

NEW LIGHT ON THE HISTORY OF THE FEDERAL
JUDICIARY ACT OF 1789.*

I

THE Federal Judiciary Act of September 24, 1789, was Senate Bill No. 1, in the First Session of the First Congress. No adequate account of this famous legislation has ever been written; and Ellsworth's latest able and careful biographer stated in 1905 that "no complete history of the bill can now be written."¹ Apparently, the only sources of information hitherto consulted by lawyers and historians have been the Journal of the Senate, which does not give the amendments made in the Committee of the Whole, and the Journal of the House, which gives no detailed statement of amendments; the Annals of Congress, which gives the debates in the House, but not those in the Senate;² and the diary of Senator William Maclay, which treats only of amendments in which he was interested, and often in a form impossible of understanding.

Recent researches by the present writer have disclosed the fact that there are still in existence in the archives of the United

* In this article, the word "Judge," instead of "Associate Justice," and capital letters are used to correspond with their use in the author's book, *THE SUPREME COURT IN UNITED STATES HISTORY*.

¹ WILLIAM GARROTT BROWN, *LIFE OF OLIVER ELLSWORTH*, 186.

² Washington wrote to David Stuart, July 26, 1789: "Why they (the Senate) keep their doors shut when acting in a legislative capacity, I am unable to inform you, unless it is because they think there is too much speaking to the gallery in the other House, and business is thereby retarded." 10 *WRITINGS OF WASHINGTON*, Spark's ed.

Alexander White, a Member of Congress from Virginia, wrote to Madison, Aug. 25, 1789: "The pleasure which our open doors and the knowledge of our debates obtained by that means, has given to the people can hardly be conceived. The different conduct of the Senate must of course have a contrary effect." *MADISON PAPERS*, MSS. in Library of Congress.

General Pinckney, Senator from South Carolina, said that "the State where the Federal Government is now exercised has sufficient influence already, and those who read the debates in the House of Representatives may perceive that many of the speeches are calculated to please the gallery. I wish their doors were shut as well as those of the Senate." *Columbian Centinel* (Boston), March 2, 1791.

States, not only the original draft of the Judiciary Act as it was introduced into the Senate, but also the original amendments to the Draft Bill, submitted during the Committee and Senate debates, and, further, the copy of the Bill as it passed the Senate and went to the House. While statements have been made by various historians that the original Draft Bill was preserved and that it was in the handwriting of Oliver Ellsworth, no one has apparently ever consulted it, and the existence of the other papers has not been known, hitherto.³ It now appears, upon examination, that the original Draft Bill is in several different handwritings. Sections 1 to 9 inclusive are in the handwriting of William Paterson; Sections 10 to 23 are, in all probability, in the handwriting of Oliver Ellsworth; Section 24 is in the handwriting of Caleb Strong; and the succeeding Sections are written by a recording clerk.⁴ On this original document comprising the Draft Bill as introduced into the Senate, the changes, additions, insertions and deletions made during process of construction by the Committee and before its introduction into the Senate, appear in handwriting in the body of the draft, and on its margin, and on slips of paper pasted or affixed by sealing wax upon it. The amendments offered in the Senate are contained in various handwritings and on odd, loose slips of paper of different sizes and shapes, preserved in a bundle, in the Senate Files.⁵ The Draft

³ Henry Flanders in his *LIVES OF THE CHIEF JUSTICES* stated that the original draft of the bill in Ellsworth's handwriting was "still preserved in the archives of the Government." W. G. BROWN in his *LIFE OF OLIVER ELLSWORTH*, 186, note 1, repeats this statement and adds: "but he gives no reference and does not state that he himself had seen the document." Hampton L. Carson in his *SUPREME COURT OF THE UNITED STATES*, 129, repeats Flanders' statement without further authority.

⁴ Identification of the handwritings has been made for me by Mr. J. C. Fitzpatrick, Chief Assistant in the Manuscript Division of the Library of Congress, through the courtesy of Mr. Charles Moore, Chief of the Manuscript Division.

⁵ Through the aid and courtesy of the Secretary of the Senate, the Draft Bill and the amendments were located in the Senate Files in the attic of the Capitol; the Bill as passed by the Senate was discovered in a cellar room, under a heap of miscellaneous papers of confused and intermingled dates and subjects.

At the same time with the discovery of these papers, the writer has also found that a copy of the Draft Bill originally introduced into the Senate was published in full in the *Boston Gazette*, of June 29, and July 6, with the interesting omission, however, of the diverse citizenship jurisdiction granted to the Circuit Courts by the Bill.

Bill, as amended and adopted by the Senate, is in the handwriting of a recording clerk.

The disclosure of this new evidence now makes it possible, by comparison with the statute as finally enacted, to write, for the first time, an accurate history of the progress of the Act through the Congress, and of the variations of the final Act from the original Draft Bill. Such a comparison reveals certain legal and historical surprises of great importance, and makes it certain that Madison was wrong in stating, in 1836 (when he was eighty-five years of age and probably of failing memory), that "it was not materially changed in its passage into a law."⁶ It is clear now that very important and, in some instances, vital changes were made from the Draft Bill before it became law. And it may well be contended that had the Judges of the Supreme Court been familiar with these changes and with the history of the progress of the Bill in the Congress, several of the leading cases before that Court might have been decided differently.

Four of these great changes may be particularly mentioned at this point. First, it appears that the United States District and Circuit Courts were intended to take jurisdiction over common law crimes, instead of being confined to crimes specifically defined by Congress, as the Draft Bill when introduced provided, and as later erroneously held by the Courts. Second, the jurisdiction of the Circuit Courts in controversies between citizens of different States was made far more restricted than the Draft Bill intended. Third, — a surprising feature — the Draft Bill contained no such provision as was contained in the much litigated Section 34 of the Act, which provided that "the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply." This Section 34 was inserted as a Senate amendment. Fourth, — a fact of still greater consequence — it is apparent, from the

⁶ 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, Madison to Joseph Ward (Ellsworth's son-in-law), Feb. 27, 1836. William Garrott Brown in his LIFE OF OLIVER ELLSWORTH, 186, said: "There is enough in the Journals of the two Houses and in the debates of the House of Representatives to sustain Madison's impression that it went through without any radical change." The new facts disprove this statement.

manner in which the original draft of this Senate amendment constituting Section 34 was altered by its proposer before its proposal, that the word "laws" in this Section 34 was not intended to be confined to "statute laws," as Judge Story held in the famous case of *Swift v. Tyson*, but was intended to include the common law of a State as well as the statute law. Had Judge Story seen this original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was. All these points are discussed at greater length later on in this article.

In view of these new sources of information, it seems that a revised history of the Judiciary Act is warranted, since knowledge of the additions, subtractions, deletions and amendments relating to the original draft may possibly afford assistance to the Federal Courts in future interpretations of the Act.

Although the opinion has been expressed, in modern times, that the Judiciary Act was "probably the most important and the most satisfactory Act ever passed by Congress," and that "the wisdom and forethought with which it was drawn have been the admiration of succeeding generations,"⁷ such was not the opinion of this statute during the first fifty years after its passage.⁸ Senator William Grayson of Virginia wrote, immediately after its passage, that it was "monstrous," that the States would take alarm, and that its destruction might be predicted.⁹ William R. Davie of North Carolina wrote that it was "defective in point of arrangement" and "obscurely drawn or expressed." James A. Bayard said that while it "displays great ability, it is no disparagement of its author to say its plan is not perfect. . . . The original system could not be more than an experiment." John Brown, a Congressman from

⁷ Mr. Justice Brown in his address before the American Bar Association, Aug. 20, 1911; Miller, J., in *United States v. Holliday*, 3 Wall. (U. S.) 407 (1865).

⁸ The *Independent Chronicle* (Boston), Sept. 16, 1790, referred to the "extensive, perplexing and distressing Judiciary system—a system which, in its operation, will, in time, involve the people of these States into the most ruinous and distressing lawsuits . . . so tedious and intricate a Judiciary system."

⁹ TYLER, LETTERS AND TIMES OF THE TYLERS, Grayson to Patrick Henry, Sept. 29, 1789; LIFE AND CORRESPONDENCE OF JAMES IREDELL, Davie to Iredell, Aug. 2, 1791; Speech of Bayard, Feb. 19, 1802, 7th Cong., 1st Sess; HARRY INNES, MSS., in Library of Congress, Brown to Innes, Sept. 28, 1789.

the Kentucky district of Virginia, wrote that he feared "great embarrassment and clashing" between the Federal and State Courts, though since it was "absolutely necessary to pass a Judiciary Law at this session, the one which passes is as good, I believe, as we at present could make it." Samuel Dexter, the leading lawyer of Massachusetts in 1816, said that in his opinion the Federal Government had not been made strong enough, and that the Act was "neither constitutionally nor politically adapted to enforce the powers of the National Courts in an amicable and pacific manner," and that it was "improvidently assented to" by President Washington.¹⁰ James D. Miller of South Carolina said in the Senate, in 1832, that the Federalist party had determined, by means of this legislation, to supply what the Constitution "lacked of energy," and that "the Judiciary Act had sprung into existence, embodying principles which were repudiated in the Convention, and which, to a certain extent, have never been acquiesced in, notwithstanding the ingenious devices resorted to, by construction, to subvert the authority of the States."¹¹

The fact is that the final form of the Act and its subsequent history cannot be properly understood, unless it is realized that it was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction. Its provisions completely satisfied no one, though they pleased the Anti-Federalists more than the Federalists.¹² Congress almost at

¹⁰ See argument in *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 320 (1816).

¹¹ 22nd Cong., 1st Sess., 451, Feb. 21, 1832.

¹² In the famous debate over the repeal of John Adams' Circuit Court Act of 1801, a leading Anti-Federalist, Joseph H. Nicholson of Maryland, commended Ellsworth and the Judiciary Act as follows: "On no occasion has his wisdom or the solidity of his judgment appeared more conspicuous to my mind than in the formation of the first judiciary system of the United States. In a government like ours, extending over a large tract of country, and composed of sovereign States, independent of each other, confederated for the purpose of mutual defence and mutual protection, it was rightly judged that its judicial powers should not extend to any other cases of judicial cognizance than those which might be deemed somewhat of a general nature, and whose importance might affect the general character or general welfare of the Nation." 7th Cong., 1st Sess., Feb. 26, 1802.

once directed the Attorney General to make "a report of such alterations and improvements in the system as experience may dictate to be necessary or the public good may require";¹³ and as early as December, 1790, Attorney General Edmund Randolph submitted a voluminous report recommending many radical changes.¹⁴ While Congress enacted only one or two of the changes, insistent efforts were made by the Federalists, during the ten years succeeding 1790, to amend the Act by broadening the scope of the Federal Judiciary.

Not only was the Judiciary Act a compromise, but its final form was closely tied up with, and largely dependent upon, the fate of the various Amendments to the Judiciary Article of the Constitution which were being debated in Congress during the debates over the Judiciary Act itself. It is well known that many of the chief objections to the Constitution were due to the broad scope of its provisions relative to the judicial power. "My principal objections to the plan are . . . that the judicial department will be oppressive," reported Elbridge Gerry, one of the Massachusetts delegates. "There are no well-defined limits

¹³ See *Gazette of the United States*, Dec. 18, 1790: "The establishment of a Judiciary system for the United States is a subject in which the greatest diversity of opinions has been entertained. When this business came before the Legislature of the Union, the division of sentiment without doors did not appear to be excluded from Congress. After long and interesting debates, in which the most patriotic concern for the rights of the people and the particular States was abundantly exemplified, the public judgment preponderated in favor of such a system; and accordingly the law establishing the necessary Courts was passed. But the Legislature, feelingly interested in the happiness of the people and the security of their persons and properties, keeping in view the imperfection and consequent possibility of improvement of every human institution, at the close of the last session, directed the Attorney General to make report, at the present, of such alterations and improvements in the system as experience may dictate to be necessary or the public good may require. From the acknowledged abilities of that respectable character we may expect much justice will be done the subject."

¹⁴ See AM. STATE PAPERS, Misc. No. 17. As to this report, one of the drafters of the Act, Caleb Strong of Massachusetts, wrote to David Sewall, Jan. 17, 1791, (see MS. letter in Library of Congress): "The Attorney General has reported Amendments to the Judicial system; the Report is very lengthy and contains nearly 40 folio pages. It is just printed and was it not too bulky I would inclose it. I have but just looked into it; he proposes that the District Judges shall be Judges of the Circuits, that the Supreme Judges shall have no other service than attending 4 Supreme Courts in a year at the seat of the Governments; that the executions to be issued shall be those in use in England, etc.; in short, I believe it is better calculated for Virginia than New England."

of the Judiciary powers, they seem to be left as a boundless ocean. . . . It would be a Herculean labor to attempt to describe the dangers with which they are replete," he wrote. James Sullivan wrote to Rufus King that he had only one doubt, "which is, whether the object of the Judicial power is well defined. I wish you to attend to this for I consider it the main-spring of the whole machinery."¹⁵ Sixteen out of the seventy-nine Amendments suggested by the Conventions of Massachusetts, New Hampshire, Virginia, New York, and North Carolina, were proposals for changes in the Judiciary Article; and around that Article, the opposition largely centred in the debates in the Conventions in most of the States.¹⁶

While there were many who actively opposed the Constitution, there were still more who were willing to accept it, with the hopes of later Amendments, and who shared the feelings of a correspondent of James Madison, who wrote: "I do not implicitly accede in sentiment to every article of the scheme proposed by the Convention, but I do not see how my utmost wishes are to be gratified until I can withdraw from society." "There would have been less repugnance to it here [Virginia] had the Judiciary been less exceptionable," wrote another correspondent.¹⁷ That "a Bill of Rights and additional checks in the

¹⁵ I THE LIFE AND CORRESPONDENCE OF RUFUS KING, Sullivan to King, Sept 23, 24, 1787.

¹⁶ See ELLIOTT'S DEBATES: in the Virginia Convention, speeches of Henry, 57, 319, 446, 539-546; Pendleton, 66-67, 517, 546-549, 570-572; Nicholas, 247, 443; Randolph, 468; Mason 521-529; Madison, 532-536; Marshall, 551-555; in the Massachusetts Convention, speeches of Holmes, 109; Gore, 112; Dawes, 113-144; Thatcher, 144; in the Pennsylvania Convention, speeches of Wilson, 469, 480, 486-494, 517, 518; Smilie, 517; in the North Carolina Convention, speeches of Spencer, 136-138, 164; Spaight, 140, 144; Johnston, 141, 150; Bloodworth, 143, 151, 166; McDowell, 143; Iredell, 145-147, 152, 165, 170-172; Maclaine, 151, 162, 172; Spencer, 154, 155; Davie, 156-159; Locke, 169; Bass, 174.

On the other hand, there were men who believed that the Constitution should have given broader Federal judicial powers. The *Massachusetts Centinel*, March 4, 1780, said that "a writer who signs himself 'A Citizen of the World' in a late Baltimore paper makes the following observation: 'For my own part, I am of opinion that if any amendments are necessary, they are those of extending the powers of the Federal Judiciary.'"

¹⁷ Edward Carrington to Madison, Sept. 25, 1787; Joseph Jones to Madison, Nov. 22, 1787. Jones wrote to Madison, Oct. 29, 1787: "There is also a strong objection against the appellate jurisdiction over law and fact, independent of a variety of other objections, which are and may be raised against the Judiciary

Judiciary Department are almost universally agreed on, as well by the honest friends as the avowed opponents of the government, to be essential improvements," was stated as early as March, 1789.¹⁸

The principal Amendments which were regarded as necessary, relative to the Judiciary, were: (a) an express provision guaranteeing jury trials in civil as well as criminal cases; (b) the confinement of appellate power to questions of law, and not of fact; (c) the elimination of any Federal Courts of first instance, or, at all events, the restriction of such original Federal jurisdiction to a Supreme Court with very limited original jurisdiction; (d) the elimination of all jurisdiction based on diverse citizenship and status as a foreigner.¹⁹

Letters and pamphlets devoted to the great struggle for the adoption of the Constitution contained constant and forcible arguments *pro* and *con* as to these Judiciary Amendments, which the First Congress of the new Government was expected to adopt and submit to the people.²⁰

arrangements and the undefined powers of that Department. . . . The Legislature may, and will properly make proper and wise regulations in the Judiciary, as, in the execution of that branch of power, the citizens of all States will generally be affected. But the reflection that there exists in the Constitution a power that may oppress, makes the mind uneasy; and that oppression will result from the appellate power of unsettling facts does to me appear beyond a doubt. . . . Could I see . . . the right of unsettling facts removed from the Court of Appeals, I could with much less reluctance yield my assent to the system."

¹⁸ *Independent Gazetteer* (Phil.), March 23, 1789; see *ibid.*, Feb. 25, 1789.

¹⁹ Arthur Lee wrote to John Adams, Oct. 3, 1787: "Securing trial by jury in criminal cases only, making the Federal Court original instead of appellant, and that in the case of a citizen of any State and one of another, and of a foreigner with the citizen of any State . . . are errors, if errors, gross as a mountain. I say, if errors; for I am very much inclined to believe they were designed." 9 WORKS OF JOHN ADAMS, 555.

See THE LETTERS OF RICHARD HENRY LEE, Ballagh ed.: letters to Samuel Adams, Oct. 5, 27, 1787; to Edmund Randolph, Oct. 16, 1787; to George Mason, Oct. 1, 1787, May 7, 1788; to William Shippen, Oct. 2, 1787. See also Mason's Objections in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION, 315, 320; 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 144, 151, James McHenry and Luther Martin to the Maryland House of Delegates, Nov. 27, 1787; "Genuine Information" by Luther Martin, 3 *ibid.*, 172, 206-207; Jefferson to Madison, Dec. 20, 1787, 4 *ibid.*, 411.

²⁰ See ESSAYS ON THE CONSTITUTION, Ford ed.; "Letters of Agrippa" (James Winthrop) in *Massachusetts Gazette*, Dec. 11, 14, 1787, Jan. 14, Feb. 5, 1788;

Meanwhile, it was recognized that the details of a judicial system under the Constitution as it then stood must be framed and put into operation, as a statute, by the First Congress, before the new Government could function at all. Since such a system was entirely without precedent, the work of constructing it would have been difficult under any circumstances; but to frame it with a view to the possibility that the Constitution itself might be amended with respect to the very matters dealt with in the statute made it doubly difficult. The importance and the seriousness of the task thus laid upon the First Congress had been early and widely recognized. To the Senate, the work was assigned. Though the House of Representatives was organized on April 1, 1789, it was not until April 6, when Richard Henry Lee of Virginia appeared in New York as the twelfth Senator, that the Senate was ready to proceed to business. On the very next day, however, it appointed a Committee to draft a bill for organizing the Judiciary system of the United States, consisting of Oliver Ellsworth of Connecticut, William Paterson of New Jersey, William Maclay of Pennsylvania, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Few of Georgia, and Paine Wingate of New Hampshire. Of these men, Ellsworth, Paterson, Strong, Few, and Wingate had served in the Federal Convention of 1787 and were familiar with its intent as to the Judiciary.²¹ Six days later, on April 13, Charles Carroll of Maryland and Ralph Izard of South Carolina were added to the Committee. Since the whole Senate at that time consisted of only twenty members,²² only four more in number than the Judiciary Committee of the present Senate of

PAMPHLETS ON THE CONSTITUTION, Ford ed., esp. "Letters of a Federal Farmer," Richard Henry Lee, Oct. 8, 9, 10, 1787; "Observations on the New Constitution by a Columbian Patriot," Elbridge Gerry; "Observations on the True Constitution," by "Centinel" (Samuel Bryan); Letter from Luther Martin in *Maryland Journal*, March 21, 1788.

²¹ In *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 297 (1888), reference is made to the fact that the Judiciary Act was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."

²² The New York Senators were not elected and did not take their seats until July; and Rhode Island and North Carolina had not yet come into the Union.

1793, this Special Judiciary Committee of 1789, consisting of ten men (one from each State), comprised one half of the Senate of that day.²³ Its membership could hardly have been harmonious; for Lee, only a year and six months before, had written the strongest letters of attack on the Constitution which appeared in the newspapers; and it is not likely that he had forgotten that Ellsworth had written in reply to him the following savage characterization: "The factious spirit of R. H. L., his implacable hatred to Gen. Washington, his well known intrigues against him in the late war . . . is so recent in your minds that it is not necessary to repeat them. He is supposed to be the author of most of the scurrility poured out in the New York papers against the new Constitution."²⁴

The Committee worked over the Bill for just two months; and, as Fisher Ames wrote, they "labored upon it with vast perseverance and have taken a fuller view of the subject as I ever knew a committee to take." They find it "an arduous task," wrote a Maryland Congressman. "From what I can learn from the Members of the House with whom I have conversed, they are disposed to proceed with great moderation on this head. On the whole, I think the Senate a most respectable body, and doubt not they will do great credit to the Nation and Union." "The reorganization of the Judiciary which the Senate has undertaken will, I apprehend, be found a labour of great difficulty," wrote Joseph Jones of Virginia to Madison.²⁵ The most direct information regarding the Bill comes from a member

²³ The members of the Senate, not members of the Committee, who were present during the debates on the Bill were: John Langdon of New Hampshire, Tristram Dalton of Massachusetts, William Samuel Johnson of Connecticut, Jonathan Elmer of New Jersey, Robert Morris of Pennsylvania, George Read of Delaware, John Henry of Maryland, William Grayson of Virginia, Pierce Butler of South Carolina, and James Gunn of Georgia.

²⁴ "Letters of a Landholder," No. 6, *New York Journal*, Dec. 10, 1787. See *ESSAYS ON THE CONSTITUTION*, Ford ed. The attack was unjust and the relations of Lee to Washington in 1789 were certainly most warm. See Lee's letter to Washington, April 6, 1789.

