

## ARTICLES

### FINISHING A FRIENDLY ARGUMENT: THE JURY AND THE HISTORICAL ORIGINS OF DIVERSITY JURISDICTION

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*This Article argues that diversity jurisdiction was intended to funnel politically significant litigation into the federal courts principally because federal officials would have the power to dictate the composition of federal juries. All existing accounts for the origins of diversity jurisdiction ultimately rely upon putative differences between the state and federal benches for their explanations of the jurisdiction's origin. This emphasis on the bench is anachronistic, however, because the jury possessed far more power than the bench to decide cases in eighteenth-century American courts. American juries during this period customarily had the right to decide issues of law as well as fact and were largely beyond the control of the bench. The Framers saw state court juries—independent bodies of citizens with almost unfettered power to resolve legal disputes—as one of the greatest dangers in allowing ordinary citizens too much control over the governance of the nation. By wresting adjudicative power out of the hands of state court juries and bestowing it upon federal juries whose compositions could be tightly controlled by federal officials, diversity jurisdiction accomplished the Constitution's overarching purpose of checking the operation of “unrestrained” democracy in the states.*

*Once the federal courts were established, federal officials controlled the composition of federal juries in several ways. In most districts, federal marshals dictated the composition of federal juries by hand-selecting jurors of their choice. In addition, Congress ensured that the political, economic, and social characteristics of federal juries would differ dramatically from their state counterparts by providing that the federal courts would draw their juries overwhelmingly from the urban, commercial centers of the nation. The state courts, by contrast, drew their juries predominantly from the agrarian populations living outside those centers. It is highly unlikely that this pervasive control over the composition of federal juries was an unintended consequence of the Constitution. Instead, as this Article argues, the evidence strongly suggests that the federal officials' control over the composition of federal juries constituted the single most important impetus behind the creation of diversity jurisdiction and a significant rationale for the establishment of the lower federal courts.*

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INTRODUCTION

Many judges and practitioners today view diversity jurisdiction as an anomaly. The bulk of the federal courts’ dockets today are comprised of cases implicating the interpretation and enforcement of federal law.<sup>1</sup> Diversity jurisdiction,<sup>2</sup> which requires the federal courts to interpret and enforce state or foreign law in the adjudication of disputes between citizens of different states or nations, has been widely criticized as an unnecessary distraction from the federal courts’ pri-

<sup>1</sup> During fiscal years 2002 to 2006, fifty-six percent of the civil cases filed in the United States District Courts involved federal question controversies between private litigants and another nineteen percent involved the United States government as either plaintiff or defendant. ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 22 (2007), available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf>. During the same period, diversity cases comprised twenty-five percent of the total number of civil filings in the district courts and twenty percent of the total civil and criminal filings. See *id.* at 22, 26 (listing total number of diversity, civil, and criminal cases filed in district court each year from 2002 to 2006).

<sup>2</sup> In this Article, I use the term “diversity jurisdiction” to refer to the federal courts’ jurisdiction over both claims between citizens of different states and claims between citizens of foreign states and American citizens. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . . between Citizens of different states . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”). Scholars who want to distinguish the courts’ jurisdiction over cases involving citizens of different states from that involving foreign citizens and American citizens typically refer to the former as “diversity” jurisdiction and the latter as “alienage” jurisdiction. See, e.g., Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT’L L. 1, 3–5 (1996) (arguing for “analytically distinct” treatment of alienage and diversity jurisdiction). Because this author believes that the underlying purposes for their creation were essentially the same, both will be analyzed as diversity jurisdiction for the purposes of this Article.

mary functions.<sup>3</sup> As recently as 1978, legislation has been introduced in Congress that would have eliminated diversity jurisdiction entirely.<sup>4</sup>

Despite its marginalization in the minds of many modern scholars and practitioners, however, diversity jurisdiction is fundamental to our understanding of the historical origins of the lower federal courts. Ironically, the primary impetus behind the creation of these courts may have had little to do with “federal questions,” i.e., the interpretation and enforcement of federal statutes and the U.S. Constitution.<sup>5</sup> In the Judiciary Act of 1789, the first Federal Congress—which included a large number of Framers who had attended the Constitutional Convention<sup>6</sup>—entrusted the state courts with exclusive trial jurisdiction over those cases “arising under” the U.S. Constitution and federal statutes.<sup>7</sup> The appellate oversight of the United States Supreme Court was deemed sufficient to address any

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<sup>3</sup> Justices Frankfurter and Jackson, for example, each argued for the complete abolition of diversity jurisdiction. See *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (calling diversity jurisdiction “the mounting mischief inflicted on the federal judicial system”); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 37 (1955) (stating that abolition of diversity would be “the greatest contribution that Congress could make to the orderly administration of justice in the United States”); see also FED. COURTS STUDY COMM., *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 38–42 (1990) (arguing that diversity jurisdiction should be dramatically curtailed). By comparison, many scholars have noted the federal courts’ unique qualifications for adjudicating federal claims. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105–06 (1977) (criticizing assumption that federal and state courts are equally competent fora for adjudicating federal constitutional rights); see also Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 104 (“[D]iversity jurisdiction forces federal courts to decide issues on which they have no special expertise at the expense of tasks they can perform significantly better than state courts.”). But see James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1 (1964) (arguing for expansion, rather than curtailment, of diversity jurisdiction).

<sup>4</sup> See H.R. 9622, 95th Cong. (1978) (proposing abolition of diversity jurisdiction); S. 2389, 95th Cong. (1978) (same); see also H.R. 2404, 97th Cong. (1981) (proposing to abolish diversity jurisdiction—suits between citizens of different states—though retaining “alienage” jurisdiction—suits between Americans and foreigners).

<sup>5</sup> It is debatable whether the Framers envisioned a world in which federal law would rival the laws of the states in terms of its volume or importance. In a study revealing the dearth of federal statutory issues raised during the first several decades of the federal government’s existence, Anthony Bellia found only seventy-four reported state cases that involved questions of federal statutory interpretation during the first thirty-one years after the Judiciary Act. Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1529 (2006). It remains unclear how strong a conclusion his findings permit, however, given that cases were only sparsely reported in this time period. *Id.*

<sup>6</sup> See *infra* note 245 (discussing members of first Congress who attended Constitutional Convention).

<sup>7</sup> See Judiciary Act of 1789, ch. 20, §§ 9–12, 1 Stat. 73, 76–79 (codified as amended in scattered sections of 28 U.S.C.) (excluding federal question jurisdiction from express grants of jurisdiction to federal courts, thereby leaving it to state courts).

inadequacies that may have existed in the state courts. In fact, nearly a century elapsed before the federal trial courts assumed permanent jurisdiction over federal questions.<sup>8</sup>

Unlike federal questions, however, diversity jurisdiction appears to have been a matter of such immediate importance to the Framers and the first Federal Congress that it justified, at least in large part, the creation of the lower federal courts. The 1789 creation of a tier of lower federal courts represented a substantial departure from existing practice and many Americans vehemently opposed it. Prior to the ratification of the Constitution there had been no federal trial courts in America.<sup>9</sup> The only national court was the Court of Appeals in Cases of Capture, which heard appeals from the state courts with regard to admiralty matters.<sup>10</sup> At the Constitutional Convention, Pierce Butler of South Carolina cautioned that “such innovations” as the establishment of lower federal courts would be unacceptable to the American people and would engender a “revolt” by the states.<sup>11</sup> Numerous delegates to the state ratification conventions argued against the creation of a federal trial court system on the grounds that it would be an unnecessary encroachment on state judiciaries.<sup>12</sup>

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<sup>8</sup> The Judiciary Act gave the Supreme Court appellate jurisdiction over federal questions decided by the highest court of a state in cases where the federal right being asserted had been denied. § 25, 1 Stat. at 85–86. The Federalist Congress of 1801 conferred federal question jurisdiction on the federal courts in the so-called Midnight Judges Act. *See* Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92 (repealed 1802) (giving courts “cognizance” of all cases “arising under” Constitution and federal laws). The incoming Republican Congress, however, repealed the law just over a year later, *see* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (codified as amended at 28 U.S.C. § 1331) (repealing Midnight Judges Act), and the federal courts were not given jurisdiction over federal questions again until 1875, *see* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (setting forth jurisdiction of federal courts, including federal question jurisdiction).

<sup>9</sup> *See generally* HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775–1787* (1977) (describing Court of Appeals in Cases of Capture as first federal court).

<sup>10</sup> *See id.* at 78 (discussing limited jurisdiction of Court of Appeals in Cases of Capture); *see also* 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME I: ANTECEDENTS AND BEGINNINGS TO 1801*, at 147–82 (1971) (same).

<sup>11</sup> 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 125 (Max Farrand rev. ed., 1937) [hereinafter *RECORDS OF THE FEDERAL CONVENTION*] (statement of Pierce Butler of South Carolina) (June 5, 1787); *see also id.* at 124 (statement of John Rutledge of South Carolina criticizing inferior federal courts as “unnecessary encroachment on the jurisdiction [of the States]” (alteration in original)); *id.* at 125 (statement of Roger Sherman of Connecticut criticizing establishment of lower federal courts as unnecessarily expensive duplication of state judiciaries); 2 *id.* at 45–46 (statements of Luther Martin of Maryland and Pierce Butler alleging that inferior federal courts were unnecessary, would incur jealousy, and would interfere with state tribunals).

<sup>12</sup> During the Virginia ratifying convention, Patrick Henry voiced the following concerns about the proposed federal judiciary’s impact on the state courts: “I see arising out of [the Constitution], a tribunal, that is to be recurred to in all cases, when the destruction of the State Judiciaries shall happen; and from the extensive jurisdiction of these para-

Despite this substantial opposition to the creation of lower federal courts, however, the same Congress that entrusted federal questions to the state courts balked at the prospect of allowing them to retain sole power to try diversity suits.<sup>13</sup> Instead, the lower federal courts were created and given jurisdiction over both diversity suits and admiralty claims.<sup>14</sup> In fact, the first Federal Congress took this step despite the fact that diversity jurisdiction was arguably the most controversial aspect of federal jurisdiction contained in the Constitution.<sup>15</sup> Therefore, while the point is subject to debate, the historical evidence suggests that the Constitution provided for lower federal courts at least as much, if not more so, for the purpose of adjudicating diversity and admiralty suits than for resolving federal question controversies.<sup>16</sup>

While diversity appears to have been central to the Framers' interest in establishing the lower federal courts, existing scholarship has failed to provide a persuasive explanation for its origins. Particularly for modern commentators, the Framers' determination to strip the state courts of their diversity claims appears inscrutable in light of

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mount Courts, the State Courts must soon be annihilated." 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1422 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION]; see also Letter from George Mason to George Washington (Oct. 7, 1787), in 8 *id.* at 43, 44 ("The Judiciary of the United States is so constructed & extended, as to absorb & destroy the Judiciarys of the several States.").

<sup>13</sup> The Judiciary Act of 1789 granted the first federal courts the power to hear controversies between citizens of different states and controversies between citizens of a state and foreign citizens, provided that the suit met a threshold jurisdictional requirement of \$500 and one of the parties was a resident of the forum state. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332).

<sup>14</sup> The federal judiciary is established in Article III of the Constitution, which provides for the creation of one Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. In the Judiciary Act, Congress created a two-tiered system of courts to handle all those cases of original jurisdiction that were not expressly reserved to the Supreme Court. See §§ 9–11, 1 Stat. at 76–79 (codified as amended in scattered sections of 28 U.S.C.). The first level, the district courts, dealt almost exclusively with maritime claims. § 9, 1 Stat. at 76. The second level, the circuit courts, handled minor appeals from the district court level and tried the vast majority of nonmaritime cases. See § 11, 1 Stat. at 79 (outlining jurisdiction of circuit courts).

<sup>15</sup> See, e.g., Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923) ("There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists . . . as that which gave them power over 'controversies between citizens of different States.'").

<sup>16</sup> See, e.g., Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989) (arguing that diversity jurisdiction over suits involving foreign citizens was "the single most important grant of national court jurisdiction embodied in the [Judiciary Act of 1789]"); see also Johnson, *supra* note 2, at 3 (arguing that authorization of federal courts to hear alienage cases from inception—and absence of such authorization for federal questions until 1875—"suggests that the leaders of the young nation attached special importance to alienage jurisdiction").

the fact that the state courts were deemed perfectly adequate to adjudicate federal questions for nearly a century.<sup>17</sup> This Article addresses that gap in our understanding by focusing on an aspect of early American judicial history that has been largely ignored in debates about the origins of diversity jurisdiction and the lower federal courts, i.e., the jury. As this Article will demonstrate, the key to understanding the origins of diversity jurisdiction is to recognize the dramatic ways in which federal juries were intended to differ from their state counterparts.

All existing accounts of the origins of diversity jurisdiction are fundamentally deficient in their overreliance upon putative differences between the state and federal benches.<sup>18</sup> Even if the architects of the federal courts expected the federal bench to be superior in some sense to its state court counterparts, the fact remains that juries, rather than judges, were most responsible for deciding cases in the courts of eighteenth-century America.<sup>19</sup> Unlike today, for example, the juries of the eighteenth century generally exercised the right to decide issues of law as well as those of fact.<sup>20</sup> Virtually all of the techniques used by the modern bench to control juries would have been unacceptable to eighteenth-century practice.<sup>21</sup>

Furthermore, one of the Framers' principal goals at the Constitutional Convention was to construct a form of federal government that could check the operation of unrestrained democracy in the states.<sup>22</sup> To many Framers, state court juries were a particularly glaring example of the risks associated with allowing ordinary citizens too much control over the governance of the nation. As an autonomous body of common citizens operating with an almost unfettered power to decide legal controversies,<sup>23</sup> juries represented one of the most direct, and therefore dangerous, forms of democracy at the time.

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<sup>17</sup> One twentieth-century commentator queried: "Why—a mystery truly dark—why did the Congress of 1789 provide that appellate jurisdiction should be sufficient in federal question cases while there should be trial court jurisdiction in diversity cases?" John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROBS.* 3, 28 (1948).

<sup>18</sup> See *infra* notes 88–112 and accompanying text. Some articulations of the modern view rely upon choice-of-law considerations. However, these articulations ultimately also rely upon purported differences between the federal and state benches because they largely assume that the bench—not the jury—would have been responsible for determining which substantive law was applied in the courts. See *infra* notes 90–98 and accompanying text.

