
The Roots of American Judicial Federalism

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*“A perpetual jealousy respecting liberty,
is absolutely requisite in all free-states.”*

-John Dickenson¹

BIOGRAPHY

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I. SUMMARY

Federalism—the division of powers between central and state governments—is inherent in the American constitutional system. A crucial component of that division of power is the immunity from federal interference the Constitution explicitly and implicitly grants to the judicial systems of the states.

The origins of this division of authority extend back further than the Constitution itself—to the days when the thirteen colonies were part of the British Empire. Prior to 1763, that empire was a *de facto* federation, allowing a great deal of colonial autonomy. In that year, the British government began a series of interventions into the internal governance of the American colonies, including the colonial administration of justice. In response, American publicists staunchly defended local control of colonial affairs, including administration of the courts.

Initially, advocates of the American cause conceded to Parliament authority over intra-colonial activities with inter-colonial effects, arguing only that each colony enjoyed exclusive jurisdiction over purely internal affairs. Beginning in 1768, however, American polemicists began to contend that American rights included self-government over all activities within particular categories, without regard to wider impacts. One of those categories was the administration of justice in case arising within the colonies.

The Declaration of Independence recited British interference with colonial judiciaries as one of the reasons justifying independence. Accordingly, the ensuing Articles of Confederation reserved most judicial matters to the states. In drafting the Constitution, the Framers provided for additional federal judicial authority. Like the post-1768 pre-Revolutionary pamphleteers, however, they rejected proposals for a central government with power over all activities with inter-jurisdictional impact. Instead, they limited federal authority to items specifically enumerated. Reserved to the states would be nearly all the authority they had exercised previously, including power over state court procedures and over existing areas of substantive jurisdiction. With a few exceptions, therefore, the states were left in exclusive possession of the law of torts, contracts, inheritance, property, and criminal law.

When the Constitution became public in September, 1787, opponents argued that the Constitution could be construed to permit Congress or the federal courts to exceed prescribed limits. They contended that the new government might interfere with criminal and civil justice within the states. The Constitution, they said, should be rewritten to prevent manipulation of its terms by legal “sophistry.”

To quiet such apprehensions, the Constitution’s proponents explained to the ratifying public that the Constitution, if adopted, would grant only restricted authority to the new government. The Constitution’s proponents listed for the ratifying public numerous areas in which the federal government would have no power and the states would enjoy exclusive power. Among the areas listed were several pertaining to state judicial systems.

The representations issued by the advocates of the Constitution were crucial to ratification; without them, it is doubtful the instrument would have been approved. At least two states alluded to these representations in their instruments of ratification. The content of the representations largely defined the meaning of the Ninth and Tenth Amendments.

¹ DICKINSON, at 386 (for explanations of short form citations, see the Bibliography at the end of this paper).

II. THE COLONIAL EXPERIENCE

A. *Origins of the pre-Revolution Dispute*

American federalism was born in the days of the British Empire. Before 1763, the colonies of British North America exercised a significant amount of self government. This autonomy resulted largely from practical considerations, but it was supported by prevailing political theory. That theory held that, as loyal subjects of the Crown Americans enjoyed the same “rights of Englishmen” held by subjects in Great Britain.² Among these rights was that of consenting, in person or by representation, to taxes and other laws.³

Prevailing political theory further held that subjects within Great Britain were represented either directly or “virtually” in the House of Commons, the lower chamber of Parliament. American colonists enjoyed no representation in the House of Commons; they consented to taxes and other laws primarily through the lower chambers of their colonial assemblies.

The prevailing theory was reflected in a pre-revolutionary proposal for a colonial federation. The Albany Plan of Union of 1754,⁴ based on a blueprint sketched by Thomas Hutchinson and Benjamin Franklin, would have created a continental president-general appointed by the Crown. Legislative power would be held by a “grand council,” chosen for three-year terms “by the representatives of the people of the several Colonies met in their respective assemblies.” The grand council (and not the president-general or Parliament) would impose continental taxes. And just as Parliament regulated commerce among different units of the British Empire, the grand council would regulate colonial trade with the Indians. The Albany plan also provided that, except as altered by Parliament’s enabling act, each colony would “retain its present constitution,” so that “the particular military as well as civil establishments in each Colony remain in their present state. . . .” Among those “civil establishments” was each colony’s individual judiciary.

When the French and Indian War ended in 1763, the British altered their *laissez-faire* colonial policy to one of intervention. The new policy encountered colonial resistance. The best-known facet of the dispute was taxation, but there were other important facets as well. Indeed, the first major measure the colonists found objectionable was not a tax at all, but the Proclamation Line of 1763, which limited colonial settlement west of the Appalachian Mountains.⁵

Another leading point of disagreement was the administration of justice. Traditionally, the colonial assemblies had paid colonial judges, but Parliament sought to pay the judges from Crown revenues. In addition, Parliament expanded the jurisdiction of the imperial courts of admiralty, tribunals charged with jurisdiction over maritime matters. The Stamp Act of 1765, for example, provided that any violation of imperial trade regulations could be prosecuted not only in a colonial tribunal, but “in any court of vice admiralty appointed or to be appointed, and which shall have jurisdiction within such colony, plantation, or place.”⁶ As relations between Britain and the colonies deteriorated, moreover, Parliament transferred additional colonial jurisdiction to imperial courts.⁷ To be sure, the colonists did not object to courts of admiralty; but they did object to Parliament’s invasion of the jurisdiction of their local tribunals.

Accordingly, while still affirming their loyalty to the Crown, Americans actively resisted all these measures.

² This observation is explored at length in Colbourn, e.g., at 5 & 65, and *passim*.

³ E.g., Otis, at 55 (“The supreme power cannot take from any man any part of his property, without his consent in person or by representation”).

⁴ Available at <http://www.constitution.org/bcp/albany.htm>.

⁵ See *Proclamation of 1773*, at <http://www.britannica.com/EBchecked/topic/536603/Proclamation-of-1763>.

⁶ 5 Geo. iii, c. 12, § lvii.

⁷ Thus, the Administration of Justice Act, permitted transfer of trials of British officials accused of committing capital offenses from Massachusetts tribunals to London. 14 Geo. iii, c. 39 (1774).

B. *The Colonial Pamphleteers*

From 1763 until the Revolution erupted early in 1775, various American political leaders—nearly all of them attorneys—composed pamphlets addressing and refuting parliamentary claims.⁸ Some of the authors are widely known today: John Adams, Thomas Jefferson, James Wilson, Alexander Hamilton. Others, especially the authors of the earlier pamphlets, are less famous—among them Daniel Dulany, Richard Bland, James Otis, and Stephen Hopkins. Standing in the middle from the standpoint of modern fame, but easily the most influential at the time, was John Dickinson, the author of the explosive series of essays collectively known as the *Letters from a Farmer in Pennsylvania*.⁹

As documented below,¹⁰ there were wide areas of agreement among these writers. All acknowledged that the colonists and the British did, and should, share a common king. All confessed pride in being part of a great empire. All contended that as a matter of English constitutional law, the colonists enjoyed the rights and privileges of Englishmen, including the right to be taxed or regulated only by their own consent or by the consent of their representatives. All argued that the colonists were represented effectively only by their own colonial assemblies, and not by Parliament. All therefore concluded that most colonial law should be made and administered locally.

Leading spokesmen for the colonial cause argued that there was a constitutional boundary between parliamentary and local authority. When in 1773, the royal governor of Massachusetts claimed that he knew of “no Line that can be drawn between the Supreme Authority of Parliament and the total Independence of the Colonies,”¹¹ John Adams retorted:

If there be no such line, the Consequence is, either that the Colonies are the Vassals of the Parliament, or, that they are totally independent. As it cannot be supposed to have been the Intention of the Parties in the Compact, that we should be reduced to a State of Vassallage [*sic*], the Conclusion is, that it was their Sense, that we were thus Independent. If there be no such line, the consequence is either that the colonies are vassals of Parliament, or that they are totally independent.”¹²

Because at that time no one was claiming overtly that the colonies should be independent, the necessary conclusion was that there *was* such a line.