²⁵ 1 *WORKS OF FISHER AMES*, Ames to George R. Minot, July 8, 1789; *Maryland Journal and Baltimore Advertiser*, May 1, 1789. The letter continued: "I have never yet heard a sentiment from any Members of either House which expressed an inclination or betrayed a wish to embarrass the Federal Government; but on the contrary, to promote its operations with all their influence." See 15 *MASS. HIST. SOC. PROC.*, 2nd Series, letter of Jones to Madison, May 10, 1789.

of the Committee, Paine Wingate, who wrote to Timothy Pickering on April 29 saying: "A Committee of the Senate have spent considerable time in arranging the judicial department, in order to frame a bill. Nothing is yet matured, tho' some general principles have been agreed to. It is a very intricate and difficult matter to adjust, so as to answer the design of the Constitution by securing impartial justice, and not make it burdensome and inconvenient for the people. It would take too long to give you any idea of the progress that is made and it is not unlikely that it may appear in a different shape from what has yet been proposed. Mr. Ellsworth seems to be the leading projector, who is a very sensible man and will do very well if he is not too much attached to the forms of law he has long been in the habit of. It is a line of life in which I have not been used and am not competent to judge of. There are several gentlemen of the law in the Committee and I trust there is good sense and information enough in the Senate to frame a bill pretty right at last."²⁶

That the Judiciary Bill which came from this Committee was, to a large extent, drafted by Ellsworth is now well established. "This Bill is a child of his, and he defends it with the care of a parent, even with wrath and anger. He kindled as he always does

²⁶ PICKERING PAPERS, MSS. in Mass. Hist. Soc. Library, Wingate to Pickering, April 27, 1789, hitherto unpublished.

An interesting item as to a possible source of parts of the Judiciary Act appeared in the *Massachusetts Spy*, May 21, 1789, in a despatch from Boston: "We are told that some of the members from this State in the Legislature of the Union have written for a copy of the Judicial System reported by the Judges of our Supreme Judicial Court and others to the Legislature last year. This System has been pronounced by able judges the best calculated to render the law prompt, efficient and plain." It is likely that this copy was asked for by Caleb Strong, of Massachusetts, who was on the Senate Committee.

And that John Lowell of Massachusetts was consulted as to the Judiciary Act seems to be evident. See Essays in the Constitutional History of the United States in the Formative Period, 1775-1789, in JAMESON, *THE PREDECESSORS OF THE SUPREME COURT*, 43: "In a footnote to Mr. Harrison Gray Otis' remembrances of Judge Lowell, printed in 1847, in the *Law Reporter*, Dr. Charles Lowell says of his father, 'I have the sketch of his on the judiciary system of the United States about which his opinion and counsel had been asked, as I think, by a Committee of Congress.' It is a matter of great regret that this paper is apparently no longer in existence." (Note) 11 *LAW REPORTER*, 429: "The Massachusetts archives formerly contained a letter written by Senator Caleb Strong to Lowell in 1789, now missing, which may very likely have been the one which elicited his letter above mentioned."

when it was meddled with," wrote Senator Maclay in his diary, June 29, 1789. "Mr. Strong, Mr. Ellsworth and Mr. Paterson have their full shares of this merit," wrote Fisher Ames; and, as quoted above, Paine Wingate of the Committee wrote, as early as April 29, "Mr. Ellsworth seems to be the leading projector."²⁷ It must, however, be observed that it is probable that William Paterson took a more considerable part in drafting the bill than he has hitherto been given credit for, as the Senate Files show that the first nine sections, with alterations and interlineations, are in his handwriting.

That Ellsworth probably prepared the first or an early draft for the consideration of the Committee may be conjectured from a letter written three weeks after its appointment, in which he said:

"The following are outlines of a judiciary system contemplating before a committee of the Senate. That the Supreme Court consist of six Judges and hold two stated sessions annually at or near the seat of government. That there be a District Court with one Judge resident in each State, with jurisdiction in admiralty cases, smaller offences and some other special cases. That the United States be divided into three circuits. That a court be holden twice annually in each State, to consist of two Judges of the Supreme Court and the District Judge. This Court to receive appeals in some cases from the District Court, to try high crimes, to have original jurisdiction in law and equity, in controversies between foreigners and citizens and between citizens of different States, etc., where the matter in dispute ex-

²⁷ Ames to Minot, July 8, 1789, *supra*. T. Lowther wrote to James Iredell, July 1, 1789: "It was principally drawn up by a Mr. Ellsworth of Connecticut." See 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, McRee ed.

Philip Doddridge of Virginia stated in the House, May 9, 1832, that James Madison was the author of the Judiciary Bill (see 22nd Cong., 1st Sess.) whereupon Madison wrote to him, June 6, 1832, in correction of the statement, stating that the Act "was understood truly, I believe, to have proceeded from Mr. Ellsworth, availing himself, as may be perceived, of consultation with some of his most enlightened colleagues." Madison also wrote to Edward Everett, May 30, 1832: "The task of preparing it was understood, justly I believe, to have been performed by Mr. Ellsworth, in consultation probably with some of his learned colleagues." See also letter of Madison to Joseph Ward, Feb. 27, 1836. "It was well understood that he was an able and operative member. It may be taken for certain, I believe, that the bill organizing the Judicial Department originated in his draft and that it was not materially changed in its passage into a law."

ceeds five hundred dollars, and to grant appeals to the Supreme Court, except as to facts, where the matter in dispute exceeds two thousand dollars.”²⁸

A letter “from a gentleman in New York to his friend in Virginia,” published in the newspapers, also stated that: “The Senate have had the Judiciary system before them. No bill is yet brought in, but the Committee has agreed to the following principles.” This latter letter, while confirming the general scheme in Ellsworth’s letter, sets forth three strikingly different provisions; while Ellsworth stated the civil jurisdiction of the Circuit Courts to be only of controversies between foreigners and citizens and between citizens of different States in cases involving over five hundred dollars, the New York letter stated that the Circuit Court was “to have cognizance of *all cases of federal jurisdiction, whether in law or equity* above the value of five hundred dollars;” and while Ellsworth’s letter stated that appeals were to lie “*except as to facts,*” the New York letter stated that “no appeal shall lie, except the matter in dispute be of the value of two thousand dollars and *in common law cases on points of law only,*” and the New York letter stated that a defendant in a case in a State Court presenting a Federal question was to be allowed to remove before trial, but not to appeal, to a Federal Court.²⁹ These two letters undoubtedly represent early stages in the draft of the Bill, for the Bill which was finally agreed upon

²⁸ Ellsworth to Judge Richard Law of Connecticut, April 30, 1789. See WHARTON’S STATE TRIALS, 37, 38, note; 3 AM. L. J. 258.

²⁹ This “letter from a gentleman in New York,” written in April or May, was copied in the *State Gazette of North Carolina*, July 30, 1789, and the portion relating to the Circuit Court was, in full, as follows: “That Inferior Courts shall be held twice a year in each district, which Courts shall consist of two of the Supreme Judges and the Admiralty Judge, and shall take cognizance of all cases of Federal jurisdiction, whether in law or equity above the value of 500 dollars (inferior matters to be left to the State Courts), and of all criminal cases not within the jurisdiction of the Admiralty Judges. This Court shall act as a *nisi prius* Judge, in cases originating in the Supreme Court, and as a Court of Appeals from the Admiralty Court; and from this Court, no appeal shall lie, except the matter in dispute be of the value of 2000 dollars, and in common law cases on points of law only. In cases of concurrent jurisdiction, the plaintiff may sue either in the State or Federal Court, but having made his option, he shall abide by it. A defendant sued in a State Court, in a matter of federal jurisdiction, may remove the cause to the Federal Court before trial but will not be allowed to appeal.”

and reported to the Senate markedly differed from both of these early drafts. The Bill as reported, as appears now from the Senate Files and as published in the *Boston Gazette*, eliminated entirely the jurisdiction of the Circuit Court over "all cases of federal jurisdiction"; it also contained a much restricted jurisdiction over cases between citizens of the different States; it limited appeals, not only "in common law cases" but in all other cases, to appeals purely on questions of law, on writ of error; and — a very important change — it allowed a defendant sued in a State Court in a case involving a Federal question, not only to remove the case before trial into a Federal Circuit Court, but also to appeal, after trial, to the Supreme Court on writ of error. These changes will be considered later, in detail. But they should be particularly noted at this point, for they undoubtedly represent the price which Ellsworth paid to secure the concurrence of Richard Henry Lee in reporting the Bill. Evidently, at some stage in the drafting of the Bill, a contest had been waged between those men who wished to confine the Federal judicial power within narrow limits and to leave to the State Courts the chief part of original jurisdiction, and those men who wished to vest in the Federal Courts the full judicial power which the Constitution granted — namely that it should "extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." The former faction prevailed, and it was not until the lapse of eighty-six years that, in the year 1875, the Federal Courts were finally vested with the broader judicial power.³⁰

That it was the course of the Committee in adopting some such compromise as to Federal jurisdiction which averted or mollified the opposition of Lee to the Bill was shown by a letter which he wrote at this time to Patrick Henry, May 28, 1789: "So far as this has gone, I am satisfied to see a spirit prevailing that promises to send this system out, free from those vexations and abuses that might have been warranted by the terms of the

³⁰ See Act of March 3, 1875, c. 137, 18 STAT. AT L. 470. The Circuit Court Act of Feb. 13, 1801, passed by the Federalists in the closing days of President Adams' administration, granted this full jurisdiction to the Circuit Courts, but it was repealed by the Act of March 8, 1802.

Constitution"; but "it must never be forgotten, however," he wrote, "that the liberties of the people are not so safe under the gracious manner of government as by the limitation of power," and hence, he continued to express his preference for the securing of the rights of the States through Amendments to the Constitution rather than through the Judiciary Act.³¹

On June 12, 1789, the Committee finished its labors, and the Bill was reported to the Senate by Richard Henry Lee, who was probably picked for that duty for tactical, political reasons, in order to strengthen the measure with the anti-Federal faction. Senator Maclay, in his diary, records the report, and states that the Bill "was long and somewhat confused,"³² and that Senator (Pierce) Butler of South Carolina "made a most flaming speech" against it, and "was called to order by the Chair and was not a little angry about it."³³

A summary of the reported Bill was widely reported in the

³¹ See 2 THE LETTERS OF RICHARD HENRY LEE.

³² MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES, Harris ed. Regarding Ellsworth as a draughtsman, Maclay wrote, Jan. 12, 1791, in describing another measure, that it "was drawn and brought in by Ellsworth, and of course, he hung like a bat to every particle of it. The first clause was mere chaos — style, preamble, and enacting clause all jumbled together. It was really unremendable — at least the shortest way to amend it was to bring in a new one. This same Ellsworth is a striking instance how powerful a man may be in some departments of the mind, and defective in others. All powerful and eloquent in debate, he is, notwithstanding, a miserable draughtsman. The habits of the bar and the lists of litigation have formed him to the former; the latter is, in a great degree, the gift of nature."

³³ Butler was one of those opposed to the Constitution in many parts, but who refused to join with Elbridge Gerry in declining to sign it, since, as he wrote, "with all its imperfections, it is the only thing that can rescue the States from civil discord and foreign contempt." 2 AUSTIN, LIFE OF ELBRIDGE GERRY, 59. As to Butler, who had arrived in the Senate, June 8, Maclay records, Tuesday, June 9: "A new phenomenon has made its appearance. . . . Pierce Butler from Carolina had taken his seat, and flamed like a meteor. He arranged the whole impost (customs) law, and then charged (indirectly) the whole Congress with a design of oppressing South Carolina. . . . Ellsworth, Morris, Carroll, Dalton, Langdon for the report; Few, Izard, Butler, Lee against it. And until four o'clock was it battled, with less order, less sense, and less decency, too, than any question I have ever yet heard debated in the Senate. . . . Butler's party had conducted themselves with so little decorum, that any effect their arguments might have had was lost by their manner." On June 10, Maclay recorded: "The lately arrived Mr. Butler is the most eccentric of creatures. . . . He has words at will; but scatters them the most at random of any man I ever heard pretend to speak."

newspapers; and the *Boston Gazette* published a copy in full, stating that: "The importance of the subject, and the anxiety of the public at large to know in what manner the Rulers of America proceed, induces us to embrace the earliest opportunity to publish the same. The Bill being now under consideration will, it is likely, undergo some amendments; but perhaps will not vary, materially, from its present plan."³⁴ Accounts of its progress and much comment and criticism regarding it appeared in the private, as well as in the published, correspondence of Congressmen and others. "The different powers and jurisdictions of the Courts would have been more clearly seen had they been taken up in separate bills," wrote a Virginia friend to Madison. "Where there is danger of clashing jurisdictions, the limits should be defined as accurately as may be, and this danger will exist where there are concurrent jurisdictions. In so extensive a country as the United States, every precaution, consistent with the right of appeal, should be interposed to prevent inconvenience and legal opposition." Madison wrote to Jefferson that the Bill "is found a pretty arduous task and will probably be long on its way through the two Houses."³⁵ A New York correspondent of James Iredell wrote that "it is supposed considerable alterations will be made before it passes both Houses. There are not many lawyers in the Senate, but they compose three fourths of the Representatives."³⁶

That the people at large were keenly following the action of

³⁴ *Boston Gazette*, June 29, July 6, 1789. See also *Connecticut Courant*, June 29, 1789; *Massachusetts Spy*, July 2, 1789; *Massachusetts Centinel*, April 29, May 2, June 17, 24, July 1, 15, Aug. 5, 8, Sept. 5, 1789, and all the New York, Connecticut and Philadelphia papers.

³⁵ MASS. HIST. SOC. PROC., 2nd Series, Jones to Madison, July 3, 1789; 1 WORKS OF JAMES MADISON, Madison to Jefferson, June 30, 1789. Madison wrote to Edmund Randolph, June 17, 1789, sending him a copy of the bill, and saying: "Having not yet looked it over, I can say nothing of its merits. You will be a better judge, and such remarks as your leisure will permit will be acceptable and useful." He wrote on July 15, again, acknowledging Randolph's letter of June 30 containing remarks on the Bill.

³⁶ 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, T. Lowther to James Iredell, July 1, 1789, enclosing copy of the Bill. Lowther's statement as to the lawyers was inaccurate. At least thirteen out of the twenty members of the Senate (New York Senators not yet having taken their seats and North Carolina and Rhode Island not being in the Union) were lawyers or had been admitted to the Bar.

their First Congress is very plain, and a Virginia Congressman writing to Madison of his impressions of a trip from New York, said: "At the inns on the road, I was surprised to find the knowledge which the landlords, and the country people who were at some of them, had acquired of the debates and proceedings of Congress."³⁷

II

On June 22, debate on the Draft Bill began in the Committee of the Whole of the Senate, and the subject first taken up was, naturally, the provisions relating to the jurisdiction of the District, Circuit and Supreme Courts.³⁸ The first issue was whether there should be any District Courts of the United States at all, or whether the functions of executing the Federal laws should be left in the first instance with the State Courts. It is a singular fact, not always recalled, that many ardent pro-Constitutionalists had already expressed the belief that the State Courts might well be entrusted with such power, subject to appeal to the Federal Supreme Court.³⁹ Thus, John Rutledge of South Carolina, in the Federal Convention of 1787, had said: "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 and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction of the States and creating unnecessary obstacles to their adoption of the new system." Roger Sherman of Connecticut had supported this view, and, the next year, had written: "The Constitution does not make

³⁷ MADISON PAPERS, MSS., Alexander White to Madison, Aug. 17, 1789.

³⁸ See SENATE JOURNAL; MACLAY. The debates on the second reading of the Bill occurred on June 22, 23, 24, 25, 26, 27, 29, 30, July 1, 2, 3, 6; the debates on the third reading, on July 7, 8, 9, 10, 11, 13.

³⁹ See FORD'S ESSAYS — "A Citizen of New Haven" (R. Sherman) in *New Haven Gazette*, Dec. 25, 1788, "Landholder" (O. Ellsworth) in *New York Journal*, Dec. 10, 1787; ELLIOTT'S DEBATES, 517 (Pendleton), 536, 549 (Madison); I LIFE AND LETTERS OF RUFUS KING, Christopher Gore to King, March 27, 1789, "Dana thinks the Supreme Judicial Courts of the several States ought to be the Federal District Courts. But this might introduce too great jarring of interests in the same Judiciary."

it necessary that any inferior tribunals should be instituted, but it may be done, if found necessary; 'tis probable that the Courts of particular States will be authorized by the laws of the Union, as has been heretofore done in cases of piracy." Oliver Ellsworth himself had written: "Nothing hinders . . . that all the cases, except the few in which it (the Supreme Court) has original and not appellate jurisdiction, may in the first instance be had in the State Courts." Edmund Pendleton said in the Virginia Convention: "I think it highly probable that their first experiment will be to appoint the State Courts to have the inferior Federal jurisdiction." James Madison had said: "It will be also in the power of Congress to vest this power in the State Courts both inferior and superior. This they will do, when they find the tribunals of the States established on a good footing." Francis Dana (later Chief Justice of Massachusetts) thought that "the Supreme Judicial Courts of the several States ought to be the Federal District Courts." "I think it would be wise to institute the State Courts, where they are well established, as the inferior Courts," wrote Edward Carrington to James Monroe, "for should the United States erect separate Courts, the probability is that bickerings will arise between the two jurisdictions; this, as you say, is in the discretion of Congress; and I trust that that discretion will be exercised properly."⁴⁰ The conclusive answer to these suggestions, however, was given later by Ellsworth: "To annex to State Courts jurisdiction which they had not before, as of admiralty cases, and, perhaps, of offences against the United States, would be constituting the Judges of them, *pro tanto*, Federal Judges, and of course they would continue such during good behaviour, and on fixed salaries, which, in many cases, would illy comport with their present tenure of office. Besides, if the State Courts, as such, could take cognizance of those offences, it might not be safe for the General Government to put the trial and punishment of them entirely out of its own hands."⁴¹

After long debate, the Senatè voted to establish Federal Dis-

⁴⁰ 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, 54, Carrington to Monroe, Sept. 15, 1788.

⁴¹ Ellsworth to Law, Aug. 4, 1789, WHARTON'S STATE TRIALS, 38. See also 1st Cong., 1st Sess., Smith of South Carolina, 801, Madison, 812.

trict Courts. Thereupon, as Senator Maclay records, Richard Henry Lee "brought forward a motion, nearly in the words of the Virginia Amendment, *viz.* that the jurisdiction of the Federal Courts should be confined to cases of admiralty and maritime jurisdiction."⁴² The motion, as it appears now on the Senate Files, was as follows: "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 United States." It has always appeared to historians as somewhat remarkable that Lee should have thus attacked a fundamental principle of the bill which he himself had reported, and especially because of the fact that, while he had long been ardently advocating Amendments to the Constitution, he had never supported the Virginia proposition of limiting the Federal Courts to so narrow a scope as now proposed. It is possible that Maclay is mistaken in stating that Lee made this motion; for the original paper in the Senate Files is not in Lee's handwriting.⁴³ Maclay reports, however, in detail Lee's speeches in favor of the motion, as well as those of William Grayson of Virginia; Ellsworth and Maclay, himself, opposed the motion, and it was finally rejected.

This was the crucial contest in the enactment of the Judiciary Act. The broad pro-Constitution men took the position that Congress had no power to withhold from the Federal Courts which it should establish any of the judicial power granted by the Constitution. On this point, they were forced to yield; for the Congress withheld from the Federal Courts much of the jurisdiction which it might have bestowed under the Constitution. On the other hand, the narrow pro-Constitution men were anxious to give to the Federal Courts as little jurisdiction as possible and to leave to the State Courts, in the first instance,

⁴² MACLAY, June 22, 1789.

⁴³ The Amendments favored by Lee were sent by him to Dr. William Shippen in a letter of Oct. 2, 1787, and, so far as they related to the Judiciary, only included Amendments as to trial by a jury of the vicinage in criminal cases, trial by jury in civil cases, appeals only on matters of law, abolition of jurisdiction between citizens of different States and between citizens and foreigners. See 2 THE LETTERS OF RICHARD HENRY LEE, 440. See also Lee to Pendleton, May 22, 1788.

jurisdiction over most of the Federal questions, subject to Federal revision through the appellate power of the United States Supreme Court. On this point, this faction also was forced to yield. The result was a compromise.

In one view of the case, the strong pro-Constitution men probably held the better position. When the Constitution stated that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish," and that "the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, etc.," it could well be argued that it did not intend to leave it within the power of Congress to withhold from the Federal Courts which Congress should establish any part of the judicial power granted by the Constitution. The only discretion which was specifically granted to Congress was with reference to the appellate jurisdiction of the Supreme Court. It was such appellate jurisdiction that was to be "with such exceptions and regulations as the Congress shall make"; there was no provision for a power in Congress to make "any exceptions or regulations" as to the original and appellate jurisdiction of the inferior Federal Courts.

It was always the view of Judge Story that Congress was bound to vest in the inferior Courts all the jurisdiction granted by the Constitution and that it could not refuse to do so "without a violation of its duty."⁴⁴ Judge Bushrod Washington apparently shared this view.⁴⁵

On the other hand, as early as 1799, Judge Chase in the course of the argument of a case said that though "the motion has frequently been entertained that the Federal Courts derive their judicial power immediately from the Constitution, . . . the

⁴⁴ *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304 (1816). See also Story, J., in *White v. Fenner*, 1 Mason (U. S.) 520 (1818).

⁴⁵ Judge Washington said in *Ex parte Cabrera*, 1 Wash. C. C. 232, 237 (1805): "Whether it would have been wise in Congress to have vested in the National Courts, the power of deciding, in some way or other, every National question, authorized by the Constitution; is another point. I am one of those, I confess, who have always thought it would have been better, if the Legislature of the Union, in allotting to the several Courts the jurisdiction they were to exercise, had occupied the whole ground marked out by the Constitution; but, I am not one of those who think it a commendable quality in a judge, to enlarge, by construction, the sphere of his jurisdiction."

political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress. . . . Congress is not bound, and it would, perhaps, be inexpedient to enlarge the jurisdiction of the Federal Courts to every subject, in every form, which the Constitution might warrant." And Chief Justice Ellsworth said that, in his opinion, the Circuit Courts had "cognizance, not of cases generally, but of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace."⁴⁶ And by 1845 it was explicitly laid down by Judge Daniel that the judicial power of the United States, except in the cases of original jurisdiction of the Supreme Court, "is dependent for its distribution and organization and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."⁴⁷

That Judge Story's views as to the imperative Federal jurisdiction of the inferior Federal Courts did not prevail was extremely fortunate for the United States. Conditions did not require in 1789, nor do they at present require, the vesting in the Federal Courts of the full scope of jurisdiction authorized by the Constitution. In fact, it would probably now be better that the present broad jurisdiction granted by the Act of 1875 should be abrogated, and that the State Courts should be left to a greater extent with jurisdiction, in the first instance, of cases arising under the Constitution and laws of the United

⁴⁶ *Turner v. Bank of North America*, 4 Dall. (U. S.) 8 (1799). See also Livingston, J., in *Livingston v. Van Ingen*, 1 Paine (Circ. Ct., N. Y.) 45, 51 (1811), with reference to the lack of power of Federal Courts in patent cases. "It cannot be believed that, in a law drawn with so much care, and embracing such a variety of provisions, so important an omission was casual. It must have been the result of much reflection, and shows their sense at least, that Congress were not bound to clothe the Courts which they might create with all the powers which by the Constitution they had the right to confer."