<sup>19</sup> See *infra* Part II.A.3.

<sup>20</sup> See *infra* notes 145–52 and accompanying text.

<sup>21</sup> See *infra* notes 151–75 and accompanying text.

<sup>22</sup> See *infra* notes 183–88 and accompanying text.

<sup>23</sup> See *infra* notes 148–82 and accompanying text.

It is far more likely, therefore, that the Framers' determination to create the lower federal courts and bestow them with diversity jurisdiction was attributable to their desire to circumvent state court juries rather than state judges or legislatures. Although individual juries decided private disputes, in the aggregate those private disputes had far-reaching political, social, and economic repercussions for the entire nation.

The creation of the lower federal courts effectively circumvented state court juries because it bestowed federal officials with the power to dictate the composition of federal juries. Throughout the eighteenth century, it was not an uncommon practice for those who controlled the courts to manipulate the composition of juries.<sup>24</sup> At the time of the Constitutional Convention, the majority of states provided local sheriffs with virtually unlimited discretion to impanel juries of their own choosing.<sup>25</sup> The Framers knew that simply adopting the prevailing contemporary state practice would provide federal marshals—the analogues of state sheriffs—with a plenary power to dictate the compositions of federal juries. Similarly, the Framers would have known that it would be a simple task for those administering the federal courts to dictate the geography of the federal jury pools and, in so doing, to pervasively control the political, economic, and social composition of the federal juries.

As this Article will explain, the composition of federal juries was in fact controlled and manipulated by federal officials during the first several decades of the federal courts' existence.<sup>26</sup> The early federal marshals appointed by Washington and Adams were prominent political figures who repeatedly selected federal juries with political, economic, and social orientations that resembled their own.<sup>27</sup> In addition, the architects of the federal courts ensured that the demographics of federal jury pools differed radically from their state court counterparts by providing that federal juries would be drawn overwhelmingly from the urban commercial centers of the country.<sup>28</sup> These cities were the primary sources of support for the new Constitution during the ratification period<sup>29</sup> and offered a much larger pool of wealthy, professional, and college-educated jurors than did the

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<sup>24</sup> See *infra* Part III. During the period leading up to the Revolution, for example, the compositions of American juries were often manipulated by American patriots as a means of frustrating British policy. See *infra* Part II.A.2.

<sup>25</sup> See *infra* note 257 and accompanying text.

<sup>26</sup> See *infra* Part III.

<sup>27</sup> See *infra* notes 259–310 and accompanying text.

<sup>28</sup> See *infra* note 389 and accompanying text.

<sup>29</sup> See *infra* note 432 and accompanying text.

rural state interiors that supplied the majority of state court jurors.<sup>30</sup> As a result, the federal officials' control over the geography of federal jury pools ensured that the jurors who sat in federal court would resemble the nation's early elites far more closely than did the jurors who sat in state court. Federal jurors were more likely to be wealthy, educated, urban, and lawyers or other professionals, and they were far more likely to favor a vigorous (or at least viable) form of federal government than their state counterparts.

The crucial point is that this manipulation and control over the composition of federal juries during the first several decades of the federal courts' existence was neither unforeseen nor unintended. The federal officials' power to control the composition of federal juries was eminently foreseeable in 1787, and was entirely consistent with the Framers' overarching purpose of creating a federal government that would check the operation of direct democracy in the states. In fact, many of those responsible for controlling the composition of federal juries during the early decades of the federal courts' existence were Framers themselves.

Just as the proponents of the Constitution believed that various factors would make the federal legislature and executive superior to their state counterparts—for example, nationwide presidential elections by electors, a relatively small Congress populated by a more elite class of legislators, a more deliberative Senate, larger congressional districts that diffused the influence of “factions,” etc.—the Framers believed that the tight control maintained by federal officials over the selection of juries in federal courts would transform the federal courts into a superior forum, i.e., one that was more aligned with the values and perspectives of the Framers than the state courts. Whereas the mass of ordinary citizens might have had the power to issue the final word in state court cases, federal officials could judiciously exercise their control over federal jury compositions to ensure that only the “better sort” of Americans would decide cases in the federal courts. It was this desire to ensure that important cases were decided by these jurors, rather than a putative desire to wrest cases away from state benches or state legislatures, that constituted the single most important driving force behind the creation of diversity jurisdiction.

Part I of this Article summarizes existing accounts of the origins of diversity jurisdiction and explores their common central weakness, i.e., their overemphasis on putative differences between the state and federal benches. Part II briefly surveys the powers and prerogatives of eighteenth-century juries and discusses the Framers' perception

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<sup>30</sup> See *infra* text accompanying notes 433–40.

that state court juries were a particularly dangerous manifestation of direct democracy. Part III explores the various ways in which the federal courts were established to draw jurors whose political, economic, and social compositions differed dramatically from their state court counterparts. In particular, Part III.A focuses on the federal jury selection procedures as implemented by those who created and administered the early federal courts. Part III.C focuses on ways in which the composition of federal juries was controlled by virtue of the geography of the early federal jury pools. To facilitate the comparison between federal and state jury pools, a detailed empirical study was conducted of the juror population of the New York federal circuit court between the years of 1791 and 1808. The results of this study are provided in Parts III.B and III.C.3.

## I

### FAILURES OF THE EXISTING ACCOUNTS OF THE ORIGINS OF DIVERSITY JURISDICTION

#### *A. Deficiencies in the Traditional “State Bias” Account for the Origins of Diversity Jurisdiction*

The traditional justification for diversity jurisdiction is based on the notion that the federal courts were necessary to provide an “impartial” federal forum that would allow litigants to avoid state prejudices inherent in the state courts.<sup>31</sup> The validity of this traditional account has been repeatedly challenged by modern scholars. Richard Posner, for example, has pointed out that the configuration of the diversity statute—from the first Judiciary Act to today—suggests that bias must have “played a smaller role in the creation of diversity jurisdiction than is assumed today . . . .”<sup>32</sup> Others, such as Henry Friendly, have challenged the view’s essential premise that the state

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<sup>31</sup> See, e.g., *Pappas v. Middle Earth Condo. Ass’n*, 963 F.2d 534, 539 (2d Cir. 1992) (“Diversity jurisdiction . . . was in the view of some scholars instituted to obviate the fear that state courts would be prejudiced against out-of-state litigants. . . . [D]iversity jurisdiction has traditionally been justified on this basis.” (citation omitted)).

<sup>32</sup> RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 141 (1985). The logic of the “impartiality” justification is that out-of-state parties would suffer from state court bias in favor of in-state parties. From this perspective, one would expect a rule allowing an out-of-state party to invoke federal jurisdiction as a protective measure when litigating against an in-state opponent. Conversely, one would not expect the in-state party—who would likely benefit from the purported bias—to be able to invoke diversity jurisdiction. The Judiciary Act, however, allowed anyone to invoke diversity, provided only that one of the parties be from the forum state. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. In-state parties—the supposed beneficiaries of “local prejudice” in the state courts—were thus allowed to invoke federal jurisdiction when suing or defending against an out-of-state party. See §§ 11–12, 1 Stat. at 78–79 (codified as amended at 28 U.S.C. § 1332).

courts were biased against out-of-state litigants. According to Friendly, the historical record reveals little evidence that any such prejudices existed or that state bias was the source of the Framers' dissatisfaction with state courts.<sup>33</sup>

Proponents of the "state bias" view have relied upon various statements offered during the ratification period to defend their position. In *The Federalist No. 80*, for example, Alexander Hamilton argued:

[I]t is necessary that [the] construction [of the privileges and immunities clause in Article IV] should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.<sup>34</sup>

Similarly, James Madison offered the following defense of diversity during the Virginia ratification convention:

It may happen that a strong prejudice may arise in some States, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some States. A citizen of another State might not chance to get justice in a State Court, and at all events he might think himself injured.<sup>35</sup>

It is important to remember the context in which these statements were made. Both were public statements intended to answer a barrage of criticism levied against the Constitution's proposal of a federal judiciary, and both were made at a time when the ratification of the document was still very much in question.<sup>36</sup>

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In 1969, the American Law Institute recommended that the diversity jurisdiction statute be amended to prohibit its invocation by in-state litigants. *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1302 (1969). Nonetheless, the diversity statute continues to allow in-state parties to invoke the jurisdiction.

<sup>33</sup> Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *HARV. L. REV.* 483, 493–94 (1928).

<sup>34</sup> *THE FEDERALIST NO. 80*, at 486 (Alexander Hamilton) (Bantam Books 1982).

<sup>35</sup> 10 *DOCUMENTARY HISTORY OF THE RATIFICATION*, *supra* note 12, at 1414. Chief Justice Marshall used similar language in a judicial opinion issued shortly after the Constitution's adoption:

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.

*Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

<sup>36</sup> Virginia's ratifying convention, in which Madison made his statements, was pivotal to the Constitution's ultimate adoption and acceptance by the nation. *See, e.g.*, Alan V. Briceland, *Virginia: The Cement of the Union*, in *THE CONSTITUTION AND THE STATES*:

Even assuming that we can take these statements at face value, however, neither statement provides definitive support for the “state bias” account of diversity. The statements suggest that Hamilton and Madison believed, and expected their opponents to agree, that there was a propensity on the part of state courts to favor their own residents. Neither statement, however, directly supports the contention that state biases or prejudices were the cause of this favoritism. Hamilton referred to *local* attachments rather than *state* attachments. Madison referred to a “prejudice” against citizens of other states but never identified the source of this prejudice. As a matter of fact, the most salient divisions in America at the time were not along state lines. Madison himself maintained that the most significant divisions in American society at the time were economic, social, and political. In *The Federalist No. 10*, he argued:

[T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.<sup>37</sup>

The divisions identified by Madison had little to do with lines drawn on a map. An owner of a small tract of land in upstate New York would likely have shared more interests in common with a similarly situated farmer in Massachusetts than with a merchant in Manhattan. It is far more likely, therefore, that proponents of diversity jurisdiction like Hamilton and Madison were referring to these deeper divisions in American society when they referred to the “local attachments” and “biases” that, in their view, affected the state courts.

It is quite possible that the Framers themselves, confident in their own vision for the young nation’s long-term prosperity, would have

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THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION 201, 210 (Patrick T. Conley & John P. Kaminski eds., 1988) (“[M]any observers became convinced that Virginia held the key to the whole ratification question.”). Virginia’s ratification—which came only by a narrow vote of eighty-nine to seventy-nine—remained in doubt until the last stages of that convention. RICHARD B. BERNSTEIN WITH KYM S. RICE, *ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION* 208–11 (1987).

Completed bound volumes of *The Federalist*, in which Hamilton’s statement appeared, were published by May 1788, before a sufficient number of states had ratified and prior to the crucial conventions in Virginia and New York. *See id.* at 234 (noting that last eight essays of *The Federalist* were written in great haste to “arm every prominent Federalist” at Virginia’s ratifying convention).

<sup>37</sup> THE FEDERALIST NO. 10 (James Madison), *supra* note 34, at 52–53.

been willing to denigrate those views inconsistent with their own as “prejudices.”<sup>38</sup> Hamilton and Madison, after all, were skilled propagandists. The public disparagement of the interests of a contrary constituency in terms such as “prejudice” or “bias” was not a new phenomenon in 1787, just as it is neither a new nor completely ineffective practice in today’s political world. That said, we must resist the temptation to interpret this historical struggle solely through the lens of those who emerged victorious. In today’s world of bankruptcy protections, farm subsidies, and the Federal Reserve, it would be disingenuous to characterize efforts to protect agrarian interests, to ease the plight of debtors, and to use currency to stimulate the economy as instances of “prejudice.”<sup>39</sup>

An additional flaw of the traditional account is that it relies virtually exclusively on the federal bench for its explanation of diversity’s origins. Because federal juries were drawn entirely from the same in-state population that was supposedly biased against those from other states,<sup>40</sup> proponents of the traditional view have focused on the federal bench to account for the federal courts’ putative “impartiality” toward out-of-state residents.<sup>41</sup> As Friendly pointed out, however, the historical evidence does not support the essential premise of the conventional view: that state judges were prone to favor their own

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<sup>38</sup> Cf. Wythe Holt, “To Establish Justice,” *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1425–26. In describing the confrontation between the different economic interests, Holt notes:

During this period, creditors and proto-capitalistic elements were confronted with state legislatures and courts that responded in a more or less democratic fashion to the needs and desires of an essentially debtor-oriented, pre-capitalist majority of the citizenry. The creditor element . . . viewed such activity as dangerous, contemptibly immoral, and the product of irrational, localistic bias.

*Id.*

<sup>39</sup> Cf. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 140 (1991) (arguing that Rhode Island offered most extensive legislation for relief of debtors precisely because it was “the most liberal, the most entrepreneurial, and the most ‘modern’ of the eighteenth-century colonies”).

<sup>40</sup> In order to serve as a juror in federal court, one had to be eligible for jury service in their state’s court, which meant, among other things, that one was necessarily a resident of the forum state. See Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (codified as amended in scattered sections of 28 U.S.C.) (describing federal juror eligibility).

<sup>41</sup> See, e.g., Orie L. Phillips & A. Sherman Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A. J. 959, 962 (1960) (arguing that diversity jurisdiction was intended in part to provide litigants with access to federal judiciary “independent and free from political pressures, local prejudice and local attachments”); see also *Bank of N.Y. v. Bank of Am.*, 861 F. Supp. 225, 229 (1994) (“The raison d’être of diversity jurisdiction is to guard against the possibility that state court judges will treat litigants from the forum state more favorably than out-of-state adversaries.”).

residents.<sup>42</sup> Furthermore, had the architects of the federal judiciary been so concerned about the neutrality or competency of the state benches, it seems illogical that they would have entrusted the state courts with the exclusive power to interpret the U.S. Constitution and the laws of Congress at the trial level.<sup>43</sup>

More fundamentally, this reliance on the federal bench to explain the origins of diversity is anachronistic. As we shall see in the following sections, eighteenth-century juries possessed a wide variety of prerogatives that rendered judges largely powerless to enforce their own judgments against the will of the local jury.

