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THE FEDERAL COURTS, THE FIRST CONGRESS, AND THE NON-SETTLEMENT OF 1789

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The extent of Congress's power to curtail the jurisdiction of the federal courts has produced a long-running debate. Article III traditionalists defend broad congressional power to withhold jurisdiction from the federal courts altogether, while critics argue that some or all Article III business—most notably cases arising under federal law—must be heard in an Article III tribunal, at least on appeal. But traditionalists and their "aggregate vesting" critics are on common ground in supposing that the Constitution is indifferent as to whether Article III cases within the Supreme Court's appellate jurisdiction are heard initially in a state court or in an inferior court that Congress chooses to create. Indeed, this is the settled understanding of Article III. This Article suggests that the First Congress likely did not share the common ground on which these competing visions of congressional power rest. Instead, the debates over the 1789 Judiciary Act reveal a widely voiced understanding that state courts were constitutionally disabled from hearing certain Article III matters in the first instance—such as federal criminal prosecutions and various

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admiralty matters—and that Congress could not empower state courts to hear them. Many in Congress therefore also supposed that lower federal courts were mandated if such cases were to be heard at all. Although a vocal minority countered with the now-dominant view of state court power and the constitutional non-necessity of lower federal courts, they did so as part of a losing effort to eliminate the proposed federal district courts. The debates pose problems for traditionalists as well as their critics, but they are ultimately more problematic for the critics. Rather than providing support for a theory of mandatory aggregate vesting of federal question cases or other Article III business, this underappreciated constitutional dimension of the debate is better viewed as supporting a limited notion of constitutionally driven jurisdictional exclusivity.

INTRODUCTION

ARTICLE III's safeguards for judicial independence—life tenure and non-reduction in salary—extend, by their terms, only to federal judges.[1] Yet state courts, whose judges ordinarily lack comparable safeguards as a matter of state law, routinely hear cases and controversies to which the federal judicial power extends. Hardly anyone sees a constitutional problem with this arrangement.[2] State courts are said to be constitutionally competent to hear all of the cases on the Article III menu that are within the Supreme Court's appellate jurisdiction. Even though there are debates over state and federal court "parity" in a variety of settings, such debate ordinarily is limited to the arena of policy, not the Constitution. Where there is a perceived problem with state courts' hearing certain Article III business in the first instance, it is left to Congress to assign such jurisdiction to lower federal courts—either exclusively, or by giving litigants a choice to come to federal court with their Article III cases.[3]

[1] See U.S. Const. art. III, § 1.

[2] See, e.g., Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 941 (1988) (noting that "there is no anomaly in the national Constitution's setting a higher fairness standard for the courts of the national government than it imposes on state courts"). Occasionally, scholars have argued that due process problems may arise if state courts hear certain Article III matters. See, e.g., Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 496–98 (1986) (suggesting due process might require state courts hearing federal law challenges to state action to have Article III-style protections "to remove possible bias"); cf. Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 726–29 (1995) (questioning faithfulness of elected judiciaries to constitutional rights and rule of law values). These arguments, however, do not suggest that Article III itself imposes such a limit.

[3] See, e.g., Barry Friedman, Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1213, 1218 & n.16 (2004) (viewing problem of jurisdictional allocation as largely involving subconstitutional questions).

Such views regarding state court competence to hear Article III judicial business despite the absence of Article III safeguards are unremarkable and are shared by both sides in a long-running debate over congressional power to curtail federal court jurisdiction. Under what is now the traditional view, the text, structure, and framing of Article III reflect a constitutional decision to leave the creation of lower federal courts to Congress's discretion and to allow Congress to give them as much or as little of the jurisdiction under Article III as it chooses. Under this view, the creation of lower federal courts was not mandatory, much less the exercise by such courts of any particular slice of jurisdiction to which the federal judicial power extended. In addition, the traditional view holds that the Constitution permits any Article III business excluded from the lower federal courts to be heard in the first instance in the state courts. In the absence of lower federal courts, federal judicial review of such cases could take place in the Supreme Court, subject to Congress's considerable power to make "exceptions" to the Court's appellate jurisdiction.[4]

Critics of the traditional view tend not to dispute the notion that state courts are competent to hear Article III business in the first instance. Some believe, however, that Article III's vesting language requires that cases listed under Article III,[5] or perhaps some subset of them, be able to be heard in a federal court either originally or on appeal.[6] For critics of the traditional view, state courts are competent to hear all cases within the Supreme Court's appellate jurisdiction as an original matter, but they challenge the extent to which state courts may have the "last word"[7] on such cases. For example, critics argue that Congress might not be able to make exceptions to

[4] For defenses of the traditional view, see, e.g., John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. Chi. L. Rev. 203 (1997); Daniel J. Meltzer, The History and Structure of Article III, 138 U. Pa. L. Rev. 1569 (1990); Julian Velasco, Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View, 46 Cath. U. L. Rev. 671 (1997).

[5] See, e.g., Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 854–55 (1984).

[6] See, e.g., Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 272 (1985).

[7] Amar, supra note 6, at 262; see also Clinton, supra note 5, at 850–51 (finding that Article III prohibits giving state courts "final jurisdiction" over cases to which federal judicial power extends).

the Supreme Court's appellate jurisdiction unless it simultaneously creates lower federal courts and vests them with jurisdiction over such excluded cases. Like traditionalists, these "mandatory aggregate vesting" adherents believe that Congress is under no constitutional obligation to create lower federal courts; for them, any and all Article III business could be heard initially in the state courts so long as it is subject to the exercise of federal court appellate review down the line.[8]

For both Article III traditionalists and their critics, therefore, the Constitution can tolerate almost any arrangement respecting the allocation of Article III judicial business for purposes of trial. This scholarly agreement is consistent with the frequently voiced understanding that, for the framers of the Judiciary Act of 1789, debate over the organization of the inferior federal courts focused primarily, if not exclusively, on questions of policy and expediency, not on the Constitution.[9] It is also consistent with the usual reading of the "Madisonian Compromise" at the Constitutional Convention that produced the language of Article III which left the creation of inferior federal courts up to Congress.[10]

[8] See Amar, supra note 6, at 229–30; Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515, 1518 (1986); see also Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 82 (1981) (suggesting that constitutional claims constitutionally require an original or appellate federal forum). Still others argue that the exceptions power cannot be exercised in such a way as to destroy the essential function of the Supreme Court in the constitutional scheme. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953); Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 201–02 (1960).

[9] See, e.g., William R. Casto, The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction, 26 B.C. L. Rev. 1101, 1124–25 (1985) (emphasizing the politics of compromise in the 1789 debates); Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1485–86 (same); Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 53–54 (1923) (same).

[10] See Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 7–9 (5th ed. 2003) [hereinafter Hart & Wechsler]. Matters were not always so tidy. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Court indicated that some Article III business could only be heard, even in the first instance, in an Article III tribunal—not as a matter of legislative choice, but by force of the Constitution:

Despite this general agreement among scholars, the issues of state court competence and congressional power to allocate Article III business were far less settled during the debates over the shaping of the First Judiciary Act than is generally assumed. As had been true for the framing and ratification of the Constitution, much of the surviving debate over the Act reflected doubts about the capacity of the state courts to hear certain Article III business in the first instance, and the perceived constitutional—not just political—problems that would surround any congressional action enabling them to do so.

The general story of the 1789 Act's framing has been told before,[11] often with an eye to whether it supports the traditionalist view of congressional power or that of its critics.[12] By contrast, this Article's main concern will be with a less familiar story: how the framers of the First Judiciary Act dealt with the question of the constitutional capacity of non-Article III tribunals to entertain Article III business as an original matter, and whether Congress could empower them to do so, either as state courts, or—as was discussed by a number of legislators—as federal courts. It is, moreover, a story that poses problems for both camps in the debate over congressional power.

A set of interrelated constitutional arguments surfaced in the debates over the organization of the lower federal courts, some more prominently than others. One argument doubted whether state courts—as state courts (and lacking the trappings of Article

> [I]t is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.

Id. at 336–37 (Story, J.).

[11] See, e.g., 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 457–508 (1971); Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789, at 13–26, 53–79, 98–148 (Wythe Holt & L.H. LaRue eds., 1990); Holt, supra note 9, at 1478–1521.

[12] See, e.g., Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1541–65 (1990); Casto, supra note 9; Clinton, supra note 8, at 1527–40.

III decisionmakers)—could hear all of the Article III cases that the hotly contested federal district courts were slated to hear. Its proponents routinely singled out certain types of cases including piracy and high-seas felonies and perhaps other aspects of admiralty jurisdiction, crimes and offenses against the United States, and other matters that were described as being outside of the state courts' pre-existing (that is, pre-constitutional) power to hear. A second argument suggested that state courts could or would be converted into federal courts when hearing matters that many thought otherwise would be constitutionally off limits to them. The First Congress seriously questioned whether state courts would be exercising their own judicial power or the judicial power of the United States when hearing certain Article III cases[13]—an odd-sounding concern in light of current understandings. A third constitutional argument, sometimes linked with the other two, was that Congress might be under a constitutional obligation to create lower federal courts to hear some or all of the cases to which the federal judicial power extended and that state courts might be disabled from hearing. This last argument seemed to presuppose a notion of mandatory vesting regarding some matters—a notion that could not be satisfied by giving federal courts the "last word," but rather by giving them the exclusive word.

By contrast, the contemporary constitutional argument for mandatory aggregate vesting—that some or all Article III cases initially heard in the state courts require federal appellate review—was far less prominent. Indeed, many of the arguments in the First Congress that have been seized upon by critics of the traditional view as suggesting that Article III requires mandatory aggregate vesting are better viewed as arguments about the constitutional incapacity of state courts to hear certain federal judicial business at all.

To be sure, the dominant modern view that state courts are competent to entertain all Article III business in the exercise of

[13] See Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1637 n.332 (2002) (noting, in discussion of the founding generation's understanding of Article III, that "when a state court proposes to adjudicate a case, the Vesting Clause of Article III arguably makes it important to know *whose* judicial power the court will be exercising"); cf. United States v. Lara, 541 U.S. 193, 210 (2004) (concluding that a federal statute permitted tribal court prosecution as an exercise of the tribe's "inherent" authority as opposed to "delegated" federal authority).

their own jurisdiction was well-represented during these debates. This view is routinely portrayed as representative of the First Congress's understanding, often without emphasizing that it was set forth as part of a losing effort to strike a provision creating district courts with multiple slices of federal jurisdiction.[14] Notably, the argument *against* state court omnicompetence was made by most of those who argued in opposition to that effort and who prevailed in securing the creation of lower federal courts.

While it may not be possible to ascribe similar constitutional views to all who supported establishment of the district courts, the debates provide considerable evidence that currently accepted views regarding the relationship between state and federal courts were not dominant at the time of the framing of the First Judiciary Act. This reinterpretation of the debates therefore contrasts with ones that view the major dispute in Congress over the establishment of lower federal courts as having been couched in merely prudential, as opposed to constitutional, terms. Further, it contrasts with the conclusions of both traditionalists and their critics regarding the extent of congressional power to allocate federal jurisdiction. In this Article, I hope to reconstruct those early congressional understandings and to call into question the extent to which they support the modern "settlement" regarding congressional power to allocate jurisdiction under Article III.

Following a brief discussion of the constitutional and statutory background of the congressional debate in Part I, Part II will take up the dominant constitutional themes raised by federalists and others who argued against a motion to eliminate the federal district courts. Part III then will focus on James Madison's constitutional objections to the motion in a part of the 1789 debate that has been largely ignored. Part IV will explore the constitutional rebuttal of those arguing in favor of scuttling the district courts, while Part V

[14] See, e.g., Maeva Marcus & Natalie Wexler, The Judiciary Act of 1789: Political Compromise of Constitutional Interpretation?, *in* Origins of the Federal Judiciary 13, 18 (Maeva Marcus ed., 1992) (emphasizing dissenting views of Reps. Stone and Jackson); see also David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 47, 49 (1997) (noting that the majority "seems to have agreed" with the views of the dissenters regarding congressional power to withhold jurisdiction from the federal courts).

will assess the impact of these congressional debates on modern federal courts law.

I. BACKGROUND TO THE DEBATES

A. The Senate Bill and the Lower Federal Courts

The primary debate over the Judiciary Act in the House of Representatives—whose records, unlike the Senate's, have been largely preserved—was over a motion introduced by Samuel Livermore of New Hampshire to eliminate the Senate bill's provision to create federal district courts, except perhaps for admiralty matters.[15] Under the Senate bill, there would be a federal district court in each state, staffed by a single federal judge. District courts would hear a variety of disputes as original matters, including admiralty cases, certain criminal and civil actions brought by the United States, suits against consuls, and civil suits by aliens alleging torts in violation of the law of nations.[16] Unlike the proposed itinerant circuit courts that also exercised various forms of trial jurisdiction, including over diversity cases, the district courts were to be geographically fixed in their locations.

The Senate version of the Act came to the House floor for debate on August 24, 1789. After some preliminary skirmishing, Livermore proposed eliminating the third article of the Senate bill—the provision that established the federal district courts.[17] Livermore hinted that although he had other objections to the bill, he surmised that their outcome would hinge on how his initial motion was resolved.[18] The motion said nothing about the circuit courts, but if Livermore had a general problem with lower federal courts and a preference for state court adjudication of Article III cases in

[15] As Professor Robert Clinton has noted, this effort substantially recapitulated earlier efforts during the Constitution's framing to restrict greatly the potential jurisdiction of the federal courts. Clinton, supra note 5, at 849.

[16] 4 The Documentary History of the Supreme Court of the United States, 1789–1800, at 53–57, 60–62 (Maeva Marcus ed., 1992) [hereinafter 4 DHSC] (detailing structure and powers of district and circuit courts under § 9 of the Senate bill).

[17] 11 Documentary History of the First Federal Congress of the United States of America, 1789–1791, at 1329–32 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter 11 DHFFC] (statement of Rep. Livermore, Debate of Aug. 24, 1789).

[18] Id. at 1348 (Debate of Aug. 29, 1789) ("The fate of this clause . . . will determine the fate of the whole bill.").

the first instance, the circuit courts might have been his next target. On the other hand, he might have considered an itinerant court, consisting of perhaps only Supreme Court Justices,[19] as less problematic than the semi-permanent[20] federal institution in each state that the district courts would have been.[21]

B. The Uncertain Goal of Livermore and the House Opposition

Livermore's motion is said to have been modeled on that made in the Senate by Virginia's Richard Henry Lee. Lee had moved that "[t]he Jurisdiction of the Federal Courts should be confined, to cases of admiralty and Maritime Jurisdiction."[22] Lee's motion, in turn, is thought to have been a legislative effort to achieve the goals of Virginia's proposed constitutional amendment,[23] which, if successful, would have limited the inferior federal courts that Congress could create to "courts of admiralty."[24] The Senate defeated

[19] With district judges out of the picture, Supreme Court Justices would be the only Article III judges available for possible lower court duties. See infra note 21. In the Senate there appears to have been a proposal to substitute for inferior courts a "nisi prius" system in which Supreme Court Justices would fan out in groups or individually to try facts in different localities and reserve questions of law for the whole Court. See 4 DHSC, supra note 16, at 31.

[20] Livermore actually referred to them as "perpetual courts." 11 DHFFC, supra note 17, at 1376 (Debate of Aug. 31, 1789).

[21] In correspondence prior to the debates, Livermore seemed clearly to favor a Supreme Court, a circuit court made only of Supreme Court Justices, "[a]nd judges of admiralty, one or more, in each state." Letter from Samuel Livermore to John Pickering (July 11, 1789), *in* 4 DHSC, supra note 16, at 458, 459. Although the "judges of admiralty" are lumped with federal courts that Congress might create, it is unclear whether Livermore meant for them to be institutionally distinct from state courts and judges.

[22] The Diary of William Maclay, *in* 9 Documentary History of the First Federal Congress of the United States of America, 1789–1791, at 3, 85 (Kenneth R. Bowling & Helen E. Veit, eds. 1988) [hereinafter 9 DHFFC]; see also Casto, supra note 9, at 1107 n.52 (quoting from Senate Files in the National Archives that Lee's motion stated: "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.").

[23] See 1 Goebel, supra note 11, at 470–71.

[24] See 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 660 (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott 1836) [hereinafter Elliot's Debates] (quoting proposed Virginia amendment as referring to "such courts of admiralty as Congress may from time to time ordain and establish"); see also The Diary of William Maclay *in* 9 DHFFC, supra note 22, at 3, 85 (noting that Lee's motion was "nearly in the Words of the Virginia amendment").

Lee's motion and the House defeated the proposed constitutional amendment as well.[25] Of course, failure of the amendment did not foreclose a statutory limitation to the same effect.

Prior to making his own motion in the House, Livermore indicated that he had no problem with carving up the United States into districts for purposes of arranging the judicial department, and he seemed to support the idea of establishing courts of admiralty in each state.[26] Most scholars have supposed that Livermore desired establishment of an institutionally distinct federal court, like the district court, but one whose jurisdiction would be limited to admiralty. Although that is the likeliest interpretation of his motion, it is not free from doubt.[27]

1. Livermore's Understanding

Rather than favoring district courts limited to admiralty, there is some evidence that Livermore may have wished to continue a version of the Confederation-era practice of authorizing state courts to serve as federal courts. Under the Articles of Confederation, Congress had the "sole and exclusive right and power" to "appoint[]" courts for the trial of cases involving piracies and felonies on the high seas.[28] It also had the power to "establish[]" an appellate tribunal for the resolution of "all cases of captures"—cases that included the disposition of ships seized as prizes of war.[29] Under the "appointment" provision, Congress never created separate

[25] See The Diary of William Maclay, *in* 9 DHFFC, supra note 22, at 3, 87; Warren, supra note 9, at 119–20.