But where was it? Before 1768, American pamphleteers tended to concede to Parliament governance of all activities common to the colonies or with inter-colonial effects. Today we might call such a system *externality federalism*—in which the central government has power to regulate all activities with inter-jurisdictional spillover effects or “externalities.”

The first of the pamphleteers was Daniel Dulany of Delaware. Dulany was deeply conservative, and refused to break formally from the Crown even after the Revolution began.¹³ But within the framework of the British Empire, he vigorously asserted the colonial cause. In his *Considerations on the Propriety of Imposing Taxes on the British Colonies*, Dulany observed that everyone admitted that the colonists enjoyed “the Privilege, which is common to all *British Subjects*, of being taxed *only* with

⁸ See the bibliography for the editions used of these pamphlets.

⁹ See Colbourn, at 135 (“The popularity of Dickinson’s *Letters* was immediate. Nearly every colonial newspaper ran them, and seven different editions were issued in book form by 1769.”).

¹⁰ See *infra* this section.

¹¹ Adams, at 131.

¹² *Id.* at 131-32.

¹³ See Edward C. Papenfuse, *Dulany, Daniel (1722–1797)*, Oxford Dictionary of National Biography. Dulany’s property eventually was confiscated for alleged Loyalist sympathies. *Id.*

their own Consent given by their Representatives.”¹⁴ His pamphlet focused largely on whether the colonists were “virtually represented” in Parliament, and concluded that they were not.¹⁵

Despite a title that mentioned only taxes, Dulany’s essay addressed other issues of governance as well. For example, he assailed British interference with the colonial judiciaries, including the creation of new colonial admiralty courts: “[T]he Colonies are stripped of the *trial by jury*, and Courts of *Admiralty* are established, in which Judges from *England*, Strangers. Without Connection or Interest in *America*. removeable [*sic*] at Pleasure and supported by liberal Salaries, are to preside. . . .”¹⁶

Other pamphleteers echoed the latter grievance. In an untitled essay, the anonymous “Britannus Americanus” wrote, “Of all the rights of Englishmen, those of consenting to their own laws, and being tried by juries, are the most material and important.”¹⁷ James Otis of Massachusetts complained that, “The common law, that inestimable privilege of a jury, is also taken away in all trials in the colonies, relating to the revenue, if the informers have a mind to go to the admiralty.”¹⁸ And Rhode Island’s Stephen Hopkins, noting that “each of the colonies hath a legislature within itself to take care of its interests and provide for its peace and internal government,”¹⁹ argued that the courts were rightfully local:

Enlarging the power and jurisdiction of the courts of vice-admiralty in the colonies is another part of the same act, greatly and justly complained of. Courts of admiralty have long been established in most of the colonies, whose authority were circumscribed within moderate territorial jurisdictions; and these courts have always done the business necessary to be brought before such courts for trial in the manner it ought to be done and in a way only moderately expensive to the subjects. . . .²⁰

Richard Bland of Virginia added that the colonies “contend for no other Right but that of directing their *internal* Government by Laws made of their own Consent. . . which has been preserved to them by repeated Acts and Declarations of the Crown.”²¹ He denounced British schemes for sowing discord among the colonies. Was this to be done, he asked, by:

extending the Jurisdiction of the Courts of Admiralty, and thereby depriving the Colonists of legal trials in the Courts of common Law? Or is it to be done by harassing the Colonists, and giving overbearing Taxgatherers an Opportunity of ruining Men, perhaps better Subjects than themselves by dragging them from one Colony to another, before Prerogative Judges, exercising a despotick [*sic*] Sway in Inquisitorial Courts?²²

These early pamphleteers defended the line they drew between the imperial and colonial spheres by resorting to externality federalism. A good illustration is Dulany’s response to the British argument that colonists historically had not objected when Parliament had regulated internal colonial affairs: The British cited the Mutiny Act (a code of military conduct), alteration of colonial rules of descent (inheritance), and the colonial post office. Dulany replied by distinguishing those measures as legitimate topics of parliamentary regulation because of their inter-colonial implications.²³ In like manner, Hopkins wrote:

¹⁴ Dulany, at 2 (italics in original).

¹⁵ See also Colbourne, at 166 (“Dulany’s fame rests largely upon the thoroughness with which he demolished British contentions for virtual representation.”).

¹⁶ *Id.* at 29.

¹⁷ *Britannus Americanus* (1766), in *American Political Writing*, at 88-91.

¹⁸ Otis, at 83. This comment related to the provision in the Stamp Act discussed at *supra* note 6 and accompanying text.

¹⁹ Hopkins, at 50.

²⁰ *Id.* at 54.

²¹ Bland, at 81. On Bland’s biography, see Colbourn, at 174. See also *id.* at 180 (“But Bland not only stressed the unconscionability of taxes without representation; he also denied the propriety of internal legislation without representation.”).

²² *Id.* at 85.

²³ Dulany, at 49-56 (discussing these three enactments).

[Y]et there are many things of a more general nature, quite out of the reach of these particular legislatures, which it is necessary should be regulated, ordered, and governed. . . . Indeed, everything that concerns the proper interest and fit government of the whole commonwealth, of keeping the peace, and subordination of all the parts towards the whole and one among another, must be considered in this light.²⁴

The problem with pure externality federalism is that it is inherently unstable because advocates for central power credibly can contend that almost every activity, no matter how local, creates inter-jurisdictional effects. Even an individual decision to sow tomato plants in one's back yard, especially when aggregated with other people's similar decisions, impacts the national tomato market, creating a pretext for central regulation.²⁵ Not surprisingly, therefore, later colonial pamphleteers rejected externality federalism in favor of a categorical approach. They conceded to Parliament only control over a few listed categories, the most important of which was trade among units of the British Empire; but they maintained that other activities within the colonies were reserved to the colonies themselves.

John Dickinson seems to have been the first prominent pamphleteer to shift the colonial case in this way. In his *Letters from a Farmer in Pennsylvania*, he conceded to Parliament authority only over "trade" and "commerce" (words that Dickinson, like other Founders, commonly used synonymously)²⁶ among units of the British Empire. Over that subject, Dickinson asserted, the colonists had consented to parliamentary power—but not over other aspects of colonial life:

The three most important articles, that our assemblies, or any legislatures can provide for, are, First—the defence [*sic*] of the society: Secondly—the administration of justice, and, Thirdly—the support of civil government. Nothing can properly regulate the expence [*sic*] of making provision for these occasions, but the *necessities* of the society; its *abilities*: the *conveniency* of the modes of levying money among them; the *manner* in which the laws have been executed; and the conduct of the officers of government; all *which* are circumstances that cannot possibly be properly *known*, but by the society itself; or, if they should be known, *will not*, probably, be properly *considered*, but by that society.²⁷

The "society" to which Dickinson was referring was each colony. Each knew its needs best. Decisions pertaining to taxation, civil government (including "the administration of justice") and even defense, should be made by the colonies' own assemblies.²⁸

The year 1773 witnessed a learned public debate in Maryland's only newspaper between Charles Carroll of Carrollton ("First Citizen") and Daniel Dulany ("Antilon") on whether fees charged by colonial officers for mandatory services, such as court fees, were taxes requiring approval of the colonial assemblies. On this issue, Dulany found himself on the more conservative side: he argued that that they were not. However, Carroll, who unlike Dulany later signed the Declaration of Independence, seems to have won the debate—further illustrating the American belief that local governance should be reserved for local legislative control.²⁹

²⁴ Hopkins, at 50.

²⁵ *Cf.* *Gonzales v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942) (both applying the "aggregation principle" to small, individual agricultural decisions).

²⁶ *E.g.*, Dickinson, at 337 & 348.

²⁷ *Id.*, at 366 (italics in original). *See also id.* at 383 (rejecting Dulany's earlier concession that a Parliamentary debt-collection statute was appropriate because affecting more than one colony).