*B. The “Friendly Revolution”: The Modern Pro-Creditor Accounts for the Origins of Diversity Jurisdiction*

Despite its flaws, the traditional “state bias” account of the origins of diversity remained the dominant view until 1928, when Henry Friendly published *The Historic Basis of Diversity Jurisdiction*.<sup>44</sup> Friendly rejected the conventional view that the federal courts were intended to provide a more “impartial” forum and argued instead that the original purpose of diversity jurisdiction was to provide a federal forum that would be favorable to the interests of creditors and commercial parties.<sup>45</sup> In order to assess both the strengths and failings of

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<sup>42</sup> See Friendly, *supra* note 33, at 493 (“[S]uch information as we are able to gather from the reporters entirely fails to show the existence of prejudice on the part of the state judges.”).

<sup>43</sup> One reply to this point would be that they were relying upon the Supreme Court to reverse wayward state judiciaries. There are several weaknesses in this answer. First, the Supreme Court’s review applied only to cases where a federal right was denied, thus depriving the Court of the chance to consider a large number of potentially important cases. Second, its docket was at the mercy of litigants’ willingness and ability to pursue costly appeals. Finally, and most importantly, if the state judiciaries really were biased, there was the danger that they would simply find ways around the Supreme Court’s precedent.

<sup>44</sup> Friendly, *supra* note 33.

<sup>45</sup> See *id.* at 498 (“[T]he commercial interests of the country were reluctant to expose themselves to the hazards of litigation before [the state courts]. [Those courts] might be good enough for the inhabitants of their respective states, but merchants from abroad felt themselves entitled to something better.”). Some have sought to harmonize Friendly’s pro-creditor account with the traditional view by characterizing the state courts’ propensity to favor debtors as a form of bias or prejudice. See, e.g., Barton H. Thompson, Jr., *The History of the Judicial Impairment “Doctrine” and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1384 (1992) (“Federal courts were awarded diversity powers in part out of fear that state courts would not always be impartial, and this fear focused almost entirely on lawsuits over debts and other contractual obligations.”). As discussed in the text, however, it would be a mistake to characterize the legitimate political, economic, and social interests of large segments of American society as “prejudices” merely because such language was in the political discourse of the era. It would also appear to be inaccurate to claim that the federal courts were originally intended to be more “impartial” than the state courts if their creation was motivated by a desire to favor one set of political and economic

this theory, it is necessary to briefly recount its historical underpinnings.

### 1. *The Historical Background of Friendly's Account*

#### a. Post-Revolution Debt and Depression

The United States suffered significant economic instability in the years leading up to the Constitutional Convention.<sup>46</sup> The American states had gone deeply into debt in order to finance the Revolutionary War,<sup>47</sup> and the new levels of taxation that were imposed to pay off the state debts were burdensome on the general population.<sup>48</sup> The plight of taxpayers was compounded by the fact that the American economy was in a severe depression between 1784 and 1786.<sup>49</sup> Optimism during the war years had led many to borrow money in order to fuel enterprise and consumption.<sup>50</sup> Furthermore, the renewal of trade

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interests over another. The most accurate reading of Friendly's view, therefore, is that diversity jurisdiction represented a political triumph of one set of interests over another.

<sup>46</sup> See, e.g., ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775–1789*, at 515 (1924) (“In these two years [1785–86] the country felt itself full in the trough of the economic depression that had swept over it like a wave in since 1781.”).

<sup>47</sup> The state debts were staggeringly large by the standards of the times. See MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781–1789*, at 303–04 (1950) (reporting that Pennsylvania's debt was £4,641,535 as of 1787; New York's was approximately £1,000,000 as of 1790; Virginia's was estimated at £4,251,283 as of 1784; Connecticut's was approximately \$3,750,000 as of 1783; and Massachusetts's was £1,468,554 as of 1785). The debts were owed to private creditors who had financed the war effort, to former holders of the states' paper money, and to soldiers for back or inadequate pay. *Id.* at 303. Some of the debt was contracted when the states pulled in paper money that they had issued during the war. The paper money was often converted, at a great discount, into interest-bearing debt. *Id.*

The federal government had gone into debt during the war as well. The Continental Congress had issued \$240,000,000 worth of notes. NEVINS, *supra* note 46, at 470–71. That debt had been largely repudiated by 1787, however, as a result of rampant inflation and the recall of notes at a forty-to-one ratio. *Id.* at 471–72. The repudiation of the federal debt left some Americans who had helped finance the war destitute. *Id.* at 472 & n.3; see also JENSEN, *supra*, at 235 (describing post-Revolution collapse of paper currency).

<sup>48</sup> See, e.g., JENSEN, *supra* note 47, at 304–11 (describing increasing severity and unfairness of state tax burdens, especially in Massachusetts, between 1777 and 1787).

<sup>49</sup> *Id.* at 187 (“By the spring of 1784 the glutted market, the scarcity of specie, and the overextension of credit all combined to produce a serious commercial depression . . .”); NEVINS, *supra* note 46, at 518 (“During 1785–86 the wave of economic discouragement reached its crest in all the States; depression and pessimism were converted in many communities into desperation.”); WOOD, *supra* note 39, at 249 (“The collapse of internal markets and the drying up of paper money meant diminished incomes, overextended businesses, swollen inventories of recently imported manufactures, and debt-laden farmers and traders.”); Holt, *supra* note 38, at 1445 (“[A] deep recession commenced in late 1784 and lasted into the 1790s. For the average farmer or planter or rural householder, there was nothing to pay debts with and a lot of debts to pay.”).

<sup>50</sup> WOOD, *supra* note 39, at 248 (“Debt . . . emerg[ed] as a symptom of expansion and enterprise. Farmers, traders, and others in these revolutionary years borrowed money, just

relations with England in 1783 helped drain the nation of its hard currency, as Americans eagerly imported goods that had been scarce during the war.<sup>51</sup> Then, as the price of goods dropped in the depressed economy of the post-Revolutionary War era, creditors pressed for the satisfaction of their debts and debtors often found themselves squeezed by an economy that demanded hard money but offered little in circulation.<sup>52</sup>

#### b. Agrarian Unrest and the Paper Money Debate

Farmers, in particular, suffered during the depression years between 1784 and 1786, and an alarming percentage were being driven into bankruptcy by the combination of public taxes and private creditors.<sup>53</sup> Rural opposition to the new taxes was intensified by the fact that public debts had been consolidated into the hands of a relatively small number of wealthy speculators who had purchased the debts (often from veterans) at large discounts.<sup>54</sup> Furthermore, the new taxes raised to pay off the debts were often disproportionately burdensome for small farmers by virtue of the states' reliance on poll taxes and inequitable methods of assessment.<sup>55</sup> On several occasions

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as they married earlier and had more children than ever before, because they thought the future was going to be even better than the present.”).

<sup>51</sup> After the peace of 1783, many Americans were anxious to import various goods that had been scarce during the war. British and other foreign goods poured into the country far more quickly than American goods were exported, and the trade imbalance drained the country of its specie. NEVINS, *supra* note 46, at 516 (“Because there was no national coinage of specie, and a steady purchase of goods from overseas was maintained, the business and agricultural depression was accompanied by a stringency of hard money.”).

<sup>52</sup> See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 115 (1974) (“Two or three debtors [in New York] petitioned for relief each week in 1784 and 1785; by 1786 the number soared in some periods to as many as thirty-five a day. Sheriffs busily auctioned off property; jails became crowded with defaulters.”); JENSEN, *supra* note 47, at 240, 314 (describing how farmers operated in barter system that brought in little hard money with which to pay debts and taxes); NEVINS, *supra* note 46, at 527 (“Money lenders charged double interest, demanded double security, and insisted upon collecting their loans on the day they fell due. Lands and houses, put in the market by poor devils who had not a ready six-pence, brought only half their real worth.”).

<sup>53</sup> See JENSEN, *supra* note 47, at 240 (“[M]any a farmer who saw little hard money . . . was subject to court action, the loss of property, and even a debtor’s prison, not only for his taxes but for private debts as well.”). The plight of farmers was particularly acute in Massachusetts, where the legislature levied heavy taxes that disproportionately burdened farmers. *Id.* at 308. At least a third of the average farmer’s income went to taxes, *id.*, and in one western Massachusetts town, the farmers’ tax burden equaled the entire rental value of their land for each of five consecutive years, NEVINS, *supra* note 46, at 536.

<sup>54</sup> *E.g.*, JENSEN, *supra* note 47, at 306; *see also id.* at 308 (stating that mercantile-creditors who owned majority of public debt in Massachusetts opposed efforts to alleviate tax burdens on farmers in that state).

<sup>55</sup> *E.g.*, *id.* at 305–06. For example, land was often taxed on the basis of total acreage, without any reference to the value of the land. *Id.* at 305.

during this period, frustration and desperation in agrarian communities boiled over into social unrest, the most famous instance of which was the rebellion of rural farmers in western Massachusetts led by Daniel Shays in 1786.<sup>56</sup>

The economic hardships of 1785 and 1786 led many distressed individuals, particularly those in America's agrarian communities, to seek relief from their state legislatures.<sup>57</sup> Among other things, these constituents pressed for the public issuance of paper money.<sup>58</sup> State issuance of paper currency promised to alleviate the plight of debtors—particularly debtor farmers—in several ways.

First, paper currency could be issued by the states to pay interest on public debts, thereby alleviating the need for additional taxation on the general population.<sup>59</sup> Second, paper notes could be issued as mortgage loans, thereby enabling property-owning farmers to ward off tax collectors and private creditors alike.<sup>60</sup> Third, increasing the amount of currency in circulation was thought by some to be an essential ingredient for economic growth.<sup>61</sup> Debtors would benefit even more if the new circulation resulted in inflation, as the relative value of their debts would be lessened.<sup>62</sup>

During this period, the vast majority of the American electorate resided in the agrarian sections of the country that were hit hardest by the economic difficulties of the mid-1780s and where the support for paper money legislation was strongest.<sup>63</sup> As a result, seven state legis-

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<sup>56</sup> For detailed historical accounts of Shays's Rebellion and the underlying economic problems faced by farmers in Massachusetts, see generally DAVID P. SZATMARY, *SHAYS'S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980), and ROBERT J. TAYLOR, *WESTERN MASSACHUSETTS IN THE REVOLUTION* (1954). For brief accounts of similar, if less notorious, uprisings in Connecticut, New Hampshire, Maryland, New Jersey, Virginia, Vermont, Pennsylvania, and South Carolina, see SZATMARY, *supra*, at 77–79, 124–26.

<sup>57</sup> JENSEN, *supra* note 47, at 240. Relief was often sought in the form of “stay laws, the privilege of paying taxes in kind, and the issuance of paper money.” *Id.*

<sup>58</sup> *Id.* at 314; see NEVINS, *supra* note 46, at 521 (discussing paper money debate in Pennsylvania); *id.* at 524 (discussing farmers' support for paper money legislation in Georgia); *id.* at 535 (noting that the western part of Massachusetts was “especially aflame with demand” for issuance of paper money).

<sup>59</sup> JENSEN, *supra* note 47, at 317.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., WOOD, *supra* note 39, at 249 (noting that calls for paper money came primarily from those claiming that paper money could best meet needs of specie-poor economy).

<sup>62</sup> See JENSEN, *supra* note 47, at 319–24 (explaining depreciating effect of new circulation).

<sup>63</sup> It is commonly estimated that ninety percent of the American population during this period engaged in agriculture as a means of subsistence. FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 359 n.3 (1992). However, some sources put the figure closer to seventy-five percent. *Id.* at 359 & n.3.

latures enacted forms of paper money legislation in either 1785 or 1786 over vehement opposition from most creditors and those located in the nation's commercial centers.<sup>64</sup> Under most of these laws, paper money was issued as interest payments on state debts and as mortgage loans on farms and real estate.<sup>65</sup> The paper money was legal tender that could then be used for the payment of taxes and, in most states, the satisfaction of private debts.<sup>66</sup> Although the experimentation with paper money proved moderately successful in relieving the burdens of debtors in some states, the notes significantly depreciated in value elsewhere.<sup>67</sup> This depreciation greatly devalued the holdings of creditors and precipitated social turmoil in states such as Rhode Island.<sup>68</sup>

## 2. *The Superiority of Friendly's Pro-Creditor Account over the Traditional "State Bias" View*

It was with this historical understanding that Friendly argued that diversity jurisdiction was intended to favor those creditors and com-

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<sup>64</sup> The seven states were: Pennsylvania (1785), South Carolina (1785), North Carolina (1785), New York (1786), New Jersey (1786), Georgia (1786), and Rhode Island (1786). JENSEN, *supra* note 47, at 316–24. For a discussion of urban opposition to paper money legislation, see *infra* text accompanying notes 391–94.

<sup>65</sup> See JENSEN, *supra* note 47, at 316–27 (describing different features of paper money legislation adopted by states during this period). Of the seven states that issued paper money, five—Pennsylvania, New York, New Jersey, South Carolina, and Rhode Island—issued at least a portion of the money as loans on real estate. *Id.* at 326. New York's legislation was fairly typical of the legislation passed at this time. New York issued £200,000 in paper, £150,000 of which was loaned on real estate and £50,000 of which was used to pay part of the interest due on the state and national debt owned by New York citizens. *Id.* at 321. The real estate loans carried a five percent interest rate with one-tenth of the principal due each year beginning in 1791. *Id.* at 322 n.20.

<sup>66</sup> *Id.* at 321–22. The proposition that paper money could be used to satisfy private debts was one of the more controversial aspects of such legislation, and two states, Pennsylvania and South Carolina, did not provide that the paper money would be legal tender for the payment of private debts. *Id.* at 318–19.

<sup>67</sup> The successful states included Pennsylvania, South Carolina, and New York. See *id.* at 317 (stating that Pennsylvania currency depreciated only seven and one-half percent in its first year); *id.* at 319 (noting favorably that in South Carolina paper money was preferable to specie by 1789); *id.* at 322 (describing New York paper money as successful due to low level of depreciation). The issuances in North Carolina, New Jersey, Georgia, and Rhode Island were considerably less successful. See *id.* at 320 (stating that North Carolina issuance was marked by difficulties and significant depreciation); *id.* at 322–23 (describing refusal of New York City and Philadelphia merchants to accept New Jersey paper money and consequential substantial depreciation); *id.* at 323 (describing immediate depreciation of Georgia's money, which lost seventy-five percent of its value within one year); *id.* at 323–25 (describing difficulties of Rhode Island issuance).