[26] Livermore stated that "he wished to have the United States divided into districts . . . for the sake of establishing a court of Admiralty in each. . . ." 11 DHFFC, supra note 17, at 1328 (Debate of Aug. 24, 1789). Section 2 of the bill did divide up the United States into a number of districts with state lines in mind. Section 2, however, did not create federal district courts or their jurisdiction; § 3 created the district courts, and § 9 established their jurisdiction. See 4 DHSC, supra note 16, at 39–41, 41–44, 53–57.

[27] See Henry J. Bourguignon, The Federal Key to the Judiciary Act of 1789, 46 S.C. L. Rev. 647, 680 (1995) (reading Livermore as wanting to eliminate district courts in favor of having Congress "establish state courts with admiralty jurisdiction"). Similarly, Professor Wilfred Ritz characterized those senators opposing the Senate bill as "seeking to have the state courts established as a part of [the federal] judicial department—as the lower national courts." Ritz, supra note 11, at 55.

[28] Arts. of Confed'n art. IX, § 1 (1778).

[29] Id. The Continental Congress established a court of appeals in cases of capture as a separate federal tribunal. See 1 Goebel, supra note 11, at 173.

federal courts; rather, it "appointed" state courts to hear such matters.[30] As Livermore put it at the outset of the debate over elimination of the provision for district courts, he "wished congress to establish *state courts of admiralty*."[31] Of course, Livermore's particular turn of phrase[32] might simply have been shorthand for establishing a federal district court in each state with admiralty jurisdiction only. But his description, "state courts of admiralty," carried with it overtones of Confederation-era arrangements.

The fact that Livermore did not argue that the proposed district courts should be maintained with their jurisdiction restricted to admiralty cases—but rather moved that the provision to establish district courts be rejected outright—also supports an inference that he may have contemplated appointing state courts as federal courts.[33] If Livermore wanted Congress to create institutionally distinct and nationally staffed federal courts as proposed by the Senate, but which exercised only admiralty jurisdiction, he could have moved to narrow the jurisdiction of the district courts, rather than to eliminate them altogether.[34] Perhaps Livermore was simply try-

[30] Ordinance of Apr. 5, 1781, *in* 19 Journals of the Continental Congress 1774–1789, at 354–55 (Gaillard Hunt ed., 1912). Some scholars, however, have suggested that the authority to "appoint" was never used (in contrast to the authority to "establish" a court of appeals in prize cases). See, e.g., Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 11 n.37 (2d ed. 1975). But the language of the Ordinance clearly shows that Congress was enforcing the "appointment" power under the Ninth Article when it "constituted and appointed" state judges as judges of piracy and high-seas felony cases. See Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1968 (1993).

[31] 11 DHFFC, supra note 17, at 1366 (statement of Rep. Livermore, Debate of Aug. 29, 1789) (emphasis added). Livermore elsewhere referred to Congress's "instituting courts of admiralty," id. at 1367, and to the "establishment of courts of admiralty," id., but it is questionable whether he thought of these as staffed by a federal judge in a court that was institutionally distinct from the state courts. See supra note 21. Perhaps Livermore meant to allow state courts to hear admiralty cases as state courts, but if so, it is not clear why Congress would have to get involved in establishing them.

[32] The *Gazette of the United States*, which carried a less-detailed summary of the speech than did the *Congressional Register*, records Livermore as "advert[ing] to the institution of courts of admiralty," 11 DHFFC, supra note 17, at 1348 (Debate of Aug. 29, 1789), but does not include the language "state courts of admiralty" which was picked up in the *Congressional Register*. Id. at 1366.

[33] Id. at 1329 (statement of Rep. Livermore, Debate of Aug. 24, 1789). Another provision of the bill dealt with the jurisdiction of the district courts. See supra note 26.

[34] Rep. William Smith of South Carolina made precisely this objection, namely, that if Livermore was concerned with the reduction of jurisdiction of the district courts to admiralty matters, there was no need to move to eliminate them altogether. 11

ing to secure legislative adoption of the language of the failed constitutional amendment to Article III limiting inferior federal courts to "admiralty courts." Although such a label would have been significant in a constitutional amendment,[35] it was largely cosmetic in a jurisdictional statute because there would be no meaningful difference between a "district court" limited to admiralty jurisdiction and an "admiralty court."

Other evidence that Livermore may have contemplated a hybrid arrangement along the lines of Confederation-era practice is that his first justification for rejecting the Senate bill's "new fangled system"[36] was cost savings: "The salaries of thirteen district judges, and the necessary buildings for their accommodation, is no inconsiderable saving. . . ."[37] Institutionally distinct federal trial courts, even if they only heard admiralty cases, would still have required salaries and accommodations, even if on a somewhat smaller scale.[38] It is therefore hard to see how the salaries of "thirteen district judges" would be saved. There could be such savings, however, if Congress employed state courts as admiralty courts, as under the Articles of Confederation. Of course, state judges might have to be paid for their moonlighting, but Livermore perceived that the expenses of his system would be "a fiftieth part" of the proposed system, and "ten thousand times" better.[39] Later in the

DHFFC, supra note 17, at 1363–64 (Debate of Aug. 29, 1789) (viewing the objection to "jurisdiction" as "premature").

[35] Its significance would lie in the fact that the lower federal courts' jurisdiction could not be statutorily expanded beyond admiralty, in contrast to a legislatively created lower federal court.

[36] 11 DHFFC, supra note 17, at 1375 (statement of Rep. Livermore, Debate of Aug. 31, 1789).

[37] Id. at 1366 (statement of Rep. Livermore, Debate of Aug. 29, 1789); see also id. at 1331 (statement of Rep. Livermore, Debate of Aug. 24, 1789) (referring to a "double suit of salary judges" and the "expence of judges"). Livermore's New Hampshire colleague in the House, Abiel Foster, understood the gist of Livermore's "idea" as one that would have entrusted state courts "in the first instance" with the federal judicial power, with "the expense of the district Courts thereby saved to the public." Letter from Rep. Abiel Foster to Oliver Peabody (Sept. 23, 1789), *in* 4 DHSC, supra note 16, at 515, 516. Foster considered such a departure from the Senate bill to be unconstitutional, however. Id. at 516.

[38] Opponents to Livermore's motion raised this very point. See, e.g., 11 DHFFC, supra note 17, at 1351 (statement of Rep. Smith, Debate of Aug. 29, 1789).

[39] Id. at 1348 (statement of Rep. Livermore, Debate of Aug. 29, 1789). On the other hand, Livermore may simply have been exaggerating the costs associated with a lower

debates, however, Livermore appeared to backtrack, stating that "by expence, I do not mean the salaries of Judges,"[40] thus suggesting that he contemplated an institutionally distinct federal court after all.

2. Understanding Livermore

More importantly, evidence that Livermore was understood by his colleagues during the debates as contemplating a Confederation-style arrangement with regard to admiralty is skimpy.[41] Nevertheless, as noted below, some of his opponents may have supposed that Livermore's motion effectively called for such an arrangement as to *other* cases within the federal judicial power that the state courts would end up hearing if his motion succeeded.

For example, although Livermore proposed eliminating the district courts altogether, even his opponents appeared to understand that Livermore was willing to tolerate "a district court of some sort" for admiralty.[42] Livermore's supporters, in fact, conceded the propriety of a lower federal court, apparently along district court lines, to handle admiralty matters.[43] To be sure, one of Livermore's opponents recalled the earlier regime, when Congress had the power to appoint state courts for the trial of piracy cases:

federal court system that heard a smorgasbord of Article III matters in the first instance, as opposed to admiralty only.

[40] Id. at 1375 (statement of Rep. Livermore, Debate of Aug. 31, 1789).

[41] Occasional statements from the sidelines suggest that some Congress-watchers viewed the motion to scrap the district courts as portending the commencement of *all* suits in the state courts. For example, Pennsylvania Attorney General William Bradford supposed that the House "motion for abolishing the district Courts" was put forward in favor of a system "of commencing all suits in the state Courts." Letter from William Bradford, Jr., to Elias Boudinot (Sept. 2, 1789), *in* 4 DHSC, supra note 16, at 505, 505. Similar concerns had been raised in connection with Lee's motion in the Senate. During the thick of the debates over Lee's motion, Francis Dana, a Justice on the Massachusetts high court, wrote to Vice President John Adams of his fear that the motion portended "annihilating the district Judges, and throwing all the Admiralty & Revenue Causes originally into the State Sup: [sic] Judicial Courts." Letter from Francis Dana to John Adams (July 31, 1789), *in* 4 DHSC, supra note 16, at 489, 490.

[42] See, e.g., 11 DHFFC, supra note 17, at 1348 (statement of Rep. Smith, Debate of Aug. 29, 1789).

[43] See, e.g., id. at 1372 (statement of Rep. Stone, Debate of Aug. 29, 1789); id. at 1354 (statement of Rep. Jackson, Debate of Aug. 29, 1789).

> I remember when the court for the trial of piracy under the authority of Congress, was held in Charleston, the judges set [sic] in the courthouse, the prisoners were confined in the gaol, were under the custody of the constables and were executed by the orders of the sheriff of the district of Charleston. All these were state institutions, and yet the court was a federal court.[44]

This point was made, however, to rebut Livermore's argument that there would necessarily have to be a double set of physical institutions to carry out the bill's provision for district courts. And the speaker was careful not to suggest that the new regime would allow for the borrowing of state judges, as had occurred under the Articles. So the point was not likely an acknowledgment that Livermore was proposing an admiralty court along Confederation lines.

Nevertheless, the reference suggests that whatever Livermore may have contemplated for admiralty cases, Confederation-era arrangements were familiar to Congress and represented a system in which state courts did most of the heavy lifting. The specific arrangement of state courts serving as federal courts may have supplied a model for how state courts could hear those matters that, under Article III, many in Congress would suppose belonged exclusively to the judicial power of the United States[45]—just as piracy and high-seas felonies once did.[46] In addition, some scholars have speculated that opponents of the district courts wanted state courts to serve as national courts in a more general capacity.[47] But the

[44] Id. at 1352 (statement of Rep. Smith, Debate of Aug. 29, 1789); see also id. at 1351 (referring to the state court as "a federal court for the particular occasion").

[45] See infra Parts II and III.

[46] See supra text accompanying notes 28–30. At the time of the debates in the First Congress, future Supreme Court Justice William Cushing wondered whether the Confederation arrangement under which the Massachusetts courts could try high-seas felonies was still operative given the Constitution's ratification and apparent preemption of state jurisdiction. See Letter from William Cushing to John Adams (Aug. 22, 1789), *in* 4 DHSC, supra note 16, at 501, 501. Virginia had dismantled its admiralty courts well before the First Congress met in March 1789, suggesting that it saw such jurisdiction as exclusively federal by force of Article III. See 1788 Va. Acts ch. 71 *in* 12 The Statutes at Large; Being a Collection of All the Laws of Virginia 769, 769 (William Waller Hening ed., 1823).

[47] See, e.g., 1 Goebel, supra note 11, at 460–62, 470, 477; Ritz, supra note 11, at 55. The possibility of a truly hybrid arrangement was a topic of private correspondence early on. See, e.g., Letter from Christopher Gore to Rufus King (Mar. 29, 1789), *in* 4 DHSC, supra note 16, at 371, 371 (noting, and apparently rejecting, the idea that "the

possibility that state courts—in the absence of district courts—might serve as federal courts in any capacity would, in turn, create constitutional problems for opponents to Livermore's motion. As discussed below, James Madison, Fisher Ames, and others doubted whether Congress could, in the manner they saw Livermore as somehow suggesting, authorize state courts to act as federal courts under the new Constitution. Moreover, their constitutional objections to the elimination of district courts make sense only if one supposes that Livermore's proposal meant (or that they supposed that its success would mean) that state judges would somehow be converted into federal judges—either with respect to admiralty matters, or, more likely, with respect to certain other matters that the state courts would end up hearing in the first instance as well.

C. Sounding Prudential Themes

In support of his own motion—and after challenging opponents to find a constitutional objection to its passage[48]—Livermore relied primarily on a number of policy-based arguments against expansive federal jurisdiction. Federal courts scholars have traditionally emphasized these types of arguments as having dominated the debates. For example, Livermore focused on the state courts' parity with the newly proposed federal courts[49] and noted that errors of federal law made in state courts could be substantially policed on direct review by the Supreme Court under proposed Section 25 of

Sup Jud Crts [sic] of the several States ought to be the federal district courts"); Letter from David Sewall to Caleb Strong (May 2, 1789), *in* 4 DHSC, supra note 16, at 384, 384 (noting Sen. Strong's persuasive objections to "making the S. J. Courts of the respective States the Inferiour federal Judicial"). It is often hard to assess whether statements that state courts might serve as federal courts meant that they would act in a hybrid capacity or simply hear federal matters as state courts exercising state judicial power. In the congressional debates, however, there is little evidence that those who supported elimination of the district courts favored a hybrid proposal; rather, they argued that state courts could hear all Article III matters within the Supreme Court's appellate jurisdiction in the exercise of their own judicial power. See infra text accompanying notes 194–199.

[48] Livermore threw down the gauntlet at the outset of his argument by asking: "Will any gentleman say that the constitution cannot be administered without this establishment[?]" 11 DHFFC, supra note 17, at 1331 (Debate of Aug. 24, 1789).

[49] Id. ("I never heard it [the judicial system administered by the states] complained of, but justice was distributed with an equal hand in all of them; I believe it is so, and the people think it so.").

the bill.[50] He questioned the need for, and expense of, a separate set of district courts[51] given the already existing state courts, and he criticized the geographical inconvenience of the district courts. Livermore also objected to what he saw as the vexatiousness of the district courts because litigants would have to deal with two sets of institutions in their states instead of just one, given the overlapping original jurisdiction of the lower federal and state courts in a number of areas.[52] Further, Livermore conjured up the image of federal and state courts warring over the body of a litigant if both should simultaneously attempt to exercise jurisdiction over him.[53] Only later in the debate, in response to constitutional arguments against his motion, did Livermore argue that sending the bulk of Article III cases to state courts in the first instance was consistent with Article III's text and structure. Like modern scholars, he read Article III as indicating that state courts had the power to hear those matters within the appellate jurisdiction of the Supreme Court,[54] and therefore lower federal courts need not be established.

Whether Livermore contemplated something like federal district courts with admiralty jurisdiction only or state courts acting as federal courts along Confederation-era lines, his argument reflected familiar anti-federalist sentiments. As noted above, much of his argument parallels framing-era objections to constitutional arrangements that would have established lower federal courts absolutely, or even that would have allowed for their creation by Congress, as the Constitution would do. The overriding concern was that lower federal courts, once established, would eventually "absorb" the state judiciaries, in part because of feared expansive readings of the federal courts' jurisdictional grants. By eliminating district courts

[50] Id. at 1332 ("Gentlemen will not pretend to be afraid of erroneous decisions, because they may be subject to appeal and revision, which furnishes as great security as it is possible to have in any system of jurisprudence whatever."); see also 4 DHSC, supra note 16, at 85–86 (describing appellate review of state court decisions under § 25 of the Senate bill).

[51] 11 DHFFC, supra note 17, at 1324, 1329, 1331 (Debate of Aug. 24, 1789); id. at 1366 (Debate of Aug. 29, 1789).

[52] Id. at 1330–31 (Debate of Aug. 24, 1789) (suggesting that litigants would be "vexed with law-suits" because of overlapping jurisdiction).

[53] Id. at 1348, 1366–67 (Debate of Aug. 29, 1789). Later, Livermore worried that debts might be collected too rapidly in the federal courts. Id. at 1375 (Debate of Aug. 31, 1789).

[54] Id. at 1376 (statement of Rep. Livermore, Debate of Aug. 31, 1789).

or assigning them less to do as an original matter, Livermore's motion meant there would be fewer opportunities for absorption. His motion also reflected a reluctance to confer more duties on federal officers that might be performed just as well by state officers with closer ties to home.

Nevertheless, if Livermore's proposed arrangement included the possibility of state courts' acting as federal courts, as under the Articles, it would also have been something of a mixed bag from an anti-federalist perspective. Government loyalties might be compromised if state officials became dependent upon the national government for their appointment to and removal from their Article III duties. Indeed, the bugbear of "Consolidation"[55] had been raised in connection with efforts to have the state courts serve as inferior federal courts. But the risk of divided loyalties and blurred lines of accountability might have been seen by Livermore's supporters as preferable to the feared "train of inferior officers"[56] associated with the creation of independent federal judicial tribunals that would have a broad jurisdiction frequently overlapping with that of the state courts.