²⁸ *Id.*, at 367.

²⁹ The debate is discussed and reproduced in Correspondence of "First Citizen"—Charles Carroll of Carrollton—and "Antilon"—Daniel Dulany, Jr., 1773 (Elihu S. Riley, ed. 1902).

More important were developments in the following year. A spate of pamphlets arguing the American cause appeared in 1774. To the extent they discussed the boundary between colonial and imperial jurisdiction, they adopted Dickinson's categorical approach. Thus, John Adams wrote that, "parliament has no authority over [the colonies], excepting to regulate their trade, and this not by any principle of common law, but merely by the consent of the colonies, founded on the obvious necessity of a case which was never in contemplation of that law. . ." ³⁰ In a pamphlet published the same year (although written earlier), James Wilson contended that Parliament was without power over the colonies, but that the king, as common sovereign of the empire and the traditional "arbiter of commerce," could regulate colonial trade. ³¹ Thomas Jefferson was not willing to concede any parliamentary power over colonial governance at all. ³²

Like earlier authors, the writers of the 1774 pamphlets emphasized that judicial matters should be administered locally. In his *Novanglus*, Adams pointed out that the dispute between colonists and the British government was not limited to taxes:

Is the threepence upon tea our only grievance? Are we not in this province deprived of the privilege of paying our governors, judges, &c.? Are not trials by jury taken from us? Are we not sent to England for trial? Is not a military government put over us? Is not our constitution demolished to the foundation? ³³

Alexander Hamilton, in *A Full Vindication of the Measures of Congress*, agreed:

Give me the right to be tried by a jury of my own neighbors, and to be taxed by my own representatives only. What will become of the law and courts of justice without this? The shadow may remain, but the substance will be gone. I would die to preserve the law upon a solid foundation; but take away liberty, and the foundation is destroyed. ³⁴

So also did Jefferson in *A Summary View of the Rights of British America*:

By the act for the suppression of riots and tumults in the town of Boston, passed also in the last session of parliament, a murder committed there is, if the governor pleases, to be tried in the court of King's Bench, in the island of Great Britain, by a jury of Middlesex [London]. ³⁵

* * * *

And the wretched criminal, if he happen to have offended on the American side, stripped of his privilege of trial by peers of his vicinage, removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof, is tried before judges predetermined to condemn. ³⁶

³⁰ Adams, at 167.

³¹ Wilson, at 33-34.

³² Jefferson, at 12 (denouncing Parliament's assumption of power over trade).

³³ Adams, at 175.

³⁴ Hamilton, at 38.

³⁵ Jefferson, at 35.

³⁶ *Id.* at 26. For the law of which Jefferson was complaining, see *supra* note 7.

C. *Resolutions by American Political Assemblies*

During 1774, the constitutional dispute was the subject of deliberation within American political assemblies. Those assemblies adopted numerous resolutions condemning British efforts to meddle in the administration of colonial justice. The resolves of Fairfax County, Virginia claimed the right of colonists to consent to all laws governing them,³⁷ while the electors of Suffolk County, Massachusetts, resolved:

That so long as the justices of our superior court of judicature, court of assize, &c.³⁸ and inferior court of common pleas in this county are appointed, or hold their places, by any other tenure than that which the charter and the laws of the province direct, they must be considered as under undue influence, and are therefore unconstitutional officers, and, as such, no regard ought to be paid to them by the people of this county.³⁹

The First Continental Congress agreed. Its resolutions of October 14, 1774, listed specific illustrations of offensive parliamentary interference with colonial judiciaries, including extending admiralty jurisdiction, imposing new criminal laws, depriving Americans of trial by a jury of the vicinage, and authorizing transport of defendants to England for trial.⁴⁰ The Continental Congress repeated those complaints in its proposed articles of association of October 20,⁴¹ in its *Address to the People of Great Britain* of October 21,⁴² in its *Memorial to the Inhabitants of the British Colonies*,⁴³ and in its *Letter to the Inhabitants of the Province of Quebec*, drafted by John Dickinson.⁴⁴ Congress's judicial grievances, in summary form, were that British actions had impaired judicial localism by (1) invading the subject-matter jurisdiction of colonial courts (and thereby compromising the right to a jury trial) and, (2) enacting new criminal law statutes without colonial assent.

In 1775, the Second Continental Congress reiterated these complaints. In its *Declaration on Taking Arms* (whose primary drafter also was Dickinson), the congressional delegates observed that “statutes have been passed for extending the jurisdiction of courts of Admiralty and Vice-Admiralty beyond their ancient limits; for depriving us of the inestimable privilege of trial by jury, in cases affecting both life and property.”⁴⁵ Then in 1776 Congress issued the Declaration of Independence. That document also recited British transgressions in “depriving us, in many cases, of the benefits of trial by jury,” and “transporting us beyond seas, to be tried for pretended offenses.”⁴⁶

During their experience as colonists, Americans had learned to value local control of the judiciary. They also had learned not to yield too readily local control over activities merely because the effects of those activities spilled over into other localities. When there was a spillover, one still had to balance the advantages of central regulation (coordination) against the advantages of local knowledge, local responsiveness, and dispersal of power. Thus, Americans were able to argue for local judicial control even over controversies involving inter-jurisdictional trade.

³⁷ See Fairfax Resolves, July 18, 1774, http://www.constitution.org/bcp/fairfax_res.htm. Like Dickinson, the Fairfax Resolves maintained that the colonists had conceded to Britain power over trade among units of the empire.

³⁸ “&c.” was the standard abbreviation for “et cetera.”

³⁹ 1 JCC 31, 33 (Sept. 17, 1774).

⁴⁰ *Id.*, at 63, 64, 71-72.

⁴¹ *Id.*, at 75, 76.

⁴² *Id.* at 81, 85

⁴³ *Id.* at 92-93, 97.

⁴⁴ *Id.*, at 107 (discussing the right of trial by jury).

⁴⁵ 2 JCC 145 (Jul 6, 1775).

⁴⁶ Declaration of Independence.

III. JUDICIAL AFFAIRS IN THE FRAMING OF THE CONSTITUTION

A. *The Constitutional Convention*

The Articles of Confederation served as the first American constitution. Congress drafted the Articles in 1776 and 1777⁴⁷ and thereafter operated under their rules—even though they did not become formally effective until the thirteenth state (Maryland) ratified them on March 1, 1781.

The Articles granted only narrow judicial powers to the Confederation. They encompassed jurisdiction over disputes between two or more states, disputes between claimants under lands granted by different states, and the appointment of “courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures.”⁴⁸ All other judicial matters were reserved to the states.

When the Constitutional Convention met in May, 1787, nearly all delegates agreed that the central government needed more authority. They were divided on the question of, “How much more?”

On this subject, the delegates split roughly into four groups. A very few (George Read of Delaware may have been the only one)⁴⁹ favored abolishing the states altogether. Another handful (John Lansing and Robert Yates of New York, William Paterson of New Jersey and a few others) wished only to strengthen the Articles. A much larger group of delegates, whom historians sometimes call the “nationalists,” included Madison, Hamilton, Wilson, and Gouverneur Morris. They wished to retain the states, but demote them to a level not far above that occupied by English counties.

An early expression of the “nationalist” impulse was the Virginia Plan, offered by the Virginia delegation under the leadership of James Madison and Governor Edmund Randolph. One part of the Virginia Plan would have created a bicameral national legislature to be:

impowered [*sic*] to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate *in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation*; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union. . . .⁵⁰

Another part would establish a national judiciary with sweeping power:

that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and *questions which may involve the national peace and harmony*.⁵¹

The Virginia Plan thus was a prescription for externality federalism.

⁴⁷ John Dickinson was the primary drafter of this document as well, although he relied heavily on a proposal by Benjamin Franklin.

⁴⁸ Arts. of Confed., Art. IX.