<sup>68</sup> See *id.* at 324–25 (describing range of social and political unrest that resulted when creditors refused to accept paper money). The refusal of merchants to accept the paper money was a prime cause of the legislation's failure in several states. See, e.g., *id.* at 325 (“The Rhode Island debtors won a complete victory in passing legislation, but they were defeated by the economic power of the merchants.”).

mercial parties whose interests were threatened in the state legislative process. “In summary,” Friendly stated, “we may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction.”<sup>69</sup>

In several important respects, Friendly’s account constitutes an improvement over the traditional “state bias” view for the origins of diversity. The empirical evidence suggests that the federal courts were indeed more conducive to creditor interests than the state courts, and that British creditors frequently utilized the federal courts during the early decades of the nation’s existence.<sup>70</sup> In addition, Friendly’s account is rooted in some of the most salient political, economic, and social divisions that gripped American society at the time the Constitution was written, i.e., divisions between creditors and debtors, between obligors of public securities and those who made their payments possible through heavy taxation, and between proponents and opponents of debtor relief legislation.

Friendly’s account of the origins of diversity jurisdiction is also more consistent than the traditional “state bias” view with respect to the defenses that were offered for diversity jurisdiction at the Constitutional Convention and during ratification. At the Constitutional Convention, for example, the states’ experimentations with paper money were repeatedly cited as a justification for the new federal government.<sup>71</sup> In his opening speech to the Convention, Edmund Randolph referred to the “havoc” of paper money as a principal shortcoming of the state of affairs under the Articles of

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<sup>69</sup> Friendly, *supra* note 33, at 496–97.

<sup>70</sup> As soon as they were established, the federal courts in the South were flooded with debt claims from British creditors. See DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 74–75 (1971) (describing how British creditors viewed opening of federal circuit courts as “opportunity to commence . . . recovery of their debts”). The Circuit Court for the District of Virginia adjudicated the single largest number of claims. According to Henderson, 445 non-Virginian plaintiffs filed claims in the Virginia Circuit Court in the years between 1790 and 1797. *Id.* at 76. Of these, 329 (74%) were citizens of Great Britain, 76 (17%) were Americans from other states, 3 (1%) were foreigners not from Great Britain, and 37 (8%) were parties of unknown citizenship. *Id.* at 75–76. Between 1790 and 1795, according to Henderson, British creditors obtained “approximately 500 favorable judgments” in the Virginia Circuit Court alone. *Id.* at 77. In the South Carolina Circuit Court, a British creditor secured a \$53,902.48 jury verdict against South Carolinian defendant-debtors. *Id.* at 79–80. The favorable early verdicts precipitated a large number of subsequent settlements. *Id.* at 82.

<sup>71</sup> See, e.g., 2 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 11, at 7, 308–10 (describing strong opposition to paper money by delegates such as Gouverneur Morris, George Mason, Edmond Randolph, and Oliver Ellsworth and proposal to include in Constitution prohibition preventing Congress from ever issuing paper money); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 *THE PAPERS OF JAMES MADISON* 206, 212 (Robert A. Rutland et al. eds., 1977) [hereinafter *PAPERS OF JAMES MADISON*] (arguing for importance of restraining “paper emissions”).

Confederation.<sup>72</sup> In an effort to prevent further innovations with paper money, the delegates adopted Article I, Section 10 of the Constitution, which provides that no state shall “make any Thing but gold and silver Coin a Tender in Payment of Debts,”<sup>73</sup> and prohibited the outright repudiation of public debts in Article VI, which provided that all public debts existing under the Articles of Confederation remained in force under the new Constitution.<sup>74</sup> The delegates also attempted to curtail the states’ efforts to alleviate the burdens of private debtors with the incorporation of the Contract Clause, which provides that no state shall pass any law “impairing the Obligation of Contracts.”<sup>75</sup>

During the state ratification debates, the need to protect creditors was one of the most cited arguments supporting the creation of diversity jurisdiction and the lower federal courts. In North Carolina, delegate William Richardson Davie argued that, “It is necessary therefore in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be recovered from the citizen of one state as soon as from the citizen of another.”<sup>76</sup> Delegate Edmund Pendleton in Virginia argued that diversity jurisdiction was necessary in order to protect creditors from having to attempt to collect their debts in places such as Rhode Island.<sup>77</sup> James Wilson of Pennsylvania asked the following of delegates in his state’s ratification debates: “[I]s it not necessary, if we mean to restore either public or private credit, that foreigners as well as ourselves, have a just and impartial tribunal to which they may resort?”<sup>78</sup>

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<sup>72</sup> 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 18.

<sup>73</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>74</sup> U.S. CONST. art. VI, cl. 1.

<sup>75</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>76</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 159 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Comp. 1836) [hereinafter DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION].

<sup>77</sup> Pendleton argued:

But may no case happen in which it may be proper to give the Federal Courts jurisdiction in such a dispute? Suppose a bond given by a citizen of Rhode-Island, to one of our citizens. The regulations of that State being unfavorable to the claims of the people of the other States, if he is obliged to go to Rhode-Island to recover it, he will be obliged to accept payment of one-third, or less, of his money.

<sup>78</sup> 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 1427–28; *see also id.* at 1415 (quoting James Madison describing diversity jurisdiction as “favourable to those States who carry on commerce”).

<sup>78</sup> 2 *id.* at 519.

The superiority of Friendly's theories to the traditional "state bias" account has led to growing acceptance (at least among academics) of Friendly's basic tenet that the federal courts were intended to favor creditors and commercial litigants.<sup>79</sup> As with the traditional "state bias" account, however, the commercial/creditor accounts for the origins of diversity jurisdiction are fundamentally flawed and ultimately unpersuasive.

### *C. Failures of the Pro-Creditor Accounts*

#### *1. Myopic Emphasis on Commercial Issues and Creditor Constituencies*

The first fundamental error of the pro-creditor/commercial accounts is that they assume that diversity jurisdiction was established overwhelmingly, if not solely, in response to a single socioeconomic issue and for the benefit of a single segment of the American public—creditors. In light of the multiplicity of problems facing the nation at this critical juncture, and in light of the fact that the Framers were attempting to construct a form of government that would endure beyond their own lifetimes, it is difficult to believe that any single issue or constituency could have been responsible for the creation of the lower federal courts and the establishment of diversity jurisdiction.

In reality, the difficulties experienced by creditors were simply one manifestation of a larger, more fundamental problem that the Framers were trying to address in 1787. For the Framers, the use of paper money by state legislatures to alleviate debtors' burdens represented the failings of unrestrained democracy.<sup>80</sup> In the eyes of many

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<sup>79</sup> See, e.g., Patrick Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 81 (1993) ("[D]iversity was intended at least in part as a protection against aberrational state laws, particularly those regarding commercial transactions."); Holt, *supra* note 38, at 1518 ("[T]he Constitution is . . . a nationalizing and creditor-oriented document, and the national court system was there in large part because state courts could not be trusted to handle creditors' suits against debtors . . ."); Johnson, *supra* note 2, at 6 ("[T]he Framers ensured that foreigners had access to a national court system perceived as less susceptible to the democratic impulse than the state courts."); see also GOEBEL, *supra* note 10, at xx ("The so-called diversity jurisdiction conferred upon the federal judicial [sic] had been contrived among other reasons to provide a forum where British creditors could pursue their claims without impediment as covenanted in the treaty of peace."); Frank, *supra* note 17, at 23–28 (describing with approval Friendly's theory, which "casts doubt" on theory that diversity jurisdiction was designed to counter biased state courts).

<sup>80</sup> See WOOD, *supra* note 39, at 252 ("As far as [the political elites] were concerned, all the paper money and debtor-relief legislation of the states were simply the consequence of men using government to promote their private interests at the expense of the public good."); see also JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 25 (1990)

Framers, debtor relief measures and paper money legislation amounted to an unjust infringement on the property rights of a minority (creditors) by a tyrannical majority (debtors).<sup>81</sup>

When presenting his own plan for the Constitution, Hamilton referred to paper money legislation and various other pro-debtor state laws as primary examples of the ability of “the many” to oppress “the few.”<sup>82</sup> South Carolinian Charles Pinckney argued that the U.S. Senate should be elected by the state legislatures, rather than directly by the people, because the legislature of South Carolina had displayed enough “sense of character” to oppose popular pressures to make paper money legal tender for the payment of private debts.<sup>83</sup>

Many of the Framers viewed debtor-friendly state laws as prime examples of how popular majorities in the new democracy were prone to enact legislation that represented shortsighted public policy.<sup>84</sup> The mistreatment of foreign and domestic creditors, it was feared, would dry up sources of credit for the young nation and imperil the growth

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(describing Madison’s concern for “the threats republican government posed to property”); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 314 (1996) (“[Madison’s] concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property. Paper-money laws, debtor-stay laws, and the specter of Shays’s Rebellion in Massachusetts all alarmed him terribly.”); GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 404 (1998) (“An excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rulers, but by the people themselves—what John Adams in 1776 had called a theoretical contradiction, a democratic despotism.”).

<sup>81</sup> Jack Rakove writes:

The emission of an unsecured currency amounted to an ‘unjust’ . . . assault on the rights of property; the more popular such measures appeared, the more [James Madison] fretted that Americans were supporting a policy that would ‘disgrace Republican Govts. in the eyes of mankind.’ Given the force of this concern, Madison was prone to suspect that the ‘great commotions’ in Massachusetts were ultimately aimed toward ‘an abolition of debts public & private, and a new division of property.’

RAKOVE, *supra* note 80, at 44 (quoting Letter from James Madison to James Madison, Sr. (Nov. 1, 1786), in 9 PAPERS OF JAMES MADISON, *supra* note 71, at 153, 154).

<sup>82</sup> See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 288.

<sup>83</sup> See 1 *id.* at 137.

<sup>84</sup> Hamilton writes:

The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind.

THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 34, at 484; see also RAKOVE, *supra* note 80, at 47 (“One central conviction lay at the heart of [Madison’s] analysis. Experience conclusively proved that neither state legislators nor their constituents could be relied upon to support the general interest of the Union, the true public good of their own communities, or the rights of minorities and individuals.”).

of the country's fledgling economy and commerce.<sup>85</sup> The experience of Rhode Island following its passage of paper money legislation was cited as an example of the type of turmoil that could result from the actions of a legislature that was too responsive to pressures from its citizens—"too democratic."<sup>86</sup> Given that the Framers viewed debt relief legislation as only part of the greater problem of unrestrained democracy, it is far more likely that the origins of diversity and the creation of the lower courts are rooted in a comprehensive effort to address the broader dangers of majoritarianism, rather than a short-term solution to a particular subspecies of the problem.<sup>87</sup>

## 2. *Overreliance on the Federal Bench*

After discrediting the notion that the state benches were inadequate, Friendly struggled to identify a substantive difference between the federal and state courts that could account for the federal courts' pro-creditor orientation. Friendly queried:

[W]hy should the federal courts reach any different result than would those of the states? In either court the same rules of the conflict of laws should be applied and the same decision given. But the Federalists seem to have cherished a vague feeling that these new courts would have none of paper money.<sup>88</sup>

Friendly's conundrum stems from the fact that his approach shares a fundamental infirmity with the traditional "state bias" account. As with the traditional accounts, he looked primarily (if not exclusively) to the federal bench for the explanation of diversity jurisdiction's origins and ignored the central role played by the jury in eighteenth-century courts.<sup>89</sup> Friendly, for example, postulated that

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<sup>85</sup> See, for example, NEDELSKY, *supra* note 80, at 74, summarizing the views of the Framers as being that, "[n]o one would want to risk money in a country whose government could not be relied upon to uphold the just rights of property."

<sup>86</sup> In *The Federalist No. 51*, Madison wrote:

It can be little doubted, that if the state of Rhode Island was separated from the confederacy, and left to itself, the insecurity of rights under the popular form of government within such narrow limits, would be displayed by such reiterated oppressions of factious majorities, that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it.

THE FEDERALIST NO. 51 (James Madison), *supra* note 34, at 319; see also JENSEN, *supra* note 47, at 325 ("Outside the state, Rhode Island was pointed to as the most horrible example of untrammelled democracy in action.").

<sup>87</sup> See *infra* notes 183–86 and accompanying text.

<sup>88</sup> Friendly, *supra* note 33, at 495.

<sup>89</sup> See *id.* at 493 ("Only if we could find that the state judges had been notoriously unfair to foreigners, would we be in a position to place much faith in the genuineness of the classical theory."); see also Frank, *supra* note 17, at 28 (describing diversity jurisdiction as motivated, in part, by desire to allow commercial interests to litigate in front of judges who

choice-of-law considerations might offer the key to understanding diversity jurisdiction on the theory that the federal courts would refrain from applying pro-debtor state laws in instances where those same laws would be enforced by the state courts.<sup>90</sup>

As an initial matter, it is questionable whether many Framers actually believed that the federal courts would be free to disregard state law in diversity cases.<sup>91</sup> While there are statements that suggest that at least some of the Framers believed (or at least hoped) that the federal courts would be free to apply their own choice-of-law or common law norms in commercial disputes,<sup>92</sup> there is also evidence that suggests that a number of influential Framers believed the federal courts would apply the state's substantive law in diversity cases. Defending the diversity provision at Virginia's ratification convention, for example, John Marshall attempted to assure opponents of the Constitution that the federal courts would faithfully apply the substantive law of the states:

By the laws of which State will [a diversity claim] be determined, said he? By the laws of the State where the contract was made. According to those laws, and those only, can it be decided. . . . If a man contracted a debt in the East-Indies, and it was sued for here, the decision must be consonant to the laws of that country.<sup>93</sup>

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shared their interests); cf. Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 209 (2001) (“[I]n preserving jury trial rights in cases brought at law, [the Federalists] sacrificed a degree of legal certainty and opened the door to having such claims nullified by local juries. In the end, it would be left to federalist judges to devise some means of controlling jury verdicts.”).

<sup>90</sup> See Friendly, *supra* note 33, at 496 (reasoning that, although conflict-of-laws rules would presumably be same for both state and federal courts, state courts might apply laws of their own state that were debtor-friendly to their residents even if debt at issue was payable in another state); see also Borchers, *supra* note 79, at 98 (“The prevailing perception appears to have been that diversity courts were to have some freedom to apply laws independent of state laws, particularly with regard to anticreditor legislation.”); Frank, *supra* note 17, at 23–27 (“[D]rafters of Article III thought that the federal courts would counterbalance the spirit of paper money and debt relief in state legislatures.”).

