98.

¹²³ Wilson was one of the most influential members of the Constitutional Convention and is

about the need for a federal forum to implement the nation's treaty obligations.¹²⁴ But Congress vested the Supreme Court with appellate jurisdiction specifically limited to state court decisions that either invalidated or misconstrued treaties.¹²⁵ This limitation, when coupled with the amount in controversy limitation on the lower courts' original jurisdiction, ignored the very real problem of state courts giving lip service to the treaty while denying a British creditor's claim on some unrelated legal issue or fact.¹²⁶ Furthermore, if a state court simply refused to recognize the supremacy of the treaty,¹²⁷ the cost of an appeal to the distant Supreme Court would be prohibitive in cases involving claims of five hundred dollars or less. The game would not be worth the candle. Congress could have solved the problem of local prejudice against British creditors by giving unlimited original jurisdiction to the lower courts.¹²⁸ Despite the important national interests implicated by the claims of British creditors, Congress declined to create a federal forum for either the original or appellate adjudication of these claims.

The Supreme Court also was deprived of appellate jurisdiction over diversity cases coming from the state courts. Just as British creditors with claims of five hundred dollars or less were deprived of a federal forum, so too were American creditors who sold to citizens of another state. This want of federal jurisdiction was an impediment to national development insofar as it discouraged interstate commerce. When President Jefferson announced in 1801 his plan to reduce the extent of the federal judiciary,¹²⁹ the New York City Chamber of Commerce saw a direct connection between diversity jurisdiction and interstate commerce:

Perhaps no part of the constitution of the United States has had a more direct and salutary influence upon the trading interest of these states than the provisions which respect the judiciary department; owing to the confidence which they are calculated to inspire in commercial dealings as well between foreigners and citizens as between the Citizens of different States.¹³⁰

considered the chief drafter of the judicial article. See G. SEED, JAMES WILSON ch. 4-6 (1978); C. SMITH, JAMES WILSON, FOUNDING FATHER 1742-1798 ch. XV & XVI (1956); see also McCloskey, *Introduction*, in *THE WORKS OF JAMES WILSON* 1-48 (R. McCloskey ed. 1967).

¹²⁴ 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 520.

¹²⁵ See *supra* notes 119-21 and accompanying text.

¹²⁶ Wilson certainly understood this problem when he argued for ratification at the Pennsylvania convention. See 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 520-21 (discussing state abuses during the Revolution). See also *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 324-26 (1796) (Wilson, J., dissenting). See *infra* notes 150-59 and accompanying text for a discussion of *Wiscart*. Nevertheless, Wilson approved the Judiciary Act. See MACLAY'S DIARY, *supra* note 36, at 98, 100.

¹²⁷ There is evidence that the state courts did "not in practice respect the decisions of the . . . Supreme Court of the United States on the construction of the said fourth article of the British treaty, in relation to British debts." AM. STATE PAPERS Misc. No. 189 (1805).

¹²⁸ Given original federal jurisdiction, even the problem of prejudiced jurors was not insurmountable. During the early years, federal marshalls were known to empanel jurors with an eye to the jurors' political beliefs. See C. PRINCE, *THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE* 263-67 (1977); M. DAURER, *THE ADAMS FEDERALISTS* 165 (1953). In addition, a special verdict could be used. See, e.g., *Ogden v. Gray*, Minute Book at 254-55 (C.C. N.C. 1799) (the Minute Book for the Circuit Court for the District of North Carolina is in the Archives Branch of the Atlanta Federal Archives & Records Center), in which Oliver Ellsworth used a special verdict in a British creditor case. Judgment subsequently was entered for the British creditor on the basis of the special verdict. *Id.* at 263.

¹²⁹ 11 ANNALS OF CONG. 11-17 (1801) (Jefferson's first annual message to the Congress). See generally G. HASKINS & H. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, ch. V (1981).

¹³⁰ Memorial of the New York City Chamber of Commerce (Feb. 11, 1801), reprinted in 25 THE

Undoubtedly, the first Congress also understood the commercial implications of diversity jurisdiction.¹³¹ Congress, however, exercised its discretion and totally deprived the federal courts of original and appellate jurisdiction over diversity cases valued at five hundred dollars or less.¹³²

Finally, the plight of aliens and out-of-state citizens involved in tort actions should not be ignored. Despite the potential for xenophobia, the doors of the federal trial courts were virtually closed to this type of litigation.¹³³ Nor was the Supreme Court granted any appellate jurisdiction to correct state court excesses in these controversies.¹³⁴

In summary, the first Congress's allocation of jurisdiction in the Judiciary Act is inconsistent with the thesis that the Constitution requires the entire judicial power of the United States to be vested in the aggregate in the Supreme Court and lower federal courts. No effort was made to mesh the Supreme Court's appellate jurisdiction with the legislative limitations imposed upon lower federal court jurisdiction. Furthermore, the Judiciary Act completely denied an original or appellate federal forum for the consideration of a number of cases involving important national interests.

C. *Randolph's Report*

Shortly after the Judiciary Act became law, Congress asked Edmund Randolph, the first Attorney General of the United States, to submit a report and recommendation on

PAPERS OF ALEXANDER HAMILTON 545-56 n.4 (H. Syrett ed. 1977) [hereinafter cited as HAMILTON PAPERS]. *Accord* Memorial of the Philadelphia Chamber of Commerce (1801), discussed in L. KERBER, *FEDERALISTS IN DISSENT* 150, 157 (Paperback ed. 1980). See also Hamilton, *The Examination No. V*, reprinted in 25 HAMILTON PAPERS, *supra*, at 476, 480. In subsequent congressional deliberations, John Rutledge forcefully argued, "[h]e must be a speculator indeed, and his purse must overflow, who would buy your Western lands and city lots, if there be no independent tribunals where the validity of your titles will be confirmed." 11 ANNALS OF CONG. 759 (1802). See also L. KERBER, *supra*, at 157. Over a hundred years later, Chief Justice Taft made the same point. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 23, at 136 (4th ed. 1983) (quoting Taft: "no single element in our governmental system has done so much to secure capital for . . . the West and South").

¹³¹ This analysis is ably developed in Frank, *supra* note 95, at 22-28. In the Virginia and Pennsylvania Ratification debates, James Madison, John Marshall, and James Wilson defended diversity jurisdiction in terms of protecting interstate commerce from local prejudice. 3 ELLIOT'S DEBATES, *supra* note 70, 534-35, 538 (Madison); *id.* at 556 (Marshall); 2 JENSEN'S DOCUMENTARY HISTORY, *supra* note 25, at 519 (Wilson). On the related issue of whether there actually was significant intersectional prejudice in judicial proceedings, compare Friendly, *supra* note 70, with Yntema & Jaffin, *supra* note 95. These three articles collect most of the pertinent primary sources. In addition, we know that Paterson was apprehensive about intersectional prejudice. In his Senate speech defending the bill that he had helped to draft, he justified the circuit courts' diversity jurisdiction on the grounds that "State Trib's keep up local Prejudices, etc." See Paterson's Speech, *infra* Appendix B, line 105. The concluding "etc." in Paterson's Speech suggests that local prejudice was a familiar and commonly understood problem.