⁴⁹ 1 Farrand, at 36:

Mr. Read. Too much attachment is betrayed to the State Governmts. We must look beyond their continuance. A national Govt. must soon of necessity swallow all of them up. They will soon be reduced to the mere office of electing the national Senate. He was agst. patching up the old federal System: he hoped the idea wd. be dismissed.

⁵⁰ *Id.*, at 21 (italics added).

⁵¹ *Id.*, at 22 (italics added).

A fourth group of delegates consisted of those who wished for a stronger government, but one limited to listed (enumerated) powers. Among them was Roger Sherman of Connecticut. As reported by Madison, Sherman argued that:

The objects of the Union . . . were few. 1. defence agst. foreign danger. 2. agst. internal disputes & a resort to force. 3. Treaties with foreign nations 4 regulating foreign commerce, & drawing revenue from it. These & perhaps a few lesser objects alone rendered a Confederation of the States necessary. All other matters civil & criminal would be much better in the hands of the States. . . . He was for giving the General Govt. power to legislate and execute within a defined province.”⁵²

Among these four groups, the nationalists were the most influential during the first half of the convention. On May 31 they secured a favorable vote on the Virginia Plan’s formula for the central legislative power.⁵³ On June 4, they also secured approval of the Plan’s formula for the judiciary.⁵⁴

After the colonial experience, why would the delegates approve a national government so potent? One reason may have been that statesmen particularly suspicious of centralizing tendencies (Patrick Henry for one) had elected not to attend the convention. Another reason may have been that the distress caused by excessive decentralization was a more recent experience than the distress caused by the British government’s efforts to centralize power in London.

Yet the advocates of enumeration persisted. On June 5, the day after the convention approved the Virginia Plan’s judicial scheme, John Rutledge of South Carolina argued for leaving state tribunals in sole possession of original jurisdiction:

that the State Tribunals might and ought to be left in all cases to decide in the first instance [;] the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts: that it was making an unnecessary encroachment on the jurisdiction <of the States,> and creating unnecessary obstacles to their adoption of the new system.⁵⁵

Rutledge was supported by Sherman and opposed by Madison and Wilson. On the subject of lower courts, on June 5 the delegates also adopted a compromise suggested by Dickinson: Congress would receive power to create lower federal courts, but not be obligated to do so.⁵⁶ This compromise was re-affirmed in mid-July, although objections to lower federal tribunals continued.⁵⁷

As for the substantive jurisdiction of federal courts, on June 13, Randolph successfully moved to eliminate all enumeration except that “the jurisdiction of the national judiciary shall extend to all cases of national revenue, impeachment of national officers, and questions which involve the national peace or harmony.”⁵⁸ Significantly, perhaps, he justified this change as a mere “place holder” for future enumeration.⁵⁹ Two days later, Paterson offered an enumeration of judicial powers in his New Jersey

⁵² *Id.*, at 133 (June 6, 1787).

⁵³ *Id.*, at 47.

⁵⁴ *Id.*, at 104.

⁵⁵ *Id.*, at 124.

⁵⁶ *Id.*, at 125.

⁵⁷ See 2 Farrand, at 45-46 (reproducing the debate).

⁵⁸ 1 Farrand, at 238.

⁵⁹ *Id.*

Plan.⁶⁰ Paterson's scheme was rejected, and the broad legislative and judicial provisions were still intact in late July, when the convention referred its resolutions to the Committee of Detail. That committee was assigned the job of composing the Constitution's first draft.⁶¹

Yet the power of the convention's nationalists already had crested. By mid-July, some delegates clearly were having second thoughts.⁶² Among the nagging questions must have been: Was enumeration really impractical, as some claimed? Would liberty be threatened by the federal government as it had once been threatened by the British imperial government? Would the general public ratify a document creating a national government with vaguely-defined powers? Thus, during the latter part of the convention, the nationalists were partially eclipsed by the convention's moderates—men like Rutledge, Dickinson, and the three Connecticut delegates: Roger Sherman, William Samuel Johnson, and Oliver Ellsworth. Randolph seemed to be moving in their direction as well.

Rutledge chaired the Committee of Detail, and he, Ellsworth, and Randolph comprised a majority of it. Their draft, presented to the full convention on August 6, replaced the broad jurisdictional statements from the Virginia Plan with lists of specified legislative and judicial powers. Although Randolph had suggested that the broad judicial grant in the Virginia Plan might serve as a "place holder" for later enumeration,⁶³ this does not fully explain the change, for the committee's legislative and judicial enumerations fell far short of the scope of authority granted the central government under the Virginia Plan.⁶⁴ In other words, the committee's list of powers did not come close to encompassing all issues with interstate implications. Later in the convention, nationalist delegates moved to close the gap by adding further federal powers, but the convention rejected some of the most important of these.⁶⁵ In fact, the finished Constitution contained several references to states exercising authority over

⁶⁰ *Id.*, at 243 (June 15, 1787) (as reported by Madison):

... that the Judiciary so established shall have authority to hear & determine in the first instance on all impeachments of federal officers, & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue[]¹² *Id.* at 131-32.

⁶¹ As submitted to the Committee of Detail, the legislative and judicial resolutions read:

Resolved That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

Resolved That a national Judiciary be established to consist of one Supreme Tribunal—the Judges of which shall be appointed by the second Branch of the national Legislature—to hold their Offices during good Behaviour—to receive punctually at stated Times a fixed Compensation for their Services, in which no Diminution shall be made so as to affect the Persons actually in Office at the Time of such Diminution

Resolved That the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony.

Resolved That the national Legislature be empowered to appoint inferior Tribunals.

2 Farrand, at 131-33.

⁶² Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L. J. 469, 472-73 (2003).

⁶³ *Supra* note 59 and accompanying text.

⁶⁴ *See* above, discussing this kind of federalism.

⁶⁵ *See* 2 Farrand, at 321-22 & 324-25 for additional powers of Congress proposed on Aug. 18, about half of which were rejected. Similarly, authority to enact sumptuary laws was rejected. *Id.* at 337.

matters with clear interstate implications.⁶⁶

The jurisdictional proposals of the Virginia Plan would have drawn a boundary between federal and state power similar to that drawn by the pre-1768 polemicists between imperial and colonial power. The ultimate resolution was more closely in line with the categorical positions of the later pamphleteers. Under the new Constitution, Congress would govern most external affairs and regulate trade among political subdivisions, but not a great deal more.⁶⁷ Judicial matters, other than those falling within the categories listed,⁶⁸ would remain within the state sphere. Even in federal court, criminal trials would be decided by jurors selected from the state where the crime allegedly was committed.⁶⁹

B. *How the Finished Constitution Limited Federal Control Over State Judiciaries*

Thus, under the finished, but still unamended, Constitution, the ability of the federal government to interfere with state administration of justice was limited in two ways. First, the Constitution contained a few provisions promoting local judicial administration. For example, the ability of Congress to suspend the writ of habeas corpus (an incident of the war power) was limited to rebellions or invasions, and was subject to judicial review.⁷⁰ Second and more importantly, although federal courts would enjoy jurisdiction over cases “arising under . . . the Laws of the United States,” those laws were restricted to enumerated subjects of fairly well-defined scope.

The founding-era understanding of the Commerce Power may illustrate what is meant by “fairly well-defined scope.” The phrase “regulate commerce” was a term of art derived from English law. To “regulate commerce” was to supervise imports and exports, control money and other weights and measures,⁷¹ oversee transportation, and administer the “law merchant”—that is, the law governing mercantile trade, markets and fairs, cargo insurance, and commercial finance.⁷² Governance of other activities, even economic activities closely connected with commerce, was not part of “to regulate commerce,” as the Constitution employed that phrase. Such governance was, therefore, outside federal jurisdiction except in atypical cases meeting fairly difficult tests of

⁶⁶ *E.g.*, U.S. Const., art. I, § 9, cl. 1 (permitting states to allow or restrict importation of slaves and immigration of free persons without congressional interference until 1808 and indefinitely thereafter in absence of congressional action), *id.*, art. I, § 10, cls. 2-3 (allowing states to lay duties on imports and exports to finance inspection laws); *id.*, art. I, § 4 (allowing states to set initially the times, places, and manner of election for members of Congress).