<sup>91</sup> See, e.g., Borchers, *supra* note 79, at 97–98 (arguing that federal courts were intended to apply different substantive law but conceding that historical records on drafting and ratification of Constitution are not clear regarding law to be applied by diversity courts).

<sup>92</sup> See, e.g., 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 518–19 (statement of James Wilson at Pennsylvania ratifying convention) (“I would ask, how a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel, who has his debts at the mercy of tender laws in other states?”); see also Borchers, *supra* note 79, at 97 & nn.138–39 (recounting statements by Marshall and other Federalists implying support for diversity courts making their own choice-of-law rules).

<sup>93</sup> 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 1434; see also Letter from Edmund Pendleton to James Madison (July 3, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 927, 928–29 (Charlene Bangs Bickford et al.

In addition, section 34 of the Judiciary Act of 1789 (drafted in a Senate where ten of the twenty-six members were Framers)<sup>94</sup> would appear to require the federal courts to apply state law in diversity suits,<sup>95</sup> although this interpretation of the language of the statute has been challenged.<sup>96</sup>

More importantly, these existing pro-creditor accounts for the origins of diversity jurisdiction are fundamentally flawed because they overlook the role of the jury. Even if we assume that the Framers believed that there would be salient differences between the federal and state benches,<sup>97</sup> and even if we grant that some of the Framers hoped that these new federal judges would feel free to disregard substantive state law in commercial disputes and instruct federal juries to do the same, none of the pro-creditor accounts for diversity's origins are persuasive, or even complete, because they are predicated on the anachronistic misconception that juries in the post-Revolutionary War era were controlled by the bench.<sup>98</sup> As we shall see in the next section, it was the juries—not the judges—that decided cases and chose the substantive law in the courts of eighteenth-century America.

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eds., 2004) (“The Judges of the State Courts . . . have the same law to direct their decisions, as the Fœdral . . .”).

<sup>94</sup> See *infra* note 246 and accompanying text (noting that three main drafters of Act had attended Constitutional Convention).

<sup>95</sup> See Warren, *supra* note 15, at 51–52, 81–88, 108 (concluding from historical analysis that federal courts were meant to apply state law, both statutory and judge-made, in diversity suits).

<sup>96</sup> See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 148 (Wythe Holt & L.H. LaRue eds., 1989) (“The one thing that can be said with assurance is that Section 34 was not intended to apply exclusively to diversity proceedings; that it was not intended to direct the application of the law of particular states in diversity proceedings . . .”); Borchers, *supra* note 79, at 101–10 (arguing that evidence contradicts conventional interpretation of Section 34 as choice-of-law command in diversity suits); Holt, *supra* note 38, at 1506–07 (same).

<sup>97</sup> At least some of the Framers undoubtedly hoped that federal judges would be more qualified, more professional, and more immune from political pressures than their state court counterparts. See, e.g., *THE FEDERALIST* NO. 81 (Alexander Hamilton), *supra* note 34, at 495 (“State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”). In terms of institutional differences between the two benches, Article II of the Constitution provides that federal judges shall be appointed rather than elected. U.S. CONST. art. II, § 2, cl. 2. Federal judges, furthermore, enjoy life tenure and may not have their salaries reduced. U.S. CONST. art. III, § 1.

<sup>98</sup> Patrick Borchers, for example, concluded that diversity jurisdiction “would be a weapon against this prejudice [of state jurors] only if it allowed federal courts to apply different substantive rules in diversity cases,” Borchers, *supra* note 79, at 94, based on the anachronistic assumption that “federal judges can still control to a significant degree the fact-finding process with their power to grant new trials, to grant judgments notwithstanding the verdict, to comment on evidence, and to instruct the jury,” *id.* at 87 n.50.

The problems creditors faced in state courts, after all, were not simply the creation of state legislatures.<sup>99</sup> More fundamentally, the creditors' difficulties were caused by the widespread hostility felt towards them by the majority of American citizens; the same majority who pressured the state legislatures into enacting the sorts of pro-debtor legislation discussed previously and who pressured state judges to close courts where such legislation had not yet been passed.<sup>100</sup> Lawyers who sought to pursue claims on behalf of foreign creditors were often the targets of mob violence.<sup>101</sup> In 1786, for example, an angry crowd gathered at the courthouse in Charles County, Maryland, to obstruct early attempts by British creditors to bring claims in that state.<sup>102</sup>

By virtue of their numbers, this majority who sympathized with debtor constituencies was often able to dominate the juries which decided cases in the state courts.<sup>103</sup> As a result, state court juries

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<sup>99</sup> To be sure, some of the creditors' problems were the result of legislation. For example, some states, for a time, barred claims by British creditors in their courts. *See, e.g.,* GOEBEL, *supra* note 10, at 196–97 (“Far from executing the terms of the Treaty of Paris, they [many states] resorted to contrivances to obstruct the collection of debts by British creditors . . . .”); Holt, *supra* note 38, at 1442 (describing legislation in South Carolina that closed courts to British creditors from March 1783 to January 1785); *id.* at 1444 (describing actions by Virginia’s legislature that effectively closed state courts to British creditors through 1787). Similarly, other states passed stay laws or laws that reduced the amount of interest that creditors could lawfully recover. *See, e.g., id.* at 1441 (“Massachusetts and Connecticut acts allowed courts and juries to deduct wartime interest from prewar British debts. Pennsylvania allowed executions for debts . . . to be made only in three equal annual payments . . . .” (citation omitted)); *id.* at 1446–47 (describing South Carolina “tender” laws of 1785 that required creditors to accept debtors’ offers of property—often of minimal value—as full payment for existing debt); *id.* at 1454 (discussing stay laws in South Carolina and Rhode Island). The jury, however, had the ultimate power to interpret and enforce these state laws. A pro-creditor jury could simply circumvent state laws that favored the debtor, *see infra* notes 158–70 and accompanying text, and a pro-debtor jury would have no difficulty assisting debtors even in the absence of such legislation, *see infra* notes 104–10 and accompanying text.

<sup>100</sup> *Cf.* Holt, *supra* note 38, at 1441–42 (describing closure of courts in North Carolina and Georgia to British creditors despite absence of legislation).

<sup>101</sup> *See, e.g.,* 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 786 (1934) (“[T]he Lawyers, dreading the resentment of some of the most violent among their Countrymen, have refused to engage in the recovery of these unpopular demands, and the Committee are well assured that not one Action for the payment of an old British debt has been prosecuted in this State.”), *quoted in* Holt, *supra* note 38, at 1442 n.71; Holt, *supra* note 38, at 1440–41 (describing actions by Americans in various states to intimidate lawyers and creditors attempting to pursue legal claims for collection of debts owed to British lenders).

<sup>102</sup> Holt, *supra* note 38, at 1449. In response to the mob, the lawyer representing the creditor dismissed the claims and the local judge closed the court. *Id.*

<sup>103</sup> *See, e.g.,* F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA’S PROVINCIAL LEGAL PERSPECTIVE, 1783–1828, at 7 (1994) (“Indebted farmers [in Virginia] were tried by their peers, twelve honest, indebted farmers.”). An analysis of the District Court in Prince Edward County, Virginia, in 1789 reveals that two-thirds of petit jurors had also served on other juries within the same court session; that over half owned land in the

often ensured that creditors experienced little success even in those courts that were accessible to them.<sup>104</sup> In New York and Pennsylvania, for example, juries deducted wartime interest from creditors' claims even though no legislation in either state provided for such a deduction.<sup>105</sup> In Virginia, both domestic and foreign creditors had little hope of success, as the local juries tended to be dominated by state residents who were debtors themselves.<sup>106</sup> George Mason argued that the Virginia legislature should remove all formal obstacles to the collection of British debts in its state courts because the local juries could take it upon themselves to protect the interests of Virginian debtors. In a 1783 letter to Virginia Governor Patrick Henry, Mason stated:

I cou'd have wished indeed that some reasonable time had been allowed for the Payment of British Debts, and that the Interest on them had been relinquished. As to the first, the Desire of the British Merchants to reinstate themselves in their Trade here, will probably prevent their pressing their Debtors; and as to the last, their Bond-Debts only will carry Interest. It is notorious that the Custom of giving Interest upon common Accounts was introduced by the Partiality of the Merchants, of whom the Jurys at the General Court were chiefly composed for several Years before the late Revolution. Under our present Circumstances, I think the Accounts of British Creditors may be safely trusted to the Virginia Jurys, without any Interposition of the Legislature.<sup>107</sup>

Others undoubtedly shared Mason's confidence, if not his cheerful disposition, about the ability and propensity of state court

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county in which the courthouse was located; and that one-fourth of the jurors had some business transpiring in the courthouse during the same session—including instances where jurors who were adjudicating debt actions were also defendants in debt actions being litigated in the same court during the same session. *Id.* at 30.

<sup>104</sup> See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 397 (“Even when the courts were open, juries exercising their power to find law as well as fact severely limited the ability of loyalists and British creditors to collect debts incurred before the Revolution.”); Holt, *supra* note 38, at 1455–58 (“[P]opular concern about debt and depreciation, about speculation in land and the commercial paper that evidences debts, and generally about the intrusion of capitalist values into rural lives expressed itself in [inter alia] jury verdicts.”).

<sup>105</sup> See Holt, *supra* note 38, at 1450 n.94 (citing cases in Pennsylvania and New York and concluding that it was likely that judges and juries in other states “from Maryland northward” also deducted interest during 1780s); see also *infra* note 152 (discussing jury disregard of bench instructions to award interest to creditors).

<sup>106</sup> Records of the District Court in Prince Edward County, Virginia, demonstrate that creditor plaintiffs between 1789 and 1792 recovered damages in less than fifty percent of all cases brought, and even when they received damages, in eighty-one percent of those cases the damages did not include interest. MILLER, *supra* note 103, at 37 tbl.3.

<sup>107</sup> Letter from George Mason to Patrick Henry (May 6, 1783), in 2 THE PAPERS OF GEORGE MASON, 1725–1792, at 769, 771 (Robert A. Rutland ed., 1970).

jurors to protect the interests of debtors. As a result of the state court venue rules of the era, creditors were forced to litigate their claims in the debtors' home communities.<sup>108</sup> The areas with the most debt would likely have also been the most difficult venues for creditors to collect their debts; juries in such courts would have been drawn predominantly from those who were debtors themselves or were closely associated with similarly situated debtors. As will be discussed in the subsequent section, state court judges (whether or not they were inclined to do so) would have been largely powerless to compel verdicts that contradicted those imposed by the populist, pro-debtor state court juries.<sup>109</sup>

As one delegate argued in the South Carolina ratifying convention, the local jury was the most intractable problem creditors faced in the state courts. In fact, this delegate went so far as to argue that jury trials should be abandoned altogether in such diversity suits:

A suit is depending between a citizen of Carolina and Georgia, and it becomes necessary to try it in Georgia. What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations compose the greater part of his judges. It is in this case, and only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.<sup>110</sup>

In summary, their failure to account for the central role of the jury has rendered modern pro-creditor accounts of diversity incapable of offering a satisfactory explanation for why the early federal courts were expected to be more sympathetic to creditors and commercial litigants than early state courts.<sup>111</sup> The most that Friendly could say,

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<sup>108</sup> See *infra* notes 354–56 and accompanying text (explaining New York venue rules of era).

<sup>109</sup> See *infra* notes 151–75 and accompanying text.

<sup>110</sup> Robert Barnwell, Remarks at the South Carolina Convention (Jan. 17, 1788), in 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 76, at 291, 295.

<sup>111</sup> The closest any scholar has come to exploring whether the composition of federal juries was intended to differ from that of their state counterparts, or to suggesting that these differences might have played a role in the creation of the federal courts, was when Wythe Holt speculated that federal marshals “might select a different sort of jury.” Holt, *supra* note 38, at 1458. Holt, however, did not analyze whether such differences actually existed and did not address the ramifications of his observation. He therefore failed (in this author's view) to grasp the key component of the lower federal courts and the single most important impetus behind the creation of diversity jurisdiction. In fact, in direct contradiction to this author's empirical findings, Holt concluded that the federal courts were ultimately *not* as pro-creditor as the Framers had intended. See *id.* at 1427 (“[T]he greatest

for example, was that there was a “vague feeling” among the advocates of diversity jurisdiction that the federal courts would be more favorable to creditors and commercial parties.<sup>112</sup>

It is only when we take the role of juries into account that the origins of diversity jurisdiction come clearly into focus. Among other things, an analysis of early federal juries reveals that there was nothing “vague” at all about the pro-creditor orientation of the early federal courts.<sup>113</sup> The perceived superiority of federal juries to state juries in the Framers’ eyes, furthermore, was not limited to the ways in which they favored creditors or even commercial litigants in general. By virtue of their belief that federal juries would be drawn from “the better sort” of society, the Framers had faith that the federal courts would provide a superior alternative to state courts—not just with respect to one issue and not just with respect to events that might transpire during their own lifetimes.<sup>114</sup> Instead, the Framers had reason to believe that, because of the juries that decided their cases, the lower federal courts would be a superior forum for every type of litigation that could arise under diversity jurisdiction, not just during their own lives but for the life of the nation.

## II

### APPREHENSION OF STATE COURT JURIES: THE PRINCIPAL MOTIVATING FORCE BEHIND THE CREATION OF DIVERSITY JURISDICTION AND THE LOWER FEDERAL COURTS

#### A. *The Powers and Prerogatives of Eighteenth-Century American Juries*

In order to appreciate the Framers’ concerns about state court juries, it is necessary to summarize the powers and prerogatives that

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surprise to be derived from the history of the invention of the national judiciary is that the compromises written into the Judiciary Act of 1789 in large part favored debtors.”); *see also* Harrington, *supra* note 104, at 402 (noting that marshals had power to select jury panels—and may have favored certain types of jurors in their selections—but describing it as “ironic twist of fate” rather than as fundamental purpose for creation of diversity).

<sup>112</sup> Friendly stated that “[t]here was a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts.” Friendly, *supra* note 33, at 498; *see also* Frank, *supra* note 17, at 23 (“[I]n a vague but real sense the drafters of Article III thought that the federal courts would counterbalance the spirit of paper money and debt relief in state legislatures.”).

<sup>113</sup> *See infra* notes 294–97, 390–422 and accompanying text.