¹³² Five hundred dollars was not a trivial amount in 1789. See *supra* notes 74-95 and accompanying text. Nevertheless, there were other interests involved. See AM. STATE PAPERS MISC. NO. 189 (1805), in which a congressional committee explained that diversity litigation in federal courts is comparatively inconvenient for local defendants because of the distance they must travel to the district court. See also *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 329 (1796) (Ellsworth, C.J.). Therefore "matters of controversy between citizens of different states, which do not involve a very considerable interest to the parties, ought not to be subjected to the jurisdiction of the courts of the United States." *Id.* This seems a proper exercise of legislative discretion even though local interests were favored over national interests.

¹³³ See *supra* notes 91-95 and accompanying text.

¹³⁴ See *supra* notes 119-21 and accompanying text.

"matters relative to the administration of justice under the authority of the United States."¹³⁵ Randolph was not a member of the first Congress, but he had proposed the Virginia plan at the Constitutional Convention¹³⁶ and had followed the Senate's judiciary measure as it progressed through Congress.¹³⁷ On December 31, 1790, a little over a year after the Judiciary Act's passage, Randolph submitted his report.¹³⁸ This contemporary report by the nation's chief law enforcement officer provides additional evidence regarding the original understanding of congressional power over the jurisdiction of the federal courts.

In the first part of the report, Attorney General Randolph discussed some defects in the existing Act. Among other things, he was dissatisfied with the Supreme Court's appellate jurisdiction over cases from the state courts. Randolph recognized, "[t]hat the avenue to the federal courts ought . . . to be unobstructed."¹³⁹ His solution was to eliminate federal appellate review of state court judgments and provide a system of pretrial removal.¹⁴⁰ If the parties elected not to try a case in federal court, "to that election [they] ought to adhere."¹⁴¹ There would be no subsequent appeal to the federal judiciary. The second part of the report consisted of a proposed new judiciary act that vested the lower federal courts with complete original jurisdiction keyed to the words of the Constitution.¹⁴² After making this broad grant of jurisdiction, the proposed legislation placed a number of specific limitations upon the lower courts' jurisdiction.¹⁴³ In addition, the proposed Act made no provision for appeals of state court judgments.¹⁴⁴ Thus,

¹³⁵ 2 ANNALS OF CONG. 1719 (1790).

¹³⁶ Although Randolph was an important delegate to the Convention, he refused to sign the Constitution. See Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), reprinted in 3 FARRAND'S RECORDS, *supra* note 5, at 123-27 (giving his objections, including, *inter alia*, a need for further "limiting and defining the judicial power"). Nevertheless, he eventually supported ratification, and explained in the Virginia debates that Congress had a broad authority to limit the Supreme Court's appellate jurisdiction. 3 ELLIOT'S DEBATES, *supra* note 70, at 572.

¹³⁷ See Letter from James Madison to Edmund Randolph (April 12, 1789), reprinted in 12 MADISON PAPERS, *supra* note 79, at 75-77 (1979); Letter from James Madison to Edmund Randolph (June 17, 1789), reprinted in 12 MADISON PAPERS, *supra* note 79, at 229-30; Letter from Edmund Randolph to James Madison (June 30, 1789), reprinted in 12 MADISON PAPERS, *supra* note 79, at 273-74.

¹³⁸ AM. STATE PAPERS, Misc. No. 17 (Dec. 31, 1790) [hereinafter cited as Randolph's Report; for convenience, the American State Papers' pagination will be used]. Congress took no action on the Report. See J. GOEBEL, *supra* note 7, at 542.

¹³⁹ Randolph's Report, *supra* note 138, at 23.

¹⁴⁰ *Id.* According to Randolph, removal would be accomplished by means of the common law writ of certiorari. Randolph twice refers to "removal by certiorari before trial" and concludes by recommending adoption of federal review "by certiorari." *Id.* In *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411 (1799), parties seeking to remove a case from a circuit court to the Supreme Court for trial in the Supreme Court resorted to a writ of certiorari.

¹⁴¹ Randolph's Report, *supra* note 138, at 23.

¹⁴² *Id.* at 26 (district courts); *id.* at 29 (circuit courts). The circuit courts' removal jurisdiction was keyed to their original jurisdiction. *Id.* at 31. A year and a half earlier, Randolph had recommended to Madison that federal court jurisdiction should be established by enacting the words of the Constitution. Letter from Edmund Randolph to James Madison (June 30, 1789), reprinted in MADISON PAPERS, *supra* note 79, at 273-74.

¹⁴³ Randolph's Report, *supra* note 138, at 26-27 (district courts); *id.* at 29-30 (circuit courts). The major limitations were amount in controversy, an Assignee Clause, and suits against the United States or an individual state. *Id.* at 26-30.

¹⁴⁴ An obscure provision in the proposed act provided, "The Supreme Court shall have power to issue . . . writs of certiorari to the circuit and the State courts." *Id.* at 31. Throughout the report,

Randolph recommended that some cases within the judicial power of the United States could not be filed in federal court, could not be removed to a federal court, and could not be appealed to a federal court.

In a note¹⁴⁵ to the proposed statute, the Attorney General examined the constitutionality of one of his proposed blanket limitations — the jurisdictional amount in controversy.¹⁴⁶ He proposed three separate constitutional bases for limiting the courts' jurisdiction.¹⁴⁷ His second analysis is readily recognizable as the now traditional argument of plenary congressional power.

The Supreme Court, though inherent in the Constitution, was to receive the first motion from Congress; the inferior courts must have slept forever without the pleasure of Congress. Can the sphere of authority over value be more enlarged?¹⁴⁸

If the original understanding was that the federal courts must be vested with a complete jurisdiction, how could Randolph plausibly have advanced the plenary power argument to a Congress consisting of many of his former fellow delegates to the Convention?¹⁴⁹ Furthermore, Randolph expressly noted that his analysis was not limited to trivial amounts. In view of Congress's power to elect not to establish federal courts in the first instance, Randolph concluded, "Can the sphere of authority over value be more enlarged?"

D. A Final Conundrum

The case of *Wiscart v. D'Auchy*¹⁵⁰ also casts light on the original understanding of congressional power over the federal courts' jurisdiction. In *Wiscart*, the plaintiff in error sought to challenge the federal circuit court's statement of facts. The Supreme Court refused on the ground that Congress had not provided appellate jurisdiction to review factual matters. Chief Justice Ellsworth delivered his opinion in broad, sweeping language:

[T]he [Supreme Court's] appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the congress shall make." Here, then, is the ground, and the only ground, on

however, Randolph consistently used the idea of *certiorari* to describe pretrial removal. See *supra* note 140. Therefore, the issuance of writs of *certiorari* by the Supreme Court must be taken to refer to cases within the Supreme Court's original jurisdiction. See U.S. CONST., art. III, § 2; Randolph's Report, *supra* note 138, at 30–31 (recognizing the Supreme Court's original jurisdiction).