⁴⁷ *Cary v. Curtis*, 3 How. (U. S.) 236, 245 (1845). See *Sheldon v. Sill*, 8 How. (U. S.) 441 (1850), *per* Grier, J.; *Holmes v. Goldsmith*, 147 U. S. 150 (1893), *per* Shiras, J.

States, Federal rights being amply safeguarded by right of appeal to the United States Supreme Court.⁴⁸

It is interesting to note that though, in the original enactment of the Judiciary Act, the State-Rights or narrow constructionist party failed in their attempt to leave to the State Courts jurisdiction over Federal questions, they succeeded, during the succeeding twenty years, in passing many statutes vesting in the State Courts such jurisdiction over Federal questions both in civil and criminal cases.⁴⁹ This voluntary surrender to the States by Congress of Federal judicial powers granted by the Constitution only ceased when the State Courts themselves proceeded to hold that Congress had no constitutional power to impose such jurisdiction on the State tribunals and officials; and, singularly, this action by Congress which had been advocated

⁴⁸ See address of Senator Thomas F. Walsh of Montana before the Virginia Bar Ass. at Lynchburg, Va., June 8, 1922, CONG. REC., 67th Cong., 2nd Sess., June 12, 1922.

⁴⁹ See statutes vesting jurisdiction in State Courts of suits by the United States for penalties and forfeitures.

Act of June 5, 1794, c. 45, § 10, 1 STAT. AT L. 373, 375; Act of July 6, 1797, c. 11, § 20, 1 STAT. AT L. 527, 532; Act of June 5, 1794, c. 48, § 5, 1 STAT. AT L. 376, 378; Act of June 5, 1794, c. 49, § 9, 1 STAT. AT L. 378, 380; Act of June 9, 1794, c. 65, § 12, 1 STAT. AT L. 397, 400, and as to this latter statute, see Act of March 3, 1795, c. 45, § 20, 1 STAT. AT L. 433, 438, continuing it in force until March 1, 1801; Act of April 18, 1796, c. 13, § 7, 1 STAT. AT L. 452, 453; Act of March 3, 1797, c. 13, § 2, 1 STAT. AT L. 506. See also the various Embargo Acts of 1808, 1809, and 1810.

Customs Acts: July 24, 1813, c. 21, § 14, 3 STAT. AT L. 35, 38; April 20, 1818, c. 79, § 25, 3 STAT. AT L. 433, 438; March 2, 1821, c. 14, § 3, 3 STAT. AT L. 616, 617; March 1, 1823, c. 21, § 35, 3 STAT. AT L. 729, 739; March 3, 1823, c. 58, § 5, 3 STAT. AT L. 781, 782.

Internal Revenue and Excise Taxes: Distillers License Tax, July 24, 1813, c. 25, § 6, 3 STAT. AT L. 42, 44; Auction Sales Tax, July 24, 1813, c. 26, § 10, 3 STAT. AT L. 44, 47; Salt Tax, July 29, 1813, c. 35, § 6, 3 STAT. AT L. 49, 51; Wine Retailers License Tax, Aug. 2, 1813, c. 39, § 5, 3 STAT. AT L. 72, 73; *ibid.*, c. 53, § 13, 3 STAT. AT L. 77, 80; Excise Tax, Dec. 21, 1814, c. 15, § 21, 3 STAT. AT L. 152, 157; Internal Revenue Tax, Jan. 18, 1815, c. 23, § 21, 3 STAT. AT L. 186, 190; Furniture and Watch Tax, Jan. 18, 1815, c. 23, § 24, 3 STAT. AT L. 186, 191; Direct Tax, March 3, 1815, c. 100, 3 STAT. AT L. 239.

See also statutes vesting jurisdiction in State Courts of prosecution of crimes against the United States: Act of March 8, 1806, c. 14, 2 STAT. AT L. 354; Act of April 21, 1808, c. 51, 2 STAT. AT L. 489; Act of March 2, 1799, c. 43, §§ 14, 15, 20, 28, 1 STAT. AT L. 733, 736, 738, 740; Act of April 30, 1810, c. 37, §§ 35, 36, 2 STAT. AT L. 592, 603; Act of March 3, 1825, c. 64, §§ 37, 38, 4 STAT. AT L. 102, 113.

by State-Rights adherents as a diminution of Federal powers became regarded by the States themselves as an unwarranted arrogation of Federal power — an attempt on the part of Congress to control the sovereignty of the States.⁵⁰ The disinclination of the Northern States to enforce the Fugitive Slave Law through their State officials, and the opinions of Story and of other Judges in the *Prigg* case in 1842, put an end to any attempt to enforce the doctrine of Congressional power to vest Federal jurisdiction in State Courts or officers.⁵¹

After determining to retain District Courts as a part of the judicial system, the Senate decided to make several changes in Sections 2, 3, and 4 of the Draft Bill as to these Courts. In the first place, it added two more districts, *viz.* that part of Massachusetts known as Main (*sic*) (which in the Draft was included in with New Hampshire) and Kentucky (which in the Draft was included with Virginia), making the total number of districts thirteen instead of eleven. The making of Kentucky a separate district was evidently in response to alarming appeals which had come from the Federalists of that portion of Virginia; for it was evident at this time that Kentucky was seriously contemplating a separation not only from the State of Virginia, but from the Union itself, in order to ally itself with Spain

⁵⁰ As to this power of Congress see debate in the House, 6th Cong., 2nd Sess., Jan. 5, 7, 1801, 878 *et seq.* See also 1 KENT, COMM. 397 *et seq.* And see the interesting line of cases in the State Courts beginning in *Ex parte Emanuel Roberts* (Md., 1809), cited in 2 Hall's Amer. L. J. 192; *State v. Feely*, cited in SERGEANT, CONSTITUTIONAL LAW, 272 (1813), Virginia Cases, 321; *Lockington's Case*, 5 Hall's Amer. L. J. 92, 301, and *ibid.*, 486; *Jackson v. Row* (Va.), cited in National Intelligencer, Dec. 23, 1815; *United States v. Campbell* (Ohio), cited in 10 Niles Reg. 405, Aug. 17, 1816, 6 Hall's Amer. L. J. 113; *Comm. v. Kosloff* (Pa. St.), 12 Niles Reg. 139, April 26, 1817; *Maryland v. Rutter*, *Almeida's Case* (Md.), 12 Niles Reg. 114, 232, April 19, 1817, and see *ibid.*, 377, Aug. 9, 1817; *Ex parte Stacy*, 10 Johns. (N. Y.) 328 (1813); *Ex parte Jeremiah Ferguson*, 9 Johns. (N. Y.) 238 (1812); *United States v. Dodge*, 14 Johns. (N. Y.) 95 (1817); *United States v. Lathrop*, 17 Johns. (N. Y.) 4 (1819); *Ex parte Pool*, cited in SERGEANT, CONSTITUTIONAL LAW, 27, 274; *Davison v. Champlin*, 7 Conn. 244 (1828); *Haney v. Sharp*, 1 Dana (Ky.) 442 (1833); *Ward v. Jenkins*, 10 Met. (Mass.) 583 (1846); *Ex parte Knowles*, 5 Cal. 300 (1855); *State v. Curtis*, 35 Conn. 374 (1868); *Rushworth v. Judges*, 58 N. J. L. 97 (1895).

⁵¹ *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 539 (1842).

and secure the free navigation of the Mississippi River.⁵² In the second place, recognizing the sentiment relative to the dragging of persons from their homes long distances to the District Courts, the Senate, in Section 3, increased the number of places at which such Courts should be held.⁵³

Sections 5, 6, 7, 8, of the Draft Bill (Sections 5, 6, 7, 8, of the Act) were not changed in substance by the Senate. Section 9 of the Draft Bill provided that: "In all cases wherein by law an oath be allowed, authorized, directed or required, the solemn affirmation of any of the people called Quakers, shall be allowed and taken instead of such oath." Maclay reports that, after a debate with Ellsworth and others "on the anti-constitutionalism of the clause," the clause was expunged.⁵⁴

⁵² See letter from George Nicholas in Kentucky to James Madison, May 8, 1789: "If the federal Courts are to have jurisdiction between individuals, let an inferior tribunal be fixed here in such a way as will give content to the people . . . ; if it is not adopted, Kentucky will renounce the government within three months from the time she gets the information. I fear that a proper idea as to the importance of this country has not yet been taken up. Be assured that no great length of time will elapse before her inhabitants will be more numerous than those of all the other parts of Virginia. Believe too that the Western Country will all unite in demanding what I have stated above and that they will live under any Government to obtain them. These things if done will have the greater effect, as the people here have been taught to believe that they are to expect nothing but oppression and a sacrifice of their dearest rights from the new government. Let me conjure you, then, my dear Sir, to exert yourself to obtain for us these reasonable demands. You know my attachment to the Union but I declare to you, if I am disappointed in my expectations from the justice and policy of the new Government, that I shall be ready to join in any other mode for obtaining our rights. That government which withholds from us the necessary defence and suffers our most valuable rights to be taken from us by another nation has no right to expect our support." MADISON PAPERS, MSS.

⁵³ The Senate fixed on Hartford and New Haven (instead of Middletown as in the Draft Bill) in Connecticut, Newcastle and Dover (instead of Dover) in Delaware, Baltimore and Easton (instead of Baltimore) in Maryland. Similarly, additional places were provided for the Circuit Courts by assigning Hartford and New Haven (instead of Middletown) in Connecticut, New York and Albany (instead of New York) in New York, Savannah and Augusta (instead of Augusta) in Georgia. In the House, further changes were made (which appear in the Act as finally passed) by adding Exeter, to Portsmouth, in New Hampshire, Salem, to Boston, in Massachusetts, Yorktown, to Philadelphia, in Pennsylvania, as places for holding District Courts; and by adding Yorktown in Pennsylvania, Charlottesville and Williamsburgh, instead of Richmond and Williamsburg, in Virginia, and Columbia and Charleston, instead of Camden and Charleston, in South Carolina, for the Circuit Courts.

⁵⁴ See MACLAY, June 24, 25, 1789.

Section 10 of the Draft Bill (Section 9 of the Act) relating to the jurisdiction of the District Courts was changed in several important features. No one of all the changes in the Draft Bill was more significant than the following. The Draft Bill gave to the District Courts, "cognizance of all crimes and offences that shall be cognizable under the authority of the United States *and defined by the laws of the same.*" The italicized words make it clear that the framers of the Bill meant to confine criminal jurisdiction to crimes specifically defined by Congress, and to them only. In other words, the framers clearly intended to exclude the Federal Courts from jurisdiction over common law crimes, and crimes under the law of nations. It will be recalled that, for many years after the passage of the Act, there was a heated political contest between the Federalist and the Jeffersonian parties as to whether the Federal Courts possessed such jurisdiction—a contest finally decided in the negative, as urged by the Jeffersonians, supported by the authority of the Federalist Judge, Samuel Chase. Yet many eminent Judges and lawyers maintained at the outset and continued long to maintain, that such jurisdiction over crimes at common law and under the law of nations was intended to be vested in the Federal Courts. It is a singular thing that no one appears to have investigated or cited the action of Congress on the original Draft Bill; for such action would seem to afford the strongest argument in favor of such a jurisdiction. It now appears, on comparison of the Draft Bill with the Act as passed, that by an amendment introduced in and adopted by the Senate, the restrictive clause—"and defined by the laws of the same"—was deliberately stricken out, thus leaving the District Courts with jurisdiction over crimes "cognizable under the authority of the United States," without any limitation. The only rational meaning that can be given to this action striking out the restrictive words is, that Congress did not intend to limit criminal jurisdiction to crimes specifically defined by it. Had the Supreme Court consulted these Senate Files, it is probable that the decisions in *United States v. Hudson*,⁵⁵ in 1812, and *United States v. Coolidge*,⁵⁶ in 1816, might have been otherwise than they were.

⁵⁵ 7 Cranch (U. S.) 32 (1812).

⁵⁶ 1 Wheat. (U. S.) 415 (1816).

The jurisdiction of the District Courts contained in the Draft Bill was increased by the Senate by adding the words: "and shall also have jurisdiction exclusively of the Courts of the several States of all suits against consuls, or vice consuls, except for offences above the description aforesaid."⁵⁷

An interesting addition to the District Court jurisdiction was made by another amendment. The Draft Bill gave "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable by the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas." In view of the extreme fears expressed by opponents of the Federal system lest the right of jury trial should be impaired, the jurisdiction thus granted to the District Courts, in the clause beginning with the words "including all seizures," was extraordinary. For in England, the admiralty jurisdiction did not extend to such "seizures under laws of import, navigation or trade," which, consequently, were triable, in that country, in a common law Court by a jury. Although in some of the Colonies, trials of such cases had been had in the Colonial Admiralty Courts without jury, it seems curious that the framers of this Bill should have deliberately included such cases of seizure within the admiralty jurisdiction of the new Federal Courts and should thus have deliberately enlarged the scope of such Courts and consequently the scope of trials without jury, beyond the scope then existent in England. But such was the effect of the phraseology of this portion of the Act, as the Supreme Court later held, Judge Samuel Chase saying that "the reason for putting seizures of this kind in admiralty side of the Court was the great danger to the revenue if such cases should be left to the caprice of juries" — a rather insufficient explanation, in view of the insistence on jury trial shown by the Congress

⁵⁷ This Amendment in the Senate Files is probably in Ellsworth's handwriting. It is to be noted that this provision was held not to exclude the Circuit Courts from jurisdiction of suits against a consul, if an alien. *Bors v. Preston*, 111 U. S. 252 (1884). And by the operation of the Act of Feb. 18, 1875, the jurisdiction of the District Courts was not exclusive of the State Courts. See also *In re Iasigi*, 79 Fed. 751 (S. D. N. Y., 1897); 5 MOORE, DIGEST OF INTERNATIONAL LAW, 76-77. But see *contra*, JUD. CODE, § 256.

throughout other portions of the Act.⁵⁸ But while jurisdiction over such seizures on the seas was given by the Draft Bill to the District Courts sitting in admiralty, no jurisdiction over seizures by the Federal Government made elsewhere than on the high seas was vested in any Federal Court, and hence such cases were left entirely to the State Courts.⁵⁹ The Senate, however, now added greatly to the scope of Federal jurisdiction by inserting the following words: "and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States."⁶⁰ These cases, however, were not included within the admiralty jurisdiction of the District Court, but were left as suits at common law to be tried by a jury.

The anxiety to preserve the right of jury trial was shown by the insertion by the Senate, at the end of Section 9 of the Act: "and the trial of issues in (*sic*) fact in the District Court, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury."⁶¹ An amendment, drafted by Maclay, and favored by Grayson and Bassett, to provide that "no District Judge shall give a vote in any case of appeal or error from his own decision, but may assign the reason of such his decision," was adopted by the Senate.⁶²

Section 10 of the Act was a new Section, introduced by the Senate in order to make special provision as to Federal Courts

⁵⁸ See *The Vengeance*, 3 Dall. (U. S.) 297 (1796); *United States v. Schooner Sally*, 2 Cranch (U. S.) 406 (1805); *United States v. Schooner Betsy*, 4 Cranch (U. S.) 443 (1808); *Whelan v. United States*, 7 Cranch (U. S.) 112 (1812); *Ship Octavia*, 1 Wheat. (U. S.) 20 (1816); Woodbury, J., dissenting, *Waring v. Clarke*, 5 How. (U. S.) 441, 483 (1847); *The Eagle*, 8 Wall. (U. S.) 15 (1869). See 1 KENT, COMM., 367. See also R. W. Greene, arguing in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344, 376 (1848), and see Daniel, J., dissenting, *ibid.*, 409, 414.

⁵⁹ See *The Sarah*, 8 Wheat. (U. S.) 391 (1823).

⁶⁰ This amendment, in the Senate Files, is probably in Ellsworth's handwriting.

⁶¹ See SENATE FILES. The Draft Bill had a clause substantially the same (but which was not broad enough, after the Senate had decided to insert its Amendments to Section 9) as follows: "And the trial of facts in both cases last mentioned shall be by jury."

It is to be noted that the District Court was given no equity powers. *United States v. Nourse*, 6 Pet. (U. S.) 470, 496 (1832).

⁶² See MACLAY, July 7.

in Maine and Kentucky, those Districts not being in the original Draft Bill, and owing to their peculiar conditions needing a different treatment.

Section 11 of the Draft Bill (Section 11 of the Act) relative to the Circuit Courts and their jurisdiction, presented a fertile subject for debate in the Senate. The first questions which arose were whether there should be any Circuit Courts at all, and what should be the number of Justices of the Supreme Court — the number being fixed at six in the Bill, so as to provide two for each of the three proposed Circuit Courts. Maclay recorded that he thought that: "If the bill stood in its present form and the Circuit Courts were continued, six Judges appeared to be too few. If the Circuit Courts were struck out, they were too many." He was opposed to the whole Circuit Court proposition. Ellsworth and Grayson favored a numerous bench of Judges, the former suggesting twelve as being few enough.⁶³ Maclay replied that: "The mass of causes would remain with the State Judges. Those only arising from Federal laws would come before the Federal Judges, and there would, comparatively, be few indeed. When they became numerous, it would be time enough to increase the Judges. The way to secure respectable decisions was to choose eminent characters for Judges . . . numbers rather lessened responsibility, and unless they were all eminent tended to obscure the decisions."⁶⁴ Ellsworth, a month later, explained in a letter the desirability of having Circuit Courts, as follows:

"One Federal Judge, at least, resident in each State appears unavoidable; and without creating any more, or much enhancing the expense, there may be Circuit Courts, which would give system to the department, uniformity to the proceedings, settle many cases in the States that would otherwise go to the Supreme Court, and provide for the higher grade of offences. Without this arrangement, there must be

⁶³ John Quincy Adams wrote to John Adams from Newburyport, Mass., June 28, 1789: "The Judiciary Bill has not yet been published here. I had a transient sight of a copy which I believe Mr. [Tristram] Dalton sent. Mr. [Theophilus] Parsons [later Chief Justice of Massachusetts] thinks six Judges will not be enough, and objects to the joining the District Judge to the other two in the Circuits, because it gives him a casting vote on affirming his own decisions." 1 WRITINGS OF JOHN QUINCY ADAMS.

⁶⁴ See MACLAY, June 23.

many appeals or writs of error from the Supreme Courts of the States, which by placing them in a subordinate situation and subjecting their decisions to frequent reversals, would probably more hurt their feelings and their influence, than to divide the ground with them at first, and leave it optional with the parties entitled to Federal jurisdiction, where the causes are of considerable magnitude, to take their remedy in which line of Courts they pleased.”⁶⁵

The establishment of Circuit Courts having been decided upon, the Senate proceeded to alter the Draft Bill with respect to the criminal jurisdiction of these Courts, and here again it evinced its intention not to confine Federal jurisdiction to crimes constituted by Act of Congress; for in Section 11, as in Section 9, it struck out the words “and defined by the laws of the land” contained in the Draft Bill, after the words “crimes and offences cognizable under the authority of the United States.” The elision of these words was clearly intended to extend jurisdiction to crimes at common law and under the law of Nations.⁶⁶

The civil jurisdiction of the Circuit Courts, as proposed by the Draft Bill, was as follows:

“that the Circuit Courts shall have original cognizance concurrent with the Courts of the several States, or the Supreme Court, as the case may be, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of 500 dollars, and the United States are plaintiffs or petitioners, or a

⁶⁵ WHARTON'S STATE TRIALS. See 15 MASS. HIST. SOC. PROC., 2nd Series, Joseph Jones to Madison, May 10, 1789, “A Circuit plan seems to be essential, to the extent of comity, for despatch and accommodation, as well for civil and criminal prosecutions.” When the Bill reached the House, Jackson of Georgia animadverted on the jurisdiction in cases of diverse citizenship contained in the Bill. See 1st Cong., 1st Sess., 814, Aug. 29, 1789.

⁶⁶ It is to be noted that: “The Judiciary Act organizing the Courts was passed before there was any statute defining or punishing any offense under authority of the United States. This clause, then, giving the Circuit Courts concurrent jurisdiction in all cases of crime cognizable in the District Courts, must, of necessity, have had reference to such statutes as should thereafter define offenses to be punished in the District Courts.” *United States v. Holliday*, 3 Wall. (U. S.) 407, 415 (1865).

The power of the Circuit Courts over criminal matters was increased by adding, at the end of Section 5, the following: “And the Circuit Courts shall have power to hold special sessions for the trial of criminal causes at their discretion, or at the discretion of the Supreme Court.” See SENATE FILES. See also *United States v. Hamilton*, 3 Dall. (U. S.) 17 (1795).

foreigner or citizen of another State than that in which the suit is brought is a party.”⁶⁷

It is to be noted that the Circuit Courts were to have no jurisdiction, if the sum involved did not exceed five hundred dollars. The reason for the fixing of this particular sum is probably that which was given by a Virginia Representative in opposition to a change proposed in the Circuit Court Act of 1801, reducing the sum to four hundred dollars:

“He stated that the estate of Lord Fairfax, with the quit rents due thereon, had been confiscated during the Revolution by the State of Virginia; notwithstanding the confiscation, the heirs of Lord Fairfax had sold all their rights, which the assignees contended remained unimpaired. It might be their wish to prosecute in a Federal Court, expecting to gain advantages in it which could not be had from the Courts of Virginia. His object was to defeat the purpose by limiting the jurisdiction of the Circuit Courts to sums beyond the amount of quit rents alleged to be due by any individual.”^{67a}

The first change in the Draft Bill made by the Senate, after the Bill was reported, was to strike out the words “or the Supreme Court, as the case may be.”⁶⁸ By this action, it would seem that the Circuit Courts were intended to be prevented from taking original cognizance of any case of which the Supreme Court had original cognizance, and which would otherwise be instituted in the Circuit Court. The change affords interesting field for surmise.