<sup>114</sup> Of course, the Framers’ confidence that federal juries would be perpetually dominated by “the better sort” was predicated on their faith in the character of the federal officials who controlled jury selection. *See infra* notes 247–55 and accompanying text (describing various reasons why Framers believed that elected and appointed federal officials would be superior to their state counterparts).

American juries enjoyed in the courts of the late eighteenth century. Having such an understanding will provide the framework for the final section's analysis of the ways in which the federal courts were structured to circumvent the powers of the state court juries.

### 1. *The Roots of the American Jury in English Law*

The expansive powers and prerogatives of eighteenth-century American juries can be traced all the way back to the institution's roots in the English common law. Dating back to the late medieval period, capital punishment was the sanction for all English felonies, including minor instances of larceny.<sup>115</sup> The English bench, appointed by the Crown and removable at its pleasure, was largely sympathetic to the government's interests.<sup>116</sup> Early juries, however, were free to ignore judges' legal instructions in order to reach verdicts that they felt were most equitable under the circumstances.<sup>117</sup> The English tradition, therefore, was one in which the participation of ordinary citizens in the judicial process was an essential liberty and a crucial safeguard against judges' severe and unyielding application of the law.<sup>118</sup>

In civil and criminal matters alike, the seventeenth- and eighteenth-century jury functioned as the voice of the community and as a

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<sup>115</sup> See THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800*, at 10–11 (1985) (discussing possible reasons for Crown's decision to extend capital punishment to all crimes).

<sup>116</sup> In his autobiography, Henry Adams summed up the history of English criminal law by quoting John Bright: "For two hundred years, the Judges of England sat on the bench, condemning to the penalty of death, every man, woman and child who stole property to the value of five shillings; and during all that time not one Judge ever remonstrated against the law." HENRY BROOKS ADAMS, *THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY* 191 (Modern Library 1996) (1918). Herbert Hadley commented on this passage and on English criminal law, maintaining that "[i]t is difficult to realize the unfairness, the brutality, the almost savage satisfaction in conviction and execution that characterized criminal prosecutions in England up to well along in the nineteenth century." Herbert S. Hadley, *The Reform of Criminal Procedure*, in 10 *PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE* 396, 398 (Samuel McCune Lindsay et al. eds., 1924).

<sup>117</sup> Thomas Green provides several examples:

There were . . . many other defendants who were guilty under the strict rules of the law whom juries refused to convict. These were persons whose acts, whether theft, homicide, or rape, were not considered sufficiently serious to merit capital punishment. . . . Thefts of a relatively trivial amount perpetrated by persons in dire straits, slayings born of sudden anger by persons long of good standing, these were offenses for which the law prescribed death but for which the community frequently refused to convict. Juries in these cases simply nullified the law of felony.

GREEN, *supra* note 115, at 26.

<sup>118</sup> See *id.* at 105 ("[A]s the result of its role in individual cases, the jury reflected the interests of the local community as opposed to those of central authorities.").

guardian of local autonomy.<sup>119</sup> In the late seventeenth century, when the English Parliament enacted legislation which outlawed “seditious” religious meetings, many Quakers were able to persuade jurors to reject the English bench’s holding that the Quakers constituted a seditious sect. Quaker pamphlets urged jurors to follow their own consciences rather than rely upon the judge’s instructions:

Can you take a passionate and testy judge’s word as your infallible director in so many most difficult controversies as must in this case be decided? Will you pin your faith upon the judge’s sleeve in matters of religion (of which perhaps he knows no more than he can find in the statute book)?<sup>120</sup>

In effect, the Quakers were asking the jury to decide the law as well as the facts; the English bench responded by attempting to exert control over insubordinate juries that refused to abide by clear and unequivocal directions. In 1670, after a jury refused to comply with the bench’s direction to convict prominent Quakers William Penn and William Mead of unlawful assembly, the bench fined the jurors for finding contrary to the “evidence” and the “law.”<sup>121</sup> When several jurors refused to pay the fine, they were jailed.<sup>122</sup> In its famous pronouncement in *Bushell’s Case*, the English Court of Common Pleas held that a jury’s freedom to reach a verdict according to its conscience could not be challenged by the bench or otherwise interfered with through coercive measures.<sup>123</sup>

Throughout the eighteenth century, English-speaking lawyers and commentators would rely on *Bushell’s Case* for the proposition that jurors were free to disregard the bench and formulate their own interpretations of the law.<sup>124</sup> As William Penn noted in 1675, jury service and voting constituted the two great “rights and privileges” of English citizens everywhere.<sup>125</sup> It was principally through these privi-

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<sup>119</sup> See *id.* at 372 (“It is also significant that mid-seventeenth-century jury proponents sometimes failed to distinguish between civil and criminal trial juries. . . . [T]hey looked to the local community to judge cases, whether crimes, civil trespasses, or disputes over property rights or contracts.”).

<sup>120</sup> THE JURY-MAN CHARGED; OR A LETTER TO A CITIZEN OF LONDON 9 (1664), quoted in GREEN, *supra* note 115, at 204, 204.

<sup>121</sup> GREEN, *supra* note 115, at 221–25.

<sup>122</sup> See *id.* at 236 (discussing imprisonment of juror Edward Bushell for failure to pay fine).

<sup>123</sup> *Bushell’s Case*, (1670) 124 Eng. Rep. 1006, 1009 (C.P.).

<sup>124</sup> See, e.g., GREEN, *supra* note 115, at 237–49 (discussing *Bushell’s Case* and other important English cases that helped to establish jury’s lawmaking prerogatives and independence from bench); Harrington, *supra* note 104, at 383–86 (same).

<sup>125</sup> WILLIAM PENN, ENGLAND’S PRESENT INTEREST CONSIDERED, WITH HONOUR TO THE PRINCE, AND SAFETY TO THE PEOPLE (1675), as reprinted in 1 THE FOUNDERS’ CONSTITUTION 429, 429 (Philip B. Kurland & Ralph Lerner eds., 1987).

leges that individuals directly participated in the governing of the state and thereby ensured the preservation of their personal and property rights.<sup>126</sup>

## 2. *The Jury as a Means of American Colonial Intransigence*

It was of particular importance to colonial Americans that local juries remain unfettered from the bench's control.<sup>127</sup> In 1771, John Adams wrote in his diary that it would be "absurd" for a jury to be constrained by a judge's instructions or view of the law:

Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment and Conscience . . .

. . . .

. . . It is not only his right but his Duty in that Case to find the Verdict according to his own best Understanding, Judgment, and Conscience, tho in Direct opposition to the Direction of the Court. . . .

The English Law obliges no Man . . . to pin his faith on the sleeve of any mere Man.<sup>128</sup>

The result was that juries drawn from the local communities, and not judges, were most responsible for shaping the substantive law of the colonies.<sup>129</sup>

By virtue of its autonomy within the British legal system, the institution of the jury proved to be one of the most effective tools with which the colonists could oppose unpopular imperial policies and

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<sup>126</sup> Penn wrote, "[T]hose rights and privileges which I call *English*, and which are the proper birth-right of Englishmen . . . may be reduced to these three[:] . . . [ownership] [voting] [and] [a]n influence upon, and a real share in, that judicatory power that must apply every such law; which is the ancient, necessary and laudable use of juries." *Id.*, as reprinted in 1 THE FOUNDERS' CONSTITUTION, *supra* note 125, at 429, 429.

<sup>127</sup> See WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 20–21 (Univ. of Ga. Press 1994) (1975) (stating that contemporaries viewed juries in prerevolutionary Massachusetts as "means of controlling judges' discretion and restraining their possible arbitrary tendencies"); *id.* at 30 ("[T]he communities of prerevolutionary Massachusetts freely received the common law of England as the basis of their jurisprudence but simultaneously reserved the unfettered right to reject whatever parts of that law were inconsistent with their own views of justice and morality or with their own needs and circumstances."); RAKOVE, *supra* note 80, at 300 ("When courts exercised their properly judicial (as opposed to administrative) functions, the decision-makers were the juries. The most striking feature of colonial justice was the bare modicum of authority that judges actually exercised.").

<sup>128</sup> 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

<sup>129</sup> NELSON, *supra* note 127, at 18–31.

harass the British officials charged with carrying them out.<sup>130</sup> In 1735, for example, an American jury refused to convict the printer John Peter Zenger for publishing criticisms of the New York governor even though Zenger's actions clearly satisfied the existing legal definition of "seditious libel."<sup>131</sup> The jury in the Zenger case was instructed by the bench to render a special verdict solely on the issue of whether Zenger had, in fact, published the articles in question.<sup>132</sup> Zenger's lawyer, however, asked the jury to ignore the judge's instructions and to render a general verdict on the overarching issue of guilt and innocence. "I know [juries] have the right beyond all dispute to determine both the law and fact," Zenger's lawyer stated during the trial, "and where they do not doubt of the law, they ought to do so."<sup>133</sup> The jury followed the lawyer's advice rather than the judge's instructions and found Zenger innocent.<sup>134</sup>

Contributing to the difficulties faced by British officials in the American colonial courts was the colonists' ability to control jury selection.<sup>135</sup> Even in those jurisdictions that selected jurors by lot, American Whigs—those in favor of a greater measure of independence for America—were able to manipulate jury selection as a means of controlling the outcomes of important trials during the

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<sup>130</sup> See, e.g., JOHN PHILLIP REID, *IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 27–28* (1977) ("In their arsenal of legal warfare, perhaps the most unrenowned instrument the whigs possessed was the civil traverse jury, especially in Massachusetts where the conditions of local law made the jury a remarkably effective device for 'punishing' those placemen bold enough to enforce imperial law.").

<sup>131</sup> See EDWIN G. BURROWS & MIKE WALLACE, *GOTHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 153–55 (1999) (stating that English common law definition of seditious libel was "publication of any material undermining the authority of government").

<sup>132</sup> See JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL 78* (Stanley Nider Katz ed., The Belknap Press of Harvard Univ. Press 1963) (1736) (recounting judge's explanation of special verdict instruction to prosecution); BURROWS & WALLACE, *supra* note 131, at 154 (describing jury charge).

<sup>133</sup> ALEXANDER, *supra* note 132, at 78.

<sup>134</sup> Had the jury limited itself to a special verdict, the bench would have been free to decide the legal issue of whether the articles constituted seditious libel. The jury, however, refused to follow the judge's instructions. Instead, it rendered a general verdict on the overarching issue of guilt and found Zenger innocent of the charges. See *id.*, at 100–01 (recounting judge's instructions to jury and jury's not guilty verdict); see also BURROWS & WALLACE, *supra* note 131, at 154–55 (describing defense attorney Andrew Hamilton's argument that case concerned "right of free people to criticize their rulers" and jury's subsequent acquittal on all charges).

<sup>135</sup> See, e.g., REID, *supra* note 130, at 28 ("[I]n prerevolutionary Massachusetts . . . a political majority could control Massachusetts juries . . ."); SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 71* (1990) (attributing colonists' administrative and substantive control over American law to colonists' control over jury selection).

period leading up to the Revolutionary War.<sup>136</sup> Peter Oliver, the Chief Justice of the Massachusetts Superior Court and a leading Tory during the revolutionary era, described some of the methods by which American colonists manipulated the jury selection procedures:

[T]he Select Men of *Boston* would draw out of the Lottery Box; & if any popular Cause was to be before the Court, & that drawn Juror was not like to serve their Cause, they would make some Excuse for the absent Man, either that he was sick & would not be well, or he was going [on] a Journey or Voyage; & so return his Name into the Box, & draw untill they drew him who was for their Purpose.<sup>137</sup>

According to one contemporary in 1765, “a Bostonian could boast that the Whigs ‘would always be sure of Eleven jury men in Twelve.’”<sup>138</sup> The ability of American juries to protect violators of the custom laws prompted one royal governor of Massachusetts to complain that “a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.”<sup>139</sup>

British efforts to rein in the power of American juries were obstinately opposed and the resulting conflict intensified the mounting tensions between British authorities and American revolutionaries.<sup>140</sup>

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<sup>136</sup> Daniel Leonard, a contemporary British observer in the colonies, explained this occurrence:

It is difficult to account for so many of the first rate whigs being returned to serve on the petit-jury at the term next after extra-ordinary insurrections, without supposing some legerdemain in drawing their names out of the box. It is certain, that, notwithstanding swarms of the most virulent libels infested the province, and there were so many riots and insurrections, scarce one offender was indicted, and I think not one convicted and punished.

DANIEL LEONARD, *MASSACHUSETTENSIS* 22 (1776), quoted in Richard B. Morris, *Legalism Versus Revolutionary Doctrine in New England*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 418, 430 n.62 (David H. Flaherty ed., 1969).

<sup>137</sup> PETER OLIVER, *ORIGIN & PROGRESS OF THE AMERICAN REBELLION* 85 (Douglass Adair & John A. Schutz eds., 1961) (n.d.). For a quick summary of Oliver's career, see *id.* at x–xii.

<sup>138</sup> REID, *supra* note 130, at 29 (quoting HILLER B. ZOBEL, *THE BOSTON MASSACRE* 169 (1970)). According to John Reid, the colonial control over grand juries “meant that it was impossible for the king's officials to obtain indictments against persons accused . . . of violating imperial statutes such as the revenue laws.” *Id.* at 45; see also Harrington, *supra* note 89, at 162–63 (“In the colonies . . . common-law juries could frustrate the enforcement of the revenue laws by simply refusing to convict those accused.”).

<sup>139</sup> STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 57 (1983) (quoting Governor William Shirley); see also Harrington, *supra* note 104, at 394 & nn.78–81 (quoting Shirley as example of imperial officials' complaints regarding jury trials of violators of customs laws).

<sup>140</sup> See, e.g., Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 596 (1993) (“Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies.”).