¹⁴⁵ Randolph's Report, *supra* note 138, at 34 n.(6).

¹⁴⁶ *Id.* at 26 (district courts); *id.* at 29 (circuit courts). Randolph left the precise amount blank.

¹⁴⁷ First, "[t]he Constitution has undertaken to describe only the kind of persons and things which should have access to the federal courts, not to estimate the value in debate." Randolph's Report, *supra* note 138, at 34 n.(6)1. Randolph's final argument was that the Constitution should not be construed to require the creation of expensive federal courts for the recovery of trifling sums. *Id.* at 34 n.(6)3.

¹⁴⁸ *Id.*

¹⁴⁹ Randolph and others have been accused of revisionism in the Virginia ratification debates. See Clinton, *Mandatory View*, *supra* note 1, at 806, 808–09. If Randolph's actions are viewed in isolation, the charge is plausible. See *supra* note 136. Randolph's analysis in his report to the Congress, however, is consistent with the position that he took in the Virginia ratification debates, see *supra* note 136, and also is consistent with the first Congress' enactment of the Judiciary Act.

¹⁵⁰ 3 U.S. (3 Dall.) 321 (1796).

which we can sustain an appeal. If congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether congress has established any rule for regulating its exercises?¹⁵¹

The Chief Justice then interpreted the Judiciary Act as depriving the Court of jurisdiction to review the circuit court's statement of facts.¹⁵² Justices Wilson and Paterson¹⁵³ disagreed with Ellsworth. Wilson construed the Judiciary Act to provide for review of the facts, but he also noted, "[e]ven, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision."¹⁵⁴

In deciding *Wiscart*, neither Ellsworth nor Wilson addressed the theory of mandatory aggregate vesting. The theory would not have been pertinent because a federal — rather than a state — court had made the findings of fact sought to be reviewed. Nevertheless, the tenor of Ellsworth's opinion suggests that he had never heard of the theory. Ellsworth used plenary language to describe congressional power over the Supreme Court's appellate jurisdiction: an act of Congress "is the ground, and the only ground, on which we can sustain an appeal."¹⁵⁵ Wilson's argument that Congress could not restrict the Court's review of lower federal court judgments is quite inconsistent with the theory of mandatory aggregate vesting.

Ellsworth's opinion might be dismissed as sloppy writing,¹⁵⁶ but Wilson's dictum verges on the inexplicable. Wilson was in attendance at the Constitutional Convention from almost the beginning to the very end.¹⁵⁷ As a member of the Committee of Detail, he personally drafted the essential outline of article III.¹⁵⁸ If the theory of mandatory aggregate vesting was accepted constitutional coin among the Founders, Wilson surely would have been aware of the doctrine. Yet his dictum in *Wiscart* casually rejected the theory. Perhaps Wilson was being devious; perhaps his memory failed; but perhaps he had never heard of the doctrine.¹⁵⁹

¹⁵¹ *Id.* at 327.

¹⁵² See generally J. GOEBEL, *supra* note 7, at 699–702.

¹⁵³ Paterson did not give an opinion in *Wiscart*, but during the very next term of Court, he noted, "[t]hough I was silent on the occasion, I concurred in opinion with Judge Wilson upon the second rule laid down in *Wiscart v. D'Auchy*." *Jennings v. The Brig Perseverance*, 3 U.S. (3 Dall.) 336, 337 (1797). Paterson almost certainly was referring to the issue of statutory construction rather than Wilson's dictum regarding congressional power. See *infra* note 154 and accompanying text.

¹⁵⁴ *Wiscart*, 3 U.S. (3 Dall.) at 325.

¹⁵⁵ See *supra* note 151 and accompanying text.

¹⁵⁶ The more likely explanation is that Ellsworth's choice of broad, sweeping language reflected his understanding of congressional control over federal court jurisdiction. *Accord Landholder VI*, *supra* note 28 (see *supra* notes 27–30 and accompanying text); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799) (see *supra* notes 102–05 and accompanying text).

¹⁵⁷ 3 FARRAND'S RECORDS, *supra* note 5, at 590.

¹⁵⁸ See *supra* note 123.

¹⁵⁹ "Since Wilson sat on the Committee of Detail that was instrumental, as we have seen, in formulating the judicial article, his views on the question of the constitutional authority of the Congress to restrict the appellate jurisdiction of the Supreme Court cannot be lightly dismissed." Clinton, *Mandatory View*, *supra* note 1, at 846 n.351.

IV. CONCLUDING ANALYSIS

In advancing such a subtle thesis of mandatory jurisdiction, Professor Clinton necessarily assumes the framers of the Constitution were subtle legal thinkers, and indeed they were. Oliver Ellsworth, William Paterson, and James Wilson were not rude colonial philosophers who dabbled in Locke and occasionally read Blackstone. They were experienced, sophisticated attorneys with substantial legal practices. Aggregate vesting would empower Congress to neuter the federal judiciary by refusing to create lower courts and restricting the Supreme Court's appellate jurisdiction to legal issues. If the framers sought meaningful constitutional protection for the federal courts' jurisdiction, would they have agreed to such a plan? This is not a hypothetical loophole. Senator Lee and his confederates in the House attempted to enact such a scheme.¹⁶⁰ Ellsworth and Paterson were practical men who surely would have noticed this loophole in the Constitution,¹⁶¹ especially Paterson, who "[e]ver since the Adoption of the Const" [had] . . . considered federal Courts of subordinate Jurisd" . . . as inevitable."¹⁶²

The first Judiciary Act was drafted by federalists who presumably wanted to assure a federal forum for disputes in which national interests were implicated, and this federalist plan by and large prevailed. Senators who, like Ellsworth and Paterson, desired a comparatively strong national government undoubtedly agreed that Congress exercised its discretion wisely. In a few cases, however, the federalists were forced to compromise and therefore agreed to significant limitations upon the courts' jurisdiction. This easily can be explained in terms of legislative discretion but is inexplicable in terms of constitutional mandate.¹⁶³

¹⁶⁰ See *supra* note 52 and accompanying text. See also Warren, *New Light*, *supra* note 34, at 66-67, 125; J. GOEBEL, *supra* note 7, at 494, 504.

¹⁶¹ During the Revolutionary War, Paterson forcefully argued for a pragmatic approach to the law in New Jersey:

It is a grand fault of all the fine writers on government that they do not distinguish between theory and practice. It is easy to build up an ingenious system or code of law which shall appear with singular beauty on paper, but which, however, will vanish the instant we attempt to put it in use. We may sit in legislation, we may frame laws, we may have all the wisdom, virtue and sagacity on earth . . . yet fruitless will be the enaction of laws, fruitless will be our utmost efforts, if such laws cannot be carried into execution.