⁶⁷ *See* 2 Farrand, at 181-82 (enumeration of the legislative powers in the Committee’s report) & *id.* at 186-87 (enumeration of judicial powers).

⁶⁸ U.S. Const., art. I, § 8 & art. III, § 2, cl. 1.

⁶⁹ U.S. Const., art. III, § 2, cl. 3:

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

⁷⁰ On this power, see Original Constitution, at 130-131.

⁷¹ In the Constitution, the powers over money and weights and measures were enumerated separately to assure that congressional authority over those subjects, unlike other aspects of “commerce,” was unlimited by state boundaries. See Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 Harvard J.L. & Pub. Policy 1017 (2008).

⁷² Robert G. Natelson, *The Legal Meaning of “Commerce” In the Commerce Clause*, 80 St. John’s L. Rev. 789, 836-39 (2006). See also Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 Mich. L. Rev. First Impressions 55 (2010); Robert G. Natelson, *The Original Meaning of the Indian Commerce Clause*, 85 Denver U.L. Rev. 201 (2007); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) and Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003).

incidence⁷³ or—like regulation of patents, copyrights, and bankruptcy—within an area separately enumerated. Except in federal territories or enclaves, state governments retained exclusive and plenary authority over such subjects as torts, contracts, agency, property, municipal law, religion, family relations, and local business law.⁷⁴

IV. THE RATIFICATION

A. *Grounds of Opposition*

The Constitutional Convention adjourned on September 17, 1787. Once the Constitution became public, it encountered widespread opposition.

Opponents (historically called “Anti-Federalists”) leveled many objections at the new plan. Some objections were *sui generis*, such as the claim that the document did not adequately protect trial by a jury of the vicinage.⁷⁵ Most of these objections, however, fell into either of two categories: (1) the Constitution granted too much power to the new federal government and (2) even if, when properly read, it did not do so, its language was sufficiently vague to be misconstrued. Future interpreters could employ “sophistry”—specious legal arguments—to justify excessive central power.⁷⁶

The Commerce Clause⁷⁷ was not seen as one of the provisions presenting a serious potential for justifying centralized power,⁷⁸ because, as explained earlier, the founding generation understood the phrase “to regulate commerce” as having a closely-defined scope.⁷⁹ If presented with the twentieth-century claim that the power to “regulate Commerce . . . among the several States” authorizes regulation of all economic activities,⁸⁰ even Anti-Federalists likely would have dismissed the assertion as fanciful. No doubt the contention of some in Congress today—that the power to regulate interstate commerce authorizes Congress to mandate procedures in state courts—would have been dismissed as beyond absurd.

⁷³ On the Founding-Era criteria of incidental powers, see Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Lawson, at 52, 60-68.

⁷⁴ Expansion of congressional and jurisdictional power under certain subsequent amendments is outside the scope of this paper. See U.S. Const., amends. XIII, XIV, XV, XVI, XIX, XXIII, XXIV, XXV & XXVI.

⁷⁵ E.g., *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, in 2 *Documentary History*, at 623 (Dec. 18, 1787).

⁷⁶ See, e.g., *Timoleon*, N.Y.J., Nov. 1, 1787, in 13 *Documentary History*, at 534, 536 (fictional judicial opinion used to justify congressional omnipotence under the General Welfare Clause).

Warnings of future constitutional sophistry were very common, and, in view of more modern developments in constitutional law, often seem prescient. See, e.g., 2 *Elliot’s Debates*, at 339 (quoting John Williams at the New York ratifying convention); 4 *id.*, at 106 (quoting one of the three delegates surnamed Taylor at the North Carolina ratifying convention).

⁷⁷ U.S. Const., art. I, §8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes.”).

⁷⁸ There was some fear in the South that a congressional majority from the North would impose regulations to the South’s disadvantage, but this was primarily a concern about fairness rather than centralized power.

⁷⁹ *Supra* notes 71-72 and accompanying text.

⁸⁰ This claim was popularized during the twentieth century by Walton H. Hamilton and Douglass Adair, *The Power to Govern: The Constitution—Then and Now* 61 (1937) and 1 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 69-109 (1953).

The modern Supreme Court, despite inexact language in some cases, never really has accepted this claim, preferring to assume that the term “Commerce” is fairly narrow, and resting other congressional economic regulation on the Necessary and Proper Clause. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942).

Of much more concern to Anti-Federalists were the Taxation Clause (with its “general Welfare” component)⁸¹ and the Necessary and Proper Clause.⁸² Anti-Federalists pointed out that the Constitution placed few restrictions on the taxing power. Some of them misread the General Welfare Clause as a license for Congress to adopt any law it though promoted the general welfare.⁸³ Anti-Federalists also misread the Necessary and Proper Clause by confusing it with another legal formula then in common use—a formula that, if employed, would have granted wider discretion to Congress.⁸⁴

B. The Federalist Representations—Among Them That State Judiciaries Are Off Limits for Congress

Proponents of the Constitution—the Federalists—responded by correcting the Anti-Federalists’ misreadings. They also explained to the ratifying public that most areas of life would be outside the authority of the new government. In an effort to induce moderates to support ratification, the Federalists issued lists of subjects over which states would retain exclusive jurisdiction. On these lists were administration of the state courts and most of the divisions of substantive jurisdiction traditionally supervised by them.

Some of the most complete lists of this kind appeared in the public essays of Tench Coxe, a Philadelphia businessman who later served as a member of Congress.⁸⁵ Although the essays urging ratification in *The Federalist* are more well-known, Coxe’s writings probably were more influential among the general public at the time they were published.⁸⁶ For this reason, Coxe’s representations as to the limits of federal power are valuable evidence of the original understanding.

The following language appears in the first of Coxe’s “Freeman” essays. I have reproduced most of this quotation to offer a sense for how specific and extensive Coxe’s representations were. I have italicized language relevant to state judicial power:

. . . [M]any things, which are indispensibly [*sic*] necessary to the existence and good order of society, cannot be performed by the fœderal [*sic*] government, but will require the agency and powers of the state legislatures or sovereignties, with their various appurtenances and appendages.

1st. Congress, under all the powers of the proposed constitution, can neither train the militia, nor appoint the officers thereof.

4thly. They [i.e., Congress] cannot *appoint a judge, constitute a court, or in any other way interfere in determining offences against the criminal law of the states, nor can they in any way interfere in the determinations of civil causes between citizens of the same state, which will be innumerable and highly important.*

⁸¹ U.S. Const., art. I, §8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).

⁸² U.S. Const., art. I, §8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

⁸³ *E.g.*, “Brutus,” No. V, N.Y.J., Dec. 13, 1787, *reprinted* in 19 Documentary History, at 410, 411-12.

⁸⁴ *E.g.*, *id.* at 411. See also Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in Lawson, at 84, 94. For the formula with which Anti-Federalists confused the Necessary and Proper Clause, see “Formula Two,” discussed in Lawson, at 73-74.

⁸⁵ For Coxe’s biography, see Jacob Cooke, *Tench Coxe and the Early Republic* (1978).

⁸⁶ Cooke, at 111.

* * * *

7thly. They cannot enact laws for the inspection of the produce of the country, a matter of the utmost importance to the commerce of the several states, and the honor of the whole.

8thly. *They cannot appoint or commission any state officer, legislative, executive or judicial.*

9thly. They cannot interfere with the opening of rivers and canals; the making or regulation of roads, except post roads; building bridges; erecting ferries; establishment of state seminaries of learning; libraries; literary, religious, trading or manufacturing societies; erecting or regulating the police of cities, towns or boroughs; *creating new state offices*; building light houses, public wharves, county gaols, markets, or other public buildings; making sale of state lands, and other state property; receiving or appropriating the incomes of state buildings and property; executing the state laws; *altering the criminal law*; nor can they do any other matter or thing appertaining to the internal affairs of any state, whether legislative, executive or judicial, civil or ecclesiastical.⁸⁷

* * * *

Note that in this passage Coxe represented that Congress could not interfere with the internal procedures of state courts: “appoint a judge, constitute a court, or in any other way interfere in determining offences against the criminal law of the states, nor . . . interfere in the determinations of civil causes between citizens of the same state.” He added that Congress could not “alter[] the criminal law. . .”