The Stamp Act Crisis of 1765–66, for example, was precipitated in significant part by the British authorities' threat to try American colonists in admiralty courts without the benefit of American juries.<sup>141</sup> In response both to royal regulations that interfered with the selection of jurors in Massachusetts and to various attempts to remove certain trials to Britain, the First Continental Congress resolved in 1774 that “the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage . . . .”<sup>142</sup> Finally, among the grievances listed in the Declaration of Independence were the deprivation of jury trials and the transportation of Americans for trials overseas.<sup>143</sup>

### 3. *American Juries at the Time of the 1787 Convention*

At the time of the Constitutional Convention, every state constitution in existence guaranteed the right to a jury trial in both civil and criminal cases.<sup>144</sup> As in the colonial era, furthermore, civil juries at this time usually possessed the power to decide questions of both law and fact.<sup>145</sup>

In civil matters, the jury was often forced to decide the law for itself because it received disparate or contradictory legal interpretations from the bench and from counsel. In eighteenth-century American courts, most states allowed each party's counsel to proffer their own legal instructions to the jury during their closing argument.<sup>146</sup> In fact, juries often received contradictory instructions from

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<sup>141</sup> See, e.g., GOEBEL, *supra* note 10, at 86–87 (describing British efforts to try Americans in admiralty courts as “amount[ing] in colonial eyes to the employment of an unconstitutional means to effect an unconstitutional end”); Harrington, *supra* note 89, at 161–67 (discussing role of jury in escalating tensions between Britain and American colonies); Landsman, *supra* note 140, at 595 (“The denial of jury trial was a strong irritant in relations between America and Great Britain, featuring prominently in formal colonial complaints in the 1760s and 1770s.”).

<sup>142</sup> See Landsman, *supra* note 140, at 596 (quoting DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS Res. 5 (1774), reprinted in SOURCES OF OUR LIBERTIES 286, 288 (Richard L. Perry & John C. Cooper eds., 1959)).

<sup>143</sup> THE DECLARATION OF INDEPENDENCE paras. 20, 21 (U.S. 1776).

<sup>144</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83 (1998) (criminal juries); *id.* at 92 & n.33 (civil juries); Harrington, *supra* note 89, at 168 & n.101. In the two states that did not have state constitutions at the time of the Convention, Rhode Island and Connecticut, the right to civil and criminal juries was preserved by colonial law and established practice. LLOYD E. MOORE, *THE JURY* 104 (1973).

<sup>145</sup> William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 916 (1978) (“It accordingly seems safe to conclude that juries in most, if not all, eighteenth-century American jurisdictions normally had the power to determine law as well as fact in both civil and criminal cases.”).

<sup>146</sup> See *id.* at 911 (“One potential source of contradiction was counsel, who on summation could argue the law as well as the facts, at least in Georgia, Massachusetts, New York,

the bench itself because most state courts tried cases before multiple judges.<sup>147</sup>

It was not thought necessary for the bench to present a unitary view of the law to the jury because it was seen as the jury's prerogative to decide the case as it saw fit.<sup>148</sup> Often, instructions from the bench amounted to no more than a terse affirmation of the jury's freedom to decide the case at its own prerogative.<sup>149</sup> In some states, such as Virginia, instructions were frequently not given at all.<sup>150</sup>

When instructions were given, juries retained the freedom to ignore them and decide the law themselves.<sup>151</sup> In debtor cases, for

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Pennsylvania, South Carolina and Virginia, and probably in other colonies for which no direct evidence is available." (citation omitted)). In *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), a Supreme Court case tried before a Philadelphia jury, the lawyers' arguments on the law lasted for four days. Nelson, *supra* note 145, at 911 n.97 (citing *Brailsford*, 3 U.S. (3 Dall.) at 3).

<sup>147</sup> See NELSON, *supra* note 127, at 26 (describing prerevolutionary Massachusetts practice where "each judge sitting on the court that tried a case gave his own interpretation of the law—an interpretation that could and sometimes did differ from those of his brethren"); Nelson, *supra* note 145, at 911 & n.98, 912 (citing examples from Massachusetts and South Carolina where multiple judge panels gave conflicting instructions to juries). The evidence suggests that judges customarily retained the right to propose their own set of legal instructions, notwithstanding the fact that each judge's directions could contradict the instructions of the other judges on the panel. See *id.* at 911–12. In 1803, a Common Pleas judge in Pennsylvania, Alexander Addison, was impeached for refusing to allow other judges on his court to independently address the jury. *Id.* at 912. In those cases where the bench was divided, juries were forced to decide for themselves the version of the law that they found most applicable. *Id.* at 913; see also RITZ, *supra* note 96, at 30 ("There is evidence that each judge gave the jury his own views as to what the law was, and these views might very well differ from the views of his fellow judges."); Harrington, *supra* note 104, at 390 & nn.56 & 59 (observing that multiple-judge panels were used in states such as Connecticut, New York, Maryland, Pennsylvania, Virginia, and Georgia and stating that individual judges could provide juries with their own legal instructions, with possible exception of Maryland, where practice may have been for bench to jointly issue instructions).

<sup>148</sup> See, e.g., RITZ, *supra* note 96, at 30 (reasoning that disparate instructions from multiple-judge bench were viewed as acceptable because "judges were only giving the jurors the benefit of their views, and it was up to the jury to choose among the views so expressed or to ignore all of them and lay down its own view of the 'true rule of law'"); see also BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 70 (1987) ("[J]udges generally left juries to their own devices").

<sup>149</sup> See, e.g., NELSON, *supra* note 127, at 26 ("In colonial Massachusetts . . . [I]t appears that in many civil cases no instructions were given at all and that even in those cases where the jury was charged the charges were often brief and compressed." (citation omitted)).

<sup>150</sup> See *Commonwealth v. Garth*, 30 Va. (3 Leigh) 761, 773 (Va. 1831) (Leigh's *amicus curiae* brief) (noting that no instructions were given in "numerous cases").

<sup>151</sup> As William Nelson describes:

Although judges with the multifarious duties of mid-eighteenth-century courts were prominent local leaders, they were leaders who had power only to guide, not to command. For juries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies. Except in equitable actions, which were nonexistent in some colonies and

example, state court juries could—and did—simply ignore the bench’s instructions or its recommendations to award interest to a plaintiff.<sup>152</sup> The eighteenth-century American bench could not effectively utilize the procedures that judges today use to discipline juries, such as directed verdicts, special verdicts, or judgments non obstante veredicto. The eighteenth-century versions of the directed verdict were largely useless as a check on the power of American juries,<sup>153</sup> and almost no American jurisdiction at the time allowed the bench to set aside a jury verdict.<sup>154</sup> One year after the Constitution was drafted, the Connecticut Supreme Court denied motions for a new trial on the grounds that “[i]t doth not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both.”<sup>155</sup> In Massachusetts, an 1808 statute codified the right of a petit jury to “decide at their discretion, by a general verdict, both the fact and the law, involved in the issue.”<sup>156</sup>

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narrowly limited in the rest, judges could not enter a judgment or impose a penalty without a jury verdict.

Nelson, *supra* note 145, at 904 (citations omitted); *see also* Harrington, *supra* note 104, at 388 (“[A] judge intent on forcing a jury to find a verdict in accordance with his particular view of the law was apt to be disappointed. A judge could not simply instruct a jury on the law and expect that it would go along.”); Nelson, *supra* note 145, at 913 (“Even when the courts’ instructions were unanimous, however, juries could not be compelled to adhere to them.”).

<sup>152</sup> *See* Harrington, *supra* note 104, at 389 (citing, *inter alia*, 1803 Pennsylvania case of Crawford v. Willing, 4 Dall. 286 (Pa. 1803), where state court jury refused to award interest to plaintiff despite bench’s instruction that law clearly supported awarding such interest).

<sup>153</sup> Two techniques existed by which a party could move to close a case before jury deliberations: the demurrer to the evidence and the compulsory nonsuit. Prior to 1787, however, there were no published cases in which a compulsory nonsuit was used to prevent a jury from deciding an issue of law otherwise before it. Nelson, *supra* note 145, at 908 & n.82. The demurrer to the evidence was an option in at least five states but was largely unused due to procedural disadvantages. *Id.* at 908, 909 & n.84 (“The most severe disadvantage was that the demurrant had to admit all the facts shown in the evidence against him and all adverse inferences that could be drawn from those facts.”).

<sup>154</sup> *Id.* at 913. According to Nelson, this was viewed as impermissible in all of the New England states as well as Maryland and Virginia. *Id.* at 913–14. Furthermore, some evidence suggests that at least four other states—Pennsylvania, South Carolina, Georgia, and New Jersey—also maintained this rule. *Id.* at 914. It appears that only in New York did judges and commentators believe that a jury verdict could be set aside for being contrary to law or evidence. *Id.* at 915. Even still, examples of this happening in New York are rare, and the view that judges held this power remained controversial in New York throughout the eighteenth century. *See id.* (“[A]s late as 1800, judges did not fully agree that they could set aside a verdict against law or evidence.”); *cf.* RITZ, *supra* note 96, at 51 (“Judges did not make law; with the collegial assistance of counsel, of jurors, and sometimes of members of the executive and legislative parts of the government, they engaged in a continual struggle to discover the law.”).

<sup>155</sup> Witter v. Brewster, Kirby 422, 423 (Conn. Super. Ct. 1788); *see also* Nelson, *supra* note 145, at 913 n.106 (citing additional cases where similar charges were given).

<sup>156</sup> Mass. Laws 1807, ch. 139, § 15 (1808); *see Note, The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 174–75 (1964) (“There is considerable evidence . . .

In New York, the one state that did allow the bench to set aside a verdict, a second jury was free to impose its will over the bench simply by ignoring the judge's instructions and returning the same verdict that had been rendered by the first jury. Judgments *non obstante veredicto*, even in New York, were simply an unthinkable intrusion upon the prerogatives of a jury.<sup>157</sup> A debtor case filed in a New York state court in 1800 illustrates this point. In *Wilkie v. Roosevelt*,<sup>158</sup> the plaintiff brought an action to recover on a promissory note.<sup>159</sup> In 1801, the parties tried their case before a state jury in Manhattan.<sup>160</sup> The panel of judges instructed the jury to hold the note void if it fell within the statutory definition of usury, which in fact it plainly did.<sup>161</sup> When the jury nonetheless decided to find in favor of the plaintiff, the bench set aside the verdict on the grounds that it was contrary to both the evidence and the law.<sup>162</sup>

A second trial was held in 1802 and again the jury found in favor of the plaintiff.<sup>163</sup> Before a full, five-man bench of the New York Supreme Court, the judges split three to two in favor of granting another new trial.<sup>164</sup> The majority was troubled by the jury's determination to ignore the clear mandate of the statute, but it lacked the power to direct a verdict.<sup>165</sup> On December 21, 1802, the case was sent to the jury for a third time.<sup>166</sup> Once again, the jury found for the plaintiff, this time awarding him \$1680<sup>167</sup> on a note that was originally signed for \$1366.<sup>168</sup> In addition, the jury awarded the plaintiff \$295.12

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indicating that the jury's right in both civil and criminal cases was recognized [in Massachusetts] during the early part of the [nineteenth] century.”)

<sup>157</sup> New York courts did not use the judgment *non obstante veredicto* because, as one scholar has written, “the judgment *non obstante veredicto* was too overt an invasion of public sentiments regarding the jury as the safeguard of liberty.” 2 THE LAW PRACTICE OF ALEXANDER HAMILTON 15 (Julius Goebel Jr. ed., 1969).

<sup>158</sup> 3 Johns. Cas. 66 (N.Y. Sup. Ct. 1802). We owe our knowledge of the specifics of this case to the involvement of Alexander Hamilton. See 2 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 157, at 228–30 (noting Hamilton's involvement in case).

<sup>159</sup> 2 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 157, at 228.

<sup>160</sup> *Id.* at 229.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* Writing for the court on January 2, 1802, Judge Kent stated: “When a case appears as strongly marked as this, we have nothing to do with the policy of the defence. It is our duty to give effect to the statute, to cause it to be observed, and to suffer no contrivance or covin of the parties to evade it.” *Id.* (quoting *Wilkie*, 3 Johns. Cas. at 69–70).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 229–30 (citing and discussing *Wilkie*, 3 Johns. Cas. 206, at 206–13).

<sup>165</sup> *Id.* at 230 (noting that “all three judges writing opinions were certain that the evidence” favored defendant and they agreed it was within court's power to grant third trial).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 231.

<sup>168</sup> *Id.* at 228.

in costs.<sup>169</sup> The defendant finally gave up appealing and satisfied the judgment.<sup>170</sup>

Special verdicts, commonly used today to limit the jury's discretion, were not an effective check on an eighteenth-century jury because their use generally required the consent of both parties.<sup>171</sup> Even in the rare case where both parties requested a special verdict, a determined jury might still have been free to return a general verdict.<sup>172</sup> John Adams maintained that juries were under no "legal or moral or divine Obligation to find a Special Verdict where they themselves are in no doubt of the Law,"<sup>173</sup> and at least one early eighteenth-century court upheld the jury's right to return a general verdict even where a special verdict had been charged by the court.<sup>174</sup> Special pleading, an eighteenth-century common law practice which could have limited the scope of the jury's review in a manner similar to that of the special verdict, appears to have been rarely used in American jurisdictions prior to 1787.<sup>175</sup>

Some of the most persuasive confirmations of the civil jury's power to determine issues of law at the time of the Constitutional Convention can be found in the statements of prominent contemporaries.<sup>176</sup> In 1794, John Jay, then the Chief Justice of the U.S. Supreme Court, affirmed the civil jury's right to decide both questions

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<sup>169</sup> *Id.* at 231.

<sup>170</sup> *Id.*

<sup>171</sup> See Nelson, *supra* note 145, at 906 ("Any party could as a matter of right demand a general verdict in which the jury applied the law to the facts.").

<sup>172</sup> See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 307–10 (1966) (discussing examples of when general verdicts were allowed and disallowed when special verdicts were requested); Nelson, *supra* note 145, at 906 ("Furthermore, it was not clear that an unwilling jury could be forced to return a special verdict even if both parties desired one."); see also *supra* notes 131–34 and accompanying text (discussing return of general verdict in Zenger trial despite instructions for special verdict).

<sup>173</sup> 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 128, at 30, *quoted in* Nelson, *supra* note 145, at 906.

<sup>174</sup> See Nelson, *supra* note 145, at 906–07 & n.76 (discussing Smith's Lessee v. Broughton, 1 H. & McH. 33 (Md. Provincial Ct. 1714)).

<sup>175</sup> Special pleading was used occasionally in Massachusetts after the Revolution. See NELSON, *supra* note 127, at 73 n.42 (citing examples). With the possible exception of early eighteenth-century Maryland, however, special pleading appears to have remained an infrequent occurrence. See Nelson, *supra* note 145, at 905 (noting that mid-eighteenth-century American courts rarely used common law devices, including special verdicts, for controlling jury findings of law and fact).