Paterson's Address to a Conference (March 15, 1777), *reprinted in* 2 SOMERSET COUNTY HIST. Q. 1, 4 (1913).

Ellsworth also was a pragmatic attorney who believed in attention to detail. See BROWN'S ELLSWORTH, *supra* note 10, at 26 n.1. See also Letter from William Vans Murray to John Quincy Adams (Nov. 7, 1800), *quoted in* C. WARREN, *THE MAKING OF THE CONSTITUTION* 60 (1928).

¹⁶² Paterson's Speech, *infra* Appendix B, lines 17-20. See *supra* note 55 and accompanying text.

¹⁶³ Apparently there is no record of any framer or participant in the ratification debates clearly espousing the thesis of mandatory aggregate vesting. Hamilton's Federalist Nos. 81 and 82 are advanced as clearly but implicitly adopting the thesis. See Clinton, *Mandatory View*, *supra* note 1, at 832-37. In neither of these papers, however, did Hamilton purport to address Congress' authority over the federal courts' jurisdiction. Since Hamilton did not present Federalist Nos. 81 and 82 as his analysis of Congress' authority over the federal courts' jurisdiction, his arguments easily can be read as a defense of a Constitutional scheme that authorizes but does not require a complete vesting of the judicial power of the United States. Hamilton did discuss legislative authority over jurisdiction in the concluding paragraph of Federalist No. 80 and seems to have adopted a plenary power analysis. See *THE FEDERALIST* No. 80, at 541 (A. Hamilton) (J. Cooke ed. 1961). See also *THE FEDERALIST* No. 81, at 552 (A. Hamilton) (J. Cooke ed. 1961).

Aside from Hamilton, the strange and obscure musings of one Alexander Contee Hanson are

The limitations enacted by the first Congress cannot be dismissed as trivial and not involving a federal "supremacy interest." To reconcile these limitations with a theory of mandatory vesting, one must assume that some of the heads of jurisdiction in the Constitution are mandatory but others — most notably diversity and alienage jurisdiction — are not. Article III does not suggest this hierarchy, nor has any historical evidence been adduced to support such a constitutional doctrine. This notion of a federal supremacy interest shaping the Judiciary Act's jurisdiction provisions is appealing and probably accurate. But surely the supremacy interest was a prudential consideration guiding Congress's exercise of discretion rather than a mandatory constitutional constraint upon congressional authority.

In the first Congress of the United States, fifty-four members had been delegates to the Constitutional Convention or their state ratification conventions, and all but seven had advocated ratification.¹⁶⁴ This same Congress immediately proceeded to place a variety of significant limitations upon the jurisdiction of the federal courts. The Judiciary Act was drafted by sophisticated lawyers who had been leading delegates at the Convention and who were to become Supreme Court justices. Does it really make sense that William Paterson and Oliver Ellsworth¹⁶⁵ did not understand the compromise that had been struck in Philadelphia? If they were in the dark, so was James Wilson.¹⁶⁶ Edmund Randolph¹⁶⁷ and James Madison¹⁶⁸ also appear to have assumed that Congress had discretion to limit the federal courts' aggregate jurisdiction. When John Marshall forcefully argued for ratification in Virginia, we are told by Professor Clinton that he did not understand the plan of the proposed Constitution.¹⁶⁹ Is it plausible to assume that these

noted and rejected. Hanson thought article III mandated the creation of inferior courts. Clinton, *Mandatory View*, *supra* note 1, at 822 n.270. In Congress, Senator Maclay and Representative Smith erroneously suggested that lower federal courts were required by the Constitution. *See supra* note 70. This specious analysis was based upon the assumption that the Constitution precluded state courts from trying cases within article III, section 2. Thus Maclay and Smith rejected the mandatory aggregate vesting thesis. Indeed, Smith raised the idea in response to a suggestion that state courts could try federal cases with eventual review by the national Supreme Court. *See* 1 ANNALS OF CONG. 798 (J. Gales ed. 1789).

¹⁶⁴ ENCYCLOPEDIA OF AMERICAN HISTORY 145 (R. Morris 6th ed. 1982).

¹⁶⁵ Professor Clinton attacks Ellsworth's opinion in *Wiscart v. D'Auchy*, *see supra* notes 150–59 and accompanying text, on the basis that Ellsworth left the Convention prior to the August 27, 1789, consideration of the judicial article. Clinton, *Mandatory View*, *supra* note 1, at 846, n.351. Professor Clinton's implicit assumption is that Ellsworth never again discussed the work of the Convention with any of the other delegates. Surely the more reasonable assumption is that intelligent and capable individuals interested in the proper governance of their country communicate with their colleagues. *See supra* note 25. We know that Paterson did. *Id.*

¹⁶⁶ *See supra* notes 82, 126. *See also supra* notes 153–59 and accompanying text.

¹⁶⁷ *See supra* notes 135–49 and accompanying text.

¹⁶⁸ Madison spoke in favor of the bill during the course of the House debate. 1 ANNALS OF CONG. 812–13 (J. Gales ed. 1789). At the conclusion of the House debate, he gave the measure a general endorsement and voted for it. *Gazette of the United States*, Sept. 19, 1789, at 3, col. 2. Although Madison was not entirely pleased with the bill, his correspondence does not suggest that he thought the measure was unconstitutional. *See* Letter from James Madison to Samuel Johnston (July 31, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 320–21; Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), *reprinted in* 12 MADISON PAPERS, *supra* note 79, at 402–03.

¹⁶⁹ Clinton, *Mandatory View*, *supra* note 1, at 847–48 ("the uninformed views of Chief Justice Marshall"). *See also id.* at 778, 806, 809–10, 845. Marshall thought Congress had broad legislative discretion to limit the Supreme Court's jurisdiction, but he never suggested that any limitation would require a corresponding expansion of the lower courts' jurisdiction. *See* *Durousseau v. United*

individuals did not understand the Constitution? Alternatively, one might argue that the first Congress engaged in a vast conspiracy of silence. But the notion that the members knew that the Judiciary Act was unconstitutional and nevertheless decided upon a course of lawlessness to further expedient political interests is equally implausible.

The enactment of the Judiciary Act of 1789, the House and Senate debates, and the papers of the participants simply cannot be reconciled with any historical thesis that the Constitution requires the federal courts to be vested with the complete judicial power of the United States as defined in article III, section 2. The pertinent historical evidence indicates that the framers understood the Constitution to grant Congress extensive legislative discretion over the jurisdiction of the federal courts.¹⁷⁰ As a matter of constitutional policy, some degree of discretion to adjust the courts' jurisdiction is essential in order to fashion a workable system. History — with perhaps a few notable exceptions — has vindicated the framers' faith in the legislative branch.