In addition to criminal law, Coxe and other Federalists listed other substantive areas traditionally administered by the court system, but out-of-bounds for the federal government. These included the law of torts, contracts,⁸⁸ inheritance, land titles, local business regulation, and other fields. By way of illustration, in another tract Coxe added that:

Trials for lands lying in any state between persons residing in such state, for bonds, notes, book debts, contracts, trespasses, assumptions [*sic*: should be *assumpsits*], and all other matters between two or more citizens of any state, will be held in the state courts by juries, as now. In these cases the foederal [*sic*] courts cannot interfere.⁸⁹

⁸⁷ Tench Coxe, “A Freeman,” No. 1, Pa. Gazette, Jan. 23, 1788, *reprinted in* 15 Documentary History, at 453, 457-58 (italics added).

⁸⁸ *But see* 2 Elliot’s Debates, at 492 (quoting James Wilson at the Pennsylvania ratifying convention:

There have been instalment [*sic*] acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit.

Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government.

However, Wilson seems to be referring to the Constitution’s ban on state tender laws and obligations of contracts, not with a general federal power to regulate contracts. A review of the representations of the other Federalists makes it clear there is no such power.

⁸⁹ Tench Coxe, “An American Citizen,” No. 4, in Pamphlets on the Constitution of the United States 145, 149 (Paul Leicester Ford, ed. 1888).

In still another essay⁹⁰ Coxe wrote that “Regulating the law of descents, and forbidding the entail of landed estates, are exclusively in the power of the state legislatures” as well as “erect[ing] corporations for literary, religious, commercial, or other purposes.”⁹¹ He continued:

The states will regulate and administer the criminal law, exclusively of Congress, so far as it regards mala in se, or real crimes; such as murder, robbery, &c. They will also have a certain and large part of the jurisdiction, with respect to mala prohibita, or matters which are forbidden from political considerations, though not in themselves immoral; such as unlicensed public houses, nuisances, and many other things of the like nature.

. . . The states are to determine all the innumerable disputes about property lying within their respective territories between their own citizens, such as titles and boundaries of lands, debts by assumption, note, bond, or account, mercantile contracts, &c. none of which can ever be cognizable by any department of the fœderal government.⁹²

Among the additional powers reserved to the states, Coxe added to “regulate descents and marriages . . . alter the criminal law; [and] constitute new courts and offices. . . ”⁹³

Tench Coxe’s lists were unusually complete. However—and this bears emphasis—many Federalist writers issued representations of the same kind. These representations seldom, if ever, contradicted each other. For example, another enumeration appearing anonymously in the Pennsylvania Gazette asserted that the administration of justice, particularly in state courts, was outside the federal sphere:

The federal government neither makes, nor can without alteration make, any provision for the choice of probates of wills, land officers and surveyors, *justices of the peace*, county lieutenants, county commissioners, receivers of quitrents, sheriffs, coroners, overseers of the poor, and constables; *nor does it provide in any way for the important and innumerable trials that must take place among the citizens of the same state, nor for criminal offenses, breaches of the peace, nuisances, or other objects of the state courts*; nor for licensing marriages, and public houses; nor for county roads, nor any other roads than the great post roads; nor the erection of ferries and bridges, unless on post roads; nor for poorhouses; nor incorporating religious and political societies, towns and boroughs; nor for charity schools, administrations on estates, and many other matters essential to the advancement of human happiness, and to the existence of civil society.⁹⁴

The preceding selections were first published in Pennsylvania, but other enumerations of the kind appeared in other states as well. Coxe’s writings “were circulated throughout the Union.”⁹⁵ In *Federalist* No. 17, first published first in New York and later more extensively distributed, Hamilton implied that exclusive state authority included the “administration of private justice between the citizens of the same State” and “the supervision of agriculture and of other concerns of a similar nature.” In Massachusetts, Nathaniel Peasley Sargeant, then a justice of that state’s Supreme Judicial Court (and shortly thereafter Chief Justice) composed a similar enumeration. He represented that among the reserved powers of judicial procedure were the “appointment of all courts” and the “rules of Proceeding in them and of determining all controversies between our own

⁹⁰ Tench Coxe, “A Freeman,” No. 2, Pa. Gazette, Jan. 30, 1788, *reprinted in* 15 Documental History, at 508, 511.

⁹¹ *Id.* at 508 & 509.

⁹² *Id.* at 509-510.

⁹³ *Id.* at 510.

⁹⁴ Pa. Gazette, Dec. 26, 1787, 2 Documental History, at 650.

⁹⁵ Cooke, at 111.

citizens.” In the substantive category he included criminal law other than treason, regulations of local government, care of the poor, inheritance, real property, marriage and divorce, and other subjects.⁹⁶

In Virginia, influential lawyer and ratification convention delegate Alexander White⁹⁷ offered his own list of substantive matters under exclusive state jurisdiction:

There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient. I mean the “rights of conscience, or religious liberty—the rights of bearing arms for defence [*sic*], or for killing game—the liberty of fowling, hunting and fishing—the right of altering the laws of descents and distribution of the effects of deceased persons and titles of land and goods and the regulation of contracts in the individual states. . . .

The freedom of speech and of the press, are likewise out of the jurisdiction of Congress . . . [including] a prosecution for libel. . . .⁹⁸

In Maryland, Judge Alexander Contee Hanson, Sr.,⁹⁹ writing as “Aristides,” listed as exclusive state concerns, “the regulations of property, the regulations of the penal law, the protection of the weak, the promotion of useful arts, the whole internal government” of the respective states.¹⁰⁰ In New Hampshire, the anonymous “A.B.” represented a series of crimes and torts as remaining exclusive matters for the states: “murder [*sic*], adultery, theft, robbery, burglary, lying, perjury, defamation.”¹⁰¹

Other advocates of the Constitution referred to substantive areas outside federal control. In April 1788, a “Native of Virginia” contributed a pamphlet in which he or she¹⁰² surveyed the entire Constitution.¹⁰³ The “Native” observed that the federal judicial power over citizens of the same state was limited to land claims under titles derived from different states,¹⁰⁴ that the federal courts had no jurisdiction over offenses under state law,¹⁰⁵ and that the enumerated powers of Congress included no authority over the press.¹⁰⁶

⁹⁶ Nathaniel Peaslee Sargeant to Joseph Badger, 1788, 5 Documentary History, at 563, 568 (exact date uncertain).

⁹⁷ *Biographical Directory of the United States Congress*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000352> (outlining White’s career).

⁹⁸ Alexander White, *Winchester Virginia Gazette*, Feb. 22, 1788, 8 Documentary History, at 404–405. Recall that this reference to “[t]he freedom of speech” and the tort and crime of libel was written before adoption of the First Amendment.

⁹⁹ Archives of Maryland (Biographical Series), at <http://www.msa.md.gov/msa/speccol/sc3500/sc3520/000500/000585/html/msa00585.html> (outlining Hanson’s career).

¹⁰⁰ “Aristides,” *Remarks on the Proposed Plan of a Federal Government*, Jan. 31 – Mar. 27, 1788, 15 Documentary History, at 545.

¹⁰¹ “A.B.,” *Hampshire Gazette*, Jan. 2, 1788, 5 Documentary History, at 599.

¹⁰² Some anonymous writers were women; Mercy Otis Warren of Massachusetts, for example, wrote under the name “A Columbian Patriot.”

¹⁰³ “A Native of Virginia,” *Observations upon the Proposed Plan of Federal Government*, Apr. 2, 1788, reprinted in 9 Documentary History, at 655–698.