As discussed below, Livermore's motion to eliminate the district courts, whatever it portended, did not lack support. Supporters echoed his policy concerns[57] and argued in favor of the constitutional non-necessity of lower federal courts and the competence of state courts to pick up any and all Article III cases in the first instance.[58] These arguments clearly articulate what is now the domi-

[55] Letter from James Sullivan to Elbridge Gerry (Apr. 22, 1789), *in* 4 DHSC, supra note 16, at 376, 376 ("[I]t appears to me that the Judicials of the Several States cannot become Tribunals of the general Government without making great approaches towards a Consolidation of all the Governments."). But Sullivan found the opposite tack problematic, too: "[I]f Congress shall have independent Tribunals the whole appendage of Legal proceedings must arise from the Same Source. [T]his will when added to the State Tribunals make an infinite multitude of civil officers." Id. Similar concerns about mixed loyalties of state courts serving as federal courts had been voiced during Ratification. See Prakash, supra note 30, at 2028–30.

[56] 11 DHFFC, supra note 17, at 1354 (statement of Rep. Jackson, Debate of Aug. 29, 1789).

[57] See infra text accompanying notes 204–206.

[58] See, e.g., 11 DHFFC, supra note 17, at 1353 (statement of Rep. Jackson, Debate of Aug. 29, 1789); id. at 1371–73 (statement of Rep. Stone, Debate of Aug. 29, 1789); id. at 1377–78, 1380 (statement of Rep. Stone, Debate of Aug. 31, 1789); see also id. at 1390–91 (statement of Rep. Sumter, Debate of Aug. 31, 1789).

nant position held by both sides in the debate over congressional power to allocate jurisdiction. Nevertheless, of the forty-two House members voting, only eleven voted in favor of Livermore's motion.[59] The most forceful arguments in support of the motion, however, came from this minority, often on the heels of federalist speeches in opposition to it. I therefore turn to the constitutionally inspired opposition to Livermore's motion first, and then to the constitutional rebuttal.

II. THE CONSTITUTIONAL ARGUMENT FOR LOWER FEDERAL COURTS

Livermore's motion was opposed on the floor by a number of speakers, nearly all of whom couched important parts of their arguments in constitutional, not just prudential, terms. Indeed, these speakers sometimes advanced constitutional arguments ahead of policy-based objections to the motion.[60] It is important to recognize that these constitutional arguments against the motion indicate—in contrast to the traditional view—that there was a perceived problem under Article III with the proposed elimination of the district courts (or, on the more familiar reading, with limiting their jurisdiction to admiralty). Such opposition might reflect, as some mandatory-vesting theorists have suggested, constitutional objections to a system in which certain Article III business would fall between the cracks by failing to vest in either an original or appellate Article III forum. Although such incomplete vesting could certainly have been one result of Livermore's motion, that was only because of the limited range of Supreme Court review of state court decisionmaking contemplated under Section 25 of the Senate bill—a

[59] Id. at 1393 (Debate of Aug. 31, 1789) (recording the vote as thirty-one to eleven); cf. id. at 1379 n.31 (indicating that one newspaper account recorded the vote as thirty-three to eleven).

[60] See, e.g., id. at 1357 (statement of Rep. Ames, Debate of Aug. 29, 1789) (opting not to address the question of the "inexpediency of the motion"); id. at 1368 (statement of Rep. Benson, Debate of Aug. 29, 1789) (arguing that the practical problems of the bill were constitutional in origin); id. at 1385 (statement of Rep. Gerry, Debate of Aug. 31, 1789) (same); id. at 1359 (statement of Rep. Madison, Debate of Aug. 29, 1789) (raising Article II objections to Livermore's motion ahead of prudential objections).

provision that the House would consider only later.[61] Strictly speaking, however, someone who believed in mandatory aggregate vesting would find nothing unconstitutional in either declining to create federal district courts or creating federal courts with minimal original jurisdiction, so long as federal appellate review of state court decisionmaking was made available. At most, Livermore's motion would have posed only an indirect and speculative threat to complete vesting.

As discussed in this section, constitutional opposition to Livermore's motion more likely reflected an objection to having the state courts hear, even in the first instance, those Article III matters that were perceived, rightly or wrongly, as constitutionally off-limits to them.[62] Indeed, if this is the objection, Livermore's motion to downsize the lower federal courts posed a direct constitutional threat. Moreover, with one possible but important exception,[63] constitutional objections to Livermore's motion were not especially focused on the absence of federal judicial review of the Article III business that would be shuttled to the state courts as a result of his motion, but rather emphasized whether such business could be heard initially in the state courts at all.

A. Constitutionally Mandated Exclusivity

Most of the major constitutional themes raised in opposition to Livermore's motion were voiced by Representative William Smith of South Carolina, who headed up the federalist opposition. Although Smith argued at some length about the expediency of having federal district courts with jurisdiction besides admiralty, he and others voiced major concerns about "how far the constitution stands in the way of this motion."[64]

[61] Under § 25 of the bill, the Supreme Court had review of cases coming from state courts only when the state court's decision was adverse to a claim of federal right. See 4 DHSC, supra note 16, at 85–86.

[62] This Article, which focuses on the understandings of the First Congress, does not attempt to evaluate the correctness of these constitutional objections to Livermore's motion. In Part V, however, it does address how these understandings might impact the current debate over Article III.

[63] See infra text accompanying notes 109–120.

[64] 11 DHFFC, supra note 17, at 1352 (Debate of Aug. 29, 1789). Constitutional arguments of others opposing Livermore's motion are discussed below. Speaking against the motion in addition to Smith were Reps. Ames, Benson, Gerry, Laurance,

1. Jurisdictional Exclusivity and the Vesting Clause

First, Smith seemed to argue that some, and perhaps all, of the jurisdiction to which the federal judicial power extended was excluded from the state courts altogether.[65] In opposition to Livermore's motion, he asserted that, "the Constitution, in the plainest and most unequivocal language preclude[s] us from allotting any part of the judicial authority of the Union to the State judicatures."[66] For Smith, Livermore's motion would produce such an unconstitutional allotment by sending cases that the Senate bill had destined for trial in the federal district courts to the state courts in the first instance. A "jurisdictional exclusivity" reading of Smith's argument is supported by a number of considerations. Most importantly, as noted below, it complemented Smith's (and others') conclusion that Congress was constitutionally compelled to create the lower federal courts that Livermore had targeted. Indeed, it is easy to understand why one would argue that the creation of lower federal courts was constitutionally compelled if one also assumed that some Article III business was off-limits to the state courts as an original matter. In addition, Smith offered specific examples of Article III cases over which he assumed state courts could exercise "no jurisdiction," including high-seas felonies and prosecutions for crimes under federal laws that have not "heretofore existed."[67] Indeed, Smith even went so far as to suggest that Section 25's provision for Supreme Court review of state court decisionmaking was not a recognition of state court authority to try cases arising under federal law, but was only a safety net in the event a state court should "usurp jurisdiction of federal causes."[68] Finally, and importantly, those who favored Livermore's motion all indicated that

Madison, Sedgwick, Sherman, and Vining, with only Sherman and Vining unambiguously limiting themselves to prudential arguments. See infra text accompanying notes 121–130, 141–148.

[65] See Meltzer, supra note 4, at 1600–01 (noting that Rep. Smith and Sen. Maclay likely shared such views).

[66] 11 DHFFC, supra note 17, at 1365 (Debate of Aug. 29, 1789).

[67] Id. at 1349–51. Under the Constitution, Congress has exclusive legislative jurisdiction over punishment of "Piracies and Felonies committed on the high Seas." U.S. Const. art. I, § 8, cl. 10. Of course, these very cases were also within the jurisdiction of the circuit courts under § 11 of the bill—jurisdiction that no one was (yet) challenging.

[68] 11 DHFFC, supra note 17, at 1365 (Debate of Aug. 29, 1789); see also infra text accompanying notes 119–120 (discussing this suggestion of Smith's).

they understood Smith and the Senate bill's supporters as arguing that certain Article III business could only be heard *originally* in an Article III tribunal—a characterization that neither Smith nor his supporters attempted to dispute.[69]

Viewed as a clear "misconception" of Article III by today's standards,[70] this notion of constitutional exclusivity of federal jurisdiction appears to have been shared by most of the opponents to Livermore's motion who spoke on the issue in the House, including Fisher Ames, Elbridge Gerry, and perhaps even James Madison.[71] The many who argued that lower federal courts were constitutionally mandated also seemed to premise their arguments on a view that some matters could not be lodged in the state courts as an original matter.[72] Even traditionalist scholars acknowledge that at least Smith held such views, and they concede that such views were probably shared by Senator William Maclay of Pennsylvania, whose notes comprise the chief source of debates in the Senate.[73]

[69] See infra text accompanying notes 187–189.

[70] Meltzer, supra note 4, at 1611 n.150.

[71] For example, Fisher Ames stated that "actions the cognizance whereof is created *de novo*, are exclusively of federal jurisdiction; that no persons can act as judges to try them, except such as may be commissioned agreeably to the constitutions." 11 DHFFC, supra note 17, at 1358 (Debate of Aug. 29, 1789). Elbridge Gerry observed that "it is expressly against the Constitution to invest the Judges of the State Courts with authority to take cognizance of federal actions." Id. at 1379 (Debate of Aug. 31, 1789). Even James Madison concluded that he did "not see how it can be made compatible with the Constitution, or safe to the federal interests to make a transfer of the federal jurisdiction to the State courts, as contended for by the gentlemen who oppose the clause [of the Senate bill] in question." Id. at 1360 (Debate of Aug. 29, 1789); see also Letter from Rep. Abiel Foster to Oliver Peabody (Sept. 23, 1789), *in* 4 DHSC, supra note 16, at 515, 515–16 (rejecting, on constitutional grounds, the "Idea" that "State Courts might well enough have been entrusted with the matter in the first instance," and concluding that Congress was "bound by the Constitution to adopt" the "arraingment [sic] . . . contained in the Bill").

[72] See infra text accompanying notes 103–106.

[73] See Meltzer, supra note 4, at 1600, 1611 n.150. Despite Maclay's distaste for "this Vile Bill . . . a child of [Oliver Ellsworth]," The Diary of William Maclay *in* 9 DHFFC, supra note 22, at 3, 91, Maclay voiced constitutional misgivings over Lee's motion to restrict the jurisdiction of inferior courts to admiralty and maritime matters. Maclay wrote that arguments in favor of Lee's motion would make sense "if amendments to the Constitution were under Consideration," but they were not. Id. at 85; see also id. at 87 ("[S]hall we follow the Constitution or not[?]"). Maclay's concern was over state courts having any word on some matters, not just the last word. See id. at 87 (stating there would be constitutional problems "if any Matter made cognizable in a federal Court, should *be agitated in* a State Court" (emphasis added)); see also id. ("[T]he

Nevertheless, these same scholars label these views surprising,[74] and not "entitled to significant weight"[75] in assessing the First Congress's understanding of Article III.

Smith based his views on his interpretation of Article III's vesting clause:

> It is declared by that instrument that the judicial power of the United States shall be vested in one supreme and in such inferior courts as Congress shall [sic] from time to time establish: Here is no discretion then in Congress to vest the judicial power of the United States in any other tribunal than in the supreme court and the inferior courts of the United States: . . . *What is the object of the motion*? To assign the jurisdiction of some of these very cases to the state courts, to judges, who in many instances hold their places for a limited period . . . .[76]

Perhaps, as critics of the traditional view have suggested, Smith is arguing in this passage that some or all[77] Article III matters only had to "vest," either originally or on appeal, in a federal court. That is, they argue that Smith interpreted Article III only to require mandatory aggregate vesting in the federal courts—not that cases had to originate in lower federal courts as opposed to state courts. In order to make such an argument, these critics are obliged to read Smith's objection to "assign[ing] the jurisdiction" to the state courts as an objection to "assign[ing] *final* jurisdiction" to them—not as an objection to their exercising original jurisdiction.[78]

State Judges in Virtue of their Oaths, would . . . abstain from every Judicial Act under the federal laws . . . and would refer all such Business to the federal Courts.").

[74] See Currie, supra note 14, at 48 n.282 (referring to Maclay's views as "surprising[]").

[75] Casto, supra note 9, at 1110 n.70; see also Meltzer, supra note 4, at 1600 (describing Smith's and Maclay's views as involving a basic misunderstanding of Article III).

[76] 11 DHFFC, supra note 17, at 1352 (Debate of Aug. 29, 1789) (emphasis added).

[77] See Amar, supra note 12, at 1549–50 (reading Smith as saying "some"); Clinton, supra note 8, at 1534–36 (reading Smith as saying "all").

[78] See Clinton, supra note 5, at 850–51 (quoting this language as objecting to the assignment of "[final] jurisdiction" to the state courts). Professor Clinton is surely right that, had Livermore's motion succeeded, some Article III jurisdiction would indeed fail to vest altogether, inconsistent with a theory of mandatory aggregate vesting. But this begs the question whether Smith was complaining of state courts exercising "jurisdiction" (as Smith said), or "final jurisdiction" (which he did not say). Professor Amar, whose view of mandatory vesting is narrower than Professor Clinton's, simi-

Similarly, they must treat Smith's language denying that "any part of the judicial authority of the Union" could be "allot[ed]" to the state courts as meaning only that such cases could not be resolved finally in the state courts, as opposed to initially.

Although a mandatory aggregate vesting interpretation is not an impossible reading of Smith's remarks on Article III, a more natural reading of Smith is that he objected to the assignment of Article III business to state courts even in the first instance.[79] Smith, after all, was arguing against the constitutionality of a motion that would lodge most, if not all, of the original jurisdiction of the proposed district courts in the state courts.[80] Regarding at least some of those cases and controversies, Smith had said that state courts could exercise "no jurisdiction"—not "some" jurisdiction provided there was federal appellate review down the line. That is why Smith argued for the constitutional necessity of inferior federal courts, and that is why the constitutional problem with the motion appeared to lie most immediately in the reassignment of original jurisdiction to the state courts. As Smith observed, the Constitution "leave[s] no discretion to Congress to parcel out the judicial powers of the Union to State judicatures," just as it leaves "no discretion" to fail to create lower federal courts.[81]

Traditionalists are therefore probably correct to conclude that Smith (like Maclay) viewed state courts as altogether barred from hearing at least some Article III matters—a view that traditionalists reject.[82] As discussed further below, however, it is probably inaccurate to treat Smith's and Maclay's views as aberrational.[83] Moreover, such sentiments regarding the constitutional exclusivity of certain federal jurisdiction were not new to Smith or to the First Congress. Similar statements had been voiced during the ratifica-

larly reads Smith's objection as directed to giving the "last word" to the state courts. See Amar, supra note 6, at 261–62.

[79] Traditionalists appear to agree that this is the better reading of Smith here, even though they reject his views. See, e.g., Casto, supra note 9, at 1110 n.70; Meltzer, supra note 4, at 1600.

[80] 11 DHFFC, supra note 17, at 1352 (statement of Rep. Smith, Debate of Aug. 29, 1789).

[81] Id. at 1365.

[82] See Casto, supra note 9, at 1110 n.70; Meltzer, supra note 4, at 1600.

[83] See infra notes 100–108 and accompanying text; see also supra note 71 (noting others who made similar arguments regarding the constitutional exclusivity of certain Article III matters).

tion of the Constitution and quickly came to dominate the early treatise tradition, as well as state and federal court decisionmaking.[84]

2. Exclusivity as to Some or All Article III Matters?

Nevertheless, it is not clear whether Smith supposed that this constitutional exclusivity applied to all Article III cases and controversies, or only to some.[85] The Senate bill included obvious examples of concurrent jurisdiction, such as diversity cases satisfying the jurisdictional amount, which Smith acknowledged and to which he raised no objection.[86] In addition, Smith provided only selective examples of what he called the unassignable "judicial authority of the Union"[87] or, as he referred to it elsewhere, "those causes which

[84] See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 58–96 (discussing founding-era understandings of jurisdictional exclusivity). Justice Story, who included an argument for mandatory aggregate vesting in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328–31, 333–36 (1816), also believed that "some" Article III business rested with the federal courts even in the first instance because of the Constitution, not just by legislative choice. See supra note 10. Story also supposed that Congress would have to create lower federal courts to handle the cases that state courts could not or would not hear. See *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 330; see also infra note 108. These particular views of Story's, but not those regarding mandatory aggregate vesting, have generally been rejected by federal courts scholars. See, e.g., Amar, supra note 12, at 1503–04 n.9; Clinton, supra note 8, at 1584.

[85] See Casto, supra note 9, at 1110 n.70 (concluding that Smith believed exclusivity applied to all Article III matters). Professor Amar, by contrast, apparently reads Smith's references to the "judicial authority of the Union" and "those causes which, by the constitution, are declared to belong to the judicial courts of the United States" as vague enough to refer only to a subset of Article III matters—for Amar, the "all cases" categories of jurisdiction within Article III—and that only these categories of cases must vest either originally or on appeal in an Article III tribunal. Amar, supra note 12, at 1548.

[86] 11 DHFFC, supra note 17, at 1350 (Debate of Aug. 29, 1789) (recognizing that state courts would at least have some such jurisdiction over a "few causes of federal jurisdiction"); see also id. at 1364 (recognizing the possibility of removal of some cases from state court, which the bill made optional with the defendant). Some diversity jurisdiction under Article III was excluded from the federal courts altogether, such as cases falling below the jurisdictional amount or in which neither of the parties was a citizen of the state in which suit was brought, but Smith did not indicate that he was bothered by this prospect either.