States, 10 U.S. (6 Cranch) 307, 313–15, 318 (1810); *United States v. More*, 7 U.S. (3 Cranch) 159, 172–73 (1805). See also Marshall, *A Friend of the Constitution III*, reprinted in, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 173 (G. Gunther ed. 1969). Paterson was present when the *More* case was decided and apparently concurred in the Chief Justice's opinion. 7 U.S. (3 Cranch) at 159 n.a.

In *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212 (1803), the Marshall Court considered an appeal from the Northwest Territory General Court. See generally Wunder, *Constitutional Oversight: Clarke v. Bazadone and the Territorial Supreme Court as the Court of Last Resort*, in 4 *THE OLD NORTHWEST* 259 (1978). In a brief per curiam decision, the Court dismissed the appeal on the ground that Congress had failed to authorize appeals from the territory courts to the Supreme Court. 5 U.S. (1 Cranch) at 214. Since the territory courts were not article III courts, the *Clarke* decision is a sweeping rejection of the theory of aggregate vesting. The district and circuit courts could not try civil actions against residents of the Northwest Territory. Judiciary Act, *supra* note 9, § 11. Therefore, Congress completely failed to vest the judicial power of the United States in respect to these cases.

¹⁷⁰ This note has addressed constitutional theories requiring the complete vesting of the judicial power of the United States. Although the Judiciary Act is inconsistent with these theories, it does not necessarily follow that Congress has plenary authority to diminish the federal courts' jurisdiction. Other constitutional theories have been advanced to limit congressional power without mandating a complete vesting of the judicial power. See generally Gunther, *Guide*, *supra* note 1. These other theories have not been addressed in this note.

APPENDIX A

Paterson's Notes of the Initial Senate Debates
and His Preliminary Draft of a Speech.

This document is a handwritten copy of William Paterson's initial notes written during the first day of the closed Senate consideration of the proposed Judiciary Act. The copy was made during the nineteenth century and now is in the New York Public Library's Bancroft Collection.¹⁷¹ The original notes were written on four pages, and the Bancroft transcript introduces the beginning of each original page with a bracketed lower case letter. The length and narrowness of each page of the Bancroft transcript indicates that the original notes were written two columns to a page.¹⁷²

The document consists of three implicit sections. The first section comprises lines 1–23 and apparently contains Paterson's notes of the arguments advanced by Senators Lee and Grayson in support of their proposed amendment to restrict the inferior federal courts' original jurisdiction to Admiralty cases.¹⁷³ The second section comprises lines 24–142. This is a preliminary draft of or notes for the speech that Paterson delivered the next day in opposition to the proposed amendment.¹⁷⁴ The final section begins with line 143. These are either Paterson's random ideas that he decided not to incorporate in the final draft of his speech or his notes of points made by other Senators during the initial debates.

The Initial Notes in this Appendix A almost certainly were written on June 22, 1789, the first day of the Senate debates. We know that on that day Senator Lee submitted an amendment to confine the lower courts' jurisdiction to admiralty and maritime matters.¹⁷⁵ Professor Goebel notes that Lee was charged with proposing this amendment to the Act because the Virginia Convention that previously had ratified the Constitution proposed such a limit on the inferior courts.¹⁷⁶ Consistent with this idea, Paterson's notes begin, "The amendm^t proposed by the Convention of Virginia." Senator Maclay noted in his diary that "Mr. Lee brought forward a motion nearly in the words of the Virginia Amendment."¹⁷⁷ Senator Lee's amendment was debated on June 22 and again on June 23 when it was rejected.¹⁷⁸ Paterson's final draft of his speech based upon the preliminary draft in the second section of the notes twice refers to Senate debate that had taken place "yesterday."¹⁷⁹ Thus the subject matter of the notes and the fact that the matter under discussion spanned two days indicates that they cover the Senate's consideration of Senator Lee's June 22 amendment.

George Bancroft thought, and Professor Goebel uncritically adopted Bancroft's assumption,¹⁸⁰ that these notes are "Notes apparently of the debate in the Senate of 8.

¹⁷¹ 300 Bancroft Collection 367–83 (available from Rare Books and Manuscripts Division, the New York Public Library, Astor, Lenox and Tilden Foundation).

¹⁷² This is the format that Paterson used in his subsequent notes of the Senate debates. See Paterson's Notes, *infra* Appendix C.

¹⁷³ See *supra* notes 52–53 and accompanying text.

¹⁷⁴ Paterson's Speech is reprinted *infra*, Appendix B. A comparison of the initial notes in Appendix A with the final draft in Appendix B clearly demonstrates the relationship between the two documents.

¹⁷⁵ See *supra* note 52 and accompanying text.

¹⁷⁶ J. GOEBEL, *supra* note 7, at 494 n.105.

¹⁷⁷ MACLAY'S DIARY, *supra* note 36, at 83.

¹⁷⁸ See *supra* notes 52–61 and accompanying text.

¹⁷⁹ Paterson's Speech, *infra* Appendix B, lines 8, 22.

¹⁸⁰ J. GOEBEL, *supra* note 7, at 494 n.105.

September 1789."¹⁸¹ On that date the Senate was considering the proposed Bill of Rights,¹⁸² and a motion was made and rejected to limit inferior courts to Admiralty jurisdiction.¹⁸³ The Bancroft thesis is implausible because we know that Paterson's notes cover a proposal that was the subject of two consecutive days of Senate debate. The September 8 motion was made and rejected on the same day.¹⁸⁴ Furthermore, Paterson's speech clearly indicates that he was defending the proposed bill — not the Constitution. If the constitutional existence of the inferior courts had been in jeopardy, Paterson surely would have defended the wisdom of Article III at some point during his detailed speech. He did not.¹⁸⁵ In contrast to Bancroft's thesis, Paterson's notes neatly fit the Senate's June 22–23 consideration of the proposed Judiciary Act.

Paterson's Initial Notes of the Senate debates and his preliminary draft of a Speech follow:

[a.]

[Notes apparently of the debate in the Senate of 8. September 1789. See A Hist. of Cong. during first term of Washington's Administration. pp. 164, 166. from original in handwriting of W^m Paterson in the possession of W^m Paterson of Perth Amboy, New Jersey.]

[In support of Senator Lee's motion]

1. The amendm^t proposed by the
2. Convention of Virginia — that there shall
3. be no subordinate federal Courts ex-
4. cept Admiralty.
5. 1. A Stigma upon State Courts; that
6. they will not do what is right— Etc.
7. 2. There may be an Appeal from
8. the State Courts to the federal—
9. 3. Circuit-Courts cannot pervade
10. so extensive a Country, as this. The
11. Idea taken from the Mother-Country—
12. How then as to appeals—
13. England— Scotland—
14. Nisi Prius Courts.
15. Mass of people if corrupt
16. no Laws can effect—
17. They operate on the same Objects—
18. 2 Supreme Legislatures,
19. omnipotent—
20. No Proof that the Debt is
21. due—

¹⁸¹ See Bancroft's bracketed introductory comments to the initial notes.