¹⁰⁴ 9 Documentary History, at 684.

¹⁰⁵ *Id.*, at 686.

¹⁰⁶ *Id.*, at 691. Many other Federalists emphasized that Congress had no authority over the press, and thus none over the tort of libel. See, e.g., Speech of James Wilson, October 6, 1787:

[T]he liberty of the press. . . has been a copious source of declamation and opposition—what control can proceed from the Federal government to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate. . . In truth, then, the proposed system pos-

Still other Federalists wrote in more general terms of how the states retained authority over their own court systems and most other judicial matters as well. “It is an elective government,” said the Massachusetts commentator “Common Sense” “consisting of three branches—legislative, judicial, and executive—having power to do nothing but of a national kind—leaving the states full power to govern themselves as individual states.”¹⁰⁷ Some spoke more specifically of limits on the federal judicial power: “Their courts are not to intermeddle with your internal police,” wrote Oliver Ellsworth, “and will have cognizance only of those subjects which are placed under the control of a national legislature.”¹⁰⁸ Or, as the young Noah Webster opined:

The jurisdiction of the federal [courts] is very accurately defined and easily understood. It extends to the cases mentioned in the constitution, and to the execution of the laws of Congress, respecting commerce, revenue, and other general concerns. . . . With respect to the other civil and criminal actions, the power and jurisdiction of each state, remain unimpaired.¹⁰⁹

These representations were reinforced by the Constitution’s advocates at the state ratifying conventions. Illustrative were observations at the Virginia ratifying convention by John Marshall, later Chief Justice of the United States, but then a rising Richmond lawyer:

[Patrick Henry, the convention’s leading Anti-Federalist] says that, the laws of the United States being paramount to the laws of the particular states, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? Does he understand it so? *Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state?* Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void. It will annihilate the state courts, says the honorable gentleman. . . . [T]here is no danger that particular subjects, small in proportion, being taken out of the jurisdiction of the state judiciaries, will render them useless and of no effect. . . . Are there any words in this Constitution which exclude the courts of the states from those cases which they now possess? . . . Are not controversies respecting lands claimed under the grants of different states the only controversies between citizens of the same state which the federal judiciary can take cognizance of? The case is so clear, that to prove it would be a useless waste of time. The state courts will not lose the jurisdiction of the causes they now decide. They have a concurrence of jurisdiction with the federal courts in those cases in which the latter have cognizance.¹¹⁰

A much more seasoned lawyer, Chancellor Edmund Pendleton, the chairman of the convention agreed. He affirmed that the federal government would not be able to “intermeddle with the local, particular affairs of the states” or “make a law altering the form of transferring property, or the rule of descents, in Virginia.”¹¹¹

sesses no influence whatever upon the press, and it would have been merely nugatory to have introduced a formal declaration upon the subject—nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent.

¹⁰⁷ “Common Sense,” *Mass. Gazette*, Jan. 11, 1788, *reprinted in* *Friends*, at 31.

¹⁰⁸ Oliver Ellsworth, “A Landholder,” *Conn. Courant*, Dec. 3, 1787, in *Friends*, at 302.

¹⁰⁹ Noah Webster, “A Citizen of America,” *An Examination Into the Leading Principles of the Federal Constitution*, Oct. 17, 1787, in *Friends*, at 373, 394.

¹¹⁰ 3 *Elliot’s Debates*, at 553–54 (reporting remarks of John Marshall at the Virginia ratifying convention) (italics added):

¹¹¹ *Id.*, at 40 (reporting remarks of Edmund Pendleton at the Virginia ratifying convention).

¹¹² *Id.*, at 620 (reporting remarks of James Madison at the Virginia ratifying convention).

¹¹³ 2 *Elliot’s Debates*, at 350 (reporting remarks of Alexander Hamilton at the New York ratifying convention).

At the same convention, Madison cautioned against amendments excepting specific powers from the federal sphere by arguing that:

every thing [*sic*] not granted is reserved. This is obviously and self-evidently the case, without the declaration. Can the general government exercise any power not delegated? . . . Does the Constitution say that they shall not alter the law of descents, or do those things which would subvert the whole system of the state laws?¹¹² If it did, what was not excepted would be granted.

At the New York convention, Hamilton underscored exclusive state jurisprudence over internal state administration, arguing that state powers are “civil and domestic—to support the legislative establishment, and to provide for the administration of the laws.”¹¹³ He added that:

Were the laws of the Union to new-model [*reform*] the internal police of any state; were they to alter, or abrogate at a blow, the whole of its civil and criminal institutions; were they to penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals,—there might be more force in the objection; and the same Constitution, which was happily calculated for one state, might sacrifice the welfare of another.¹¹⁴

Chancellor Robert R. Livingston assured the convention that state power over traditional areas of judicial power was exclusive:

They tell us that the state governments will be destroyed, because they will have no powers left them. This is new. Is the power over property nothing? Is the power over life and death no power? . . . In one word, can [Congress] make a single law for the individual, exclusive purpose of any one state?¹¹⁵

In North Carolina, several of the Constitution’s advocates emphasized limits on federal power over judicial matters. Governor Samuel Johnston observed:

The rights of the people, in my opinion, cannot be affected by the federal courts. . . [T]his I am sure of, that the state judiciaries are not divested of their present judicial cognizance, and that we have every security that our ease and convenience will be consulted. Unless Congress had this power, their laws could not be carried into execution.¹¹⁶

Similarly, Archibald (or William, the record is not clear which) MacClaine argued:

The federal court has jurisdiction only in some instances. There are many instances in which no court but the state courts can have any jurisdiction whatsoever, except where parties claim land under the grant of different states, or the subject of dispute arises under the Constitution itself. The state courts have exclusive jurisdiction over every other possible controversy that can arise between the inhabitants of their own states; nor can the federal courts intermeddle with such disputes, either originally or by appeal.¹¹⁷

¹¹⁴ *Id.*, at 267-68.

¹¹⁵ *Id.*, at 384 (reporting remarks of Chancellor Robert R. Livingston at the New York ratifying convention).

¹¹⁶ 4 Elliot’s Debates, at 142 (reporting remarks of Gov. Samuel Johnston at the North Carolina ratifying convention).

¹¹⁷ *Id.*, at 164-165 reporting remarks of delegate MacClaine at the North Carolina ratifying convention).

¹¹⁸ For example, the North Carolina proposed amendment was as follows:

[E]ach state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution

In response to such representations, seven of the 13 ratifying states accompanied their ratification by recommending amendments to the Constitution. All these states adopted some version of what later became the Tenth Amendment, declaring that powers not delegated by the Constitution to the federal government were reserved to the states and people.¹¹⁸ New York, the eleventh state to ratify, also proposed this amendment:

That the Congress shall not constitute ordain or establish any Tribunals or Inferior Courts, with any other than Appellate Jurisdiction, except such as may be necessary for the Tryal [*sic*] of Causes of Admiralty and Maritime Jurisdiction, and for the Trial of Piracies and Felonies committed on the High Seas; and in all other Cases to which the Judicial Power of the United States extends, and in which the Supreme Court of the United States has not original Jurisdiction, the Causes shall be heard tried, and determined in some one of the State Courts, with the right of Appeal to the Supreme Court of the United States, or other proper Tribunal to be established for that purpose by the Congress, with such exceptions, and under such regulations as the Congress shall make.¹¹⁹

In addition, New York included in its ratification instrument several understandings derived in large part from Federalist representations as to the limited scope of federal power. Among them was the following:

That the Judicial Power of the United States as to Controversies between Citizens of the same State claiming Lands under Grants of different States is not to be construed to extend to any other Controversies between them except those which relate to such Lands, so claimed under Grants of different States.
That the Jurisdiction of the Supreme Court of the United States, or of any other Court to be instituted by the Congress, is not in any case to be increased [*sic*] enlarged or extended by any Fiction Collusion or mere suggestion. . .¹²⁰

The Rhode Island convention also resolved that “It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a State.”¹²¹

V. EPILOGUE: THE BILL OF RIGHTS

New York’s ratification on July 26, 1788 brought the count of approving states to eleven, two more than necessary for the Constitution to become effective. To obtain those ratifications, Federalists had to go beyond representing the meaning of disputed provisions. They also had to promise that they would support a bill of rights once the Constitution was ratified. Five of the 11 ratifying state ratifying conventions had accompanied their approval with suggested amendments. The two states that thus far had refused to ratify, North Carolina and Rhode Island, determined to stay out of the union until a bill of rights was proposed.