The next change made by the Senate was one which, if retained, would have completely altered the Federal judicial procedure in equity trials. As noted above, one of the chief fears

⁶⁷ Changes in this Section, as shown in the original Bill in the Senate Files, made during the drafting and before the Draft Bill was reported, are of considerable interest. In the first place, the words “of a civil nature” were inserted, with a caret, before the words “at common law or in equity.” In the second place, jurisdiction was given in suits where “a State is plaintiff,” as well as “where the United States are plaintiffs or petitioners”; but this jurisdiction was stricken out. In the third place, the provision for civil jurisdiction over suits of individuals was confined to suits brought “against a foreigner or citizen of another State than that in which the suit is brought”; but this restriction was removed.

^{67a} Speech of Nicholas, Jan. 7, 1801, 6th Cong., 2nd Sess.

⁶⁸ See SENATE FILES, SENATE JOURNAL, July 10.

as to the new Federal Government was lest it might infringe on the right to jury trial, so cherished by the American colonists and their descendants, and lest it might adopt the obnoxious equity powers of the British royal Governors. Now, the Senate took the extraordinary and radical step of amending the Draft Bill, so as to require jury trials in all suits in equity. Luckily, at a later date, the Senate reversed its action.⁶⁹

The next change made by the Senate was to restrict the rather broad jurisdiction given by the Draft Bill to the Circuit Courts in diverse citizenship cases. Under the Bill, as reported, neither the plaintiff nor the defendant need be a citizen of the State where the suit was brought. This was evidently felt to be far too liberal a scope for Federal jurisdiction,⁷⁰ and the clause was amended in the Senate by restricting it so as to read "or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."⁷¹ This confined suits in the Circuit Court to suits brought in the State of which either the plaintiff or the defendant was a citizen.

It was singular that the Senate did not make a further change in the Draft by restricting the broad jurisdiction given to the Circuit Court over suits in which "a foreigner . . . is a party"; for by leaving the clause as it stood, it rendered that portion of the Section, if literally interpreted, unconstitutional; and the Supreme Court, in order to hold it valid, was obliged, twenty years later, to read into it a limitation which it did not actually contain.⁷²

A further limitation on the Circuit Court jurisdiction was not

⁶⁹ See SENATE JOURNAL, July 10. The entry reads: "On motion it was agreed to reconsider the amendment, page 13th, line 35, 'or on any hearing of a cause in equity in a circuit court.'" Until the recent discovery of the original Draft Bill, it was impossible to locate the point in the bill where this amendment had occurred. It now appears to have been at the end of Section 10 of the Draft Bill (Section 9 of the Act) relative to the jurisdiction of the District Courts.

⁷⁰ See *Jones v. Andrews*, 10 Wall. (U. S.) 327 (1870).

⁷¹ This amendment in the Senate Files appears to be in Ellsworth's handwriting.

⁷² See *Hodgson v. Bowerbank*, 5 Cranch (U. S.) 303 (1809), in which Marshall, C. J., held that suits in the Circuit Courts, under Section 11, must be between an alien and a United States citizen, although the Section, in specific language, gave jurisdiction wherever an alien was a party. See ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS, 23.

contained in the original draft but was written on a separate slip of paper and pasted to the draft before the Bill was reported, *viz.* a provision that the Court should have no cognizance "of any action to recover the contents of any promissory note or other chose of action in favor of an assignee unless an action might have been prosecuted in such Court to recover the said contents if no assignment had been made." It may be noted that in the Senate this was amended by inserting at the end, the words "except in cases of foreign bills of exchange," which appeared in the Act as enacted; the Senate also changed the word "action" to "suit." It is interesting to note that a bitter attack was made on the Senate, a month later, for not extending this exception to assignments of real estate made for the purpose of getting suits into the Federal Courts.⁷³

In the original draft, the provision for venue of the suit was as follows: "No person shall be arrested for trial in any cause before any other Circuit Court or District Court than that within which the arrest shall be made." This was changed so as to read: "No person shall be brought to trial in any cause in any other district than that where the defendant is an inhabitant or in which he shall be found at the time of serving the writ." And it was again changed before the Draft Bill was reported so as to read: "But no person shall be arrested in one district for trial in another, in any civil action before a Circuit or District Court, and no civil suit shall be brought before either of said Courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is

⁷³ See "Centinel Revived" in *Independent Gazetteer* (Phil.), Aug. 27, Sept. 9, 1789: "This temporary prohibition which may be repealed at any time, extends only to prevent the assignment of '*les choses en action*,' or in plain English, to demands of a personal nature such as for money due on bonds, bills of exchange, notes of hand, etc., and that therefore suits may be immediately instituted in the Federal Court for all the controverted land in Pennsylvania or any other State, by merely borrowing the name of a friend in another State, to bring the suit, which, as above observed, may, be done by a mock assignment of the claim. Here is a fruitful source of vexatious litigiousness and oppression; an ejectment may be brought for land in the most remote part of the State in the Federal Court of the State, and from thence carried by appeal to the Supreme Court of Congress, at such a distance from the evidence, and necessarily attended with such great expense of time and money as to make it frequently better to surrender the best title to real estate rather than contend with a litigious or wealthy suitor."

an inhabitant, or in which he shall be found at the time of serving the writ.”⁷⁴ One significant change thus made was to restrict the application of this clause to “inhabitants of the United States,” instead of to a “person”; and thus to exclude its application to suits against foreigners or foreign corporations.⁷⁵

Such being the changes made in Section 11 by the Senate, we come to an interesting amendment of the Draft Bill of great importance, namely, the addition of an entirely new section — Section 34 — which, inserted at the very end of the statute between two sections dealing exclusively with criminal matters, has received more attention from the Supreme Court than any other Section except the twenty-fifth. For an appreciation of its significance, it is necessary to review the reasons which led to the grant of diverse citizenship jurisdiction to the Federal Judiciary by the Constitution. There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists,⁷⁶ or which had received so weak a defense from the Federalists as that which gave them power over “controversies between citizens of different States.” “I will not say it is a matter of much importance,” said Madison in the Virginia Convention. “Perhaps it might be left to the State Courts. But I sincerely believe that this provision will be rather salutary

⁷⁴ It was held in *Atkins v. Disintegrating Co.*, 18 Wall. (U. S.) 272 (1873) that this provision did not apply to suits in admiralty. These restrictions on suits in the Circuit Courts were thus referred to by Marshall, C. J., in *Russell v. Clark's Ex.*, 7 Cranch (U. S.) 69, 98 (1812): “The incapacity imposed on the Circuit Courts to proceed against any person residing within the United States, but not within the District, for which the Court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interest of absent persons, it may be the duty of the Court to decree, as between the parties before them.” See also Act of Feb. 28, 1839; *Jones v. Andrews*, 10 Wall. (U. S.) 327 (1870).

⁷⁵ See *In re Hohorst*, 150 U. S. 653 (1893); *Galveston, etc. R. R. v. Gonzales*, 151 U. S. 496 (1894); *Barron Steamship Co. v. Kane*, 170 U. S. 100 (1898); *Picquet v. Swan*, 5 Mason (Circ. Ct., Mass.) 35 (1828). See “Suits between Aliens in the Courts of this Country,” 7 AM. L. REV. 417-432.

⁷⁶ See ESSAYS ON THE CONSTITUTION, *supra*; “Letters of Agrippa” (James Winthrop), *Massachusetts Gazette*, Dec. 11, 14, 1787, Jan. 14, 1788; PAMPHLETS ON THE CONSTITUTION, *supra*; “Letters by a Federal Farmer,” by Richard Henry Lee, Oct. 10, 1787; “Observations on the Constitution,” by “Centinel” (Samuel Bryan), Jan. 5, 1788; 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING, James Sullivan to King, Sept. 28, 1787.

than otherwise." Pendleton said: "I think, in general, these decisions might be left to the State tribunals. . . . I think it will, in general, be so left by the regulations of Congress." Marshall said: "Were I to contend that this was necessary in all cases and that the government without it would be defective, I should not use my own judgment." Randolph said: "I do not see any absolute necessity for vesting it with jurisdiction in these cases."⁷⁷ James Wilson said in Pennsylvania: "This part of the jurisdiction, I presume, will occasion more doubt than any other part."

One of the arguments in favor of this jurisdiction was that it might give a remedy in Federal Courts against iniquitous and unconstitutional State paper money, legal tender, and stay laws;⁷⁸ but an equally good remedy to a party injured by such laws was afforded through the provision for a writ of error to the State Courts. Hamilton in *The Federalist* argued the necessity of such jurisdiction in order to enforce the Privileges and Immunities Clause of the Constitution; but a writ of error to any State Court disregarding that Clause was an adequate

⁷⁷ 3 ELLIOTT'S DEBATES, 433, 549, 556, 570; 2 *ibid.*, 491. See also W. R. Davie in North Carolina, 4 *ibid.*, 159. Ex-United States Attorney General, Charles Lee of Virginia, said in argument in *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445, 450 (1805): "The jurisdiction given to the federal courts in cases between citizens of different states, was, at the time of the adoption of the Constitution, supposed to be of very little importance to the people."

⁷⁸ Hugh Williamson in *State Gazette of North Carolina*. See PAMPHLETS ON THE CONSTITUTION, *supra*, as follows: "The objects that are now to be submitted to the Supreme Judiciary, or to the inferior Courts are those which naturally arise from the constitutional laws of Congress. If there is a single new case that can be exceptional, it is that between a foreigner and a citizen or that between citizens of different States. These cases may come up by appeal. It is provided in this system that there shall be no fraudulent tender in the payment of debts. Foreigners with whom we have treaties will trust our citizens on the faith of this engagement, and the citizens of different States will do the same. If the Congress had a negative on the laws of the several States, they would certainly prevent all such laws as might endanger the honor or safety of the nation by making a tender of base money; but they have no such power, and it is at least possible that some State may be found in this Union, disposed to break the Constitution and abolish private debts by such tenders. In those cases the Courts of the offending State would probably decide according to its own laws. The foreigner would complain and the nation might be involved in war for the support of such dishonest measures. Is it not better to have a Court of Appeals in which the Judges can only be determined by the laws of the Nation? This Court is equally to be desired by the citizens of different States."

remedy. The chief and only real reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens. The Federal Court was to secure to a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens in the application of justice.⁷⁹ There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction. The idea that a Federal Court in a State was to administer any other than the law of that State or were to discriminate *in favor of a non-citizen*, and *against a citizen*, or to administer law as an entirely free and independent tribunal, never appears to have entered the mind of any one. But to make it perfectly certain that the Federal Courts were simply to administer State law,

⁷⁹ Marshall, C. J., in *Bank of the United States v. Deveaux*, 5 Cranch (U. S.) 61, 87 (1809): "The judicial department was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the Nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established National tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States." Wayne, J., in *Dodge v. Woolsey*, 18 How. (U. S.) 331, 354 (1855): "The foundation of the right of citizens of different States to sue each other in the Courts of the United States, is not an unworthy jealousy of the impartiality of the State tribunals. It was a higher aim and purpose. It is to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in Courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit."

Pitney, J., in *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 478 (1915): it "was established for the very purpose of avoiding the influence of local opinion." Bradley, J., in *Burgess v. Seligman*, 107 U. S. 20, 34 (1882): its object was "to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views. . . ."

See Curtis, J., dissenting in *Scott v. Sandford*, 19 How. (U. S.) 393, 580 (1856): "Its purpose was to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States. . . ."

the Senate amended the Draft Bill by adding Section 34, which in its final form read as follows: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply." Unquestionably the addition of this Section was intended to remove the objections of those who had opposed the Constitution and which had been expressed in 1787 by a prominent Massachusetts man as follows:

"Causes of all kinds between citizens of different States are to be tried before a Continental Court. The Court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in the State Court. The rule which is to govern the new Courts must therefore be made by the Court itself, or by its employees, the Congress. . . . Congress, therefore, have the right to make rules for trying all kinds of questions relating to property between citizens of different States. . . . The right to appoint such Courts necessarily involves in it the right of defining their powers and determining the rules by which their judgment shall be regulated. . . . It is vain to tell us that a maxim of common law required contracts to be determined by the law existing where the contract was made; for it is also a maxim that the Legislature has the right to alter the common law."⁸⁰

Until Judge Story, in 1842, in *Swift v. Tyson*,⁸¹ decided that the word "laws" in this section did not include the "common law" of the State, and that the Federal Courts in a State were free to decide questions of general commercial law for themselves, it had never been held that there was even any doubt about the matter. The sole object for which this jurisdiction is vested in the Federal Courts, Judge Johnson had said in 1820, "is to secure to all the administration of justice upon the same principles upon which it is administered between citizens of the same State." The object, Chief Justice Taney had said in 1838, "was to make the rules of decisions in the Courts of the United States, the same with those of the States, taking care to preserve

⁸⁰ "Letters of Agrippa" (James Winthrop), *Massachusetts Gazette*, Dec. 11, 14, 1787.

⁸¹ 16 Pet. (U. S.) 1 (1842).

the rights of the United States by the exception contained in the same Section. . . . Justice to citizens of the several States required this to be done." If this was so, then as has been said, Judge Story's construction was "hardly possible, unless the purpose of the provision is ignored";⁸² but Story's decision has been affirmed and extended by the Supreme Court from 1842 to the present day, with the result that, as to a large class of cases, that which was feared in 1787 has virtually taken place.⁸³ The application of Story's doctrine has resulted in the total reversal of the purposes for which Sections 11 and 34 were originally enacted. Diverse citizenship jurisdiction in the Federal Courts now, in many cases, instead of preventing a discrimination *against* a non-citizen, results in discrimination *in their favor* and *against* the citizen; and instead of making one law for all in a State, makes different law for citizen and non-citizen.

It now appears from an examination of the Senate Files, however, that if Judge Story and the Court had had recourse to those Files in preparing the decision in *Swift v. Tyson*, it is highly probable that the decision would have been different, and that the word "laws" in Section 34 would have been construed to include the common law of a State as well as the statute law. This conclusion will probably be reached by anyone who examines the original slip of paper on which the amendment containing Section 34 was written, and which is, with little doubt, in Ellsworth's handwriting.

⁸² J. B. Heiskell, "Conflict between Federal and State Decisions," 16 AM. L. REV. 743, 747. "It remained for Mr. Justice Story to construe 'laws' as 'statute laws,' and so to defeat a great part of the object contemplated by the Constitution. If the reason for the grant of jurisdiction had been kept in view, it is inconceivable that such a construction could have been adopted." GEORGE WHARTON PEPPER, THE BORDERLAND OF FEDERAL AND STATE DECISIONS. See also William Trickett, "The Non-Federal Law Administered in Federal Courts," 40 AM. L. REV. 819.

⁸³ As an example of this, see the long line of municipal bond cases, in which the Federal Courts administer the law in one way in favor of a non-citizen, and the State Courts the law in another way, in favor of a citizen. "It is to be observed that the parties were to have been put on terms of equality—a construction which favors a non-resident brings about an evil as great as that which exists when bias is exerted in favor of a resident. A construction which makes a common carrier liable to non-residents in cases where it is not liable to residents brings about a state of affairs as unjust as if the reverse of that condition were true." GEORGE WHARTON PEPPER, *supra*.

As originally drafted, this amendment read as follows:

“And be it further enacted, That the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, except where the constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the trials at common law in the courts of the United States in cases where they apply.”

Before the Amendment was actually submitted, its phraseology was changed by Ellsworth in the following manner: the words “Statute law” were stricken out and the word “laws” was inserted with a caret before the words “of the several States”; and the words “in force for the time being and their unwritten or common law now in use whether by adoption from the common law of England, the ancient statutes of the same or otherwise” were stricken out.

The meaning of this change was probably as follows: that the word “laws of the several States” was intended to be a concise expression and a summary of the more detailed enumeration of the different forms of State law, set forth in the original draft. It seems clear that the word “laws” was not intended to be confined to “Statute law,” because Ellsworth expressly and evidently intentionally struck out the words “Statute law” from his original draft, and broadened it by inserting the word “laws”; having so broadened it, he evidently concluded that the specific enumeration which followed in his original draft was unnecessary.

Not only did he broaden “Statute law” to “laws,” but he also removed the limitation (contained in his original draft) to laws “in force for the time being,” “now in use.”

Unless the change from “Statute law” to “laws,” combined with the elimination of the express enumeration of “common law,” meant that Ellsworth intended “laws” to include the common law as well as the statute law of the State, then no meaning whatever can be given to the change. If Ellsworth had simply meant to strike out the provision that the State common law should be a rule of decision in Federal Courts and had

Aug. 15th X
 And be it further enacted, That the ^{Laws} Statutes
 Law of the several States ~~shall be~~ ^{shall be} ~~in force~~ ^{in force}
~~in the several States~~ ^{in the several States}
~~where they shall be~~ ^{where they shall be}
~~in force~~ ^{in force} ~~except~~ ^{except} where the Constitution
 Treaties or Statutes of the United States shall
 otherwise require or provide, shall be regard-
 ed as rules of Decision in ~~the~~ trials at com-
 mon Law in the courts of the United States
 in cases where they apply.

~~Enacted by the Senate~~

PHOTOSTAT COPY OF SECTION 34 OF THE JUDICIARY ACT.

intended to have only the State statute law apply, he would have left his original draft just as it stood, and would simply have struck out the clause following the words "the several States," in which case the Section would have read precisely as Judge Story construed it, *viz.*: "The Statute law of the several States . . . shall be regarded as rules of decision." Instead of so doing, Ellsworth deliberately struck out the words "Statute law" and inserted the words "laws" — clearly meaning to include within that term both kinds of law — statute and common.

That this was understood to be the meaning of Section 34 by the first Attorney General of the United States, Edmund Randolph, seems to appear in his Report to the House of Representatives, December 27, 1790, suggesting amendments to the Judiciary Act.⁸⁴ And that the word "laws" included the common law of the State was also clearly the construction of the section given by both counsel and Ellsworth himself in the Supreme Court, in cases as early as 1797 and 1799.⁸⁵

⁸⁴ See AM. STATE PAPERS, Misc. No. 17, Note 26, in which Randolph spoke of the fact that the Constitution, laws and treaties of the United States "will particularly control the laws of the several States whether consisting of their own original legislation, the common law or the statute law expressly or tacitly adopted."

⁸⁵ In 1797, in *Brown v. Van Braam*, 3 Dall. (U. S.) 344, 352, 354, 356, David M. Barnes of Rhode Island and Thomas Mifflin of Pennsylvania argued for the defendant in error that "the adoption of the State laws [by Section 34 of the Judiciary Act] extends as well to the unwritten, as to the written law; — to the law arising from established usage and judicial determinations, as well as to the law created by positive acts of the Legislature." "It will not be disputed that within her [Rhode Island's] jurisdiction whatever is her law, and not what is the law of other counties or states, must furnish the rule for decision." The Court apparently adopted this view of counsel for it held that: "We are unanimously of opinion, that under the laws, and the practical construction of the courts of Rhode Island, the judgment of the Circuit Court ought to be affirmed."

In 1799, in *Sims v. Irvine*, 3 Dall. (U. S.) 425, 454, 455, Charles Lee, Jared Ingersoll and William Rawle, in argument set forth their early understanding of the 34th Section of the Judiciary Act as follows: "The 34th section of the Judicial Act . . . adopts the laws of the several states, as rules of decision in trials at common law. Now, as in England, the laws are defined to be general customs, local customs, and acts of Parliament . . . so in Pennsylvania, the laws must be defined to be the common law, as modified by practice, and acts of the Great Assembly."

And Chief Justice Ellsworth in his opinion would clearly appear to have adopted this view; for he said that in Pennsylvania "payment, or as in this

The most important omission on the part of the drafters of the Bill which occurred in connection with this Section relative to the jurisdiction of the Circuit Courts — an omission which had most grave results and which necessitated decisions tantamount to judicial legislation by the Supreme Court — was the neglect to make any provision regarding jurisdiction as to corporations. It is not certain whether the drafters considered that the Constitution did not give to the Federal Court any jurisdiction based on diverse citizenship in cases involving corporations, or whether they agreed with the decision made later by Chief Justice Marshall that the citizenship of the stockholders was the citizenship of the corporation.⁸⁶ The doubt which was left on this point was unfortunate; for it made possible such judicial legislation as occurred when the Court, in a series of cases beginning in 1844, decided, through the device of a conclusive presumption as to citizenship of the stockholders, to regard a corporation as a citizen of the State in which it was chartered.⁸⁷ This adoption by the Court of this pure legal fiction thus brought about precisely the situation which two States in 1788 had endeavored to guard against by proposed Amendment to the Constitution as follows: “that the Federal Courts shall not be entitled to jurisdiction by fictions or collusion.”⁸⁸ And it was precisely

case consideration passed, and a survey though unaccompanied by patent, give a *legal* right of entry, which is sufficient in ejectment. Why they have been adjudged to give such right, whether from a defect of Chancery powers, or for other reasons of policy or justice, is not now material. The right once having become an *established legal* right . . . it must be regarded by the common law Courts of the United States, in Pennsylvania, as a rule of decision.” *Ibid.*, 457. It is plain that the “law” of Pennsylvania, thus held to be “a rule of decision” for the Federal Court there, was not in any way a statute law of the State, but a common law doctrine of that State.

⁸⁶ *Bank of the United States v. Deveaux*, 5 Cranch (U. S.) 61 (1809); *Doctor v. Harrington*, 106 U. S. 579 (1905).

⁸⁷ *Louisville etc. R. R. v. Letson*, 2 How. (U. S.) 497 (1844); *Rundle v. Delaware & Raritan Canal Co.*, 14 How. (U. S.) 80 (1852); *Marshall v. B. & O. R. R.*, 16 How. (U. S.) 314 (1853); *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404 (1855); *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227 (1857); *Ohio etc. R. R. v. Wheeler*, 1 Black (U. S.) 286 (1861).