¹⁸² DEPAUW'S SENATE JOURNAL, *supra* note 35, at 160–64.

¹⁸³ *Id.* at 163–64.

¹⁸⁴ *Id.* The Senate Journal's coverage of the Senate's action on the Bill of Rights is uncharacteristically detailed. The Senate's actions are reported article by article and the precise wording of proposed amendments are included. There is no indication that the Senate considered the inferior courts' jurisdiction on either the day before or the day after.

¹⁸⁵ See Paterson's Speech, *infra* Appendix B.

- 22. No Time to study—
- 23. Abolition of State Leg^r—

[Paterson's preliminary draft of his speech]

- 24. Objects different—
- 25. Self-Preservation— As to Crimes—
- 26. as to Revenue— Judges annually appointed— Sheriffs— reg^s.
- 27. Why Admiralty Juris^{dn}
- 28. When & how are the Facts to be
- 29. tried—
- 30. How as to Appeals—
- 31. Bring Law Home— meet every
- 32. Citizen in his own State— not drag
- 33. him 800 miles upon an appeal—
- 34. The silent operation of Law— or by Force—
- 35. An appeal from Scotland to England—
- 36. No appeal in criminal Cases— Sup.
- 37. Court cannot go into each State—
- 38. The Necessity— Utility— Policy of
[b.]
- 39. federal Courts— they grow out of the
- 40. Nature of the Thing—
- 41. A number of Republics confederated.
- 42. Why call upon other Tribunals—
- 43. Clashing of Jurisdⁿ— will destroy
- 44. their Respectability—
- 45. Uniformity of Decision.
- 46. A Beauty— if the Bill presents—
- 47. I consider federal Courts as in—
- 48. evitable— the Necessity.
- 49. Who are we—
- 50. United we have a Head— separated
- 51. we have a Head, each operating upon
- 52. different Objects—
- 53. When we act in Union—
- 54. The States in their federal Capacity have
- 55. an Ex— have a Leg— and who shall
- 56. adjudicate— Judges chosen by the Union—
- 57. no— Judges &c. They legislate upon dif-
- 58. ferent objects, their [*sic*] should be other Judges
- 59. to decide upon them— It grows up out
- 60. of the very Nature of the Thing.
- 61. The State Tribunals consist, &c.
- 62. The Union has no Vote in their Election,
- 63. &c.
- 64. Consider how appointed— some
- 65. annually, &c.
- 66. Their Salary— how paid—
- 67. They become your Judges— fixed upon
- 68. you during good Behaviour— entitled to

- 117. each other gradually—
- 118. Hence we shall be assimilated in
- 119. Manner, in Laws, in Customs—
- 120. Local Prejudices will be removed—
- 121. State Passions & Views will be done
- 122. away— the Mind expands— it will
- 123. embrace the Union; we shall think
- 124. and feel, & act as one People—

[d.]

- 125. Circ^t Courts— Mistaken Notions of
- 126. them— Not in the Nature of Nisi Prius.
- 127. Courts of Orig^l Jurisdⁿ— you carry Law
- 128. to their Homes, to their very Doors—
- 129. meets every Citizen in his own State—
- 130. Not many appeals— if qⁿ intricate,
- 131. adj^d till next Term & take the Opinion
- 132. of the Judges. Appeals from the State
- 133. Tribunals— monstrous— you make
- 134. them expensive & oppressive.
- 135. Cir^t Courts cannot pervade the
- 136. Country— too extensive. Silent operation
- 137. of Laws.
- 138. The Laws should be more wisely
- 139. framed— judiciously expounded, &
- 140. vigorously executed in Republics
- 141. than in Monarchies.
- 142. England— Scotland—

[Miscellaneous notes]

- 143. Two omnipotent Bodies—
- 144. Aversion of People to
- 145. strange Judicatures—
- 146. Pope's authority; &
- 147. King's.
- 148. England. Scotland—
- 149. An appeal from Scotland
- 150. to England—
- 151. Some Courts are appointed
- 152. by the People— limited
- 153. by Age— some during
- 154. Pleasure—
- 155. Cannot compel them
- 156. to act— or to become
- 157. our officers—
- 158. How as to Jayls— what
- 159. Power over Sheriffs—
- 160. Gov. of Laws.

161. When a Crime is created,
162. who shall have Jurisdⁿ of it—
163. you must enlarge the Jurisdⁿ
164. of a State Court.
165. The Constⁿ points out a
166. Number of Articles, which the federal
167. Courts must take up.
168. The objects are not different—
169. they legislate upon Persons and Things—
170. Corporations shew the actual
171. Existence of distinct Jurisd^{ns}.
172. The Constⁿ has made the Judges
173. of the several States the Judges of the
174. Union; because they have taken an
175. Oath to observe the Constⁿ.
176. This proves too much—
177. Instance the State Législatures.
178. The Oath is in Nature of an
179. Oath of Allegiance, and not an
180. Oath of Office—

APPENDIX B

Paterson's Speech

This speech was written for the Senate debates on June 23, 1789 in opposition to Senator Lee's motion to restrict the jurisdiction of the inferior courts.¹⁸⁶ The speech was written front and back on a single folded sheet of paper about twice legal size. The original manuscript is in the Rutgers University Library at New Brunswick.¹⁸⁷

The speech follows:

1. The Proposition now before the House has
2. undergone a very able Discussion. It involves
3. Questions of Magnitude. and no Doubt will receive
4. the most dispassionate Investigation. What objects
5. shall the Jurisdⁿ of your Dist. Court embrace. What
6. Qⁿ of power shall be attached to it. This is the
7. Qⁿ & it is proper to consider it with a critical
8. Eye. Genⁿ Yesterday took a large Field. they
9. viewed the whole System. they took it in
10. Connection. this perhaps was right. A Beauty
11. frequently results from a View of the Whole which is
12. lost when garbled, or taken by Piecemeal. If the
13. Bill presents a System properly founded, the more
14. thoroughly it is examined the brighter it will
15. appear; it will please. if bad, if radically
16. defective, the sooner it tumbles to the Ground the
17. better. Ever since the Adoption of the Constⁿ I
18. have considered federal Courts of subordinate
19. Jurisdⁿ and detached from state Tribunals as
20. inevitable.
- 20a. The Necessity, the Utility, the Policy
21. of them strikes my Mind in the most forcible Manner.
22. The arguments made use of Yesterday might carry
23. Conviction. Who are we. how compounded. of what
24. Materials do we consist. We are a Combination of
25. Republics. a Number of free States confederated
26. together, & forming a Social League. United we have
27. a Head. separately we have a Head. each operating
28. upon different Objects. When we act as a Union we
29. move in one Sphere when we act in our individual
30. Capacity we move in another. Totally different &
31. altogether detached from each other. God grant they
32. may remain so. Contemplate the states in their
33. federal Capacity. They have an Executive. They
34. have a Legislature consisting of two Houses to frame
35. Laws for the Weal and Salvation of the Union. and
36. who are to adjudicate upon these Laws. Judges
37. chosen by the Union. No. A new Era indeed. Judges

¹⁸⁶ See Paterson's Initial Notes, *supra* Appendix A, notes 174-79 and accompanying text.