The amendments proposed by the state ratifying conventions were of various kinds. Some would have altered the basic structure or procedures of the federal government. For example, the South Carolina convention advanced an amendment requiring “that the general Government . . . never . . . impose direct taxes, but where the monies arising from the duties, imposts

delegated to the Congress of the United States, or to the departments of the Federal Government.

¹¹⁹ *Ratification of the Constitution by the State of New York*, July 26, 1788, at http://avalon.law.yale.edu/18th_century/ratny.asp.

¹²⁰ *Id.*

¹²¹ *Ratification of the Constitution by the State of Rhode Island*, May 29, 1790, at http://avalon.law.yale.edu/18th_century/ratri.asp.

¹²² *Ratification of the Constitution by the State of South Carolina*, May 23, 1788, http://avalon.law.yale.edu/18th_century/ratsc.asp.

¹²³ *Ratification of the Constitution by the State of New Hampshire*, June 21, 1788, http://avalon.law.yale.edu/18th_century/ratnh.

and excise are insufficient for the public exigencies nor then until Congress shall have made a requisition upon the states. . .”¹²² Other ratifying conventions proffered amendments that sought to secure specific rights to the people. An illustration is the New Hampshire amendment providing that grand jury indictment be preserved.¹²³ Still other proposals were designed to serve as clarifications or rules of construction. In this category was a proposal offered by all five states: That the federal government would enjoy only those powers granted by the Constitution, with all other powers retained by the states.¹²⁴ Yet another was offered by Virginia:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.¹²⁵

During the ratification fight, James Madison had opposed a bill of rights. But he was elected to the First Federal Congress only after promising to support one. Accordingly, on June 8, 1789, he rose in the House of Representatives to offer his proposals. By September 28, he had succeeded in shepherding 12 amendments through Congress.

According to its congressional preamble (which did not become part of the Constitution), the Bill of Rights contained clauses both “declaratory and restrictive.”¹²⁶ The restrictive amendments limited federal power, while the declaratory amendments communicated how the Constitution was to be construed. The first and second amendments would have required minor structural changes, but the first was never ratified and the second was not ratified until 1992 (as the Twenty-Seventh Amendment). The following eight protected discrete rights and privileges by limiting federal power in various ways. The last two (which eventually became the Ninth and Tenth Amendments) were rules of construction. As a result of this action, North Carolina pronounced itself satisfied, and approved the Constitution (while proposing still further amendments) on November 21, 1789. Rhode Island ratified on May 29, 1790. By December of the following year, the requisite number of states had ratified the third through twelfth amendments.

Among the restrictive amendments were some restraining the federal judiciary. Thus, the Fourth Amendment¹²⁷ regulated judicially-issued warrants, the Fifth barred double jeopardy,¹²⁸ the Seventh¹²⁹ prescribed jury trial in civil cases, and so on. The Ninth and Tenth Amendments were the declaratory amendments. They highlighted the limited scope of federal powers, including federal powers over judicial matters.

asp (“That no Person shall be Tryed for any Crime by which he may incur an Infamous Punishment, or loss of Life, untill he first be indicted by a Grand Jury except in such Cases as may arise in the Government and regulation of the Land & Naval Forces”).

¹²⁴ Massachusetts was the first state to make a proposal of this kind. 2 Elliot’s Debates, at 177 (“That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised.”).

¹²⁵ 3 Elliot’s Debates, at 661.

¹²⁶ The preamble to the Bill of Rights read:

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the benificent [sic] ends of its institution, Resolved. . .”

See 4 The Documentary History of the First Federal Congress 1 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) (reproducing text).

¹²⁷ U.S. Const., amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

The Ninth Amendment,¹³⁰ which was based on the Virginia proposal set forth above (later sponsored by North Carolina and Rhode Island as well), addressed a point that, during the ratification battle, many Federalists had used against a bill of rights. Because of the maxim, *Designatio unius est exclusio alterius*,¹³¹ the enumeration of certain rights in the Constitution might be interpreted as implying that the federal government was not otherwise limited.¹³² The Ninth Amendment reversed the *Designatio unius* rule by informing the reader that the enumeration of specific rights in the Constitution did not weaken the Constitution's other limits on federal power.¹³³ Although the Ninth Amendment is widely misunderstood today,¹³⁴ its principal role was as a protection for federalism, including judicial federalism. It affirmed that Congress was no more able to impair the independence of the state judiciaries after adoption of the Bill of Rights than had been true before adoption.

The Tenth Amendment,¹³⁵ based on the most popular proposal from the states, reinforced that whatever was not given was reserved. It may have been targeted specifically against claims raised during the Confederation period that, despite the Articles' limits on congressional power, Congress enjoyed additional "inherent" authority merely by virtue of being a sovereign.¹³⁶

In other words, both the Ninth and Tenth Amendments rendered explicit the Constitution's implicit restraints on Congress and the federal judiciary, as explained by Federalist essayists during the ratification debates. Both amendments protected the exclusive sphere of the states, including the integrity of the state courts.

seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹²⁸ Id., amend. V (“ . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”).

¹²⁹ Id., amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

¹³⁰ Id., amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

¹³¹ “The designation of one thing implies the exclusion of another.”

¹³² Cf. supra note 112 and accompanying text (referring to Madison's argument at the Virginia ratifying convention).

¹³³ Original Constitution, at 193-98.

¹³⁴ The amendment sometimes is seen as a source of unenumerated rights, a misunderstanding encouraged by a change in English language usage. See id. (discussing the meaning of “rights” and “powers” and the history of the Ninth Amendment).

¹³⁵ U.S. Const., amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹³⁶ Original Constitution, at 198-201.

VI. CONCLUSION

This paper has shown that immunity of the state judiciaries from federal interference is deeply rooted in American constitutional history. In fact, it antedates the Constitution itself.

When the Atlantic seacoast colonies were still part of the British Empire, an informal federalism prevailed among units of that empire. As was true of other aspects of colonial government, colonial courts—their procedures, maintenance, and areas of substantive jurisdiction—were relatively free from interference from London. When, beginning in 1763, London sought to increase control over the colonial judiciaries, the American response was firm and clear: colonial courts were a colonial affair. Initially, the Americans argued that the British had no jurisdiction in areas where effects were merely local. They later maintained that certain areas of life were protected categorically from imperial interference, one of which was the judiciary. The British failure to respect this position was one of the causes of the American Revolution.

Under the Articles of Confederation, nearly all judicial matters were concerns of the states rather than of Congress. During the Constitutional Convention, the Framers considered provisions that would grant to Congress and the federal courts jurisdiction over all activities with interstate effects. Ultimately, however, they rejected that approach, opting instead to enumerate the powers of Congress and of the federal courts. The Framers thereby adopted a categorical approach to federalism similar to that favored by later advocates of the colonial cause.

During the ratification debates, supporters of the Constitution repeatedly represented to the public the limited scope of federal power. They emphasized that the establishment and procedures of state courts would remain immune from federal interference, as would most of the substantive law those courts administered. Tort law, for example, was to remain almost exclusively a state affair. Those representations are authoritative evidence of the ratifiers' understanding; without them it is doubtful the instrument would have been adopted. The Bill of Rights was designed in part to fulfill those representations.

Integrity of state court systems is a fundamental aspect of the Founders' design. Except as authorized by subsequent constitutional amendment, congressional interference with state courts' procedures and substantive jurisdiction is profoundly hostile to the federalism the Founders bequeathed to us.

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