[87] Id. at 1365.

by the constitution are declared to belong to the judicial courts of the United States."[88]

For example, Smith stated that federal courts "must of necessity have jurisdiction of offences committed on the high seas."[89] References to "necessity" during the House debates were often ambiguous as to whether the speaker intended to refer to political, as opposed to constitutional, necessity.[90] But this particular statement was likely not simply prudential in scope, bearing in mind Smith's earlier remarks about the constitutional limits on congressional power to parcel out Article III cases. A constitutional dimension to Smith's statement about necessity is also suggested by his comments elsewhere that, even under the Confederation, a state court could not take jurisdiction of offenses committed on the high seas except pursuant to an Act of Congress, and then only as a federal court, not by virtue of its native state court jurisdiction: "Can the state courts at this moment *take cognizance* of offences committed on the high seas? If they do, it is under an act of Congress, giving them jurisdiction . . . [and] this tribunal becomes then a federal court for the particular occasion . . . ."[91] Smith apparently thought that state courts, as such, could not hear cases like high-seas offenses, and that no greater power had been given them by the Constitution than had been given by the Articles of Confederation. Smith's contention regarding the inability of state courts to "take cognizance" of such cases as state courts should not be read as an argument that state courts would have to be subject to some kind of federal review of these cases after trial; rather, Smith argued that such cases could only be tried in a federal court.[92]

[88] Id. at 1349.

[89] Id.

[90] See Meltzer, supra note 4, at 1611. It is perhaps possible that exclusivity arguments arose from understandings, grounded in the law of nations and "general law" notions of extraterritoriality, regarding the incompetence of courts of one jurisdiction to hear certain cases implicating another jurisdiction's laws, such as its penal laws. See Ann Woolhandler & Michael G. Collins, State Standing, 81 Va. L. Rev. 387, 423 (1995). Although such arguments would not be merely prudential in scope, they might not be strictly constitutional either.

[91] 11 DHFFC, supra note 17, at 1351 (statement of Rep. Smith, Debate of Aug. 29, 1789) (emphasis added).

[92] By contrast, Smith does not mention jurisdiction in cases of capture or prize jurisdiction as beyond state court competence under the Constitution—cases over which

The other example of exclusivity that Smith offered was that state courts could exercise "*no jurisdiction* of causes arising from a national impost law, because no such law has heretofore existed."[93] In context, the sentiment is not likely a mere prudential objection. His phrasing suggests more generally that he supposed state courts lacked jurisdiction over such revenue cases because they had no judicial authority over such cases prior to the ratification of the Constitution. The idea that state courts might not be able to exercise concurrent jurisdiction in cases that were not within their "pre-existing" authority—as opposed to cases that were, such as diversity cases—had also been a familiar one in federalist circles during ratification.[94] Furthermore, because state court decisions respecting federal rights in connection with a national impost law would have been reviewable by the Supreme Court under Section 25 of the bill,[95] it is unlikely that Smith's objection was that some such cases would fail to vest on appeal. Instead, his objection to eliminating

the state courts antecedently had original (but not final) jurisdiction under the Articles. See supra text accompanying notes 28–30.

[93] 11 DHFFC, supra note 17, at 1351 (Debate of Aug. 29, 1789) (emphasis added). Smith stated that "[i]t is very proper that a court of the United States should try offences committed against the United States." Id. at 1350. This, of course, is not the language of constitutional necessity, but others would conclude that federal criminal proceedings were constitutionally off-limits to the state courts. See infra text accompanying notes 124–134 (discussing views of Fisher Ames and Oliver Ellsworth). During earlier debates over the Bill of Rights, Smith appeared to invoke constitutional necessity when he remarked that the creation of the judiciary should take precedence because without it "not a single part of the revenue system can operate; no breach of your laws can be punished." 11 DHFFC, supra note 17, at 1218 (Debate of Aug. 13, 1789).

[94] In describing the scope of concurrent jurisdiction, Alexander Hamilton wrote that "the states will retain all *pre-existing* authorities," but that "this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the state courts have previous cognizance." The Federalist No. 82, at 553–54 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Alexander C. Hanson, Remarks on the Proposed Plan of a Federal Government (Jan. 1, 1788), *reprinted in* Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787–1788, at 217, 238 (Paul L. Ford ed., Da Capo Press 1968) (1888) (denying that Article III would permit concurrent jurisdiction in cases "created by or under the proposed constitution, in which, as they do not now exist, the inferior federal courts will have exclusive jurisdiction" (emphasis omitted)); cf. John Marshall, Remarks in the Virginia Ratifying Convention, *in* 3 Elliot's Debates, supra note 24, at 551, 553–54 (emphasizing that state courts would retain jurisdiction over "those cases which they now possess" and "causes [that] they now decide").

[95] See supra note 61.

the federal district courts as contemplated by Livermore's motion appears to derive from a belief in the necessity of federal court trial jurisdiction over such cases.

Finally, Smith observed that Article III declares that the judicial power "shall extend to all cases of a particular description" and complained that Livermore's motion would "assign the jurisdiction of some of these very cases to the state courts" whose judges lacked Article III trappings.[96] Professor Akhil Amar has argued that this reference to "all cases of a particular description" can be read as expressing a theory of mandatory vesting for the tier of cases that Article III introduces by the "all cases" language—i.e., federal question, admiralty, and ambassador cases.[97] But given Smith's own specific examples, it is not clear that his understanding would have been coextensive with Amar's "all cases" categories. Because the conclusion of Smith's argument, as discussed below, was that the inferior federal courts were constitutionally compelled, Smith likely understood state courts to be absolutely disqualified as trial courts in at least some settings. Nor did Smith state that he believed the creation of district courts was constitutionally compelled only because of the narrow provisions of review under Section 25 (as mandatory aggregate vesting theorists might argue), as opposed to being unconditionally compelled. Finally, as traditionalists have observed, it is difficult to separate Smith's apparent notions of jurisdictional exclusivity from his ideas about the necessity of lower federal courts.[98]

This "all cases of a particular description" language, like Smith's other language, is therefore far easier to read as expressing a notion of constitutionally driven exclusivity rather than mandatory aggregate vesting. But even if Amar is right that Smith's phrasing is meant to refer only to a subset of Article III matters, that phrasing might only suggest that Smith did not believe that the Constitution mandated exclusive federal jurisdiction in *all* categories of cases to which the judicial power extended, but only in some categories of cases.[99] In short, Smith's reference to the "unassignability" of "the

[96] 11 DHFFC, supra note 17, at 1352 (Debate of Aug. 29, 1789).

[97] Amar, supra note 12, at 1549–50.

[98] See Meltzer, supra note 4, at 1600.

[99] As noted in the text, those cases that Smith mentioned as exclusive were not the "all cases" categories (which would have been easy to mention), but a hodge-podge of

judicial authority of the Union" may not have been a general reference to all cases and controversies to which the federal judicial power happened to extend; instead it may have referred to the cases and controversies to which pre-existing state judicial authority did not also extend. Absent such a reading, it would be difficult to explain Smith's apparent acceptance of some concurrent jurisdiction within the Senate bill, as well as his seeming acceptance of the party-initiated mechanism of removal, which itself presupposes that state judicial power could extend to some cases to which the federal judicial power also extends.

B. Constitutionally Mandated Lower Federal Courts

As noted above, an additional constitutional argument against Livermore's motion was that Congress had a constitutional duty to create lower federal courts. This argument complemented the theory of constitutionally mandated exclusivity because it supposed that lower federal courts would be needed in the first instance to hear those Article III cases that the Constitution excluded from the state courts. As also noted above, in making the argument for inferior courts, Smith read Article III as conferring "no discretion" upon Congress as to whether to create them, but rather only to their "number and quality . . . and not to the possibility of excluding them altogether."[100] "[T]hat Congress must establish some inferior Courts is beyond a doubt . . . ."[101]

Smith saw the requirement of lower federal courts as arising from Article III's Vesting Clause as well—what he called the "terms of command" in the Constitution.[102] Given the state courts' jurisdictional incapacity over some Article III matters in the first instance, the Clause's "shall be vested" language supposedly required the creation of lower federal courts to pick up the jurisdictional slack. In addition, it was immediately after Smith stated that Congress must create some inferior courts that he said Congress lacked the power "to parcel out" the federal judicial power to state

cases such as high-seas offenses and suits under impost laws. See supra note 67 and accompanying text.

[100] 11 DHFFC, supra note 17, at 1364–65 (Debate of Aug. 29, 1789).

[101] Id. at 1365.

[102] Id.

courts. The structure of Smith's argument therefore strongly suggests that he believed such unconstitutional parceling out of Article III business would take place if Congress failed to create a federal trial forum and left various matters for trial in the state courts, as Livermore's motion contemplated. Smith's conclusion that inferior courts must be created therefore appears to rest on a theory of mandatory vesting, but a theory that nonetheless fundamentally differs from mandatory aggregate vesting. Smith's theory denies that state courts can have any word on certain Article III matters; mandatory aggregate vesting theory only denies that state courts can have the "last word." Directly responding to Livermore's constitutional challenge, Smith concluded that "[t]he district court is necessary, if we intend to adhere to the spirit of the constitution."[103]

Constitutional insistence on the creation of lower federal courts is "obviously an incorrect understanding of article III"[104] from a modern perspective. But arguments about the constitutional necessity of lower federal courts were voiced by many others besides Smith who opposed Livermore's motion, including such heavyweights as Fisher Ames, Egbert Benson, and Elbridge Gerry.[105] Moreover, nothing in their arguments suggests that they supposed the obligation to create lower federal courts was merely conditional, or based on the possible narrowness of Supreme Court review of state court decisionmaking under Section 25 of the bill. More likely, their arguments supporting a constitutional obligation to create lower federal courts arose because they too perceived the

[103] Id. at 1352.

[104] Clinton, supra note 8, at 1535–36 (basing his objection on the Madisonian Compromise).

[105] See 11 DHFFC, supra note 17, at 1355 (statement of Rep. Benson, Debate of Aug. 29, 1789) ("This Legislature therefore, have it not at their option to establish judicial courts, or not. . . ."); id. at 1357 (statement of Rep. Ames, Debate of Aug. 29, 1789) (indicating that "the constitution requires" the creation of lower federal courts); id. at 1386 (statement of Rep. Gerry, Debate of Aug. 31, 1789) ("We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequence."); see also id. at 1369 (statement of Rep. Sedgwick) ("[W]e are so circumstanced that two distinct independent powers of judicial proceedings must exist; at least I do not see how we shall get rid of the difficulty, if it is one, until there shall be a change in the constitution."); see also Letter from Rep. Abiel Foster to Oliver Peabody (Sept. 23, 1789), *in* 4 DHSC, supra note 16, at 515, 516 ("The arraingment therefor[e,] contained in the Bill, is such an one, as I concei[ve] every member of the general Government is bound by the Constitution to adopt who has taken an Oath to maintain the same.").

incapacity of state courts to entertain certain Article III business.[106] Even after the 1789 debates, the argument that Article III required lower federal courts would persist in Congress,[107] and it would eventually be picked up and echoed by Justice Story.[108]

C. Constitutionally Mandatory Aggregate Vesting?

Nevertheless, at one point early in his argument Smith could fairly be read as suggesting, in agreement with the theory of mandatory aggregate vesting, that Article III cases only had to begin or end in an Article III court to satisfy the Constitution. Smith stated: "If the state courts are to take cognizance of those causes which by the constitution are declared to belong to the judicial courts of the United States, an appeal must lie in every case to the latter, otherwise the judicial authority of the Union might be altogether eluded."[109] And shortly thereafter, when arguing for the state courts to be restricted to only a "few causes of federal jurisdiction," Smith repeated that "every cause tried in those [state] courts will for the

[106] Some also spoke to the state courts' unwillingness to hear certain Article III cases, a largely subconstitutional concern. See, e.g., 11 DHFFC, supra note 17, at 1369 (statement of Rep. Sedgwick, Debate of Aug. 29, 1789) (stating that state courts "might refuse or neglect to attend to the national business"); id. at 1386 (statement of Rep. Gerry, Debate of Aug. 31, 1789) (noting existence of state laws that attempted to disable state judges from considering certain federal judicial business); see also Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *in* 4 DHSC, supra note 16, at 395, 395–96.

[107] See Marcus & Wexler, supra note 14, at 33 n.36 (noting persistence of the idea for over a decade in Congress); see also David P. Currie, The Constitution in Congress: The Jeffersonians, 1801–1829, at 13 & n.16 (2001) (noting, in connection with the repeal of the Judiciary Act of 1801, 2 Stat. 89, that "[s]everal Federalists" argued that Congress had to establish lower federal courts, but characterizing such arguments as "feebl[e]").

[108] In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 336–37 (1816), after pointing out that "the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority," Justice Story remarked: "It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance." Id. at 331. Although a contrary reading is not impossible, it seems doubtful that Justice Story's reference to exclusive jurisdiction here was to something other than exclusive original jurisdiction.

[109] 11 DHFFC, supra note 17, at 1349 (Debate of Aug. 29, 1789). Elsewhere, when Smith used the phrase "take cognizance" he was referring to whether a court was able to entertain any jurisdiction over a case, not just final jurisdiction over it. See supra text accompanying notes 91–92.

reasons before mentioned be subject to appeal . . . ."[110] These statements—although not made as part of Smith's constitutional objections to Livermore's motion[111]—appear to assume that Article III calls for some kind of mandatory aggregate vesting; they suppose that federal jurisdictional concerns could be satisfied by having an appellate federal forum sitting in review of state courts, rather than requiring a federal trial forum. They therefore arguably contrast with other parts of Smith's argument that suggest federal jurisdictional exclusivity even at the trial stage. As a result, traditionalists have concluded that Smith was just "confused" here.[112] By contrast, mandatory vesting theorists have chosen to emphasize this particular argument of Smith's while simultaneously rejecting his other arguments about jurisdictional exclusivity and the constitutional necessity of lower federal courts.[113]

Maybe Smith was confused. But it is also possible that Smith was simply arguing in the alternative, putting forward various possible objections to Livermore's motion in the hope that one of them would stick. In other words, if Smith turned out to be wrong about the constitutional necessity of original federal court jurisdiction over certain Article III matters (and if the Constitution imposed no barrier to state courts' hearing such matters in the first instance), then there might be a separate problem absent an appeal of those matters from the state courts to a federal court. Alternatively, but perhaps more speculatively, Smith may have been referring to those Article III cases that he believed did *not* constitutionally require an original federal forum (because they were within the states' pre-existing jurisdiction, such as diversity cases), but which, under Smith's possibly additional views on mandatory vesting, at least required a federal forum on appeal.[114]

[110] 11 DHFFC, supra note 17, at 1350 (Debate of Aug. 29, 1789).

[111] Only later in his remarks did Smith expressly turn to the constitutional, as opposed to prudential, objections to Livermore's motion: "There is another important consideration; that is, how far the constitution stands in the way of this motion . . . ." Id. at 1352.

[112] Meltzer, supra note 4, at 1610; see also id. at 1601 (noting the tension between this argument of Smith's and his earlier statements about the requirement of review in every case heard initially by the state courts).

[113] See Amar, supra note 12, at 1553–54 (finding these arguments of Smith's severable).

[114] Smith indicated that he thought the bill conferred too little jurisdiction on the federal courts. See 11 DHFFC, supra note 17, at 1350 (Debate of Aug. 29, 1789) (not-

Yet the strongest argument that Smith probably did not see the bill as propelled by a modern-day theory of mandatory aggregate vesting lies in his peculiar (and unseconded) declaration that Section 25 of the bill did not recognize a power in the Supreme Court to overturn state court decisions that were contrary to federal law or the Constitution.[115] For Smith, review was possible in such cases only to protect against a state court's "usurp[ing] jurisdiction of federal causes."[116] And elsewhere, Smith specifically declared that only appeals from lower federal courts, and not state courts, could be heard by the Supreme Court.[117] Thus, Smith's statement that appeals must lie to the Supreme Court in some Article III matters lest the federal judicial power be avoided altogether seems itself to be qualified and informed by notions of jurisdictional exclusivity.

In any event, it is significant that Smith's mandatory aggregate vesting arguments—if that is what they are—attracted little support from other House opponents to Livermore's motion.[118] And that stands in contrast, for example, to his arguments about exclusive federal jurisdiction and the necessity for lower federal courts.[119]

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ing the bill "does not embrace objects enough"). Perhaps this was an oblique reference to § 25's nonextension to nonfederal question cases, although removal rights attached to many such cases.

[115] After arguing that the Constitution "preclude[s] us from allotting any part of the judicial authority of the Union to the State judicatures," id. at 1365, Smith continued:

> The bill, it is said, is then unconstitutional, for it recognizes the authority of the State courts in that clause which empowers the Supreme Court to overturn the decisions of the States [sic] Courts when those decisions are repugnant to the laws or Constitution of the United States. This is no recognition of any such authority, it is a necessary provision to guard the rights of the Union against the invasion of the States. If a State court should usurp jurisdiction of federal causes, and by its adjudications attempt to strip the federal Government of its Constitutional rights, it is necessary that the national tribunal should possess the power of protecting those rights from such invasion.

Id.

[116] Id.

[117] Id. ("Again, the Supreme Court in two cases only has original [jurisdiction;] in all others it has appellate jurisdiction; but where is the appeal to come from? Certainly not from the State courts. . . .").

[118] See Meltzer, supra note 4, at 1601 (noting the lack of support by other representatives for this argument of Smith's).