¹⁸⁷ Paterson Papers, file 4, Rutgers University Library. The New York Public Library's Bancroft Collection has a transcript of the speech. 300 Bancroft Collection 387-97.

38. chosen by the respective States; in whose election
 39. the Union has no Voice and over whom they have
 40. little or no Control. This is a Solecism in
 41. Politics. A Novelty in Gov^t. The State Tribunals
 42. consist of Judges elected by the States in their
 43. separate Capacity to decide upon State Laws and
 44. State Objects. They are not elected to decide upon
 45. National Objects or Laws except as they may come in
 46. incidentally in a Cause. The Union has no Vote in
 47. their Election, no Voice in their Appointment. They
 48. are Strangers. Creatures of the State. dependent
 49. upon the State for their Subsistence.
50. Consider how appointed. In some states
 51. annually. in some States for a Term of Years. in
 52. some during good Behavior. In most they depend for
 53. their Salary upon the Leg^e from Year to Year. It is
 54. reducible to this Dilemma. either they become your
 55. Judges & so forced upon you during good Behavior &
 56. entitled to a permanent Salary, and therefore if the
 57. State refuses to choose them the Year following, the
 58. Union will be saddled with the Expense of both of
 59. them in a State because they are they have become
 60. your Judges. or if your Judges no longer than they
 61. are state Judges Then you make entirely dependent
 62. upon the State. Is this an eligible Situation.
63. It is said that it has the Ap. of casting a
 64. Stigma upon State Courts; that you fear their
 65. Virtue. that they will not do what is right. I do
 66. think it should be viewed in that Light. It is a
 67. proper Precaution ag^t dependent Men.
68. However I may value a Man, yet if he be dependent
 69. upon another, I should not like to submit to his
 70. Decision a Dispute in which that other is concerned.
71. We have as Men individually our Interests,
 72. Connections and Ambitions. so as to States. Shall
 73. we suffer them so situated to mingle in the federal
 74. Admⁿ for their Interests. Virtue. Vice.
75. 1. Different Objects. Different The Objects. 1. Adml.
 76. Judicatures 2. Crimes of a certain Grade.
77. 2. Situation of the state Tribunals 3. Revenue.
78. The first conceded. but why. cannot the State
 79. Tribunals decide upon Mari Causes subject to an
 80. Appeal as well as upon others.
- 81.
82. 2. As to Crimes. It is an Axiom. That every Coun^y
 83. ought to retain in its own Hands the means of
 84. Self-Preservation. If Offences be committed ag^t the
 85. Union, will you put it in the Power of state Judges
 86. to decide thereupon. to acquit or to condemn. I
 87. hope not. You put your Life in their Hands. You
 88. present them with a Sword to destroy yourself.
 89. Suppose New Jersty was to make such a Req^t of

90. Virginia.
91. No appeal.
92. 3. As to the Revenue. do not give up the
93. Power of collecting your own Revenues. How is to be
94. done. You will collect Nothing. The state Officers
95. will feel it their Interest to consult the Temper of
96. the People of the State in which they live rather
97. than of the Union.
98. There must therefore be Dis^t. Judges of
99. more extent of Jurisdⁿ than maritime Causes.
100. 4. To become one People. We must have one
101. common national Tribunal. Hence Uniformity of
102. Decision. hence a band of Union. we shall
103. approximate to each other gradually. be assimilated
104. in Manners, in Laws, in Customs.
-
105. Circuit Courts State Trib^l keep up local Prejudices, etc.
106. Mistaken Notions of them. Not in the Nature of Nisi Prius.
107. They are Courts of original Jurisdⁿ. You carry Law
108. to their Homes. Courts to their Doors. meet every
109. Citizen in his own State. not many appeals. if Qⁿ is
110. intricate, ad^j till next Term & take the Opⁿ of the
111. Judges
112. Appeals from the State Tribunals. Monstrous. you will
113. make it expensive and oppressive.
114. Circuit Courts cannot prevade a Country so extensive as this.
115. Silent Operation of Laws. The Laws should be more wisely
116. framed, judiciously expounded, and promptly executed
117. in Republics than in Monarchies.
118. . England. Scotland.

APPENDIX C

Paterson's Notes

These notes were written front and back on two roughly legal sized sheets of paper. The original manuscript is in the Rutgers University Library at New Brunswick.¹⁸⁸ A comparison of the notes with Maclay's Diary¹⁸⁹ indicates that they are notes of the Senate debates taken from June 23, 1789 through June 30, 1789. The following seven points appear in exactly the same order in both sources:

MACLAY'S DIARY	PATERSON'S NOTES
1. <i>June 23</i> : Maclay notes the following speech that he gave that day — "If the bill stood in its present form and the Circuit Courts were continued, six [Supreme Court] judges appeared to be too few. If the Circuit Courts were struck out, they were too many."	1. "Too few, if Circuit Courts. too great, if no Circuit Courts."
2. <i>June 23</i> : A continuation of Maclay's speech, "The mass of causes would remain with the State judges."	2. "The State Courts will take up the great Mass of Business."
3. <i>June 24</i> : "The first debate that arose was whether there should be Circuit Courts, or courts of <i>nisi prius</i> ."	3. [roughly a page of the notes are devoted to the relative merits of Circuit Courts and <i>nisi prius</i> courts]
4. <i>June 29</i> : "We got on to the clause where a <i>defendant was required, on oath, to disclose his or her knowledge in the cause, etc.</i> " (emphasis original)	4. "May compell a Man to disclose on oath . . ."
5. <i>June 29</i> : "Ellsworth moved an amendment that the plaintiff, too, should swear at the request of the defendant."	5. "Motion, that Clause be amended by swearing the Pltf."
6. <i>June 30</i> : "Up rose Ellsworth and threw the common law back all the way to the wager of law."	6. "The Law. Wager."

¹⁸⁸ Paterson Papers, file 4, Rutgers University Library. The New York Public Library's Bancroft Collection includes a transcript of the notes. 300 Bancroft Collection 495-511.

¹⁸⁹ See *supra* note 36.

7. June 30: "Strong went back to the ancient trial by battle."

7. "Trial by Battle."

In particular, note the similarity of phrasing between Maclay's Diary and Paterson's Notes in numbers 1 and 2. Finally, Ellsworth's motion in number 5 seems conclusive.

The Notes follow:

[Begin first page of manuscript notes. Supreme Court debate of June 23.¹⁹⁰]

1. The Number of Judges not
2. Sufficient. Life, Liberty, and
3. Property. House of Lords in England.
4. Sessions in Scotland 13 or 15.
5. No Appeal from them.
6. — Too few, if Circuit Courts. too
7. great, if no Circuit Courts.
8. — The Powers of the S. Court are
9. great. they are to check the
10. Excess of Legislation.
11. The State courts will take
12. up the great Mass of Business.
13. Difficult to get Judges enough
14. Numbers no Security ag^t Corruption.