⁸⁸ See 2 ELLIOTT'S DEBATES, 550, 409, proposal of the Minority in the Maryland Convention. See also proposal in New York, as follows: “That the jurisdiction of the Supreme Court of the United States, or of any other Court instituted by the Congress, ought not, in any case, to be increased, enlarged or extended, by any fiction, collusion, or mere suggestion.” See also *New York Federal Gazette*,

what Judge Iredell denounced, in 1797, as follows: "I am an enemy to every species of fictions. The fictions which have been incorporated into the law by long usage (and, I believe, the cases of ejectment and common recovery afford the only fictions recognized in America) must be sustained; but as far as I can prevent the introduction of novelties of this nature, I shall be assiduous to do so."⁸⁹ This malignant decision has resulted in allowing a corporation sued in the State in which it actually does business, to remove the suit into a Federal Court on the ground of diverse citizenship, simply because it happens to be chartered in another State. No single factor has given rise to more friction and jealousy between State and Federal Courts, or to more State legislation conflicting with and repugnant to Federal jurisdiction, than has the doctrine of citizenship for corporations. And this diverse citizenship jurisdiction created by the Constitution and intended to allay friction and to afford equal and identical law to citizen and non-citizen in a State, has resulted in putting foreign corporations in a more favorable situation than domestic corporations, sued in a State. The failure to anticipate this corporation issue was one of the great defects of the Act.

The only other matter to be especially noted in connection with this Section is that since, by the succeeding Section, it was specifically provided that all issues of fact in these Courts must be tried by a jury, it was subsequently held that the Supreme Court could not review any judgment of a lower Court where trial had been had without jury, even with consent of the parties, since no statute authorized a writ of error or appeal based on such a proceeding; and it was not until the passage of the Act of 1865, allowing jury-waived trials, that the Supreme Court took appellate cognizance of such suits.⁹⁰

Section 12 of the Draft Bill (Section 12 of the Act), relating to removals into the Federal Court of causes between citizens of different States brought in a State Court, originally provided for

June 29, 1789, for description of "fictions" in the English Courts, and for interesting argument as to their impossibility in the Federal judicial system.

⁸⁹ *United States v. Parker*, 2 Dall. (Circ. Ct., Pa.) 373, 379 (1797).

⁹⁰ See Act of March 3, 1865, c. 86, § 4, 13 STAT. AT L. 501, 502. See *Kearney v. Case*, 12 Wall. (U. S.) 275 (1870); *Boogher v. Ins. Co.*, 103 U. S. 90 (1880); *Bond v. Dustin*, 112 (U. S.) 604 (1884).

the removal by the defendant, "if a suit be commenced in any State Court against a foreigner or citizen of another State than that in which the suit is brought." This would have allowed removals even in cases where neither plaintiff nor defendant was a citizen of the State in which suit was brought. The Senate limited this, by restricting removals to cases brought "by an alien or by a citizen of the State in which the suit is brought against a citizen of another State."⁹¹

It is interesting to note that, from 1789 to 1875, this Section as to removals was the only one in which any essential changes were made in the Act, or with regard to which any broadening of Federal powers was enacted.⁹² As early as 1815, however, it was found that, in periods of excited local passion, the State Courts could not be trusted to enforce the Federal laws, or to protect Federal officials or the rights of citizens of other States. Accordingly, at the time of the War of 1812, owing to failures of duty on the part of New England State Courts, an Act was passed providing for removal into the Federal Courts of suits or prosecutions brought in State Courts against Federal military and customs and other civil officials.⁹³ In 1833, the Nullification proceedings in South Carolina necessitated the passage of a similar Act providing for removal of suits or prosecutions in State Courts against Federal officials acting under the Federal revenue laws.⁹⁴ The legislation of the Civil War and Reconstruction

⁹¹ The Draft Bill provided that in case of a petition for removal, "it shall be the duty of the State Court to accept the surety and dismiss further proceedings in the cause." The Senate amended this so as to read "that the State Court should proceed no further in the cause"; and after the words "and any attachment of the goods or estate of the defendant by the original process shall hold to respond the final judgment" (in the Draft Bill), the Senate added the words "in the same manner as by the laws of such State, they would have been holden to respond final judgment had it been rendered in a Court of the same." See SENATE FILES, in which the slip containing the amendment is endorsed under date of July 8.

⁹² To this statement, the addition may be made that the powers of the Federal Courts to issue writs of *habeas corpus* were enlarged by the Act of March 2, 1833, c. 57, 4 STAT. AT L. 632; Act of Aug. 23, 1842, c. 188, 5 STAT. AT L. 516; Act of March 3, 1863, c. 81, 12 STAT. AT L. 755; Act of May 11, 1866, c. 80, 14 STAT. AT L. 46; Act of Feb. 5, 1867, c. 27, 14 STAT. AT L. 385.

⁹³ Act of Feb. 4, 1815, c. 31, 3 STAT. AT L. 195; Act of March 3, 1815, c. 94, 3 STAT. AT L. 231; Act of March 3, 1817, c. 109, 3 STAT. AT L. 396.

⁹⁴ Act of March 2, 1833, c. 57, 4 STAT. AT L. 632; Act of March 7, 1864, c. 20, 13 STAT. AT L. 14; Act of Jan. 13, 1866, c. 184, 14 STAT. AT L. 98.

periods immensely enlarged the class of cases which might be removed from the State Courts to the Federal Courts.⁹⁵ In view of the fact that this legislation was designed purely to meet temporary and emergency conditions, it is doubtful whether its continuance on the statute books is either necessary or desirable. A return to the limited scope of removal which prevailed for eighty years would now relieve the overloaded dockets of the Federal Courts, and there is now little danger that the State Court will not amply protect persons claiming Federal rights.

It is to be especially noted that while neither the Draft Bill nor the Act as passed vested any original jurisdiction in the Circuit Courts of that part of the judicial power granted by the Constitution to the National Judiciary with respect to controversies "between citizens of the same State, claiming lands under grants of different States,"⁹⁶ this Section 12, however, provided for removal, by the defendant only, of such class of cases brought in a State Court, into a Federal Court. The Senate made a very great amendment of the Draft Bill in this respect by allowing such removal by either plaintiff or defendant.⁹⁷

⁹⁵ See Act of March 3, 1863, c. 81, 12 STAT. AT L. 755; Act of April 9, 1866, c. 31, 14 STAT. AT L. 27; Act of July 27, 1866, c. 288, 14 STAT. AT L. 306; Act of March 2, 1867, c. 196, 14 STAT. AT L. 558; Act of Jan. 22, 1869, c. 13, 15 STAT. AT L. 267; Act of May 31, 1870, c. 114, 16 STAT. AT L. 140; Act of Feb. 28, 1871, c. 99, 16 STAT. AT L. 433; Act of March 30, 1872, c. 72, 17 STAT. AT L. 44; Act of March 3, 1875, c. 137, 18 STAT. AT L. 470.

⁹⁶ It is to be noted that this did not apply to controversies between citizens of *different* States, claiming lands under grants of different States. See *Stevenson v. Fain*, 195 U. S. 165 (1904).

⁹⁷ The Draft Bill provided as follows: that if "the defendant in his plea in bar shall set up a title under a grant from another State than that in which the suit is pending and move that the plaintiff also set forth his title, the plaintiff shall set it forth in his replication, and if he founds it upon a grant from the State in which the suit is pending, the defendant may then on motion have the cause removed in the same manner and under the regulations as in the case before mentioned of the removal of a cause into that Court by a foreigner."

The Act, as passed, provided as follows: that if "either party, before the trial, shall state to the Court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a State other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the Court whether he claims a right or title to the land under a grant from the State in which the suit is pending; the said adverse [party] shall give such information, or otherwise not

In Section 13 of the Draft Bill (Section 13 of the Act) relating to the jurisdiction of the Supreme Court, two very significant changes were made by the Senate. The Draft Bill provided that: "The Supreme Court shall have jurisdiction of all controversies of a civil nature, where any of the United States or a foreign State is a party." The Senate eliminated the words "or a foreign State"; it also inserted a limitation on the Court's jurisdiction over controversies "where a State is a party," by inserting the words "except between a State and its citizens." The fear had been expressed in many of the State Conventions that the language of the Constitution authorized a suit against a sovereign State by its own citizens, in the Supreme Court, and the change from the Draft Bill was evidently made to allay this fear.

Original jurisdiction was granted by the Constitution to the Supreme Court "*in all cases affecting* ambassadors, other public ministers and consuls"; but the Draft Bill narrowed this, by giving exclusive jurisdiction only "of suits or proceedings *against* ambassadors or other public ministers or consuls, or their domestics"; and it gave original but not exclusive jurisdiction "of all suits for trespasses brought *by* ambassadors or other public ministers or consuls or their domestics or domestic servants."⁹⁸ The Senate amended the Draft Bill by

be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned, may then, on motion, remove the cause for trial to the next Circuit Court to be holden in such dictrict, or if in the District of Maine, to the Court next to be holden therein; or if in Kentucky District, to the District Court next to be holden therein; but if he is the defendant shall do it under the same regulations as in the before mentioned case of the removal of a cause into such Court by an alien; and neither party removing the cause shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the Circuit Courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury."

⁹⁸ See MACLAY, June 30. Section 13 and the Constitution are in accord. See *Pennsylvania v. Quicksilver Co.*, 10 Wall. (U. S.) 553 (1870); *Wisconsin v. Pelican Ins. Co.*, 127 (U. S.) 265 (1888); *California v. Southern Pacific Co.*, 157 (U. S.) 229 (1895).

As appears from the Senate Files, the amendment as originally proposed read as follows: "And shall have exclusively all such jurisdiction of suits or proceedings against Ambassadors or other publick Ministers or their domesticks or domestick servants, as a court of law can have or exercise consistently with the

eliminating the words "or consuls" from the exclusive jurisdiction of suits brought against foreign representatives; it eliminated the words "for trespasses" and the words "or consuls or their domestics or domestic servants," from the jurisdiction over suits brought by foreign representatives; and it made a further amendment by adding an original but not exclusive jurisdiction of all suits "in which a consul or vice consul shall be a party."

The Senate provided in the Act as passed that the "trial of issues in fact" (instead of "the trial of *facts*" as in the Draft Bill) in the Supreme Court "in actions at law against citizens of the United States shall be by jury."⁹⁹ In spite of the great anxiety expressed in the State Conventions for the fullest preservation of the right of trial by jury, it is to be noted that the Congress did not provide for such jury trial in the Supreme

law of nations; and original but not exclusive jurisdiction of all suits brought by Ambassadors or other publick Ministers or in which a consul or vice consul be a party."

It would appear that the only Federal statute which ever provided for a criminal trial before the Supreme Court of the United States involved consuls, *viz.*, the Act of March 3, 1817, c. 40, § 2 (3 STAT. AT L. 362), as follows: "It shall not be lawful for any foreign consul to deliver to the master or commander of any foreign vessel the register and other papers deposited with him pursuant to the provision of this Act, until such master or command shall produce to him a clearance in due form from the collector of the port where such vessel has been entered; and any consul offending against the provisions of this Act shall *upon conviction thereof before the Supreme Court of the United States*, be fined at the discretion of the Court in a sum not less than \$500 nor exceeding \$5000."

It appears from the Papers of the Attorney General, MSS., in the Library of Congress that the United States Attorney for the District of Columbia wrote to Attorney General Taney, Feb. 7, 1832, that an indictment of servants of a foreign minister brought in the Circuit Court of the District had been dismissed by that Court, and he asked for instructions as to whether he should prosecute it in the Supreme Court of the United States. Taney endorsed on the back of the letter the following: "There is no law prescribing the mode in which the Supreme Court shall exercise jurisdiction in this case. And therefore, with the approbation of the President, I have declined taking any steps in the Supreme Court." See also Lee to Secretary of State, July 7, 1797, 1 OPP. ATTY. GEN. 71. See also *United States v. Ravara*, 2 Dall. (Circ. Ct., Pa.) 297 (1793); *United States v. Liddle*, 2 Wash. C. C. 205 (1808); *United States v. Hand*, 2 Wash. C. C. 435 (1810); *United States v. Ortega*, 4 Wash. C. C. 531 (1825).

⁹⁹ Such a jury trial was ordered by the Supreme Court in the case of *Georgia v. Brailsford*, 3 Dall. (U. S.) 1 (1794), although only one of the four defendants was a United States citizen.

Court in cases brought against foreigners, but only against citizens.¹⁰⁰

In the Senate, two efforts were made to secure the adoption of an amendment excluding the Justice who sat in the Circuit Court from sitting in the Supreme Court on the same case. These efforts, though at first successful, were finally defeated.¹⁰¹

Section 14 of the Draft Bill (Section 14 of the Act) relative to the power of the Courts to issue various forms of writs, was adopted by the Senate with but one change, as follows: an express power to issue a writ of "subpoena and protection for witnesses" was stricken out after the words "scire facias."

Section 15, however, (Section 15 of the Act) gave rise to a long and warm debate. This Section, as drafted, vested the Federal Courts with power in actions at law to require parties to produce their books or papers containing evidence,¹⁰² and also contained a provision enabling a plaintiff, on motion, to require a defendant "to disclose on oath his or her knowledge in the cause," in default of which the Court might render judgment against the defendant. Ellsworth supported this clause; but Strong and Maclay argued forcibly against it. It was termed a clause carrying "inquisitorial powers". . . . "extorting evidence from any person was a species of torture, and

¹⁰⁰ Jefferson wrote to Madison, July 31, 1788: "In disputes between a foreigner and a native, a trial by jury may be improper, but if this exception cannot be agreed to, the remedy will be to model the jury by giving the *medietas linguae* in civil as well as criminal matters."

¹⁰¹ See MACLAY, July 7, 11. These motions to amend as they appear in the Senate Files and in the Senate Journal were as follows:

On motion: "That in the trial of causes in the Supreme Court upon a writ of error from a Circuit Court, the Justices who sat on the trial of the cause below, shall not vote in the decision of the cause, except where the Court shall be equally divided, but may assign the reasons of their former decision." Passed in the negative. On motion to insert the following clause: "But no Judge of the Supreme Court shall sit on any cause wherein he has given judgment in a Circuit Court." Passed in the negative.

See SENATE JOURNAL, July 13, for amendment to the original draft, proposed and adopted, striking out certain immaterial provisions, as to amounts in dispute in cases of writ of error.

¹⁰² See Geyger's Lessee *v.* Geyger, 2 Dall. (Circ. Ct., Pa.) 332, 333 (1795): "The provision contained in the Judicial Act was intended to prevent the necessity of instituting suits in Equity, merely to obtain from an adverse party the production of deeds and papers relative to the litigated issue."

inconsistent with the spirit of freedom;" and it was finally stricken out by the Senate, on motion of Paterson.¹⁰³

Section 16 of the Draft Bill (Section 16 of the Act) gave rise to one of the hottest contests. As introduced, it provided "that suits in equity shall not be sustained in either of the Courts of the United States in any case where a remedy may be had at law." When this Section was taken up, the batteries of those who opposed all equity jurisdiction were at once opened.¹⁰⁴ It is to be recalled that, at this period, equity jurisdiction existed in only a portion of the States, and that for over a hundred years prior to the Revolution, it had been bitterly attacked in most of the colonies. There were Courts of Chancery, in 1787, in New York, South Carolina, Maryland, Virginia, and to some extent, in New Jersey; in Pennsylvania, Delaware and North Carolina, there were no such Courts, though the common law courts had certain equity powers; in Connecticut and Rhode Island, the Legislature exercised some powers of a Court of Chancery; in Massachusetts and New Hampshire, there were common law courts only, having a few very limited equity powers; Georgia had only common law courts.¹⁰⁵

From the Senate Files it now appears that William Paterson "moves to dele" the whole Section as to equity jurisdiction. After speeches of opposition made by Dr. Johnson, Lee and Grayson, and in favor by Ellsworth, Reed, Bassett and Strong, the Section was retained, and the phraseology of the Draft Bill was apparently strengthened in favor of equity jurisdiction by adding the word "complete" before the word "remedy." As Maclay, who violently attacked this Section, reported: "The lawyers were in a rage for speaking. Many things were said in favor of chancery that I knew to be wrong. . . . The clause stood, on the question. The gentlemen of the Bar, in the House,

¹⁰³ See MACLAY, June 29, 30. The clause stricken out was as follows: "All the said Courts of the United States shall have power in the trial of actions at law on motion of a plaintiff, and due notice thereof as aforesaid, and his rendering it probable to the satisfaction of the Court that he has by casualty and without fault or negligence of his own been deprived of evidence necessary to support his acts, to require the defendant to disclose on oath his or her knowledge in the cause in cases and under circumstances where a respondent might be compelled to make such disclosure on oath by the aforesaid rules of chancery."

¹⁰⁴ See MACLAY, July 1.

¹⁰⁵ See FEDERALIST, No. 83.

seemed to have made common cause of it, to push the power of Chancery as far as possible.”¹⁰⁶ Two weeks later, the Senate further changed this equity Section by voting to insert the words “plain, adequate and” before the words “complete remedy may be had at law.”¹⁰⁷ Without the words “plain, adequate and complete,” it is clear that the Courts would have been granted a greater equity jurisdiction than they had at common law, and the Section would consequently have been in violation of the Seventh Amendment (not then but soon after adopted). With these words, the Section was only declaratory of the law as it then existed with respect to equity jurisdiction.¹⁰⁸

Meanwhile, the equity powers had been considered in another aspect, when, on July 11, it was moved by Ellsworth to insert in the Draft Bill a new Section 19 as follows:

¹⁰⁶ MACLAY, July 1. On July 2, Maclay again voiced his hostility to the legal profession: “I really dislike the whole of this bill. . . . It was fabricated by a knot of lawyers, who join hue and cry to run down any person who will venture to say one word about it. . . . I ran Ellsworth hard on the uselessness of part of this bill today, and I thought I had the advantage in some of the answers he gave. But it was of little avail. Grayson, though a lawyer, told me yesterday that it was in vain to attempt anything. The people who were not lawyers, on a supposition that lawyers know best, but follow the lawyers, and a party, were determined to push it.”

¹⁰⁷ See SENATE JOURNAL, July 11, 13. Attorney General Randolph, in his report on changes in the Judiciary Act, Dec. 27, 1790, to the House of Representatives urged that the equity jurisdiction be confined to “cases of fraud, accident, trust or unconscionable hardship, or where the modes of proof or the mode of relief at common law be incompetent to the case of the complainant, or where persons not resident in the United States and having any estate or debts in the hands of another person resident within the district shall, together with that other person, be made defendant, and in the last mentioned case, the decree may subject such estate and debts to the demand of the complainant.” His comment (Note 7) as to the need of equity courts is interesting.

¹⁰⁸ In 1830, Johnson, J., said in *Boyce’s Executors v. Grundy*, 3 Pet. (U. S.) 210, 215, “This Court has been often called upon to consider the sixteenth section of the judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held, that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity.”

The Court has held that the Judiciary Act would have been unconstitutional, if it had provided for the exercise of equity powers in a case where “a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy”; in such a case it held that “the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.” *Hipp v. Babin*, 19 How. (U. S.) 271, 278 (1856).

"It shall be the duty of Circuit Courts in causes in equity and of admiralty and maritime jurisdiction to cause the facts on which they found their sentence or decree fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties or their counsel, or if they disagree, by a stating of the case by the Court."¹⁰⁹

A motion by Paterson to postpone Ellsworth's motion and to substitute for it the following, was defeated:

"It shall be the duty of Circuit Courts in the trial of causes in equity and of admiralty and maritime jurisdiction where facts are contested, to cause the evidence exhibited at the hearing to be reduced to writing, if either of the parties require it, or a state of the facts to be made, if the parties agreed thereto."¹¹⁰

A motion was then made by Dr. Johnson to substitute the word "evidences" for "facts" in the original motion — which would have resulted in having all the evidence go up from the trial Court to the appellate Court. The proposal was defeated;¹¹¹ and, according to Maclay, the lawyers — Reed, Bas-

¹⁰⁹ See SENATE FILES. See also MACLAY, July 10, 11, 13, 1789, though here as elsewhere, the dates given in Maclay's journal are not reliable, as the matters mentioned as acted on do not always coincide with the officially printed Senate Journal. It appears from the Senate Files that this motion was made by Ellsworth and was intended by him to be inserted between Sections 9 and 10 of the Draft Bill, where it would have been more appropriate than as Section 19 of the Act as it finally passed.

¹¹⁰ See SENATE FILES, containing Paterson's original motion, on which is endorsed: "Mr. Paterson's motion to postpone Ellsworth's motion lost. July 11, 1789."

¹¹¹ See SENATE FILES, in which the original slip containing the motion reads: "Johnson moves to dele 'facts' and insert 'evidences.' Question lost." Attorney General Randolph in his report to the House of Representatives Dec. 27, 1790, on changes in the Judiciary Act recommended that on appeals in equity, the Court should "cause the facts on which they found their decree fully to appear upon the record by inserting the depositions of the witnesses sworn in the cause and the exhibits therein at large." And in his Note 17, he said: "The mode of giving testimony in equity is by deposition; it is also practised in the Admiralty, to examine witnesses *viva voce* and commit their evidence to writing. In our intercourse with foreign nations an exposition of the conduct of our admiralty may be frequently decent and useful. Perhaps, therefore, the original law is exceptionable in allowing the Judge whose opinion is to be canvassed the privilege of placing the cause in any attitude which squares best with that opinion." AM. STATE PAPERS, Misc., No. 17.

sett, Paterson, Johnson, Grayson, and others—“this day showed plainly the cloven foot of their intention.” It appears also that such an amendment had been previously adopted as to equity appeals from the Circuit Courts to the Supreme Court, providing that the depositions should be sent up so that there might be a rehearing of facts. Ellsworth and Strong moved a reconsideration, as did Maclay, the latter saying that “while no professed admirer of the judicial system” he had thought the Circuit Courts “the best part of it” but that this proposed amendment would render these Courts abortive, by producing so much delay in them that “justice never can be obtained”; that the purpose of the move was “to try facts on civil law principles without the aid of a jury, and this, I promise you, never will be submitted to.” Maclay’s views prevailed. The substitute motions were defeated; and the new Section 19 of the Act, as proposed to the Senate, was adopted.¹¹²

It also appears that the Senate, at some previous day not noted in the Journal, had amended the provisions of the original Draft which required that trials of facts in the District and Circuit Courts (except in admiralty and maritime causes) should be by jury, by inserting a further provision that there should be a similar jury trial of facts “on any hearing of a cause in equity in a Circuit Court.” This provision which would have revolutionized equity procedure, the Senate now voted to expunge, not being willing to yield any further to the anti-equity faction.¹¹³ An attempt later, by Maclay and Ellsworth, supported by R. H. Lee, to reverse this vote failed.¹¹⁴ It appears that Ellsworth himself did not, in general, agree with extensions of equity jurisdiction;¹¹⁵ and Maclay fought against equity, chiefly on the ground that it deprived parties of jury trials and resulted in costs, delays and innumerable reviews. Maclay stated that he believed the general opinion over the Union,

¹¹² See SENATE JOURNAL, July 11.