[119] See infra Sections II.D and E. As a policy matter, Smith viewed Article III's provisions regarding salary and removal as designed to eliminate "dependence on" the political branches in resolving Article III business, and he surmised that "[w]hether the inexpediency or the unconstitutionality of [Livermore's] motion be considered,

In fact, among opponents to Livermore's motion, Smith was alone in adverting to the possible narrowness of Supreme Court review as a potential criticism of the motion.[120]

D. Outsourcing Article III: State Courts and the Federal Judicial Power

A final constitutional argument—an important variation on the exclusivity argument on which it was based—was developed by a number of other opponents to Livermore's motion. They argued that if state courts were given matters that were constitutionally off-limits to them, these state courts might become federal courts whose judges would become entitled to life tenure and a permanent federal salary. This argument—altogether odd from today's perspective—had considerable traction. Like Smith, Massachusetts federalist Fisher Ames raised constitutional grounds for opposing Livermore's motion, decrying the "hiring out [of] our judicial power" and the reliance on state courts "instead of instituting them ourselves as the constitution requires."[121] In connection with that objection, he observed that some Article III business, given "the exclusive nature of certain parts of the national judicial power," could be heard only by persons appointed as judges in the manner prescribed by Article III.[122] Within those "certain parts," Ames included a prosecution for a violation of federal criminal laws and

there are more than sufficient reasons to oppose it." 11 DHFFC, supra note 17, at 1352 (Debate of Aug. 29, 1789).

[120] It was the supporters of Livermore who harped on § 25 of the bill to show that it presupposed that there was concurrent power in the state courts to hear matters arising under federal law and to show that federal interests in supremacy and uniformity would be largely secured. See infra text accompanying note 185.

[121] 11 DHFFC, supra note 17, at 1357 (Debate of Aug. 29, 1789).

[122] Letter from Fisher Ames to George Richards Minot (Sept. 3, 1789), *in* 4 DHSC, supra note 16, at 507, 507. Elsewhere, Ames notes: "This doctrine of exclusive cognizance by the national courts is not observed in the Bill—and of course urging it ag[ainst] the state courts would be no defence of the Bill." Letter from Fisher Ames to John Lowell (July 28, 1789), *in* 4 DHSC, supra note 16, at 480, 481. Given his championing of a notion of limited jurisdictional exclusivity, it is doubtful that Ames is arguing here against any constitutional exclusivity whatsoever. Perhaps all he means is that the bill recognizes concurrency in many areas, and therefore no one could argue that all of the cases to which the federal judicial power extends are exclusively federal by the force of the Constitution.

other matters not a part of "the jurisdiction which [the state courts] exercised before" the Constitution.[123]

If there were any doubts about whether Ames's arguments regarding exclusivity were constitutionally driven, he dispelled them quickly. Federal criminal prosecutions, Ames explained, were cases the "cognizance whereof is created *de novo*"—that is, after the ratification of the Constitution,[124] and are therefore "exclusively of federal jurisdiction; that no persons can act as judges to try [these cases], except such as may be commissioned agreeably to the constitutions [and] [t]hat for the *trial* of such offences and causes tribunals must be created."[125] In response to the suggestion that state courts were adequate to the task of hearing Article III cases in the first instance because they would be bound by the Supremacy Clause to adhere to federal law and would be subject to direct review, Ames stated that "[t]he law of the United States is a rule to them, but not an authority for them. It controuls their decisions, but cannot enlarge their powers."[126] Given his reference to the "trial" of such cases, little doubt exists that Ames was concerned about state courts exercising any jurisdiction over such matters, not just "final" jurisdiction, as argued by mandatory vesting theorists.

Ames then addressed what he perceived to be the consequences of state courts' hearing those cases that he believed were within the exclusive power of the federal courts. Ames argued that if Congress did not create lower federal courts to hear federal criminal

[123] 11 DHFFC, supra note 17, at 1357 (Debate of Aug. 29, 1789).

[124] Id. at 1358; see also Letter from Fisher Ames to George Richards Minot (Sept. 3, 1789), *in* 4 DHSC, supra note 16, at 507, 507. Ames also illustrated his argument about selective jurisdictional exclusivity by referring to an action "brought on a statute declaring a forfeiture" for "unlad[ing] without a permit":

> Before the law was made, no court had jurisdiction. Can a State court sustain such an action? They may as properly assume admiralty jurisdiction, or sustain actions for forfeitures of the British revenue acts. . . . But whence would they get the power of trying the supposed action? The States . . . never had any such power to give [to state judges], and this government never gave them any.

11 DHFFC, supra note 17, at 1358 (Debate of Aug. 29, 1789); see also Letter from Fisher Ames to John Lowell (July 28, 1789), *in* 4 DHSC, supra note 16, at 480, 482.

[125] 11 DHFFC, supra note 17, at 1358 (Debate of Aug. 29, 1789) (emphasis added).

[126] Id. Ames also indicated in private correspondence that he doubted whether the Supremacy Clause could add to the jurisdiction of state courts. See Letter from Fisher Ames to George Richards Minot (Sept. 3, 1789), *in* 4 DHSC, supra note 16, at 507, 507 (referring to his own "speechicle" in Congress about "my distinction between *jurisdiction* and the *rule of decision* in causes properly cognizable in a State Court").

prosecutions, and if state courts heard such cases, they could not do so as state courts:

> [I]t is not only true that they cannot decide this cause [a prosecution for a federal crime], if we neglect to make provision by creating proper tribunals for the decision, but they will not be authorised to do it even if we pass an act declaring that they shall be invested with power: For they must be individually commissioned and salaried to have it constitutionally, and then they will not have it as the State judges.[127]

This statement is remarkable in light of current understandings about Article III. First of all, it seems to declare that state courts would lack the capacity as state courts to hear some Article III business that was within the Supreme Court's appellate jurisdiction. In addition, the state courts' incapacity to hear such Article III business would exist even if Congress failed to provide a "proper tribunal"—that is, an Article III tribunal—in which it could be heard. Perhaps Ames held out the possibility that state judges could be federal judges too, able to hear matters otherwise off-limits to them, so long as the state judges were "commissioned agreeably to the constitutions." Ames observed, however, that "[i]f we must pay judges, we may as well employ them."[128] It appears as though Ames was suggesting that it might make just as much political sense to have a genuinely federal district judge in each state (as under the Senate bill) as it would to adopt a scheme like Livermore's, which Ames saw as having to rely on state judges wearing two hats in order for it to work constitutionally.

Privately, Ames wondered at the time: "Is it constitutional to refer to the states the decision of causes to which the jurisdiction of the federal judicial shall extend[?] . . . Will the state judges act quasi state judges or as federal[?]"[129] He also wrote: "If the state courts cannot, quasi state courts, exercise the authority, they would become federal Judges by exercising federal jurisdiction & claim

[127] 11 DHFFC, supra note 17, at 1358 (Debate of Aug. 29, 1789).

[128] Id.

[129] Letter from Fisher Ames to John Lowell (July 28, 1789), *in* 4 DHSC, supra note 16, at 480, 481 (emphasis omitted).

seats & salaries as other Judges may."[130] Although occasional pre-debate expressions by others about state courts' serving as the inferior federal courts may simply have been a roundabout way of saying that state courts, as such, could hear any and all Article III business,[131] that clearly was not what Ames supposed would be the consequence of Livermore's motion at least as to "certain parts" of the federal judicial power.

As discussed below, other opponents of Livermore's motion, including James Madison, took seriously the suggestion that state courts might be converted into federal courts if certain Article III jurisdiction was transferred to them. Although the Senate's records are sketchy, Senator Oliver Ellsworth, the reputed father of the Judiciary Act,[132] also appears to have shared this concern. As the Senate bill was awaiting action in the House,[133] Ellsworth wrote privately that "[t]o annex to State Courts jurisdiction which they had not before, as of admiralty cases, & perhaps of offences against the United States, would be constituting the Judges of them, protanto, federal Judges, & of course they would continue such during good behaviour & on fixed saleries."[134] That is surely a strange

[130] Letter from Fisher Ames to John Lowell (July 10–16, 1789), *in* 4 DHSC, supra note 16, at 457, 457; see also Letter from Fisher Ames to John Lowell (Apr. 8, 1789), *in* 4 DHSC, supra note 16, at 373, 373–74 (expressing similar worries). It is doubtful whether Ames supposed that the problem of state judges being converted to federal ones could be avoided so long as the Supreme Court could review cases he supposed were off-limits to the state courts.

[131] See, e.g., Edmund Pendleton, Remarks in the Virginia Ratifying Convention, *in* 3 Elliot's Debates, supra note 24, at 517, 517 ("I think it highly probable that their first experiment will be, to appoint the state courts to have the inferior federal jurisdiction . . . ."); id. at 546, 548 ("For the sake of economy, the appointment of these courts might be in the state courts."); Letter from Edward Carrington to James Madison (Aug. 3, 1789), *in* 4 DHSC, supra note 16, at 493, 493 ("State-Courts, where they are well established might be adopted as the inferior Federal Courts, except as to Maritime business."). These statements may be consistent with an idea of state courts acting as state courts when hearing cases to which the federal judicial power extends, but their phrasing is ambiguous.

[132] Warren, supra note 9, at 59–60.

[133] See 1 Goebel, supra note 11, at 460, 503–04.

[134] Letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789), *in* 4 DHSC, supra note 16, at 495, 495. Professor Prakash, supra note 30, at 2030 n.370, finds Sen. Ellsworth's statement inconsistent with another statement Ellsworth made during ratification:

> [N]othing hinders but the supreme federal court may be held in different districts, or in all the states, and that all the cases, except the few in which it has

thing to fear if one supposed that state courts, exercising their own judicial power, could hear any and all federal judicial business in the first instance. But as did Ames, Ellsworth believed that the state courts could not hear such cases, except perhaps as federal courts. A similar fear that state courts hearing such federal judicial business would "acquire a permanency of right in their Seats & Salaries" even beyond their terms as state judges was apparently expressed by Senator Robert Morris,[135] as well as by Senators William Paterson[136] and Caleb Strong.[137] Although these views of Ellsworth lately have been described as "musings" that "no one else" shared,[138] they seem, in light of the House debates and other contemporary understandings, to have been a standard part of federalist arguments regarding the constitutional consequences of restricting the powers of the lower federal courts.

> 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 . . . .

Oliver Ellsworth, Letters of a Landholder (VI) (Dec. 10, 1787), *reprinted in* Essays on the Constitution of the United States 161, 164–65 (Paul L. Ford, ed., Brooklyn, Historical Prtg. Club 1892). But there need be no inconsistency. Even assuming the earlier statement about "state courts" is not a reference to federal court trials held "in . . . the states," it may simply acknowledge that, when trying some cases within the Supreme Court's appellate jurisdiction, state courts would act as federal courts, not state courts. Ellsworth's letter to Richard Law indicates that Ellsworth did not like the idea, but perhaps he supposed it was possible.

[135] Letter from Robert Morris to Richard Peters (Aug. 24, 1789), *in* 4 DHSC, supra note 16, at 502, 503.

[136] Notes of William Paterson, *in* 9 DHFFC, supra note 22, at 474, 476 ("They become your Judges—fixed upon you during good Behaviour—entitled to a permanent Salary—and therefore if the State refuses to elect them the year following, the Union will be saddled with the Expence of 3 or 4 Judges in a State instead of one."). It is hard to see this concern of Paterson's as solely "prudential," as some scholars do. See, e.g., Casto, supra note 9, at 1110.

[137] See Letter from Caleb Strong to Nathaniel Peaslea Sargeant (May 7, 1789), *in* 4 DHSC, supra note 16, at 387, 387 ("[A] Judge might be removed from his State and continue in his federal office or from his federal & continue in his State Office. . . ."). Ellsworth, Strong, and Paterson were the "three lawyers . . . mainly responsible for the form and content of the Judiciary Bill." 1 Goebel, supra note 11, at 459.

[138] Prakash, supra note 30, at 2030 n.370. Professor Prakash argues that Ellsworth's statement, see supra text accompanying note 134, is not a constitutional argument. But it is hard to see how state judges would become federal judges when they heard certain admiralty cases and federal criminal prosecutions unless one supposed that they lacked the capacity to do so as state judges.

E. Reluctance and Constitutional Doubt

Constitutional concerns even swayed those House members who found Livermore's motion to eliminate the district courts attractive as a matter of jurisdictional policy. For example, Aedanus Burke of South Carolina indicated he was inclined to support Livermore's motion, but said that while he sought to "extricate himself" from the Senate bill, he found that "which ever way he turned, the constitution still stared him in the face."[139] He clearly regretted that the Constitution compelled rejection of Livermore's motion: "[H]e confessed he saw no way to avoid the evil," and indicated that "[i]f any substitute could be devised that was not contrary to the constitution, it should have his support, but he absolutely dispaired of finding any."[140] Egbert Benson of New York acknowledged "difficulties or embarrassments"[141] in the Senate bill—mainly having to do with a dual and possibly clashing set of judicial authorities operating over the same territory. But Benson concluded that the difficulties which "arise out of the proposed establishment . . . grow out of the constitution itself" and that "[i]t is not left to the election of the legislature of the United States whether to adopt or not, a judicial system like the one before us; the words of the constitution are plain and full . . . ."[142] Such constitutional doubts and despair about alternative structures for the judiciary likely were not grounded in a view that Article III called for mandatory aggregate vesting, because legislative provision for enhanced Supreme Court review easily could have addressed any such vesting problems associated with the elimination of the district courts.

Similarly, Elbridge Gerry of Massachusetts acknowledged that objections to the Senate bill had "made [a] deep impression on [him]" and conceded that those who opposed the Constitution's ratification (as had Gerry himself) "will be uneasy" under the proposed judicial system.[143] Nevertheless, like Burke and Benson, he concluded that Congress could not remedy the objections voiced

[139] 11 DHFFC, supra note 17, at 1374 (Debate of Aug. 29, 1789).

[140] Id. In the context of Livermore's motion, the "evil" was presumably the district courts. Burke, however, apparently overcame his constitutional misgivings and voted for Livermore's motion. See id. at 1392 (Debate of Aug. 31, 1789).

[141] Id. at 1368 (Debate of Aug. 29, 1789).

[142] Id.

[143] Id. at 1385–86 (Debate of Aug. 31, 1789).

by Livermore to the Senate bill. "[T]hey result from the constitution itself, and therefore must be borne until the constitution is altered . . . ."[144] Somewhat ominously, he declared, "We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequence." In support of this fatalistic reading of Article III, Gerry also supposed that any limitations on the jurisdiction of the lower federal courts as contemplated by Livermore's motion would be wasted effort as a constitutional matter. Once a lower federal court was created and staffed by an Article III decisionmaker—and Gerry supposed that Livermore's motion contemplated such a court—then that decisionmaker would have to reject Livermore's other restrictions on the jurisdiction of the federal courts.[145]

Of course, a few who opposed Livermore's motion raised exclusively prudential concerns with it, focusing on the promise of "independent" federal courts as fostering a more "impartial" justice while criticizing the disuniformity of state laws regarding judicial continuance in office.[146] And those who sounded constitutional themes also greatly emphasized the expediency of the Senate's plan with regard to inferior federal courts. Although still others may not have been clear whether the thrust of their argument was constitutional or merely prudential,[147] no one speaking in opposition to Livermore's motion suggested that the constitutional concerns raised against it were misplaced or overstated. On the contrary, those who emphasized prudential concerns appeared to

[144] Id. at 1385.

[145] Id. at 1386–87 (statement of Rep. Gerry, Debate of Aug. 31, 1789). Given Gerry's opposition to the ratification of the Constitution, his comments about Article III have a certain "I told you so" flavor to them.

[146] Id. at 1374 (statement of Rep. Sherman, Debate of Aug. 29, 1789) (noting that the Senate proposal was "better" than Livermore's alternative, that it provided for greater "uniformity of decision," and that it would not be "more expensive"); id. at 1376–77 (statement of Rep. Vining, Debate of Aug. 31, 1789) (emphasizing the independence of the federal judiciary from the dangers of "faction").

[147] For example, Rep. Laurance stated tersely that he was against Livermore's motion "because he conceived that it was essential to carry this part of the constitution into effect, and that the courts had better be established now than hereafter." Id. at 1374 (Debate of Aug. 29, 1789). Whether "essential" has a constitutional and not merely prudential force is unclear. Elsewhere, Laurance stated that the scope of federal jurisdiction was not a question of "principle" but "expediency," after noting that "on all hands" members had conceded the "necessity" of a Supreme Court and "some kind of inferior courts." Id. at 1390 (Debate of Aug. 31, 1789).

acknowledge the force of the constitutional critique by asking whether Livermore's proposal "[w]ould . . . be prudent even if it was in our power."[148]

III. MADISON'S UNCOMPROMISING POSITION

A. Article II Limits on the "Transfer" of Article III Power

Perhaps the most revealing opposition to Livermore's motion was James Madison's. It too was constitutionally grounded, and it further developed Ames's point about state courts acting as federal courts. That Madison had constitutional difficulties with Livermore's motion is noteworthy because Madison had authored the Compromise at the constitutional convention that resulted in the language of Article III that appears to give Congress discretion as to whether or not to establish lower federal courts. Also, Madison, like all of Virginia's congressional representatives, was under an injunction to press for a constitutional amendment to have no inferior federal courts besides admiralty courts and to enact legislation that "conform[ed] to the spirit" of the proposed amendment.[149] But Madison resisted.[150] Madison, however, did not directly address the question discussed by Smith, Ames, and others: whether Congress was constitutionally obliged to create lower federal courts. But he had considerable constitutional doubt about "mak[ing] the state courts federal courts," as he supposed Livermore's proposal would somehow do.[151]

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[148] Id. at 1369 (statement of Rep. Sedgwick, Debate of Aug. 29, 1789). In response to the argument against having parallel systems of lower courts, Rep. Sedgwick stated, "I do not see how we shall get rid of the difficulty, if it is one, till there shall be a change in the constitution." Id. at 1356.