[Circuit Courts debate of June 24 through June 27.¹⁹¹]

15. Saving of Expenses in Nisi Prius
16. Courts. as to W^s [witnesses?]
17. Arguments more Solemn when
18. at Bar.
19. Difficult for parties to attend
20. at the Sup. Court.
21. Extent of the Country. Great
22. Labour & Expenses.
23. Counsel. two sets of them.
24. New Trials.
25. Gaol Delivery. Jury of
26. Assizes to ascertain the
27. Fact.
28. Equity Cases should be
29. referred to Chy. they should
30. not be blended. L^d Mansfield.
31. Equitizing. keep them
32. distinct.
33. Hab. Corpus & Sovereignty

¹⁹⁰ See MACLAY'S DIARY, *supra* note 36, at 85.

¹⁹¹ A general reading of Maclay's Diary indicates that the Senate considered the bill section by section, beginning with the first section. The notes in lines 15–82 partially cover the period between June 23 when the nisi prius debate began and June 29 when the procedure debate began. MACLAY'S DIARY, *supra* note 36, at 86, 89–91. Congress was not in session on June 28, a Sunday.

- 34. of the State.
- 35. Germany like America.
- 36. Russians & Peter the Great.
- 37. People in Extremity bold,
- 38. interprising, etc not cringing
- 39. and courting Offices as about
- 40. the Court. Must have
- 41. Nisi Prius Courts, & not Circuits.
- 42. Must trust a great Deal
- 43. to State courts.
- 44. Advantages of Nisi Prius
- 45. 1. Uniformity of Decision.
- 46. 2. Maturity of Judgment.
- 47. Commⁿ swift, easy, and direct
- 48. None. except as to a new trial.
- 49. Excon. [Ex continenti?] Affidavits.
- 50. cases.

[Begin second page of manuscript notes.]

- 51. Nisi Prius
- 52. Why should not the
- 53. Jurisdⁿ of the Dist^l Court be
- 54. complete & extend to all
- 55. Cases at Law and in Equity,
- 56. with an Appeal, limiting
- 57. the same.
- 58. If a small Sum, it
- 59. may involve a Question of Law
- 60. of great Importance, and
- 61. should be liable to be removed.
- 62. Hambden, his a Cause of 20 *s/l*.
- 63. — Sum of 500 D^r small enough.
- 64. General Intercourse.
- 65. No Complaint as to the Admⁿ
- 66. of Justice. 2 *Sheriffs*.
- 67. Def^t but how as to the Pltf.
- 68. Concurrent Jurisdⁿ.
- 69. Pervade the Union.
- 70. More Satisfⁿ to the Parties.
- 71. The Farmers in the New England
- 72. States not worth more than
- 73. 1,000 D^r on an Average.
- 74. Money. Merchandize. Land
- 75. bought and sold.
- 76. Suppose 2 District Courts in
- 77. a large Dist^l.
- 78. Where Titles are held under
- 79. different States, each State
- 80. will endeavor to protect its
- 81. own Grant. they should be
- 82. tried in the federal Court.

[Begin June 29 debate over procedure in the lower courts.¹⁹²]

- 83. May compel a Man to
- 84. disclose on Oath in one Side of
- 85. the Court & not on the other.
- 86. Strange.
- 87. No Ground for the Distinction
- 88. More within the Reach of
- 89. Juries. Juries can judge
- 90. of Evidence.
- 91. uncertain. Too common.
- 92. better a particular Mischief
- 93. than a general Inconvenience
- 94. Judges cannot infer a
- 95. Fact from a Fact.
- 96. A Witness may testify
- 97. ag^t his Interest.
- 98. May in Com. Law Courts
- 99. admit a Party's Oath by
- 100. Consent
- 101. Cannot compell a man to disclose
- 102. a Fraud. A Factor

[Begin third page of manuscript notes.]

- 103. Here the Court possesses the same
- 104. Jurisdⁿ both Law and Equity.
- 105. Cheaper swearing in one
- 106. Court than the other.
- 107. An interested Person may
- 108. swear in his own Behalf.
- 109. Less Delay, & Less Expense in
- 110. taking the Evidence at Com. Law,
- 111. than in Equity.
- 112. Equity has swallowed up
- 113. the Com. Law Courts.
- 114. In Delaware they have
- 115. double Jurisdⁿ much Confusion.
- 116. House of Lords take up Appeals
- 117. from Equity.
- 118. Motion, that Clause be
- 119. amended by swearing the
- 120. Pltf.

[Procedure debate continues on June 30.¹⁹³]

- 121. 1. The same Judges here exercise
- 122. both. This perhaps an Imperfⁿ

¹⁹² See *id.* at 89–91.

¹⁹³ See *id.* at 91–92. Lines 121–44 appear as a separate column on the third page of the

- 123. impracticable.
- 124. 2. Eq. has swallowed up the
- 125. Com. Law. overleaped her
- 126. Bounds. How as to the Com.
- 127. Law Courts. Too straightlaced.
- 128. 3. Whether viva voce Testimony
- 129. preferable to written. not
- 130. the Question. No Interro^y
- 131. No Exⁿ before the Judge or Exⁿ
- 132. The Answer. Too sh.
- 133. 4. Why not swear in one
- 134. court as well as in the other.
- 135. Cheaper in one than the
- 136. other. Make Oaths cheap.
- 137. An interested Person may
- 138. swear at Com. Law.
- 139. Both Pltf and Def^t ought
- 140. to swear.
- 141. Novel Idea. — is —
- 142. The Remedy is not reciprocal
- 143. at Com. Law. it should be
- 144. mutual. both swear.

[Begin fourth page of manuscript notes.]

- 145. Mode of Proof the same in
- 146. the Bill in both Courts.
- 147. Provide for Mortgages; and then
- 148. Equity will have nothing to do.
- 149. Why have not the Com. Law Courts
- 150. in England this Power. Parliament
- 151. sits frequently. it is improper.
- 152. If the Judges thought with Blackstone,
- 153. a Bill would have been brought
- 154. forward.
-
- 155. A Witness interested may be
- 156. sworn.
- 157. The Parties by Mutual
- 158. Consent may swear.
- 159. The Law. Wager. simple
- 160. Contract Debt. but not
- 161. tried by a Jury.
- 162. Aw Auditors. the Parties
- 163. there swear before the Auditors.
- 164. Lord Mansfield's Decisions generally
- 165. followed.
- 166. Trial by Battle

- 167. It will narrow the Court of
- 168. Equity.
- 169. To try the Credibility of
- 170. W^s To try a Question of Law.
- 171. Very tedious. very expensive
- 172. and then an Arbⁿ advised.