¹¹³ See SENATE JOURNAL, July 10.

¹¹⁴ See MACLAY, July 13.

¹¹⁵ Under date of July 9, Maclay recorded: “A great part of this day was taken up with light debates, chiefly conducted by lawyers on both sides, and the object seemed to be the increasing the powers of chancery. Ellsworth has credit with me. I know not, however, whether it be the effect of judgment, whim or caprice, but he is, generally, for limiting the chancery powers.”

excepting amongst lawyers, was opposed to Chancery Courts. "The bill however, before you, as it now stands is not chancery. It is something much worse. The line between chancery and common law is broken down. All actions may now be tried in the Federal Courts by the Judges without the interruption of a jury — the birthright of every American, a privilege they will not part with."¹¹⁶

In connection with this fight over the limitation of equity powers, it should be noted here that a successful attack was made on the modes of proof then prevailing in both equity and admiralty causes, testimony being taken in such causes by depositions and not by oral evidence. By a later section of the Draft Bill, Section 30, proof by deposition was abolished except in cases of persons more than one hundred miles from the Court, or on a voyage, or ancient or very infirm, and it was provided that:

"the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the Courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction as of actions at common law."

This was a great triumph for the anti-chancery party.¹¹⁷ The annoyance of relying on oral evidence in equity cases soon became so great that, in 1802, it was enacted that "it shall be in the discretion of the Court upon the request of either party to order the testimony of the witnesses therein to be taken by depositions."¹¹⁸

Another example of the anxiety to preserve the functions of the jury and to eliminate equity powers may be noted in the debate on a change from Section 24 of the Draft Bill (Section

¹¹⁶ MACLAY, July 10, 11, 13. The dates given in Maclay's Journal do not always coincide with the officially printed Senate Journal.

¹¹⁷ The Draft Bill in the Senate Files shows that this provision of Section 30 was at first intended to be included in Section 16, for the draft of Section 12 as introduced contains the following words written in, and then struck out: "Nor shall depositions be admitted in either of said Courts in suits in equity." In the margin of Section 16, there is also written (and struck out with cross bars) the following: "Nor shall they admit depositions in the trial of suits in equity or of admiralty or of maritime jurisdiction except where they are admissible at common law or by the special provision hereinafter made."

¹¹⁸ Act of April 29, 1802, c. 31, § 25, 2 STAT. AT L. 156, 166.

26 of the Act). This Section, as introduced, provided that in actions in Federal Courts "to recover the forfeiture annexed to any articles of agreement, covenant, bond or other specialty, where the forfeiture, breach or nonperformance shall be found by jury, by the default or confession of the defendant, or upon demurrer, the Court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity."¹¹⁹ Under this provision, the jury might find the breach, but the Judge was to assess the damage. "I attacked this mixed half common law, half chancery proceeding. . . . The jury were the proper chancellors, in such a case, to assess the damages; and I liked them much better than the Judges. They were from the vicinity and best acquainted with the parties and their circumstances," said Maclay. To an argument to the contrary, by Strong, Maclay retorted that he "hoped we were not always to be trammelled with the fetters of English jurisprudence; that we would show we had judgment and would act for ourselves."¹²⁰ The Draft Bill was amended by the Senate by striking out the words "shall be found by the jury," and by adding at the end the following provision for jury trial: "And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

Sections 17, 18, 19, 20, of the Draft Bill (Sections 17, 18, 20, 21, 22 of the Act), relative to new trials, costs, etc., and as to appeals to the Circuit Courts in admiralty and maritime cases involving over \$300, and relative to writs of error in civil actions involving over \$50 from the Circuit Courts to the District Courts,¹²¹ and relative to writs of error in civil actions and suits

¹¹⁹ This Section 24 in the Draft Bill in the Senate Files is in the handwriting of Caleb Strong of Massachusetts.

¹²⁰ MACLAY, July 2.

¹²¹ With reference to the appellate jurisdiction of the Circuit Courts, an amendment was proposed in the Senate by Maclay and favored by Grayson and Bassett, that "no District Judge shall give a vote in any case of appeal from his own decision." This was carried; it was further moved to amend this by adding: "but may assign the reason of such his decision." See SENATE FILES, and MACLAY, July 7. It was later rejected.

It is to be noted that cases could go from the District to the Circuit Courts only by appeal or writ of error. A writ of *certiorari* from the Circuit Court to transfer a case was not authorized. *Patterson v. United States*, 2 Wheat. (U. S.) 221 (1817).

in equity involving over \$2000 from the Supreme Court to the Circuit Courts, were adopted by the Senate, substantially as drafted, with the following exception. The Draft Bill allowed a writ of error from the Supreme Court to the Circuit Court "in civil actions and suits in equity in a Circuit Court;" but the Senate restricted this appellate jurisdiction by adding the words "brought there by original process or removed there from Courts of the several States or removed there by appeal from a District Court." This had the effect of excluding all appeals to the Supreme Court in cases taken from the District Court to the Circuit Court by writ of error.¹²²

That the drafters of the Act had taken warning by the violent and reiterated attacks made upon that portion of the Constitution which vested the Supreme Court with appellate jurisdiction "both as to law and fact," and were exceedingly anxious to allay the fears of those who saw in this provision a determination to abolish jury trial and to adopt a system of civil law appeals, is seen from the provision which they made in Sections 21 and 23 of the Draft Bill (Section 22 and 25 of the Act), with reference to appellate jurisdiction; for they restricted it in a more drastically extreme manner than even the opponents of the Constitution had advocated. Most of such opponents had admitted that an appeal as to facts as well as law was warranted in admiralty and in equity cases, and that such an appeal in those classes of causes would not be in violation of the common law jury system. Appeals as to fact in admiralty cases already existed in the Federal Court, under Acts of the Continental Congress and of the Congress of the Confederation, and were recognized as proper in many of the State Courts. Appeals as to fact in equity cases also were already recognized in those States which had Courts of Chancery. But the drafters of the Act now determined that there should not be an appeal on questions of fact in *any* class of cases; and they provided for appellate jurisdiction from the Circuit to the Supreme Court only on "petition in error" ("petition in error" being an anomalous term, which was changed to "writ of error" by amendment in the Senate), presenting only questions of law

¹²² See SENATE FILES. This illogical situation was not cured until the passage of the Act of July 4, 1840, 5 STAT. AT L. 392.

for the determination of the appellate Court. This provision later caused great trouble and inconvenience in equity and admiralty appeals;¹²³ but it was not altered for fourteen years, when, in 1803, an Act was passed by Congress, providing for appeals in equity and admiralty cases, instead of writs of error;¹²⁴ and thus the Courts were given power to pass upon the facts as well as the law in such cases, and their power in this direction was still further enhanced by a provision that in such cases they might even hear new evidence.¹²⁵

¹²³ "A writ of error in equity proceedings is not peculiar," said Catron, J., *Erwin v. Lowry*, 7 How. (U. S.) 172, 184 (1849), pointing to this original Judiciary Act.

In *Wiscart v. Dauchy*, 3 Dall. (U. S.) 321, 327 (1796), Judge Wilson, dissenting, said that an appeal should be allowed in equity and admiralty cases so that the Supreme Court might review both fact and law; and that it was "essential to the security and the dignity of the United States" and "of moment to our domestic tranquillity, and foreign relations," that such cases "should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal."

In *Jennings v. Brig Perseverance*, 3 Dall. (U. S.) 336, 337 (1797), Judge Paterson said that exclusion of consideration of the evidence by the Supreme Court "was leaving the property of the country too much to the discretion and judgment of a single Judge."

¹²⁴ Act of March 3, 1803, c. 40, 2 STAT. AT L. 244. This Act provided that: "Upon such an appeal a transcript of the libel, bill, answer, depositions and all other proceedings . . . shall be transmitted to the said Supreme Court; and that no new evidence shall be received in the said Court on the hearing of such appeal, except in admiralty and prize causes."

The reasons for this Act were set forth by Washington, J., in *The San Pedro*, 2 Wheat. (U. S.) 132 (1817). Taney, C. J., said in *Hemenway v. Fisher*, 20 How. (U. S.) 255, 258 (1857): "The writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as a process to remove decrees in chancery and admiralty to a superior court." See also *Jones v. La Vallette*, 5 Wall. (U. S.) 579 (1866).

There was no provision in the Judiciary for the removal of a case from the Circuit Court to the Supreme Court by *certiorari*. *Fowler v. Lindsey*, 3 Dall. (U. S.) 411, 414 (1799), such a proceeding being termed by the Court "a novelty in judicial proceeding." In *Washington County v. Durant*, 18 L. C. P. Co. 169 (1866), it was held that a case could not be brought into the Supreme Court by agreement of parties. *United States v. Curry*, 6 How. (U. S.) 106 (1848); *Kelsey v. Forsyth*, 21 How. (U. S.) 85 (1858): "The agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a State. . . ."

¹²⁵ See *The Mabey*, 13 Wall. (U. S.) 738 (1871). In *United States v. Schooner Betsy*, 4 Cranch (U. S.) 443, 444 (1808), upon appeal from a decree

The Senate, in 1789, however, further evinced its determination that there should be no appellate jurisdiction as to facts, by adding, at the end of the appellate section of the Draft Bill, a specific provision that there should be no reversal "for any error in fact."¹²⁶

One other change in the appellate section made by the Senate may be noted: the Draft Bill allowed only three years for bringing a writ of error; the Senate changed this to five years.

With reference to appellate jurisdiction over judgments of State Courts, granted by Section 23 of the Draft Bill (the famous twenty-fifth section of the Act), the Senate made a very significant change, by adding the provision that no error should be regarded as a ground of reversal other "than such as appears on the face of the record." The original Draft Bill did not contain these words, and had the Act been passed without them, the lack of such specific provision might have rendered

of the Circuit Court in admiralty, it was said: "The United States appealed to *this* court, where witnesses were examined *viva voce*, both on the part of the United States and on that of the claimant." In *The Samuel*, 1 Wheat. (U. S.) 9, 19 (1816), on appeal from the Circuit Court in admiralty, the Court found "it very difficult to form an opinion satisfactory to itself," and ordered "the cause to be continued to the next term for further proof, which each party is at liberty to produce." See also *The George*, 2 Wheat. (U. S.) 278 (1817), 2 Gallison (Circ. Ct., Mass.) 248 (1814) where further proof was also ordered.

It is to be noted that the duty of re-examining facts on appeals in equity and admiralty gradually grew so burdensome on the Supreme Court, that without any change in statutory requirement, the Court itself adopted a rule of decision which practically eliminated much of its duty to decide questions of fact on appeal. It announced a formula, first in admiralty appeals [see Grier, J., in *The Ship Marcellus*, 1 Black (U. S.) 414 (1861)] and later extended to equity appeals, that where both the District and Circuit Courts concurred on a question of fact, it would not reverse such a finding except on clearest proof of mistake. But see *Newell v. Norton*, 3 Wall. (U. S.) 257 (1865). By the Act of Feb. 16, 1875, 18 STAT. AT L. 315, findings of fact in admiralty cases by the Circuit Courts were made conclusive. *The Abbotsford*, 98 (U. S.) 440 (1878).

¹²⁶ The Draft Bill read: "But there shall be no reversal in either Court for error in ruling any plea in abatement, other than to the jurisdiction of the Court or such plea to a petition or bill in equity as is in the nature of a demurrer."

The Act read: "But there shall be no reversal in either Court *on such writ of error* for error in ruling any plea in abatement other than a *plea* to the jurisdiction of the Court, or such plea to a petition or bill in equity as is in the nature of a demurrer, *or for any error in fact.*"

It is to be noted that no appeal, but only a writ of error, was allowed in cases taken from a State Court to the Supreme Court. *Verden v. Coleman*, 22 How. (U. S.) 192 (1859).

the practice of the Supreme Court on writs of error to State Courts, with respect to appearance of error, much more liberal than it later actually became.

In Section 21 of the Draft Bill (Section 23 of the Act) as to the effect of a writ of error as a *supersedeas* and stay of execution, the provisions differed from the English common law, by which every writ of error acted as a *supersedeas*; for it made very rigid requirements as to service of the writ within ten days after judgment, if the writ was desired to act as a *supersedeas*. The section was adopted by the Senate against the opposition of Ellsworth and Reed.¹²⁷

Section 22, judgment after appeal, and Sections 25, 26, of the Draft Bill (Sections 24, 27, 28, of the Act) — (Sections 23 and 24 of the Draft, 25 and 26 of the Act have been considered above) — were adopted by the Senate substantially as drafted.

Section 27 of the Draft Bill (Section 29 of the Act) as to juries in criminal cases occasioned a bitter contest, which was continued in the House, after the bill passed the Senate. Pending and after the adoption of the Constitution, grave fears had been expressed in the State Conventions and elsewhere, as to the provisions of Article Three, Section Two, Clause Three that criminal trials should be held "in the State where the said crimes shall have been committed." It was charged that this failed to preserve the common law right of an accused person to be tried by a "jury of the vicinage." Violent attacks had been made upon the iniquity of this omission, and various Amendments to the Constitution had been proposed for the preservation of the liberties of the citizen in this respect. The Draft Bill had made no attempt to cure this alleged defect. It was now moved in the Senate by R. H. Lee and Grayson of Virginia that Section 27 of the Draft be amended, so as to provide that "in criminal cases when the punishment is capital, the petit jury shall come from the body of the county where the fact was committed."¹²⁸

¹²⁷ See MACLAY. Attorney General Randolph in his report of Dec. 27, 1790, recommended that no writ of error "be a *supersedeas*, unless some Judge of the Circuit or Supreme Court, as the case may be, after inspecting a copy of the record, and being of opinion that there is sufficient error therein for reversing the judgment in whole or in part certify the same." AM. STATE PAPERS, Misc., No. 17.

¹²⁸ See SENATE JOURNAL, July 9, 13.

This motion was defeated; but later when the Bill came back from the House, it was amended so as to include Lee's motion in a modified form as follows:

"That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence; and jurors, in all cases, to serve in the Courts of the United States, shall be designated by lot or otherwise, in each State respectively, according to the mode of forming juries therein, now practiced, so far as the laws of the same shall render such designation practicable by the Courts or Marshals of the United States."¹²⁹

The reason, however, for the defeat of the attempt to require, imperatively, that Federal juries should be drawn from the county in which the offense was committed was stated by James Madison, in writing of the defeat of a similar proposition for an Amendment to the Constitution: "The truth is that in most of the States, the practice is different, and hence the irreconcilable difference of ideas on the subject. In some States, jurors are drawn from the whole body of the community indiscriminately; in others, from larger districts comprehending a number of counties, and in a few only from a single county."¹³⁰

Section 28 of the Draft Bill (Section 30 of the Act) as to modes of proof by oral testimony and by depositions was adopted by the Senate with no substantial change, except the addition of an allowance of depositions in cases of persons "ancient or very infirm."

Sections 29, 30, of the Draft Bill (Sections 31, 32, of the Act) were adopted substantially without change, except that the Senate added, in Section 30, a power in the Judges to "at any time permit either of the parties to amend any defect in the proceedings or pleadings, upon such conditions as the said Courts respectively shall in their discretion, and by their rules, prescribe."¹³¹

¹²⁹ SENATE JOURNAL, Sept. 19; SENATE FILES. See *United States v. Insurgents*, 2 Dall. (Circ. Ct., Pa.) 335, 341 (1795).

¹³⁰ WORKS OF JAMES MADISON, Madison to Edmund Pendleton, Sept. 14, 23, 1789. See *United States v. Wilson*, Bald. 78, 117 (Circ. Ct., Pa., 1830): "We [the Circuit Courts] are bound to try all crimes within the district which are duly presented before us, but not to try them in the county where committed."

¹³¹ SENATE JOURNAL, July 10. As to Section 32, it was said in *Parks v.*

Section 31 of the Draft Bill (Section 33 of the Act) treating of the powers of Judges as to arrest, bail, etc., occasioned considerable debate over a provision which empowered Federal Judges to apprehend, bail, and commit, on their own knowledge as well as on complaint of others, persons charged with Federal offenses.¹³² Ellsworth, Strong, Bassett and Grayson favored the provision, saying that this was according to English practice and that the oath of the Judge would prevent abuse. Maclay and R. H. Lee opposed, the latter arguing "as to the dangerous ground on which we trod; considering the interference, or the very possible interference of the Federal and State Legislature; and the giving more power over the liberty of the citizen to the former, than was practiced by the latter, would not fail to sow the seeds of dissention." On motion, the clause was expunged, after an unsuccessful attempt by Ellsworth to secure the adoption of a modified clause as follows: "For any offence against the laws of the United States upon complaint exhibited on oath or affirmation, or where the offence is committed in his presence and with actual force, or is an offence for which corporal punishment may be inflicted may upon his own

Turner, 12 How. (U. S.) 39, 46 (1851): Section 32 "directs the courts of the United States to proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects, or want of form in the writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatever, except those only in cases of demurrer, which the party demurring shall specially set down and express together with his demurrer as the cause thereof. This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them. And although verdicts are not specially mentioned in this provision, yet the words 'or course of proceeding whatever,' are evidently broad enough to include them; and, as they are within the evil, they cannot, upon a fair interpretation of the statute, be excluded from the remedy." See also *Roach v. Hulings*, 16 Pet. (U. S.) 319 (1842).

¹³² See MACLAY, July 10. The clause was as follows. "That every justice of the Supreme Court and Judge of a District Court may, either upon his own knowledge or the complaint of others cause any person to be apprehended for any offence against the laws of the United States and brought before himself for examination; and if he shall think proper, may bail or commit such offender, or send him by warrant to the district where the offence was committed."

knowledge cause any person to be apprehended and brought before him for examination.”¹³³

Section 34 of the Act, as stated above, was not contained in the Draft Bill, as introduced in the Senate, but was proposed, probably by Ellsworth, as an amendment and adopted by the Senate as follows:

“The laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.”

That it was adopted late in the debate is to be seen by its position in the Bill — being inserted next to the last section and between two sections dealing with criminal matters with which it had no connection.¹³⁴ Its proper place in the Bill would have been after Section 11, dealing with the subject of the Circuit Court jurisdiction.¹³⁵

Section 35 of the Act (Section 32 of the Draft Bill), which now provides for the appointment of United States Attorneys and of the Attorney General by the President, was quite different in its original form, for the Draft Bill provided that each District Court should appoint “a meet person learned in the law, to act as Attorney of the United States in such district,”¹³⁶ and

¹³³ This does not appear in the Senate Journal, but is to be found in the Senate Files in a slip of paper containing this suggested modification, on which is endorsed: “Mr. Ellsworth’s motion not accepted.”

¹³⁴ In *United States v. Reid*, 12 How. (U. S.) 361 (1851), it was held, *per* Taney, C. J., that this Section 34 applied only to civil cases at common law, and not to criminal offenses against the United States. But see *Rosen v. United States*, 245 U. S. 467 (1918).

In *Logan v. United States*, 144 U. S. 263, 300 (1892), Gray, J., referred to the location of this Section 34, saying: “Although that section stood between two sections clearly applicable to criminal cases, it was adjudged by this court . . . that the section did not include criminal trials. . . .” When the history of the statute is now understood, it will be seen that the location of the section had no connection with its subject matter.

¹³⁵ In the Senate Files, the original slip of paper in which this Section is written bears the notation “page 15th.” If it had been inserted on page 15 of the manuscript Draft Bill, it would have appeared in its proper position in the bill, for that page contains Sections 11 and 12 as to Circuit Courts.

¹³⁶ See letter from “Curtius” in *Gazette of the United States*, Feb. 6, 1791, as to failure of Congress to provide adequate salaries for the United States

that the Supreme Court should appoint "a meet person learned in the law to act as Attorney General for the United States, and shall swear him to faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in such Courts in which the United States shall be concerned and to give his advice and opinion upon questions of law when required by the President of the United States and when requested by the Heads of any of the Departments, touching any matters that may concern their Departments."¹³⁷

On July 17, 1789, the bill passed the Senate by a vote of fourteen to six — the negative votes being cast by Richard Henry Lee (who thus voted against the very bill which he had reported to the Senate), William Grayson of Virginia, John Langdon and Paine Wingate of New Hampshire, Pierce Butler of South Carolina, and William Maclay of Pennsylvania. "I opposed this bill from the beginning," wrote Senator Maclay. "It certainly is a vile law system, calculated for expense, and with a design to draw by degrees all law business into the Federal Courts. The Constitution is meant to swallow all the State Constitutions, by degrees; and this to swallow, by degrees, all the State Judiciaries. This, at least, is the design some gentlemen seem driving at."¹³⁸

Attorneys, especially since, "it is well known that most, if not all the States have taken effectual steps, either by Legislative Acts or the inculcation of a jealous distrust, to exclude all Federal officers from State appointments, in order, as they say, to preserve the State governments free from the influence of the Federal Government. . . . Is it to be supposed then that persons whose talents afford them prospects of advancement at home will accept of the office of District Attorney estimated at so low a rate as it is at present by Congress?"

¹³⁷ Christopher Gore wrote to Rufus King, Aug. 22, 1788: "The report of the Committee to the Senate made the Attorney for the district to rest on the District Judge for his appointment, but the Act as transmitted from the Senate to the House only declared that such an officer should be appointed. I, therefore, conclude that if the Act passes in its present form, the district attorney must be appointed by the President."