[149] See 3 Elliot's Debates, supra note 24, at 661 (recording Virginia's effort to "enjoin" its representatives in the First Congress to work toward ratification of its proposed amendments and to pass laws in conformity with their spirit).

[150] Madison, who played a central role in getting congressional approval of amendments to the Constitution, stated: "Had it been my wish to have comprehended every amendt. recommended by Virga. I should have acted from prudence the very part to which I have been led by choice." Letter from James Madison to Edmund Randolph (Aug. 21, 1789), *in* 12 The Papers of James Madison 348, 349 (Charles F. Hobson & Robert A. Rutland eds., 1979).

[151] 11 DHFFC, supra note 17, at 1359 (statement of Rep. Madison, Debate of Aug. 29, 1789).

Madison began his brief remarks on Livermore's motion by acknowledging the propriety of federal jurisdiction "concurrent with the state jurisdictions," just as "in some cases" state and federal legislative power would be concurrent.[152] The concurrency argument responded to Livermore's objection that the shared jurisdiction, which was clearly provided for in the Senate bill (such as diversity cases over the requisite amount in controversy), would be unworkable as a practical matter.[153] Madison's main point here was that it was actually less "difficult[]" and "novel[]" to have concurrent jurisdiction in the state and federal judiciaries than to have concurrent legislative power.[154]

Then, before launching into a discussion of the political undesirability of leaving certain Article III business to the state courts given the relative lack of judicial independence of judges in some of the states, Madison joined issue with Livermore's motion on constitutional grounds:

> To make the state courts federal courts is liable to insuperable objections. Not to repeat that the moment that is done, they will from the highest down to the county courts, hold their tenures during good behaviour, by virtue of the Constitution. It may be remarked that in another point of view it would violate the Constitution, by usurping a prerogative of the Supreme Executive of the United States. It would be making appointments which are expressly vested in that department, not indeed by *nomination* but by *description*, which would amount to the same thing.[155]

Madison was not tilting at windmills here. Rather, his concern about federalized state courts was specifically directed to Livermore's motion to eliminate the district courts. As he stated, "I do not see how it can be made compatible with the Constitution, or safe to the federal interests to make a transfer of the federal jurisdiction to the State courts, *as contended for* by the gentlemen who

[152] Id.

[153] Id.; see also supra text accompanying note 52.

[154] 11 DHFFC, supra note 17, at 1359 (Debate of Aug. 29, 1789). Still, Madison viewed the Senate bill's general nonreliance on state courts to do federal business as analogous to nonreliance on state legislatures to do federal legislative business. Letter from James Madison to Samuel Johnston (July 31, 1789), *in* 4 DHSC, supra note 16, at 491.

[155] 11 DHFFC, supra note 17, at 1359 (Debate of Aug. 29, 1789).

oppose the clause in question."[156] It was a motion that Madison (and others) supposed would morph state courts into federal courts by the congressional transfer of Article III business to state courts.[157]

Perhaps this concern reflected Madison's sense of what would happen when state courts heard in the first instance any of the cases and controversies listed under Article III—namely, that state courts would become federal courts, *pro tanto*. As discussed below, prominent supporters of Livermore understood Madison as suggesting precisely that.[158] But Madison was probably not making such a suggestion given his earlier apparent acknowledgment that there would be some concurrent jurisdiction in the state and federal judiciaries and that such an arrangement would be workable. Alternatively, Madison may have been referring to the unconstitutional upshot of Livermore's motion in the admiralty setting—namely, reinstating some version of the Confederation-era practice of authorizing state courts to hear admiralty cases as federal courts.[159] Yet this too is doubtful, given that Livermore was not likely making any such suggestion even in the admiralty setting. Besides, Madison seemed to speak broadly about the jurisdiction that might be handed over "by description"[160] to the state courts in the first instance, as a result of Livermore's motion.

More likely, Madison saw constitutional problems with state courts' hearing various other types of cases that the district courts—now on the chopping block—were slated to hear. Madison indicated that the consequence of Livermore's motion was that all

[156] Id. at 1360 (emphasis added).

[157] See infra note 163 (noting another possible reading of Madison's statement).

[158] 11 DHFFC, supra note 17, at 1361 (statement of Rep. Jackson, Debate of Aug. 29, 1789); see also infra notes 200–203 and accompanying text.

[159] There would have been no fundamental objection to such a practice during the era of Confederation, inasmuch as the Articles expressly provided for congressional appointment. See supra text accompanying note 28. Madison was fully aware of the older practice of "invest[ing] the admiralty courts of each state with this jurisdiction"—that is, regarding piracy and high-seas felonies. See James Madison, Remarks in the Virginia Ratifying Convention, *in* 3 Elliot's Debates, supra note 24, at 536, 536. During Ratification, however, Madison seems to have supposed that state courts might be "vested" with similar such jurisdiction, as under the Articles. Id.; see also id. at 539 (remarks of Patrick Henry) (understanding Madison as suggesting that "our state judges might be contented to be federal judges and state judges also").

[160] 11 DHFFC, supra note 17, at 1359 (Debate of Aug. 29, 1789).

state judges (from the highest to the lowest, as he put it) would have federal job security under Article III. Madison would not need to worry about the fate of all state judges, however, if the "transfer" of admiralty was all that Madison had in mind, because not all state judges likely would be recipients of such jurisdiction.[161] Nor would Madison need to worry about state judges' becoming federal ones if he supposed that state courts, as such, could hear any and all Article III matters that the elimination of the district courts would leave to them.[162]

Consequently, if Madison endorsed the possibility of jurisdictional concurrency—thereby recognizing the state courts' power to hear some of the judicial business to which the federal judicial power extends—and yet also believed that Livermore's motion eliminating the district courts would cause an unconstitutional "transfer of the federal jurisdiction" to the state courts, then Madison probably supposed that some limited slices of federal jurisdiction were off-limits to the state courts as state courts.[163] This would make Madison's argument entirely in sync with arguments of other federalists regarding the makeover of state courts into federal courts—arguments that Madison took pains "[n]ot to repeat."[164]

[161] Admiralty matters would likely not be within the ambit of "all" state judges of first resort.

[162] Madison seems to take a different view of state court power than did Edward Carrington. See Letter from Edward Carrington to James Madison (Aug. 3, 1789), *in* 4 DHSC, supra note 16, at 493 (writing that state courts, under their own judicial power, could hear cases to which the federal judicial power extended without violating Virginia's law prohibiting the performance of federal duties); see also infra note 163.

[163] 11 DHFFC, supra note 17, at 1359–60 (statement of Rep. Madison, Debate of Aug. 29, 1789). Perhaps it is possible to see Madison's objections to Livermore's motion as one that somehow affirmatively argued for Congress to "make the state courts federal courts," id. at 1359, instead of still having them act as state courts exercising their own judicial power, when hearing the judicial business that would fall to them if Livermore's motion passed. On this view, Madison ought to have *supported* the constitutionality of Livermore's motion had it contemplated the state courts' exercise of their own jurisdiction over such business. Such an interpretation of Madison, however, seems unlikely. No one so understood Madison, and no one in support of Livermore's motion supposed that state courts would be acting under anything other than state judicial power. Indeed, Livermore's supporters criticized Madison for disagreeing with that notion. See infra text accompanying notes 200–203.

[164] 11 DHFFC, supra note 17, at 1359 (Debate of Aug. 29, 1789). A mandatory vesting theorist might strain to see Madison's concern about state courts being made federal courts as arising from the necessity of a lower "federal" court to hear those cases

Roundly denounced as a "strange mode of reasoning"[165] by Livermore's supporters, this "imaginative"[166] and "somewhat novel"[167] suggestion of Madison's is politely avoided by federal courts scholars.[168] They do so despite the fact that others in the House echoed Madison's basic insight, just as central figures in the shaping of the Act in the Senate had,[169] that a transfer of certain Article III business to state judges would risk their becoming federal judges.[170] Madison's only novelty was the addition of an Appointments Clause objection. To be sure, neither Madison nor those who shared his views offered an explanation of why the state courts would have been transformed into federal courts by the "transfer" of such forbidden jurisdiction, as opposed to merely acting unlaw-

excluded from the Supreme Court's appellate review, but Madison did not refer to the narrowness of appellate review in his remarks as a reason for his concerns.

[165] Id. at 1382 (statement of Rep. Stone, Debate of Aug. 31, 1789).

[166] Kent Greenfield, Original Penumbras: Constitutional Interpretation in the First Year of Congress, 26 Conn. L. Rev. 79, 120 (1993); see also id. at 119 (referring to Ames's argument as "innovative"). Ames's views of exclusivity should be read as limited to cases over which the state courts lacked pre-existing jurisdiction, which would be in line with Madison's views regarding concurrent jurisdiction.

[167] Clinton, supra note 8, at 1538.

[168] Some have characterized Madison's reference to making "state courts federal courts" as directed to pragmatic concerns. See Michael L. Wells & Edward J. Larson, Original Intent and Article III, 70 Tul. L. Rev. 75, 115–16 (1995). The particular reference to Article II, however, was unambiguously constitutional in scope.

[169] See supra text accompanying notes 135–137; see also The Notes of William Paterson, *in* 9 DHFFC, supra note 22, at 474, 477 ("When a Crime is created, who shall have Jurisdn. of it—you must enlarge the Jurisdn. of a State Court."); id. at 478 ("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 . . . ."). These particular statements by Paterson only arguably reflect constitutional concerns, but other statements of his more clearly do. See supra note 136.

[170] For example, Elbridge Gerry observed that "[y]ou cannot make federal courts of the state courts; because the constitution is an insuperable bar" and went on to point out that some states prohibited their judges from "administering, or taking cognizance of foreign matters." 11 DHFFC, supra note 17, at 1386 (Debate of Aug. 31, 1789). Rep. Benson, who had expressed doubts about the system proposed by the Senate bill, but still felt it was constitutionally compelled, would later propose a constitutional amendment to permit the federal government to confer on state courts such judicial power under Article III as it chose—arguably in recognition that the Constitution did not allow for such an arrangement. See Wythe Holt, "Federal Courts as the Asylum to Federal Interests": Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary, 36 Buff. L. Rev. 341, 357–63 (1987).

fully or in excess of their own judicial power. Perhaps the thought was that if some portion of the jurisdiction to which the judicial power extended was beyond the pre-existing power of the state courts to hear, they could only hear it by congressional conferral or delegation, and then the state courts would be exercising the federal judicial power rather than state judicial power. If so, they could do so only as Article III decisionmakers.[171] Some appear only to have feared the prospect, but Madison raised an additional constitutional objection to it.[172]

B. Compromising the Compromise?

Of course, this reading of Madison's constitutional objections to Livermore's motion might appear to be in conflict with the Compromise that bears his name, which is usually viewed as smoking-gun historical evidence of the constitutional non-necessity of lower federal courts.[173] But one could logically hold a belief that certain cases within the federal judicial power were constitutionally off-limits to the state courts as such—as Madison arguably did—without also assuming that Congress was under a constitutionally driven (much less judicially enforceable) obligation to create tribunals of its own in which such cases could be heard in the first instance. Such a belief only meant that some Article III cases, such as federal crimes, piracies, revenue cases, and high-seas felonies, would have nowhere to go—a problem, but not necessarily one of constitutional dimension.[174] Madison's Compromise, even as traditionally understood, is therefore not inconsistent with a political, as

[171] Alexander Hamilton noted in Federalist No. 81 that "[t]o confer the power of determining such causes upon the existing courts of the several states, would perhaps be as much 'to constitute tribunals,' as to create new courts with the like power." The Federalist No. 81, at 541, 547 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[172] Madison made an analogous nondelegation argument two months earlier during the debate over the President's removal power by asking: "The judicial power is vested in a supreme court, but will gentlemen say the judicial power can be placed elsewhere, unless the constitution has made an exception?" 11 DHFFC, supra note 17, at 869 (Debate of June 16, 1789).

[173] See Currie, supra note 14, at 48.

[174] This possibility might also mean, as some in the House supposed, that Congress was under an obligation to create lower federal courts to hear those cases that they supposed the state courts could not hear. See also infra text accompanying notes 229–233.

opposed to a constitutional, imperative for the creation of lower federal courts.[175]

More importantly, Madison does not appear to have supposed that the Compromise meant that state courts would be presumptively capable of handling all Article III business that might be denied to lower federal courts. For Madison, the possibility that the Constitution might not compel the establishment of lower federal courts did not compel the further conclusion that state courts would be constitutionally able to hear all those cases not heard by the federal courts. Indeed, neither Madison nor anyone else made reference to the events of the Compromise as bearing on the question of the allocation of federal judicial power in the debates over the 1789 Act.

Finally, the smoking-gun quality of the Compromise is itself open to question.[176] The Compromise resolved: "That the national legislature be empowered to appoint inferior Tribunals."[177] This seemed to break a stalemate between those who wanted inferior courts embedded in the Constitution and those who wanted no mention of them. But given earlier developments on the day of the Compromise, it is possible that there were some who were drawn to the language of appointment by the "national legislature" because it undid the earlier elimination of such language—elimination that Madison had himself engineered.[178] In addition, it is possible that some of those voting for the Compromise did not view it as foreclosing the ability of Congress to "appoint" the state

[175] Others apparently found the language of the Compromise wholly consistent with a constitutional imperative for lower federal courts. See Collins, supra note 84, at 132–34. Gouverneur Morris, who would claim credit for the final draft of Article III at the Constitutional Convention, see Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *in* 3 The Records of the Federal Convention of 1787, at 419, 420 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand's Records], once said of Article III: "This, therefore, amounts to a declaration, that the inferior courts shall exist . . . . In declaring then that these tribunals shall exist, it equally declares that the Congress shall ordain and establish them. I say they shall; this is the evident intention, if not the express words, of the Constitution." 11 Annals of Cong. 75, 79 (1802) (statement of Sen. Morris).

[176] Collins, supra note 84, at 105–35.

[177] Journal of June 5, 1787, *in* 1 Farrand's Records, supra note 175, at 115, 118.

[178] See Hart & Wechsler, supra note 10, at 8 (noting that Madison and Wilson had earlier succeeded in eliminating the language of appointment by the national legislature, only to see all reference to inferior courts then dropped).

courts as federal courts, just as under the Articles of Confederation.[179] If so, it might have been an attractive idea to those who championed state courts as the preferred courts of first resort.[180] For them, any discretion in Congress regarding inferior courts would be limited to deciding whether to appoint state courts as federal courts—at least for matters otherwise off-limits to them as state courts—or to create institutionally distinct lower federal courts.[181]

To be sure, Article II's provision for executive appointment of officers of the United States—which Madison would invoke in opposition to Livermore's House motion—seems to bar the possibility of legislative appointment of state judges as federal ones. But Article II's language would materialize only later in the Constitutional convention, well after the initial vote on the Compromise.[182] Madison's statements on the House floor may therefore have been inconsistent with these alternative original understandings of the Compromise, which may have held open the possibility for state courts to be appointed as federal courts, but perhaps not with Madison's own original understandings of it.

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[179] See id. at 8 n.46. Madison quotes himself and Wilson as saying that "there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." Debate of June 5, 1787, *in* 1 Farrand's Records, supra note 175, at 119, 125. Also, accounts differ on whether Madison's resolution used the word "appoint" or "institute" with respect to inferior tribunals. See Hart & Wechsler, supra note 10, at 8. Madison may have supposed that the relevant congressional discretion was whether or not to establish institutionally distinct federal courts or none at all. But other participants may not have similarly so supposed.

[180] See James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 717 n.100 (1998); Prakash, supra note 30, at 2015–20 & n.286.

[181] See Prakash, supra note 30, at 2019–20.

[182] See Journal of Sept. 7, 1787, *in* 2 Farrand's Records, supra note 175, at 532, 533 (describing how the appointment process for federal officers was not finalized until late in the drafting process). The Compromise's language of appointment of inferior courts would also give way to Article III's language of "ordain[ing] and establish[ing]" federal courts—language that is perhaps harder to reconcile with the possibility of appointing state courts to be federal ones. See 1 Goebel, supra note 11, at 211–12, 247; Liebman & Ryan, supra note 180, at 735, 740–41, 759; cf. James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643, 683–84 (2004) (speculating that Congress's power "to constitute Tribunals inferior to the supreme Court" under U.S. Const. art. I, § 8, cl. 9, "might include state courts").

IV. "SEVERAL GENTLEMEN HAVE MISTAKEN THIS IDEA"[183]

In response to the barrage of constitutional objections to Livermore's motion, a vocal minority replied in support of it. Livermore's supporters generally agreed on the constitutional non-necessity of lower federal courts and the constitutional competence of state courts to pick up, even in the first instance, all Article III cases within the Supreme Court's appellate jurisdiction. In addition, on the prudential front, they saw the bill's presumption of state court partiality as ill-founded.[184] In that regard they emphasized the state courts' duties under the Supremacy Clause to conform their decisionmaking to federal law—duties that they pointed out could be substantially policed on direct review under Section 25 of the bill.[185] These arguments favoring Livermore's motion well articulate what is now the dominant view of state and federal court power. It is for that reason that their views get such attention, despite the minority role such arguments played in an ultimately unsuccessful effort to limit the lower federal courts and their jurisdiction. Similar arguments had apparently been urged by the losing side in the Senate's consideration of a similar motion.[186]

The two most prominent supporters of Livermore's motion were Representatives James Jackson of Georgia and Michael Stone of Maryland. Their reading of Article III was quite different from that of their opponents. Jackson stated that the Constitution did not

[183] 11 DHFFC, supra note 17, at 1381 (statement of Rep. Stone, Debate of Aug. 31, 1789). The mistaken "idea" to which Stone referred was that the Vesting Clause was a command to Congress. Traditionalists would agree. See, e.g., Harrison, supra note 4, at 211–12. Among the "several gentlemen" whom Stone supposed misunderstood this "idea" were Madison and Ames. See infra text accompanying notes 194–202.

[184] See 11 DHFFC, supra note 17, at 1331 (statement of Rep. Livermore, Debate of Aug. 24, 1789); id. at 1378–79 (statement of Rep. Stone, Debate of Aug. 31, 1789); id. at 1391 (statement of Rep. Sumter, Debate of Aug. 31, 1789); id. at 1392 (statement of Rep. Burke, Debate of Aug. 31, 1789).

[185] See id. at 1378, 1382 (statement of Rep. Stone, Debate of Aug. 31, 1789); id. at 1389–90 (statement of Rep. Livermore, Debate of Aug. 31, 1789). Representatives also made specific references to § 25 and the judicial review of state courts by the Supreme Court, which only can be taken as implicit references to § 25 of the Act. See id. at 1332 (statement of Rep. Livermore, Debate of Aug. 24, 1789); id. at 1361, 1388–89 (statement of Rep. Jackson, Debate of Aug. 29, 1789); id. at 1367 (statement of Rep. Livermore, Debate of Aug. 29, 1789).

[186] See The Diary of William Maclay, *in* 9 DHFFC, supra note 22, at 3, 85, 87 (recounting arguments made by Sens. Lee and Grayson); The Notes of Pierce Butler, *in* 9 DHFFC, supra note 22, at 452, 455–56.

"absolutely require" lower federal courts because the language of Article III referred to what Congress "may" do, and was therefore permissive.[187] Similarly, Stone argued that Congress had unfettered discretion with respect to the decision to create lower federal courts[188] and focused on language allowing Congress to create inferior courts "from time to time" as meaning "when they think proper."[189] Both Jackson and Stone also dismissed the "mistaken" view shared by "several gentlemen" that Article III's vesting language required Article III cases to be heard in federal courts only.[190] Stone read the constitutional text as embodying the idea that the federal judicial power merely extended to such cases: "[T]hey have given you a power to extend your jurisdiction to them, but have not compelled you to that extension . . . ."[191] Reasoning from the structure of Article III, Stone then concluded that if the entire judicial power had to be vested, any legislative efforts to restrict it were themselves nugatory.[192] Yet the Senate bill clearly had such restrictions, such as the exclusion of district court jurisdiction over civil suits by the United States when the matter in dispute involved less than $100.[193]

Jackson and Stone also denied that the Livermore proposal would leave state courts unconstitutionally exercising jurisdiction outside of their competence.[194] This position clearly indicates that they understood opponents of the proposal as animated by a constitutionally driven theory of federal jurisdictional exclusivity. For example, Jackson noted that Fisher Ames's main arguments—

[187] 11 DHFFC, supra note 17, at 1353 (Debate of Aug. 29, 1789).

[188] Id. at 1371, 1380 (Debate of Aug. 31, 1789).

[189] Id. at 1371 (Debate of Aug. 29, 1789).

[190] Id. at 1353 (statement of Rep. Jackson, Debate of Aug. 29, 1789); id. at 1381 (statement of Rep. Stone, Debate of Aug. 31, 1789).

[191] Id. at 1381 (Debate of Aug. 31, 1789).

[192] Id. Elbridge Gerry, a reluctant opponent of Livermore's motion, had made a similar suggestion. See supra text accompanying note 145.

[193] See 4 DHSC, supra note 16, at 56. Under § 9 of the bill, such a case—assuming the United States chose to bring one—was effectively within the exclusive jurisdiction of the state courts.

[194] See 11 DHFFC, supra note 17, at 1353 (statement of Rep. Jackson, Debate of Aug. 29, 1789) (stating that state courts were competent for "every judiciary purpose"); id. at 1382–83 (statement of Rep. Stone, Debate of Aug. 31, 1789) (denying that jurisdictional exclusivity inhered in Article III).

which Jackson termed "specious"[195]—were grounded in the idea that any tribunals other than Article III tribunals were incompetent to hear Article III business, even in the first instance. For Jackson, any possible "necessity" for an inferior federal court for admiralty cases and perhaps "matters relative to the revenue" was prudential only and not constitutionally inspired.[196] As did Jackson, Stone and others argued that state courts were constitutionally competent to exercise jurisdiction over any Article III business that Livermore's motion would leave to them.[197] Like Jackson, Stone also supposed that even admiralty and piracy cases were not constitutionally off-limits to the state courts.[198] Rather, if there was any necessity in the congressional establishment of such courts in the states, he argued that it was because not all state courts had instituted such tribunals.[199] In short, Jackson and Stone sought to characterize matters that their opponents had treated in terms of constitutional necessity as implicating only questions of political expediency. And at the political level, they simply disagreed on the need for federal jurisdiction beyond admiralty.

Finally, Jackson and Stone both objected to the suggestion that if state courts heard Article III business in the first instance, they would be doing so as federal courts. Stone in particular zeroed in on what he referred to as Madison's "strange mode of reasoning."[200] He characterized Madison's argument as stating that whenever a court heard a case on the Article III menu, it could only do so as a federal court, with federal salaries and tenure.[201] Madison, however, had apparently assumed a role for concurrent state court

[195] Id. at 1361 (Debate of Aug. 29, 1789).

[196] Id. at 1354.

[197] See id. at 1371 (statement of Rep. Stone, Debate of Aug. 29, 1789). Jackson and Stone were seconded by Reps. Aedanus Burke and Thomas Sumter, who, along with Livermore, made up the ranks of those voicing support of the motion to eliminate the district courts. See id. at 1373–74 (statement of Rep. Burke, Debate of Aug. 29, 1789); id. at 1390–91 (statement of Rep. Sumter, Debate of Aug. 31, 1789); id. at 1392–93 (statement of Rep. Burke, Debate of Aug. 31, 1789). Rep. Tucker also briefly indicated that state courts could do all the work intended for the district courts. Id. at 1328 (Debate of Aug. 24, 1789).

[198] See id. at 1372 (Debate of Aug. 29, 1789); id. at 1383 (Debate of Aug. 31, 1789).

[199] See id. at 1372 (Debate of Aug. 29, 1789).

[200] Id. at 1382 (Debate of Aug. 31, 1789).

[201] Id. ("[T]he very moment any suit is brought by the United States, under 100 dollars, before a state court, such court becomes a continental court.").

jurisdiction over some Article III business; consequently, the state-to-federal court metamorphosis to which Stone referred would probably have occurred for Madison only when state courts heard matters that were beyond their powers to hear as state courts.[202] Jackson also disputed Madison's suggestion that if Livermore's motion succeeded, state courts would hear Article III business as something other than state courts; he even denied that state courts had been acting as federal courts when they heard admiralty cases by congressional authorization under the Articles of Confederation.[203]

Having sought to rebut constitutional objections to having state courts hear the bulk of federal judicial business in the first instance, Jackson and Stone both turned to what they saw as the bill's unfair assumptions of state court inadequacy. Absent a viable constitutional objection to Livermore's proposal, such assumptions would be all that remained of the effort to refuse state courts jurisdiction over such matters in the first instance.[204] Indeed, the view that the Senate bill was "founded upon distrust" of the state courts was central to the argument of those supporting Livermore's motion.[205] Supporters of the motion repeatedly emphasized state courts' duty under the Supremacy Clause to conform their decisionmaking to federal law in order to defuse worries that the enforcement of federal law might be undermined. Supporters bolstered their arguments by noting that the duty to comply with supreme federal law could be policed under Section 25 of the bill.[206] Jackson and Stone

[202] An ordinary civil suit brought by the United States would likely not have been beyond the antecedent jurisdiction of the state courts. Other sections of the bill also expressly provided for concurrent state court jurisdiction in civil suits brought by the United States for $100 or more. See 4 DHSC, supra note 16, at 53–54, 58–63 (reprinting §§ 9 and 11 of the Senate bill).

[203] 11 DHFFC, supra note 17, at 1389 (statement of Rep. Jackson, Debate of Aug. 31, 1789).

[204] See id. ("[I]f congress do not think there is a constitutional necessity, they ought not to appoint [the district courts], because they will be burthensome and disagreeable to the people.").

[205] As Rep. Thomas Sumter stated, "a system founded upon distrust" was not likely to be well received. Id. at 1391 (Debate of Aug. 31, 1789). Sumter also doubted whether "the licentiousness which has been complained of in our state courts" was "so great as to warrant an exertion of power, little if any thing short of tyranny." Id.

[206] See supra note 185 (noting views of supporters of Livermore's motion). In addition, Jackson also supposed that there could be no worry for "partial" decisions of

were unsuccessful, however, and Livermore's motion was overwhelmingly defeated.[207]

V. DRAWING LESSONS FOR ARTICLE III

It would obviously take more than a rereading of the First Congress's debates over the 1789 Judiciary Act to attempt any reassessment of Article III itself. Even a focus limited to the original understanding of Article III would have to take into account the Constitution's framing and ratification and how its text and structure would have been understood by reasonable lawmakers at the time. Such an effort is beyond the scope of this more narrowly focused Article. Nevertheless, the debates of the First Congress can shed light on how reasonable lawmakers in the founding era might have understood the Constitution as it related to state courts' power to entertain Article III business. And to the extent that original understandings can legitimately bear upon constitutional interpretation,[208] they are relevant here as well. Moreover, the First Congress's deliberations and decisions regarding implementation of the Constitution have generally been accorded special weight as an interpretive tool.[209]

Of course, it may be impossible to know whether the constitutional objections raised against Livermore's motion were shared by all of those who voted against it. Political compromises regarding various matters may have made the final version of the bill sufficiently palatable to some who, in a perfect world, might have pre-

state judges, and that such worries were, at a minimum, overblown. 11 DHFFC, supra note 17, at 1387–89 (Debate of Aug. 31, 1789).

[207] See supra text accompanying note 59.

[208] Even skeptics of originalism concede its place in constitutional argument. See, e.g., Richard H. Fallon, Jr., Implementing the Constitution 24 (2001).

[209] See, e.g., Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004) (noting, with respect to the 1789 Judiciary Act, that "[t]he First Congress . . . reflected the understanding of the framing generation and included some of the Framers"); see also Bowsher v. Synar, 478 U.S. 714, 723 (1986) (focusing on the deliberations that produced the "Decision of 1789" regarding the meaning of the President's removal power); Myers v. United States, 272 U.S. 52, 115–36 (1926) (devoting considerable attention to the First Congress's "discussion and decision" regarding the President's removal power under Article II). Predictably, there is scholarly disagreement over the weight to be placed on the First Congress's understandings as an aid in constitutional interpretation in general, see Rebecca L. Brown, Tradition and Insight, 103 Yale L.J. 177, 185–88 (1993), or for Article III in particular, see Clinton, supra note 8, at 1520.

ferred to see only federal admiralty courts.[210] But given that only a comparative few objected to Livermore's motion on purely prudential grounds—and even they did not quarrel with their colleagues' constitutional objections to it—it would be a rational inference that others who opposed the motion also rejected the constitutional arguments of the minority who supported it.

A. Revising Revisionism and Traditionalism

The powerful constitutional opposition to Livermore's motion renders the debates unsupportive of the traditional view in an important way. Traditionalists would have no constitutional objection to the non-creation of lower federal courts or to a regime leaving them with minimal jurisdiction. Were traditionalists' views dominant in the First Congress, arguments in opposition to Livermore's motion to eliminate the lower federal courts or to leave them with minimal jurisdiction ought to have been couched only in terms of policy or expediency. That did not happen. The argument that Livermore's motion presented no constitutional difficulty was raised by a determined few, but only within the minority that supported it. In this regard, mandatory vesting critics are right to focus on the prominence of the constitutional dimension of the debate that traditionalists have been inclined to ignore.

The traditionalists are probably right, however, that the constitutional debate does not appear to have been over the problem of mandatory aggregate vesting as urged by the critics. Rather, as this Article has suggested, the debate appears to have been over the power of state courts to entertain, as an original matter, some of the jurisdiction to which the federal judicial power extended. Indeed, that is precisely how the supporters of Livermore's motion understood the constitutional objections being made by Smith, Ames, Madison, and others. Nevertheless, traditionalists seek to portray these constitutional objections as isolated and aberrational

[210] See William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 47–51 (1995) (suggesting that political compromise, such as the non-inclusion of federal question jurisdiction and the imposition of a hefty amount-in-controversy requirement in diversity cases, must have won over some reluctant votes); see also supra note 9 (noting scholars who see constitutional arguments as taking a back seat to political arguments).

(as well as wrongheaded, in light of modern understandings of Article III and the history of the Compromise).

As urged above, the isolated-and-aberrational characterization does not fairly capture the debates. To be sure, arguments supporting the constitutional necessity of lower federal courts seemed to suppose a notion of mandatory vesting of at least some cases. But such mandatory vesting was not "aggregate" (as opposed to "exclusive") vesting. Also, as noted earlier, the selective cases to which such exclusive vesting applied did not correspond with the cases focused on by critics of the traditional view as calling for mandatory aggregate vesting.

The debates therefore suggest that both sides are partly right and partly wrong about the First Congress's understandings regarding Article III. Overall, the debates point to a third—and by contemporary standards, thoroughly rejected—reading of Article III: that some of the cases and controversies within the Supreme Court's appellate jurisdiction could only be heard initially by Article III decisionmakers. Among supporters of the Senate bill, there was a widely voiced understanding that, if state courts were to hear such matters (or if Congress somehow conferred such jurisdiction on them), they would be exercising the federal judicial power and could do so only as federal courts. This, in turn, led some to suppose that lower federal courts might be constitutionally mandated, at least to hear those matters that state courts would not be able to hear as state courts. Such views were fully consistent with a broad, but not unlimited, constitutional role for concurrent state court jurisdiction over much Article III business.

In addition, it is not due to indeterminacy that this history largely fails to support either of the entrenched views of Article III. Rather, as just noted, much of the history seems to point affirmatively in a very different direction. Nor does Congress's focus in these debates appear to have been on jurisdiction-stripping generally or on federal question cases in particular; instead, the focus was on the more limited problem of jurisdictional exclusivity over certain matters and the limits of state judicial power. That the debates were centered on these peculiar limitations on Congress's ability to allocate jurisdiction might seem like small beer compared to the more far-reaching limitations associated with contemporary theories of mandatory vesting. But that may simply mean that, as

far as the debates are concerned, there is much to support the traditionalists' view that Congress has considerable power to allocate Article III jurisdiction—subject, however, to this unconventional requirement of jurisdictional exclusivity in a handful of matters.

B. Enclaves of Exclusivity

Congress, of course, gave the federal courts exclusive jurisdiction over the very areas that House members repeatedly emphasized as constitutionally calling for exclusivity, and that jurisdiction has largely remained intact. In this respect, the final structure of the 1789 Act is consistent with the views of constitutionally driven jurisdictional exclusivity developed in this Article. Prosecutions for federal crimes, for example, were given exclusively to the lower federal courts in the 1789 Judiciary Act.[211] Later congresses permitted state court enforcement of certain federal penal matters,[212] but it is open to question whether state courts were given authority to hear federal criminal prosecutions, as opposed to nominally civil proceedings involving fines and forfeitures.[213] Beginning in the last century, however, there have been a number of calls for shifting prosecution of many federal crimes to the state courts.[214] These calls are based on the assumption that Congress has near-plenary

[211] See Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79. Congress passed a statute defining various federal crimes seven months after passage of the Judiciary Act. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

[212] See Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 303–06 (1989); Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 551–54, 570–73 (1925).

[213] For example, actions to recover statutory penalties under federal statutes would likely have been treated as civil actions in debt—actions with which state courts would have been very familiar as part of their pre-existing jurisdiction. See United States v. Mundell, 27 F. Cas. 23, 26 (C.C.D. Va. 1795) (No. 15,834) (stating that an action by the United States for a statutory penalty "was, in truth, a civil suit"). Other federal statutes that some have read as opening up the state courts to hear prosecutions for federal crimes may simply have been designed to permit states to prosecute, as a state-law crime, the same activities that the federal government could prosecute as a federal crime. See Collins, supra note 84, at 88–89.