¹³⁸ On July 7, Maclay had recorded that: "The Judiciary was taken up for a third reading. I can scarce account for my dislike to this bill. I really fear it will be the gun-powder plot of the Constitution, so confused and so obscure it will not fail to give a general alarm. Ellsworth had lead in this business, backed with Strong, Peters, Reed often, Bassett seldom." On July 8, Maclay had modified his views somewhat, for he stated: "The Chief Justice of Pennsylvania, Mr. Wilson, Myers, Fisher, the Speaker, Mr. Peters, Tench Coxe, and sundry others have, in their letters, approved of the general outlines of the

Edward Carrington of Virginia, though a pro-Constitution man, disapproved of the form of the bill and thought that more reliance should have been made on the State Courts. Writing to Madison, he said:

“Our friend Grayson has given me a sketch of the Judiciary system projected in the Senate. It is very different from what I had formed in my own mind and I believe will not be much approved of. . . . The State Courts where they are well established might be adopted as the inferior Federal Courts, except as to maritime business, and indeed it appears to me that institute as many inferior Federal Courts as you will, those of the States will, from the Constitution which enjoins upon them an observance of the Federal laws, have concurrent jurisdiction with the former and that appeals to the Supreme Court will alike lie from each. If this idea is right, why not leave the whole business with the State Courts, under such regulations as to appeals, as may be found well? Such an arrangement would save immense expense, would occasion little innovation in the ancient forms of judicial proceedings amongst the people, and would also, without difficulty, accommodate jury trials, in matters of fact, to the wishes of each State, as every one would retain its own usage.”¹³⁹

And Senator Wingate wrote to Pickering: “The Judicial bill has had three readings in the Senate and is now to be committed, in order to make some little alterations and amendments, and then it will be ready to go [to] the other House. How it will fare there is very uncertain. For my own part I do not much like it. I think it will be a very expensive machine, without deriving benefits to the public equal to the cost. The bill is too long to give you any tolerable account of it in this letter.”¹⁴⁰

On the other hand, Ellsworth wrote regarding the final shape which his draft had taken: “I consider a proper arrangement of the Judiciary, however difficult to establish, among the best securities the government will have, and question much if any will be found at once more economical, systematic and efficient,

bill. Any amendments which they have offered have been of a lesser nature. I own the approbation of so many men of character for abilities has lessened my dislike of it.”

¹³⁹ MADISON PAPERS, MSS, Carrington to Madison, Aug. 3, 1789.

¹⁴⁰ PICKERING PAPERS, MSS, Paine Wingate to Pickering, July 11, 1789.

than the one under consideration. Its fate in the House of Representatives, or in the opinion of the public, I cannot determine. But being after a long investigation satisfied in my own mind of its expediency, I have not hesitated, nor shall I, to give it the little support in my power."¹⁴¹

III

On July 20, the Judiciary Bill was taken up in the House and ordered committed to a Committee of the Whole, where it remained on the table, unacted upon, for over a month.¹⁴² This delay was due to the fact that the proposed Amendments to the Constitution, then pending in the House, related to many of the most essential matters covered by the Bill; and if some of these Amendments should be adopted, the Bill must be radically altered.

"What a cool and exploring sagacity," wrote St. John de Crevecoeur to Jefferson in the fall of 1788, "will be wanted in the discussion and acceptance of those numberless Amendments which a few of the States insist upon, in order to please everybody and yet to discriminate the useful from the needless." As early as April 8, 1789, Madison had written to Edmund Randolph: "The subject of Amendments has not yet been touched. From appearances there will be no great difficulty in obtaining reasonable ones. It will depend, however, entirely on the temper of the Federalists who predominate as much in both branches as could be wished." And on April 12, he wrote: "The Senate has appointed a Committee on the subject of the Judiciary Department. On the subject of the Amendments, nothing has been publicly and very little privately said. Such as I am known to have espoused, will, as far as I can gather, be attainable from the Federalists who sufficiently predominate in both branches; though with some, the concurrence will proceed from a spirit of conciliation rather than conviction." And a Kentucky correspondent wrote to Madison, April 28: "I rejoice to find that

¹⁴¹ Ellsworth to Law, Aug. 4, 1789, WHARTON'S STATE TRIALS, 37-38.

¹⁴² Christopher Gore wrote to Rufus King, June 7, 1789: "If slowness of progress is evidence of wisdom, Congress certainly must be pronounced a wise body."

you came forward at an early day with a proposition for Amendments, altho I could have wished they had been more extensive."¹⁴³

As early as June 8, 1789, the House had been strongly urged by Madison to consider and adopt a series of Amendments, which he had formulated in compliance with State recommendations. Sending to Jefferson a copy, Madison wrote that all he thought advisable to submit was a Bill of Rights, "with a few alterations most called for by the opponents of the Government and least objectionable to its friends"; and that he thought that "they will, if passed, be satisfactory to a majority of those who have opposed the Constitution. I am persuaded they will be so to a majority of that description in Virginia." "Everything of a controvertible nature," he said, "that might endanger concurrence of two thirds of each House and three fourths of the States was studiously avoided. This will account for the omission of several Amendments which occur as proper"; and again he wrote to Edmund Pendleton that "nothing of a controvertible nature ought to be hazarded by those who are sincere in wishing for the approbation" of the Amendments.¹⁴⁴ The Amendments included some of the changes proposed in the Judiciary Article, by guaranteeing trial by jury, by prohibiting to some extent appellate jurisdiction as to facts, and by including a Bill of Rights. "They are calculated to secure the personal rights of the people, so far as declarations on paper can effect the purpose," wrote a Virginia friend to Madison, "leaving unimpaired the great power of the government. They are of such a nature as to be generally acceptable and of course more likely to obtain the assent of Congress than would any proposition tending to separate the powers or lessen them in either branch. . . . That part that speaks of facts triable by jury not otherwise examinable than may consist with the principles of common law means, I suppose, that the Court of Appeals shall not re-examine the facts but by a jury, or what is the true meaning?"¹⁴⁵ Tench Coxe

¹⁴³ 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, 92, 170, 179.

¹⁴⁴ Madison to Jefferson, May 27, June 13, 30, 1789. On May 27, Madison wrote that: "The subject of Amendments was to have been introduced on Monday last, but it is postponed in order that more urgent business may not be delayed. On Monday sennight it will certainly come forward."

¹⁴⁵ 15 MASS. HIST. SOC. PROC., 2nd Series, Joseph Jones to Madison, June 24, 1789.

of Pennsylvania wrote to Madison that he had noted particularly the reception of the Amendments by the public, and that "the most decided friends of the Constitution admit (generally) that they will ameliorate the government by removing some points of litigation and jealousy, and by heightening and strengthening the barriers between necessary power and indispensable liberty."¹⁴⁶ William R. Davie of North Carolina wrote that the announcement of Madison's intention to support Amendments had been received with "universal pleasure" where "the uniform cant of the enemies of the Government" had been that Congress would never consent to any alterations. This "refutation of the gloomy prophecies of the leaders of the opposition" had caused "the honest part of our Anti-Federalists to express great satisfaction;" and the objections of the "honest and serious" would be met by "an abridgment of the jurisdiction of the Federal Court in a few instances and some fixed regulations respecting appeals. They also insist on the trial by jury being expressly secured to them in all cases — and a constitutional guarantee for the free exercise of their religious rights and privileges. . . . Instead of a Bill of Rights attempting to enumerate the rights of the individual or the State Governments, they seem to prefer some general negative confining Congress to the exercise of powers particularly granted and some express negative restriction in some important cases." Edward Carrington of Virginia wrote that the anti-Federal districts in that State had become "perfectly calm and show a disposition to acquiesce in whatever may be the fate of the proposed alterations, relying upon their meeting with due consideration."

The more extreme Federalist view was set forth in a letter written on June 11, by Fisher Ames of Massachusetts: "Madison has introduced his long expected Amendments. They are the fruit of much labor and research. He has hunted up all the grievances and complaints of newspapers, all the Articles of Conventions, and the small talk of their debates. . . . There is too much of it. . . . Upon the whole, it may do some good

¹⁴⁶ 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, 176; MADISON PAPERS, MSS., Coxe to Madison, June 18, 1789, Davie to Madison, June 10, 1789, Carrington to Madison, May 12, 1789.

towards quieting men who attend to sounds only, and may get the mover some popularity which he wishes.”¹⁴⁷ On the other hand, the anti-Federal Richard Henry Lee expressed apprehension at the small scope of Madison’s proposal: “Mr. Madison has given notice that on Monday sennight, he will call for the attention of the House to the subject of Amendments. I apprehend that his ideas, and those of our Convention, on this subject, are not similar. We shall carefully attend to this; and when the plan comes to the Senate, we shall prepare to abridge, or enlarge, as to effect, if possible, the wishes of our Legislature. I think, from what I hear and see, that many of our Amendments will not succeed, but my hopes are strong that such as may effectually secure civil liberty will not be refused.”¹⁴⁸

It was clear that the action of Congress on these Amendments would have considerable effect upon the action which the House should take upon the Judiciary Bill. Should the more radical Amendments desired be adopted, considerable portions of the Judiciary Bill, as it had passed the Senate, would become unnecessary — notably the provisions as to inferior courts, as to trial by jury and equity jurisdiction, and as to the scope of the Supreme Court’s original and appellate powers.

Many Congressmen thought that it was unwise to amend or tamper with the Constitution in respect to the Judiciary Article, and felt that all needful regulations of the Courts could be made in the contemplated Judiciary Bill.¹⁴⁹ “Much has been said by the opponents to this Constitution respecting the insecurity of jury trials, that great bulwark of personal safety,” James Jackson of Georgia had argued, in the House at an early date. “All their objections may be done away with by proper regulations on this point, and I do not fear but such regulations will take place. The Bill is now before the Senate, and a proper attention is shown to this business.” John Vining of Delaware said: “Let me ask gentlemen how they propose to amend that part

¹⁴⁷ Ames to Thomas Dwight, June 11, 1789; Ames to George R. Minot, June 12, 1789.

¹⁴⁸ 2 THE LETTERS OF RICHARD HENRY LEE, ed. by James C. Ballagh, Lee to Patrick Henry, May 28, 1789.

¹⁴⁹ 1st Cong., 1st Sess., 425-450, June 8, 1789. Full reports of this debate were published in the newspapers throughout the country.

of the Constitution which embraces the judicial branch of the Government when they do not know the regulations proposed by the Senate who are forming a bill on this subject?" Elbridge Gerry of Massachusetts and Samuel Livermore of New Hampshire opposed consideration at this time. The latter said that he "supposed the Judiciary Law would contain certain regulations that would remove the anxiety of people respecting such Amendments as related thereto because he thought much of the *minutiae* respecting suits between citizens of different States, etc., might be provided for by law. He could not agree to make jury trials necessary on every occasion; they were not practiced even at this time, and there were some cases in which a cause could be better decided without a jury than with one."

Madison, on the other hand, argued that a Bill of Rights was necessary so as to bind the Courts, and that it should be adopted before the Judiciary Bill was acted on. "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." He even thought that the provisions of the Bill of Rights should be applied to the States as well as to Congress. He also thought that "it will be proper, with respect to the Judiciary powers, to satisfy the public mind", and he said: "Great inconvenience has been apprehended to suitors from the distance they would be dragged to obtain justice in the Supreme Court of the United States. To remedy this, declare that no appeal shall be made unless the matter in controversy amounts to a particular sum; this, with the regulation respecting jury trials in criminal cases and suits at common law, it is to be hoped, will quiet and reconcile the minds of the people to that part of the Constitution."

Finally, unable to come to a conclusion and desirous of taking up the Revenue Bill, the House laid aside all consideration of the Amendments, until the Senate should pass the Judiciary Bill.¹⁵⁰

¹⁵⁰ Madison wrote to Col. Jas. Madison, July 5, 1789: "The subject of Amendments to the Constitution will not be resumed till the revenue matters

Meanwhile, strong propaganda against the Amendments was launched in New York, through the publication in a leading newspaper of a series of twenty-eight articles, on successive days from June 3 to July 7, containing the most able and convincing dissection or refutation of the arguments of the anti-Federalists that had appeared anywhere, since the publication of the articles entitled *The Federalist*, in the preceding year. No person desirous of a full understanding of the Federal Judiciary system can afford to overlook the portions of this series which deal with that subject.¹⁵¹

When the Senate finally passed the Bill on July 17, it was generally supposed that the House would speedily consider it;¹⁵² but, instead of doing so, it took up the Amendments first. Madison moved, on July 21, that the Committee of the Whole should consider the Amendments; but on motion of Fisher Ames of Massachusetts, they were referred to a Select Committee of one

are over. I hope it will then be duly attended to and will end in such a recommendation as will satisfy moderate opponents. This, however, is but opinion, nothing having passed from which any conclusion can be drawn with regard to the sentiments of the two Houses, particularly the Senate."

¹⁵¹ See *New York Federal Gazette*, June 3 to July 7, 1789, "Remarks by a Foreign Spectator on the Amendments proposed by the Conventions of five of the adopting States, the minority of the others, and the late one of North Carolina." See esp. June 13, 15, 16, 23, 24, 26, 27, 29.

Amendments to the Constitution were opposed in the *New York Daily Advertiser*, Aug. 17, 18, 1789, in letters from "Pacifcus" and others as "an empty tub to catch people."

See also "Observations on the new Federal Constitution and the Alterations that have been proposed as Amendments" by "A Citizen of New Haven," in *New York Packet* quoted in *Salem Mercury*, June 30, July 7, 1789, in which the Amendments were opposed, saying: "Restraints in a Constitution upon the Legislature of a free State are but an abridgment of the liberties of the people to make, alter and repeal laws which the publick good may require. Bills of Right and Charters of investing in England were made to limit the prerogatives of Princes, and not the powers of the Legislature."

¹⁵² Fisher Ames wrote to George R. Minot, July 23, 1789: "The Judicial Bill is to be taken up next Monday. If that should not occupy us longer than the spirit of fair inquiry may demand, we shall adjourn in six weeks, I dare not indulge the hope of it." See *Massachusetts Centinel*, Aug. 5, 1789. "The Judiciary Bill will be taken up tomorrow in our House, and I think, will be warmly opposed, but it may now pass notwithstanding." On Aug. 8, 1789, the *Massachusetts Centinel* stated under date of Aug. 2, from New York: "The Judiciary Bill has not been taken up in the House yet. It is expected to come on the carpet."

from each State — Vining of Delaware, Madison of Virginia, Baldwin of Georgia, Sherman of Connecticut, Burke of South Carolina, Clymer of Pennsylvania, Gilman of New Hampshire, Benson of New York, Goodhue of Massachusetts, Boudinot of New Jersey, Gale of Maryland. “I hope much debate will be avoided by this mode,” wrote Ames, “and that the Amendments will be more rational and less *ad populum*, than Madison’s. It is necessary to conciliate, and I would have Amendments. But they should not be trash, such as would dishonor the Constitution, without pleasing its enemies.”

This Committee was expected to report soon, and a letter from New York to a Boston newspaper, under date of July 26, stated that the Committee “have gone over those Amendments and have selected the principles, and put them into form and will soon be ready to report. The Amendments are of that kind, I understand, as it is presumed will quiet the dissatisfied, without injuring the Constitution. . . . If any others, materially affecting the Constitution, should be moved for, they will certainly be rejected.”¹⁵³

Finally, on August 13, the Select Committee made its report, but its consideration was then opposed by those who thought that the Judiciary Bill ought to be taken up first; for many Members of the House had long believed that it ought to be dealing at once with matters of first importance, rather than with less important matters like Western lands, Home Department, Coasting Trade, Treasury Department, and compensation of officials, on which it had spent its time during these three weeks.¹⁵⁴ William Smith of South Carolina said that that Bill was entitled to preference “both in point of order and in point of propriety. . . . The Legislative and Executive are now in existence; but the Judicial is uncreated. While we remain in this state, not a single part of the several systems can operate; no breach of your laws can be punished; illicit trade cannot be prevented. Greater harm will arise from delaying the establishment of the Judicial system than can possibly grow from a delay of the other subject. . . . The Judiciary is an essential part of the Government, and as such ought not to remain a single

¹⁵³ *Massachusetts Centinel*, Aug. 5, 1789.

¹⁵⁴ 1st Cong., 1st Sess., 704 *et seq.*, Aug. 13, 1789.

instant in a state of torpidity." Thomas Hartley of Pennsylvania, Elbridge Gerry of Massachusetts, and John Lawrence of New York — all lawyers — agreed with Smith. Madison, on the other hand, thought that the House ought to consider the Amendments first, and his motion to that effect was carried.¹⁵⁵

The proposed Amendments were then debated exhaustively for nine days from August 14 to 24 while the Senate's Judiciary Bill was laid aside. On August 17, the first Amendment relative to the Judiciary, proposed by the Committee, was taken up — to amend Article Three, Section Two of the Constitution, relative to the jurisdiction of the Supreme Court, by adding the following: "But no appeal to such Court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by a jury according to the course of the common law be otherwise re-examinable than according to the rules of common law." Madison advocated this Amendment, saying that, while "there is little danger that any Court in the United States will admit an appeal where the matter in dispute does not amount to a thousand dollars, yet as the possibility of such an event has excited in the minds of many

¹⁵⁵ Fisher Ames wrote to Minot, Aug. 12, 1789: "We are beginning the Amendments in a Committee of the Whole. We have voted to take up the subject in preference to the Judiciary, to incorporate them into the Constitution, and not to require, in Committee, two thirds to a vote. This cost us the day. Tomorrow we shall proceed. . . . We shall make a dozen or two of rights and privileges for our posterity. . . . It will consume a good deal of time and renew the party struggles of the States. . . . However, I am persuaded it is proper to propose Amendments without delay, but if the antis affect to say that they are of no consequence, they may be reproached with their opposition to the government, because they protested that the principles were important." Bishop James Madison wrote to Madison, Aug. 15, 1789: "That the business of Amendments has been entered upon in so dispassionate a manner must afford real satisfaction to every friend to the Union. Some of those proposed appear to be important, at least in removing the objections of many of the opponents to the Constitution tho' I do not observe that the Committee has proposed such as appear of the first magnitude. Would it not be advisable to seize the present moment to render the Constitution more perfect, the most essential parts; or to do away those defects which its warmest friends admit must eventually, if continued, render the Government less prosperous. . . . Such an exposition of those alterations which would really render the government more perfect would at least have this important effect; it would fix the public mind upon those great and necessary improvements; it would thus be gradually prepared for them, and time might bring about what the spirit of faction might now prevent." MADISON PAPERS, MSS.

citizens the greatest apprehension that persons of opulence would carry a cause from the extremities of the Union to the Supreme Court, and thereby prevent the due administration of justice, it ought to be guarded against.”¹⁵⁶ The latter portion of the Amendment was framed to avert the fears of those who considered that the Constitution, in providing for an appellate jurisdiction of the Court as to matters of fact as well as of law, was introducing the civil law system. The Amendment as proposed by the Committee was adopted, after a defeat of a proposition by Sedgwick of Massachusetts to fix the monetary limit at \$3000. And on August 18 the Committee of the Whole reported to the House the Amendments as amended by the Select Committee. Tucker of Virginia then moved that seventeen further Amendments proposed by him be referred to the consideration of the Committees of the Whole. Among these new Amendments was one which would have entirely changed the constitutional scheme of the Federal Courts; for Tucker now proposed the plan which had been put forward by the States of Virginia and North Carolina, and which Richard Henry Lee had tried to persuade the Senate to adopt in the Judiciary Act — but without success — namely, to eliminate the power of Congress to appoint “tribunals inferior to the Supreme Court,” and to abolish the vesting of Federal judicial power in “such inferior Courts as Congress may from time to time ordain and establish,” and to confine such inferior Courts to Courts of Admiralty. Another of Tucker’s Amendments repealed that portion of Article Three, Section Two of the Constitution which vested Federal judicial power over “controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or other citizens thereof, and foreign States, citizens or subjects,” and in its place Tucker proposed to substitute a very narrow jurisdiction over “controversies between a State and foreign States, and between citizens of the United States claiming the same lands under

¹⁵⁶ As early as Jan. 2, 1789, Madison had written to George Eve: “I think it will be proper also . . . to put the Judiciary Department into such form as will render vexatious appeals impossible.”

grants of different States.”¹⁵⁷ The motion was defeated. On August 21, the House considered the report of the Committee of Eleven and adopted sixteen of the seventeen Articles recommended. Article XVII, which was as follows: “The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively,” became the subject of vigorous debate on the proposition to insert the word “expressly” before the word “delegated.” The change was defeated by a vote of 17 to 32. On August 22, Tucker renewed his motion that the inferior Federal Courts should be confined to Courts of Admiralty, and again it was defeated. Finally on August 24, the Articles of Amendments, seventeen in number, were adopted and sent to the Senate. Their progress, wrote Madison, “has been exceedingly wearisome, not only on account of the diversity of opinions that was to be apprehended, but of the apparent views of some to defeat, by delaying, a plan, short of their wishes, but likely to satisfy a great part of their companions in disposition, throughout the Union. It has been absolutely necessary, in order to effect anything, to abbreviate debate and exclude every proposition of a doubtful and unimportant nature. Had it been my wish to have comprehended every Amendment recommended by Virginia, I should have acted from prudence the very part I have been led by choice. Two or three contentious additions would, even now, prostrate the whole project.”¹⁵⁸ It may be noted that provisions of four Articles, so adopted respecting the Judiciary, do not appear in the Amendments as finally submitted to the people, one being rejected by the Senate as too restrictive of the States, the others being substantially provided for in the final draft of the Judiciary Act and in the Seventh Amendment. They were as follows: a provision in Article X that all criminal trials should be “by an impartial jury of the vicinage;” a portion of Article XII providing that “no appeal to the Supreme Court of the United States shall be allowed where the value in controversy shall not amount to one thousand dollars;” Article

¹⁵⁷ 1st Cong., 1st Sess., Aug. 18, 1789; HOUSE JOURNAL, 82, 83, Aug. 18, 1789, amending Article I, § 8, cl. 9, and Article III, § 2.

¹⁵⁸ 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, 191, Madison to Edmund Randolph, Aug. 21, 1789.