[214] For examples of early suggestions, see Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 516–17 (1928); Warren, supra note 212, at 546, 594–98. For more recent examples, see Judicial Conference of the United States, Long Range Plan for the Federal Courts 27 (1995); Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 1010–15 (1995).

power to allocate all cases within the appellate jurisdiction of the Supreme Court for trial in the state courts. The debates over the Judiciary Act in the First Congress, however, reveal early understandings of Article III that would be difficult to reconcile with any such efforts. In addition, later developments allowing federal courts to hear state criminal prosecutions on removal have not necessarily settled the constitutionality of this issue.[215] Delegating the prosecution of federal crimes to state courts also presents various non-Article III problems, including issues surrounding the appointment power (if state prosecutors are employed), the role of grand juries, and the location of the pardon power.[216]

Similarly, much of the admiralty jurisdiction was given exclusively to the federal courts by statute,[217] although only parts of it (such as high-seas felonies, piracy, and perhaps revenue matters) were regularly spoken of as constitutionally exclusive. Today, one would probably view these cases as part of the federal criminal jurisdiction, arising under federal law, rather than admiralty. Furthermore, the Supreme Court long ago passed up the opportunity to settle the question of whether any part of admiralty jurisdiction was exclusive by force of the Constitution or only by statute.[218]

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[215] See, e.g., Tennessee v. Davis, 100 U.S. 257 (1879). *Davis* upheld the constitutionality of a federal statute permitting removal of a state criminal prosecution against a federal revenue officer on the ground that "when the Constitution was adopted, a portion of [state] judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State." Id. at 267. It does not follow from the fact that Congress has power to confer the judicial determination of all federal questions upon federal courts that it may also permit the judicial determination of any and all federal question cases by state courts.

[216] Questions about commandeering of state officials would also arise if coercion rather than cooperation were at issue. See Printz v. United States, 521 U.S. 898, 935 (1997); see also United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring). For a discussion of various constitutional problems with state court prosecution of federal crimes, see Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 78–82 (1996).

[217] See Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77. The statute preserved to litigants "the right of a common law remedy" where the common law was competent to give one. Id. ch. 20, § 9, 1 Stat. at 77. State courts, therefore, might hear such matters. See Ernest A. Young, Preemption at Sea, 67 Geo. Wash. L. Rev. 273, 282–83 (1999) (suggesting that the "saving to suitors" provision meant that most of the civil side of admiralty jurisdiction was effectively concurrent).

[218] See The Moses Taylor, 71 U.S. (4 Wall.) 411, 430 (1866) (concluding that it was sufficient that the case was statutorily exclusive).

Unlike with certain federal criminal jurisdiction, however, the prospect of a reassignment of this jurisdictionally exclusive core of admiralty to the state courts is unlikely. Yet here, too, the debates over the 1789 Act would be hard to reconcile with any such effort were Congress to attempt it. And any such attempt would raise similar, non-Article III-based constitutional doubts that would attend the reassignment of federal criminal jurisdiction more generally. Then again, because admiralty seldom was treated as off-limits to state courts in its entirety, and given the 1789 Act's express provision for admiralty litigants to pursue common-law remedies in state courts,[219] evidence surrounding the Act's passage would appear to present no obstacle to a congressional decision to prune admiralty jurisdiction back to its arguably "mo[re] important" public-law side.[220] Supreme Court review of state court admiralty decisions could be left largely to Congress as well.[221]

Although some in Congress spoke more generally about the exclusivity of actions in which the state courts lacked antecedent or

[219] There is debate whether suits for common-law remedies referenced in the 1789 Judiciary Act were really part of Article III's admiralty jurisdiction at all. Compare Amar, supra note 12, at 1525–29 (arguing that they are not), with Young, supra note 217, at 282–83 (indicating that they are), and Meltzer, supra note 4, at 1593–95 (expressing uncertainty).

[220] The Federalist No. 80, at 534, 538 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (observing with respect to "maritime causes" that "[t]he most important part of them are by the present confederation submitted to federal jurisdiction"). Piracies, high-seas felonies, and cases of capture were the three areas to which federal judicial power extended during the era of Confederation. See supra text accompanying notes 28–29. Although not suggesting that the public-law side of admiralty is constitutionally exclusive, modern scholars conclude that it was perhaps admiralty's most critical side, largely because of its foreign policy implications. See, e.g., Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1337 n.440 (1996). For a dissenting view regarding the centrality of admiralty's public-law side, see Jonathan M. Gutoff, Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto, 30 J. Mar. L. & Com. 361, 397–99 (1999) (noting foreign-affairs impact of admiralty's private-law side).

[221] As part of his mandatory aggregate vesting argument, Professor Amar argues that all admiralty cases (as part of Article III's "all cases" groupings) must be heard either originally or finally in an Article III tribunal. See Amar, supra note 12, at 1525–29. To keep the 1789 Act consistent with such a vision, he also argues that state court saving-to-suitors cases are not part of the admiralty jurisdiction. See id. at 1525. Whether or not Amar is correct on this particular point, the debate in the First Congress seemed more focused on whether state courts could take any cognizance at all of certain admiralty matters.

"pre-existing" jurisdiction, the scope of this category is not entirely clear. For some, federal crimes, piracy, and high-seas felonies provided examples of such a category.[222] Other examples included a "de novo" action based on a newly enacted federal impost law[223] and a forfeiture action based on a new federal statute.[224] These particular examples suggest a somewhat broader reach for exclusivity. Also, these examples may indicate that those who spoke to the problem of de novo causes were speaking primarily of actions newly created by federal law, in which the United States or its surrogate would be the enforcing party. If so, the use of these examples suggests an overarching concern with jurisdictional exclusivity over public-law enforcement actions more generally.

More important, perhaps, is what the de novo category probably did *not* include: It was broadly understood that state courts could hear common-law actions implicating questions of federal law, even though all federal law would be de novo in some sense.[225] And Section 25 of the bill obviously contemplated that state courts would render decisions in at least some cases in which questions of federal law were raised.[226] Moreover, the First Congress made no statutory provision for general federal question jurisdiction in the lower federal courts,[227] and no one seemed especially troubled about that either. State courts, as Hamilton suggested in *The Federalist*, could hear civil cases that they ordinarily entertained and

[222] See supra text accompanying notes 91–92.

[223] See supra text accompanying note 93.

[224] See supra note 124.

[225] Sen. Maclay appears to be the exception here. See supra note 73. Maclay likely thought that there was a problem with cases arising under federal laws being excluded from the federal courts in the first instance. See The Diary of William Maclay, *in* 9 DHFFC, supra note 22, at 85 ("These must be executed by the federal Judiciary"). Maclay also noted that many federal questions could not be shoehorned into admiralty jurisdiction, which alone was made subject to federal district court jurisdiction under Sen. Lee's proposal. See id. at 86. Rep. Smith may also have held such views, but it is unclear. See supra text accompanying notes 85–99.

[226] But see supra text accompanying note 68 (quoting statement of Rep. Smith, apparently reaching a contrary conclusion).

[227] See Hart & Wechsler, supra note 10, at 826–27. Despite the lack of such a provision, many cases raising questions of federal law could still be heard in the lower federal courts under the 1789 Act. For example, federal law might be implicated in diversity cases, in civil cases in which the United States was a party, in federal criminal prosecutions, and in admiralty cases that raised questions of federal law, apart from the general maritime law.

plug in the relevant federal norm as easily as they could plug in the relevant law of a foreign country.[228]

C. Congressional Versus State Court Obligations

In addition, the debates shed only limited light on the seemingly long-settled question of whether Congress is required to create some inferior courts. Many supposed that Congress was under such an obligation, which appeared to flow from their understandings about jurisdictional exclusivity. Only Livermore's die-hard supporters asserted the contrary. As discussed above, however, it might be possible for supporters of the Senate bill to suppose that lower federal courts were ultimately dependent on Congress for their creation, and yet still suppose that Congress was under some kind of an obligation to create them.[229] The absence of any judicial power to enforce such an obligation is consistent with an idea—embodied in the traditional understanding of the Madisonian Compromise—that the decision is remitted to Congress. Certainly those who *opposed* the Senate bill viewed the creation of inferior courts as a political question, and one that lacked any constitutional overtones. Of course, if a theory of jurisdictional exclusivity is combined with congressional discretion regarding the creation of inferior courts, the possibility exists that some Article III cases might have no forum in which to commence. But any harm arising from Congress's choice not to create a lower federal court would be something of a self-inflicted injury, at least to the extent that it would primarily impact federal enforcement proceedings.

Finally, and perhaps more significant for the modern debate, is the fact that the threatened non-creation of (or severe jurisdictional limitations on) the lower federal courts did not lead anyone in Congress to suggest that state courts might be under a jurisdictional duty to hear leftover Article III matters. Not even the author of the Compromise supposed that the possibly non-mandatory na-

[228] The Federalist No. 82, supra note 94, at 553, 555 (Alexander Hamilton).

[229] See supra text accompanying notes 174–175; cf. Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 501 (1974) (arguing that lower federal courts may be constitutionally required in a system in which institutional constraints limit the Supreme Court's ability to perform its intended function of judicial review; "the premise that Congress may abolish the lower federal courts is false").

ture of the lower federal courts meant that state courts could entertain—much less be obliged to entertain—federal jurisdiction that Congress failed to confer on its own courts. Such duties were largely beside the point for those who believed that state courts were jurisdictionally disabled from the outset. And those who presupposed state court power to hear such cases appeared to concede the political necessity for lower federal courts, but only if state courts "will not execute that power"—that is, not until after they first refused.[230] Although supporters of Livermore's motion noted that state courts would be under a duty to "decide according to the supreme law,"[231] they did not suggest that such an obligation would require state courts to entertain unwanted jurisdiction in the first place.[232] Federalist opponents of the motion also specifically noted that the Supremacy Clause was a "rule[] of decision" for the state courts, not a jurisdictional provision.[233]

CONCLUSION

It is hard to read the debates in the First Congress and not be struck by the prominence of constitutionally based arguments lev-

[230] 11 DHFFC, supra note 17, at 1372 (statement of Rep. Stone, Debate of Aug. 29, 1789); id. at 1385 (statement of Rep. Stone, Debate of Aug. 31, 1789) (noting that he was in favor of the "government[] moving as silent as death," until the necessity arose for a separate court system, apart from admiralty). Stone also indicated that there might be a political necessity for federal admiralty courts because not all states had such courts, thus suggesting that he believed that creating a federal court was preferable to forcing states to create courts of their own and to supply them with jurisdiction. See supra note 199 and accompanying text.

[231] 11 DHFFC, supra note 17, at 1372 (statement of Rep. Stone, Debate of Aug. 29, 1789).

[232] At one point, Rep. Livermore suggested that state judges would "be bound to carry our laws into execution," but he did so in a context that appears to assume that the state courts were otherwise prepared to exercise their own jurisdiction and apply federal law. Id. at 1389 (Debate of Aug. 31, 1789). But see Currie, supra note 14, at 50 n.299 (reading Livermore as saying that the Supremacy Clause requires state courts to hear cases to which the federal judicial power extends). Similarly, Rep. Jackson observed: "[T]here is not a state but has exercised the admiralty jurisdiction in its fullest extent . . . ." 11 DHFFC, supra note 17, at 1389 (Debate of Aug. 31, 1789). The statement, however, only suggests that Jackson supposed that there was nothing to worry about in terms of state court willingness to assume jurisdiction—not that state courts would be constitutionally compelled to exercise jurisdiction over any and all Article III business within the Supreme Court's appellate jurisdiction.

[233] See 11 DHFFC, supra note 17, at 1357–58 (statement of Rep. Ames, Debate of Aug. 29, 1789).

eled against Livermore's proposal—whether that proposal is viewed as a motion to shrink the jurisdiction of federal trial courts to admiralty or to eliminate them altogether. Under either view, there was a constitutional worry that state judges could not entertain certain slices of Article III business and, if they were allowed to do so as a result of Livermore's motion, that they would somehow be converted into federal judges. The recognition that certain federal jurisdiction was exclusively federal by force of the Constitution was, moreover, seemingly widespread in the House, and perhaps in the Senate as well. It is also not likely that these arguments were simply scare tactics, insofar as the private correspondence of some of the principal actors reflected similar sentiments.

Nevertheless, most scholarship tends to treat the constitutional issues surrounding the First Judiciary Act as a minor theme and places political concerns at the forefront.[234] Political compromise no doubt played an important role in defining the contours of the Act, such as the decisions to limit the Supreme Court's jurisdiction, to withhold from the lower federal courts a general grant of federal question jurisdiction, and to impose a substantial amount-in-controversy requirement in diversity cases. As scholars have noted, the latter two decisions meant, for example, that British creditors would be denied a federal trial forum for enforcement of many debts owed them by American citizens, despite a treaty guaranteeing such debts.[235] But these particular decisions by Congress only show that constitutional arguments in favor of the exclusive jurisdiction of *all* Article III business, or in favor of mandatory aggregate vesting as to all cases and controversies, did not prevail in the First Congress.[236] Assuming there were those who held such

[234] See supra note 9; see also Casto, supra note 9, at 1124 (finding the 1789 Judiciary Act "inexplicable in terms of constitutional mandate"); Marcus & Wexler, supra note 14, at 27, 29 (suggesting that more attention was paid to "political forces" than to the language of the Constitution).

[235] See Holt, supra note 9, at 1487–88, 1516 (viewing compromise regarding British debt as critical to the successful passage of the Act); see also Casto, supra note 210, at 43–44 (noting that § 9's provision permitting aliens to sue for "a tort only" in violation of the law of nations, without regard to amount in controversy, would have excluded debt claims). Nevertheless, Supreme Court review of treaty-violating state court judgments in British creditor cases would presumably have been available under § 25 of the 1789 Act.

[236] Professor Amar's more limited version of mandatory aggregate vesting is somewhat more compatible with the final shape of the Act than one requiring all federal

views,[237] little evidence exists that they were as widely shared as those regarding selective, constitutionally driven, federal jurisdictional exclusivity.

To the extent that modern scholars even acknowledge constitutional arguments over the First Judiciary Act regarding state court incapacity to hear certain Article III matters, they are ritually dismissed as "surprising," "obviously incorrect," and "confused," or are otherwise marginalized.[238] The dismissive criticism echoes that of Livermore's minority of supporters who dubbed their opponents' views of Article III as "mistaken," "specious," and "strange."[239] A similarly dismissive attitude is displayed about such statements during the debates over the Constitution's ratification, although they, too, were anything but isolated.[240] The effort today to downplay such sentiments is understandable. They ill comport with the modern federal courts canon, no matter which side of the debate one takes regarding congressional power to regulate jurisdiction. They also seem inconsistent with the traditional understanding of the Madisonian Compromise as presupposing state court capacity, and perhaps even duties, to hear all cases that Congress chooses not to give to lower federal courts.

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jurisdiction to so vest. See Currie, supra note 14, at 49–50. But even Professor Amar's more limited theory cannot be easily squared with the final shape of the Act. See Meltzer, supra note 4, at 1585–99 (finding substantial "gaps" in the final structure of 1789 Act that are inconsistent with Amar's theory); Velasco, supra note 4, at 692, 745–46 (same). Furthermore, as discussed above, mandatory aggregate vesting is probably not the best explanation of what motivated the First Congress.

[237] It is often stated that the Act was a compromise between those who wanted federal courts to exercise jurisdiction to the full extent of the Constitution and those who wanted a narrower scope for federal jurisdiction. See, e.g., Casto, supra note 210, at 32, 42; Warren, supra note 8, at 67–68, 131. That said, it is hard to identify those who actually expressed the former view that was supposedly compromised.

[238] See supra text accompanying notes 74, 104, and 112.

[239] See supra text accompanying notes 190, 195, and 200.

[240] See, e.g., Casto, supra note 9, at 1124 n.163 (treating as "strange and obscure musings" the run-of-the-mill federalist sentiments of Alexander C. Hanson, see supra note 94, that state courts could constitutionally exercise concurrent jurisdiction only over those cases listed in Article III that pre-existed the Constitution and that federal jurisdiction would otherwise be exclusive); Prakash, supra note 30, at 2027 n.355 (critiquing views of anti-federalists George Mason and Luther Martin regarding federal court exclusivity); cf. id. at 2030 n.370 (criticizing Oliver Ellsworth's supposed post-ratification retreat from pre-ratification views regarding state court capacity to handle certain Article III matters).

These debates in the First Congress, however, show that the arguments regarding state court incapacity were not aberrant within their historical setting. Rather, they were a part of mainstream congressional understandings at a point when certain constitutional understandings were still very much in flux. The irony is that these once-mainstream views about state courts and federal judicial power eventually were displaced by formerly minority views about Article III—views that would become an unshakeable fixture of the modern federal courts canon.[241] These early views also show that the Compromise is perhaps read today for more than it may be worth, and certainly for more than it was worth to its author or to the First Congress. The understandings of the First Congress may not alone suffice to settle the 1789 Act's interpretation, much less the interpretation of Article III that it implemented. But they should at least unsettle attempts by traditionalists or their critics to enlist those early understandings on their own behalf.

[241] In contrast to the legislative settlement regarding the president's power to remove federal officers, reached just two months before, the First Congress expressed little awareness that the issues of federal jurisdiction were being settled for all time. Compare 11 DHFFC, supra note 17, at 921 (statement of Rep. Madison, Debate of June 17, 1789) ("The decision [regarding removal of officers] that is at this time made will become the permanent exposition of the constitution . . . ."), with Letter from James Madison to Samuel Johnston (July 31, 1789), *in* 4 DHSC, supra note 16, at 491, 491 (noting that the judicial bill "is the first essay, and in practice will be surely an experiment").