XV that "in suits at common law, the right of trial by jury shall be preserved;" Article XI that "no State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech or of the press."¹⁵⁹ This latter article had been proposed by Livermore of New Hampshire. Tucker of Virginia had said: "It will be much better to leave the State Governments to themselves and not to interfere with them more than we already do; and that is thought by many to be rather too much. . . ." Madison, on the other hand, had said that he conceived this Amendment to be the most valuable in the whole list; that it was equally necessary to restrain the State Governments as well as the United States Government from infringing upon these essential rights, and he was satisfied that it would be equally grateful to the people.¹⁶⁰

Madison's prominent part in proposing and advocating these Amendments greatly pleased his political opponents. "A very considerable change has taken place amongst the Anti's as to yourself," wrote Edward Carrington. "They consider you as the patron of Amendments, and it is no common thing to hear confessions that they had been formerly imposed on, by representations that you were fixed against any alterations whatever. . . . Indeed I see no appearance of anything but acquiescence in whatever may be agreed on by those whom they have detailed (?) to take care of their affairs." And Dr. Stuart wrote to Washington: "The success of the Amendments will leave but a few scattering opponents. Mr. Madison will be a

¹⁵⁹ See article in *New York Daily Advertiser*, July 3, 1789, in which it is said as to this Amendment restrictive of the States: "How unsurmountable are the obstructions to the progress of tyranny which this inestimable proposition will create."

That there was a sentiment that the Bill of Rights ought to be made restrictive upon the States as well as upon Congress was shown by a New York letter in the *Pennsylvania Packet*, Aug. 29, 1789, in which it was said: "It is to be regretted that there are not more restrictions imposed upon individual governments by the Constitution to secure the equal rights of the people. Is it not astonishing that the only idea of abuse of power which some persons seem to apprehend is from the general government . . . when in retracing a few pages of very modern history, we find that individual States have been guilty of stretches of power and acts of oppression which, should the General Government be so abandoned and infatuated as to commit, would immediately produce another revolution."

¹⁶⁰ 1st Cong., 1st Sess., Aug. 17, 1789, p. 756.

very popular character hereafter on the south side of James River.”¹⁶¹ On the other hand, some of the more ardent Federalists deplored Madison’s course; and Richard Peters of Pennsylvania wrote:

“I believe that a firmness in adhering to our Constitution till at least it had a longer trial would have silenced Anti-Federalists sooner than by magnifying their importance by acknowledgments on our part, and of ourselves holding up a banner for them to rally to. All you offer comes not up to their desires, and as long as they have one unreasonable wish ungratified the clamour will be the same. I know there are among them good characters, but many of those who lead do it not from other motives than to make or keep themselves heads of a Party. Our character abroad will never acquire consistency while foreigners see us wavering even in our Government, about the very instrument under which that Government acts. In short, I fear worse consequences from the good disposition of the conciliators (especially now when some things done by Congress have startled even many Federalists) than I apprehend from an adherence to the system.”

On the day of the passage of the Amendments by the House, August 24, that body, having postponed action for six weeks after the Senate had passed the Judiciary Bill, took that measure up for debate.¹⁶² It was not highly approved by Madison, who wrote that: “In many points, even supposing the outline a good one, which I have always viewed as controvertible, defects and inaccuracies were striking.”¹⁶³ And Monroe wrote to Madison: “That [the Bill] to embrace the Judiciary will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the Government itself, and show in the opinion of those who organized it, how far it can

¹⁶¹ 5 DOCUMENTARY HISTORY OF THE CONSTITUTION, 202, 192, 205; MADISON PAPERS, MSS., Carrington to Madison, Sept. 9, 1789, Peters to Madison, Aug. 24, 1789.

¹⁶² Madison wrote to Edmund Randolph, Aug. 21, 1789, that the Judiciary Bill was put off in favor of the Amendments but that it was evident that a longer delay “would prevent any decision on it at this session. A push was therefore made, which did not succeed without strenuous opposition. On Monday, the Bill will probably be taken up, and be pursued to a final question, as fast as the nature of the case will allow.”

¹⁶³ Madison to Pendleton, July 15, 1789, thanking him for his suggestions as to changes in the Judiciary Bill in his letter of July 3.

discharge its own functions, or must depend for that purpose on the aid of those of the States. Whatever arrangement shall be now made in that respect will be of some duration, which shows the propriety of a wise provision in the commencement.”¹⁶⁴

The discussion in the House opened with a vigorous attack by the pertinacious Tucker of Virginia upon Section 3 of the Bill providing for District and Circuit Courts. He now once more moved to confine the inferior Federal Courts to Courts of Admiralty, evidently thinking that he might now succeed, since an amendment to the bill required only a majority vote, while a vote on a Constitutional Amendment had required a two-thirds vote. The debate on this point was reported at considerable length in the newspapers.¹⁶⁵ Tucker's chief point was that the State Courts were fully adequate to deal with all Federal matters. Livermore of New Hampshire supported him, saying that “he contemplated with horror the effect of the plan,” and thought that he could see “a foundation laid for discord, civil wars, and all its concomitants.” William Smith of South Carolina warmly favored the provisions of the Bill, and thought the jurisdiction of the District Courts too confined rather than too extensive; he pointed out, moreover, that the Constitution granted no authority to Congress to vest Judicial power in State Courts. Jackson of Georgia opposed the system as unnecessary, vexatious and expensive, “calculated to destroy the harmony and confidence of the people;” and he argued that the power given to the Supreme Court by the twenty-fifth section of the Bill to review the decisions of State Courts on Federal questions was sufficient to bring about a compliance with Federal law by State Judges; he pointed out defects in other parts of the Bill, and concluded by expressing his hope that the House would not adopt it until a milder system should be tried. “It is calculated to foment and harass the people without answering any essential purpose.” Benson and Lawrence of New York and Sedgwick and Ames of Massachusetts favored the Bill,¹⁶⁶ and

¹⁶⁴ 1 WORKS OF JAMES MONROE, Monroe to Madison, Aug. 12, 1789.

¹⁶⁵ 1st Cong., 1st Sess., 783 *et seq.*, 796 *et seq.*, Aug. 24, 29, 31, Sept. 8, 10, 12, 14, 17, 1789.

¹⁶⁶ Ames wrote to Minot, Sept. 3, 1789: “You will see by the papers, what pace we move in the discussion of the Judiciary Bill. The question whether

Madison eloquently defended it, saying that a review of the system of the Courts in many States "will satisfy us that they cannot be trusted with the execution of the Federal laws. . . . In some, they are so dependent on State Legislatures that to make the Federal laws dependent on them would throw us back into all the embarrassments which characterized our former situation. In Connecticut, the Judges are appointed originally by the Legislature and the Legislature is itself the last resort in civil causes. In Rhode Island, the case is at least as bad." In Pennsylvania and Georgia, the Judges are appointed for short terms and with salaries absolutely dependent on Legislative favor, "thus rendering them by no means independent." Vining of Delaware aided Madison in supporting the Bill. Most extraordinary of all its champions was Elbridge Gerry, for hitherto he had been strongly opposed to the whole Federal system. He now took the position that the Constitution required Congress to establish these inferior Federal Courts, that Admiralty Courts alone could not administer Federal law; and in this early debate this ardent Anti-Federalist admitted the power of the Supreme and other Federal Courts to pass upon the validity of statutes, for he said: "The Constitution will undoubtedly be their first rule; and so far as your laws conform to that, they will attend to them, but no further."¹⁶⁷ Thomas Sumter of South Carolina, on the other hand, said the present Bill was "a system of oppression which the people neither desired nor were prepared to receive," and Aedanus Burke of South Carolina was also opposed, principally to Section 29, relative to jury trial in criminal cases, which, he felt "insidiously strips the citizen of this happy privilege" of a trial by a jury of the vicinage.

The general effect of the debate was described in the newspapers, on August 30, as follows: "The Judiciary Bill has been

we shall have inferior tribunals (except Admiralty Courts, which were not denied to be necessary) was very formidably contested. Judge Livermore and ten others voted against them. You will see in *Fenno's Gazette* my speechicle on the subject. The lawyers consider my idea of the exclusive nature of certain parts of the National Judicial power (offences against statutes and actions on statutes) in various points of light. . . . If my distinction between jurisdiction and the rule of decision in causes properly cognizable in a State Court should be clearly understood, they will have the means of judging on the merits of my argument."

¹⁶⁷ 1st Cong., 1st Sess., Aug. 31, 1789, p. 827.

taken up. The 3rd Section was yesterday debated with great ingenuity. There is a warm opposition to the clause for establishing District Courts, which are the essence of the whole system. There is, however, I am told, a large majority in favour of their establishment, and the substance of the bill will undoubtedly be adopted. In the course of a few days, it has been seen that there are more weapons than one to give the Constitution its *quietus*. This would be one. For if you take from Congress the power of establishing Courts, its authority is but a name.”¹⁶⁸

On August 31, Tucker’s and Livermore’s motion to strike out Section 3 as to District Courts was defeated by a vote of eleven to thirty-one.¹⁶⁹

The propriety of the provisions of the Judiciary Bill now again became involved with the question as to how far the Constitution was to be amended; for since the Senate was considering extensive changes in the Articles of Amendment which had passed the House, the latter body decided again to lay aside the Bill, in order to await the Senate’s action. “The Judicial slumbers,” wrote Fisher Ames, “and when it shall be resumed, will probably pass, as an experimental law, without much debate or amendment, in the confidence that a short experience will make manifest the proper alterations.”¹⁷⁰

In the Senate, the debate on the subject of the Amendments lasted from September 2 to 13. Many Senators who had voted for the Judiciary Bill under the belief that their own views could be better carried out by Amendments to the Constitution than by opposing the Bill, now brought forward their desired Amendments. Their first attack was made upon the Judiciary provisions of the Constitution, based on grounds which were well set forth in an article which had just appeared in a prominent Anti-Federalist newspaper, as follows:

“By far the most weighty and conclusive objection against the new Constitution in its present form is that it will necessarily and speedily produce a consolidated or national government; by superseding and

¹⁶⁸ *Massachusetts Centinel*, Sept. 5, 1789.

¹⁶⁹ A correspondent of the *Salem Mercury*, Sept. 15, 1789, gives the vote as 11 to 33.

¹⁷⁰ Ames to Minot, Sept. 3, 1789.

annihilating in its operation, the several State Governments, which from the nature of things would in so extended a territory be an iron handed despotism. . . . subversive of all liberty. . . . The legislative power vested in Congress is so unlimited in its nature; may be so comprehensive and boundless in its exercise that this alone would be amply sufficient to annihilate the State governments and swallow them up in the grand vortex of general empire. The judicial powers vested in Congress are also so various and extensive that by legal ingenuity they may be extended to every case, and thus absorb the State Judiciaries; and when we consider the decisive influence that a general judiciary would have over the civil polity of the several States, we do not hesitate to pronounce that this power, unaided by the legislative, would effect a consolidation of the States under one government. As an instance of the unlimited jurisdiction of the Federal Judiciary, I will only select one of the many objects that are made cognizable by it, in order to illustrate how conclusively comprehensive that one may be made to the annihilation of the State Judiciaries: Section 2 of the new government — ‘the judicial power shall extend to all cases in law and equity, etc. to all controversies between citizens of different States.’ Here, then, is a Section which will enable any person having any manner of controversy, whether it respects real or personal estate, to bring the matter in dispute into the Federal Judiciary, by making an assignment of his demand to a citizen of another State, whose name he may thus borrow to make his case cognizable in the Federal Court. After this sweeping jurisdiction, added to its auxiliaries, what will remain for the State Courts? Nothing that can prevent their being reduced to cyphers. However, it will be said, that Congress in the proposed Judiciary Bill, have prohibited such assignments of demands. But to this I reply that this is but a legislative regulation, that, when the public ferment is lulled, may be at any time repealed; and that this is the intention no one can doubt when he beholds this very Congress, who are about making this present restriction on the unlimited jurisdiction of the Federal Courts, decidedly refusing to make it a fundamental alteration to the form of government; yea, refusing even to refer the consideration of such a stipulation to a committee. Consequently, the present restraint upon the Federal Judiciary is but an emanation of that lulling policy which characterizes the proposed Amendments.”¹⁷¹

¹⁷¹ “Centinel Revived” in *Independent Gazetteer* (Phil.), Aug. 29, 1789. See *ibid.*, Sept. 9, 1789, an attack made on the failure of the Judiciary Bill to prohibit suits in the Federal Courts on assignments of real estate.

The first move was for a restriction of the Federal jurisdiction in cases of diverse citizenship, through the Amendment proposed by Massachusetts and New Hampshire as follows:

“The Supreme judicial federal Court shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute, whether it concerns the realty or personalty, be of the value of three thousand dollars at the least, nor shall the federal judicial powers extend to any actions between citizens of different States where the matter in dispute, whether it concerns the realty or personalty, is not of the value of fifteen hundred dollars at the least; and no part, triable by a jury according to the course of the common law, shall be otherwise re-examinable than according to the rules of common law.”

This Amendment was defeated.¹⁷²

The following House Amendment, framed to satisfy those who feared that Congress might give the Supreme Court power to review facts as well as law in common law cases, as follows: “No fact, triable by a jury according to the course of common law, shall be otherwise re-examinable in any Court of the United States, than according to the rules of common law,” was adopted by the Senate; and later it was combined with another House Amendment so as to read (as in the present Seventh Amendment): “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 common law.”

On September 8, a final move was made in the Senate, by those who were opposed to the system of inferior Federal Courts and to all jurisdiction over cases of diverse citizenship, to obtain the adoption of the Amendment recommended by Virginia, which had already been defeated in the Judiciary Bill debate in the Senate, and twice in the House, when proposed both as an Amendment and as a part of the Bill. The proposal was now again defeated in the Senate.¹⁷³

¹⁷² See SENATE JOURNAL, Sept. 4, 1789, 1st Cong., 1st Sess.

¹⁷³ See SENATE JOURNAL, Sept. 8, 1789, 1st Cong., 1st Sess., Amendment as follows: “That the judicial power of the United States shall be vested in one Supreme Court and in such Courts of Admiralty as Congress may, from time

No other Amendments were voted upon, so far as is disclosed by the Senate Journal. Finally, on September 10, the Senate sent back twelve Amendments (out of the seventeen adopted by the House) for concurrence of the House. The latter body refused to agree, and a conference Committee of the two branches was appointed.¹⁷⁴ The situation was interestingly described in letters from Madison.¹⁷⁵ On September 14, he wrote:

“The Senate have sent back the plan of Amendments, with some alterations, which strike, in my opinion, at the most salutary Articles. In many of the States, juries, even in criminal cases, are taken from the State at large; in others from districts of considerable extent; in very few from the county alone. Hence, a dislike to the restraint with respect to vicinage which has produced a negative in that clause. A fear of inconvenience from a Constitutional bar to appeals below a certain value, and a confidence that such a limitation is not necessary have had the same effect on the Article. Several others have had a similar fate. The difficulty of uniting the minds of men accustomed to think and act differently can only be conceived by those who have witnessed it.”

to time, ordain and establish in any of the different States; the judicial powers shall extend to all cases in law and equity arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; and between parties claiming lands under the grants of different States. In all cases affecting ambassadors, other foreign ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only, except in cases of equity and of admiralty and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make. But the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of this Constitution; except in disputes between States about their territory, disputes between persons claiming lands under the grants of different States and suits for debts due to the United States.”

¹⁷⁴ See *Massachusetts Centinel*, Sept. 26, 1789, letter from New York of Sept. 20: “The Amendments as amended by the Senate were yesterday brought on the carpet and again amended. What the Senate has done does not suit. I believe it will be extremely difficult to obtain a coincidence of sentiment on this subject.”

¹⁷⁵ Madison to Pendleton, Sept. 14, 23, 1789.

And on September 23, he wrote:

“The pressure of unfinished business has suspended the adjournment of Congress till Saturday next. Among the Articles which required it was the plan of Amendments, on which the two Houses so far disagreed as to require conference. It will be impossible, I find, to prevail on the Senate, to concur in the limitation on the value of appeals to the Supreme Court, which they say is unnecessary, and might be embarrassing in questions of National or Constitutional importance in their principle, though of small pecuniary amount. They are equally inflexible in opposing a definition of the locality of juries. The ‘vicinage’ they contend is either too vague or too strict a term, too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the country. It was proposed to insert after the word ‘juries’ ‘with the accustomed requisites,’ leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. . . . The Senate suppose also that the provision for ‘vicinage’ in the Judiciary Bill will sufficiently quiet the fears which called for an Amendment on this point. On a few other points in the plan the Senate refuse to join the House of Representatives.”

The more extreme anti-Federal point of view and his especial dissatisfaction with the form of the Bill of Rights, were shown in letters of Richard Henry Lee, who wrote that the Amendments had passed the Senate “with difficulty, after being much mutilated and enfeebled.” Writing to Patrick Henry, he said:

“As they came from the House of Representatives, they were far short of the wishes of our Convention; but as they are returned by the Senate, they are certainly much weakened. You may be assured that nothing on my part was left undone to prevent this, and every possible effort was used to give success to all the Amendments proposed by our country. We might as well have attempted to move Atlas upon our shoulders. . . . The great points of free election, jury trial in criminal cases, and the unlimited right of taxation, and standing armies remain as they are. The most essential danger from the present system arises, in my opinion, from its tendency to a consolidated government, instead of a union of confederated States. . . . Some valuable rights are indeed declared, but the power to violate them to all intents and purposes remains unchanged.”

And writing a week later, he said: “Your observation is perfectly just that right, without power to protect it, is of little

avail. . . . Yet small as it is, how wonderfully scrupulous they have been in stating rights. The English language has been carefully culled to find words feeble in their nature or doubtful in their meaning.”¹⁷⁶

While the Senate and the House were trying to compose their differences on the Amendments, the House took up the Judiciary Bill for final discussion.¹⁷⁷ That it was unsatisfactory even to many Federalists was shown by a letter from Madison to Edmund Pendleton, of September 14: “I view it as you do, as defective in its general structure and many of its particular regulations. The attachment of the Eastern members, the difficulty of substituting another plan with the consent of those who agree in disliking the bill, the defect of time, etc., will, however, prevent any radical alteration. The most I hope is that some offensive violations of Southern jurisprudence may be corrected, and that the system may speedily undergo a reconsideration under the auspices of the Judges who alone will be able, perhaps, to set it to rights.” The Bill finally passed the House on September 17, without further material change.¹⁷⁸ While the House Journal does not give in detail the amendments made to the Bill in the House, it appears that they were at least fifty-two in number,¹⁷⁹ but as they were not essential in their nature, all but

¹⁷⁶ Lee to Francis Lightfoot Lee, Sept. 13, 1789; Lee to Patrick Henry, Sept. 14, 27, 1789.

¹⁷⁷ In the House, the Bill was read for a first and second time, on July 20, 1789, and ordered committed to the Committee of the Whole; it was considered in Committee, Aug. 29, 31, Sept. 8, 9, 11, 12, 14; the amendments were considered by the House, Sept. 14, 15, 16; the Bill was read a third time and passed, Sept. 17. See HOUSE JOURNAL.

¹⁷⁸ The recent discovery in the Senate Files of the draft of the Bill as it passed the Senate has made it possible to ascertain the House amendments, by comparing that draft with the Act as finally passed; and on such comparison it appears that the House Amendments were merely verbal in nature and made no essential alteration in the Bill.

¹⁷⁹ From the Senate Journal, Sept. 19, 1789, 1st Cong., 1st Sess., it appears that after reference to a Committee consisting of Ellsworth, Paterson and Pierce Butler, the Senate agreed to the House Amendments except to the 9th, 16th, 41st and 52nd; and it amended Section 29 of the Act, as to the juries in criminal cases, by adding the first clause contained in the Act as finally passed. See *supra*. The Senate Files contain the original paper stating the Senate's action.

According to the House Journal, Sept. 21, 1789, the House resolved “that this House doth recede from the 9th, 16th, 41st and 52nd Amendments to the Bill and doth agree to the modification and amendment of their 48th Amendment as proposed by the Senate.”

five were accepted by the Senate. Four of the House amendments were rejected by the Senate, and the fifth, that as to juries in criminal cases, was modified by the Senate. The House receded from its four amendments thus rejected and accepted the Senate's modification on September 21. The Judiciary Bill, in its final form, was signed by the President on September 24, and on the same day, the Senate and House finally agreed on the final form of the twelve Amendments to the Constitution to be submitted to the States.

As has been stated, the Judiciary Act was a measure in the nature of a compromise between the extreme Federalist view that the full extent of judicial power granted by the Constitution should be vested by Congress in the Federal Courts, and the view of those who feared the new Government as a destroyer of the rights of the States, who wished all suits to be decided first in the State Courts, and only on appeal by the Federal Supreme Court. That the compromise was both wise and successful was seen from the fact that it was not until the lapse of forty-five years that jurisdiction of the Federal Courts was increased, to any substantial extent, when the Removal Act of 1833 was passed; and until the lapse of another thirty years when the broader Removal Acts of 1861, 1866 and 1867 were passed. It was eighty-six years before legislation was enacted, in 1875, vesting the Federal Circuit Courts with jurisdiction in all cases arising under the Federal Constitution and laws.

With the present congestion of the dockets of the Federal Courts, the question may well be asked by lawyers and legislators whether it would not now be wise to return to the provision of the original Judiciary Act, which worked so well for so long a period, and to cut down to its early dimensions the original jurisdiction of the inferior Federal Courts. All the various laws providing for removal of cases from the State Courts into the Federal Courts were passed to meet emergency conditions, in times of Nullification, Civil War and Reconstruction. The occasion for these statutes no longer exists; and their repeal may well be considered advisable. If the occasion for them should revive, they could easily be re-enacted. Or, if complete abolition of Removal Acts is regarded as too radical, it would seem that the only such statute now necessary is that

which allows removal from a State Court in a case where local prejudice is averred and proved to the satisfaction of the Federal Court.

Similarly, cases arising under the Federal laws and Constitution might now be left to come to the Supreme Court of the United States through the State Courts (or at least excepting those cases arising under certain Federal statutes which might especially require Federal execution). So, too, it might be wise to return to the original early practice of making many Federal statutes enforceable by the State Courts, if the latter assented. Further, the original reasons, extant in 1789, for the diverse citizenship jurisdiction of the inferior Federal Courts, have now almost entirely disappeared, and this jurisdiction might well be radically cut down, especially with reference to corporations doing business in States outside of their charter States.

The efforts now made to relieve the pressure upon the Supreme Court by cutting off the classes of cases which may be considered by that Court on appeal or writ of error might well be supplemented by determined effort to cut off these cases, *not* at the Supreme Court end but at the District Court end; in other words by turning the stream of cases at their source, out of the District Court conduit, and into and through the State Courts.

It is in its bearing on these phases of the law of Federal jurisdiction that a close study of the Judiciary Act of 1789 is worth the while of all students of our peculiar Federal system.

Charles Warren.

WASHINGTON, D. C.