<sup>176</sup> In 1781 or 1782, for example, Thomas Jefferson wrote the following about Virginia: [I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.

of law and fact when he issued his jury instructions in *Georgia v. Brailsford*.<sup>177</sup> Addressing a civil jury during a trial before the Supreme Court, Jay informed the jurors that although issues of law were usually determined by the court, “[Y]ou have . . . a right to take upon yourselves to judge of both [law and fact], and to determine the law as well as the fact in controversy.”<sup>178</sup> “[B]oth objects,” Jay informed the jurors, “are lawfully, within your power of decision.”<sup>179</sup> A year later, Justice James Iredell confirmed that “though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.”<sup>180</sup>

By virtue of their extensive prerogatives, eighteenth-century American juries did more than simply apply established legal norms to the cases that came before them. Instead, they played a substantial role throughout this period in shaping and creating the substantive law of their jurisdictions.<sup>181</sup> As a result, juries served as much a political as a judicial function, and their verdicts were ultimately reflections of the values, mores, and social frameworks of their respective communities.<sup>182</sup> The difficulty for many of the nation’s political elites in 1787 was that the values and mores of America’s local communities too often appeared to contradict the elite’s own vision for the nation’s well-being. In fact, by 1787, many of the nation’s political leaders had reached the conclusion that one of the greatest threats to the stability

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THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (Richmond, Virginia, J.W. Randolph 1853), *quoted in* Nelson, *supra* note 145, at 916–17.

<sup>177</sup> 3 U.S. (3 Dall.) 1 (1794).

<sup>178</sup> *Id.* at 4.

<sup>179</sup> *Id.*

<sup>180</sup> *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19, 33 (1795); *see also* *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 307, 28 F. Cas. 1012, 1013 (C.C.D. Pa. 1795) (No. 16,857) (“In general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts.”).

<sup>181</sup> *See* NELSON, *supra* note 127, at 29 (stating that, with reference to prerevolutionary Massachusetts, “the law-finding power of juries meant that the representatives of local communities assembled as jurors generally had effective power to control the content of the province’s substantive law”); RITZ, *supra* note 96, at 30 (“Juries not only found the facts, but they also had the final word as to what the law was.”); Harrington, *supra* note 89, at 160 (“[T]he latter part of the eighteenth century is notable for a remarkable consensus on the power of the jury to say not only ‘what happened’ in a particular case, but what law might be applied.”).

<sup>182</sup> For example, Jeffrey Abramson notes that:

Local citizens were empowered to control the actual administration of justice—thus, the jury was our best assurance that law and justice accurately reflected the morals, values, and common sense of the people asked to obey the law. . . . Functioning as the conscience of the community, the jury, according to the Anti-Federalists, was as much a ‘political’ institution as it was a judicial body . . . .

JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 28 (1994).

and prosperity of American society came from the ordinary citizens that comprised it.

*B. Direct Democracy and the Framers' Apprehension  
of State Court Juries*

The Constitutional Convention of 1787 was largely an effort to construct a form of mixed government that would address and control the pernicious effects of “unrestrained democracy” within the individual states.<sup>183</sup> America at that time had by far the broadest suffrage rights in the world.<sup>184</sup> In the eyes of many Framers, the years leading up to the Convention had demonstrated the dangers of allowing large numbers of ordinary citizens too much control over the governance of the new nation.<sup>185</sup> As one Framer subsequently articulated during a congressional debate over the structure of the federal judiciary, the fundamental challenge facing political elites was “[t]o save the people from their most dangerous enemy; to save them from themselves.”<sup>186</sup> At the beginning of the Convention, Edmund Randolph stated to his fellow delegates: “Our chief danger arises from the democratic parts of our [state] constitutions. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallows up the other branches. None of the constitutions have provided sufficient checks against the democracy.”<sup>187</sup>

The views of James Madison, arguably the single most influential figure in the Constitution’s drafting, are particularly instructive. In a

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<sup>183</sup> See, e.g., RAKOVE, *supra* note 80, at 34 (“The time had come, Madison concluded, not only to free the Union from its dependence on the states but to free the states from themselves by taking steps that would undo the damage done by the excesses of republicanism.”); WOOD, *supra* note 80, at 411 (“Yet the pressing constitutional problem was not really the lack of power in the state legislatures but the excess of it—popular despotism.”); WOOD, *supra* note 39, at 230 (“The Constitution, the new federal government, and the development of independent judiciaries and judicial review were certainly meant to temper popular majoritarianism . . .”).

<sup>184</sup> See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 10 (1988) (arguing that there was “nothing else in Europe to compare with the American practice of popular sovereignty” and noting that Georgia, whose suffrage laws were stricter than any other state’s, nonetheless enfranchised a percentage of its population four to five times as large as that which had right to vote in England).

<sup>185</sup> See, e.g., RAKOVE, *supra* note 80, at 50 (“[Madison’s] ideas of federalism, representation, and the separation of powers—the crucial theoretical issues that the Convention would face—all reflected his disillusion with the failings of state legislators and citizens alike.”); WOOD, *supra* note 80, at 404 (“The confiscation of property, the paper money schemes, the tender laws, and the various devices suspending the ordinary means for the recovery of debts . . . [were] laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history.”).

<sup>186</sup> 7 ANNALS OF CONG. 41 (1851) (statement of Sen. Morris).

<sup>187</sup> 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 26–27 (May 29, 1787) (statement of Edmund Randolph of Virginia).

letter to Thomas Jefferson, Madison summarized the concerns that had led him to identify the necessity of the Constitutional Convention:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.<sup>188</sup>

When the Framers referred to the dangers of popular sovereignty, they often cited the states' paper money legislation.<sup>189</sup> Paper money legislation, in turn, was intimately tied to the most cited justification for the need for diversity jurisdiction, i.e., the inability of creditors to collect the full value of their debts in state court. These perceived failings of the state courts and legislatures were inextricably bound together because both were viewed as manifestations of the same underlying problem, i.e., the propensity of ordinary Americans to misuse their political power.

In fact, the mass of ordinary citizens who elected the state legislatures and pressured them to pass paper money legislation constituted the same body of citizens who directly made law when sitting as jurors in the state courts. The greatest danger to liberty, Madison warned, was "not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority."<sup>190</sup> It was this same "body of the people," however, who composed the state court juries. "Juries are constantly and frequently drawn from the body of the people," the anti-Federalist "Federal Farmer" noted, "and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul [sic] in the judicial department."<sup>191</sup>

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<sup>188</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, *supra* note 71, at 295, 298. Similarly, Madison wrote:

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

THE FEDERALIST NO. 51 (James Madison), *supra* note 34, at 317–18.

<sup>189</sup> See *supra* notes 80–86 and accompanying text (describing various attacks on paper money legislation by Hamilton, Madison, and others).

<sup>190</sup> James Madison, Speech to the House of Representatives (June 8, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 71, at 197, 204.

<sup>191</sup> Letter from the Federal Farmer (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981).

For Anti-Federalists such as the Federal Farmer, the fact that the “body of the people” was in control of the various state judiciaries was laudable. For Constitutional Convention delegates such as Madison, who were led to Philadelphia in large part by a belief that the unrestrained exercise of democracy in the states had driven the nation into crisis, the fact that the state judiciaries were controlled by the mass of ordinary citizens was a cause for apprehension.

In Madison’s own terminology, injustice at the hands of a judiciary controlled by ordinary citizens was analogous to injustice at the hands of a popularly elected legislature. Madison stated in *The Federalist No. 10*:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be both judges and parties, at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens . . . ?<sup>192</sup>

Madison’s reflections in *The Federalist No. 10* are telling. According to Madison’s logic, American juries’ decisions on matters of private litigation, when aggregated, were the functional equivalent of legislation.<sup>193</sup>

In fact, for Framers such as Madison, juries probably were a more troublesome manifestation of majoritarian rule than were legislatures. At least in theory, the propensity of ordinary citizens for misrule could be muted in the legislature by representatives drawn from the “better sort” of society.<sup>194</sup> Madison preferred a republican form of democracy because he believed the mitigating effects of representation were instrumental in preventing the general mass of citizens from concentrating power and wielding it irresponsibly:

From this view of the subject, it may be concluded, that a pure Democracy, by which I mean a Society consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the

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<sup>192</sup> THE FEDERALIST NO. 10 (James Madison), *supra* note 34, at 53.

<sup>193</sup> Cf. WOOD, *supra* note 39, at 244 (“By classical republican standards such participation [of ordinary citizens in the deliberations and decisions of government] would imply the participation of private ‘interests’ in government, with the participants becoming judges of their own interests.”).

<sup>194</sup> Cf. LUTZ, *supra* note 184, at 84 (“In a republic . . . an elected group of men ‘refined’ the public views.”); *id.* (“Representatives were more likely to be wise, patriotic, and lovers of justice.”).

whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property . . . .<sup>195</sup>

The eighteenth-century jury strongly resembled Madison's description of the paradigm of bad government. As a "[s]ociety[ ] consisting of a small number of citizens[ ] who assemble and administer the Government in person," eighteenth-century juries drawn from local communities had the power to resolve individual legal disputes according to the dictates of their own "common passion or interest." In the aggregate, therefore, state court juries had a greater power and propensity for majoritarian misrule than the state legislatures that Madison so heavily criticized before, during, and after the Constitutional Convention.<sup>196</sup>

For the Framers, the inability of foreign and domestic creditors to recover their debts in state courts offered a tangible example of the injustice and shortsightedness of the majoritarian hegemony of state court juries.<sup>197</sup> The difficulties foreign creditors encountered in state courts threatened to disrupt America's foreign trade relations and imperil the nation's economic growth by drying up future sources of credit.<sup>198</sup> Repayment of American debts to British citizens had been one of the key obstacles to the negotiation of peace between Britain and the United States at the Revolutionary War's end.<sup>199</sup> As part of

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<sup>195</sup> THE FEDERALIST NO. 10 (James Madison), *supra* note 34, at 54–55.

<sup>196</sup> See Harrington, *supra* note 89, at 168 ("The jury's power to find law as well as fact seemed less attractive to those who also worried about the power increasingly held by populist elements in state governments. Political elites . . . began to seek some means by which juries might be restrained . . . ."); see also WOOD, *supra* note 39, at 244 ("It was one thing for ordinary people to take part in a mob or to vote; for them to participate in the deliberations and decisions of government was quite another.").

<sup>197</sup> The difficulties creditors experienced in state courts prior to the adoption of the Constitution were not derived solely from the actions of juries, but virtually all of the creditors' difficulties were derived in one way or another from the political pressures applied by the mass of Americans who composed the debtor constituencies. See *supra* notes 99–107 and accompanying text (discussing various manifestations of Americans' hostility towards creditors).

<sup>198</sup> See, e.g., Harrington, *supra* note 104, at 397 (arguing that political leaders of time were "concerned that unrestrained juries would have the potential over time to damage the reputation and credit of the United States abroad"); see also 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 518–20 (statement of James Wilson in the Pennsylvania ratifying convention) (arguing in favor of diversity jurisdiction because favoritism toward debtors in state courts threatened to "destroy the very sources of credit" and imperil efforts to "extend our manufacturers and our commerce").

<sup>199</sup> British merchants were owed large prewar debts, particularly by Southern planters, and the debts had been impossible to collect during the war. During the Revolutionary

the 1783 Treaty of Paris, the United States had agreed to remove all legal impediments to the recovery of debts in the state courts.<sup>200</sup> British creditors nonetheless continued to experience substantial difficulty collecting their debts after the war, particularly in the South, in part as a result of state court juries.<sup>201</sup> Britain cited the inability of its creditors to secure repayment in state courts as justification for its decision not to adhere to some of the treaty's other terms.<sup>202</sup> Some American leaders voiced concern that Britain would use its creditors' difficulties as a pretext for harassing American maritime commerce.<sup>203</sup>

In Philadelphia, Madison argued that an array of lower federal courts was necessary in order to counteract the "prejudices" of state

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War, at least nine states had enacted legislation that sequestered debts or obstructed their collection. HENDERSON, *supra* note 70, at 72.

<sup>200</sup> Article IV of the treaty required that "creditors on either side shall meet with no lawful impediment" to the recovery of debts previously contracted in good faith. The Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit. art. IV, Sept. 3, 1783, 8 Stat. 80. Similarly, Article V required that the American Congress recommend to the individual states that they permit loyalists and British subjects to be able to sue for the recovery of confiscated property. The Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80, 82.

<sup>201</sup> According to some sources, by 1791 the outstanding American debt to British creditors totaled approximately £5,000,000, eighty-three percent of which was concentrated in five southern states: Virginia, Maryland, South Carolina, North Carolina, and Georgia. HENDERSON, *supra* note 70, at 72; *see also* Holt, *supra* note 38, at 1434 & n.35 (citing sources placing total American debt to British sources at more than £5,000,000 by beginning of Revolution).

<sup>202</sup> Britain justified its refusal to comply with the treaty's requirement that it surrender its northwestern forts in Oswego, Niagara, and Detroit by noting that the United States had failed to comply with the treaty requirements regarding British creditors. RAKOVE, *supra* note 80, at 27. British occupation of these forts was of crucial significance to many Americans. It allowed the British both to control the important water passage between the Great Lakes and the St. Lawrence River—upon which many Americans hoped to ship their goods—and to continue to supply and support Indian tribes that were in conflict with Americans settling west of the Appalachians. *See* Holt, *supra* note 38, at 1444 & n.75 (describing continued British control of forts along Canadian border and subsequent control of Great Lakes-St. Lawrence water passage).

<sup>203</sup> For example, the Virginian George Mason wrote to his governor, Patrick Henry, in 1783:

The People in this Part of the Country are made very uneasy by the Reports we have from below, that the Assembly will make some Laws or Resolutions, respecting British Debts, which may infringe the Articles of the Peace; under the mistaken Idea, that Great Britain will not risque a Renewal of the War, on account of such an Infraction of the Treaty. . . . A new Ministry, averse to the Treaty, or even the Ministry who concluded it, might resent, and revenge an Infringement of it in any particular State, by Reprisals upon the Ships or Coasts of such State, or by sending two or three Frigates to intercept their Trade, without Danger of involving themselves in a new War . . . .

Letter from George Mason to Patrick Henry (May 6, 1783), in 2 *THE PAPERS OF GEORGE MASON, 1725-1792*, *supra* note 107, at 769, 770-71.

juries and benches.<sup>204</sup> Oliver Ellsworth, a delegate to the Constitutional Convention and one of the primary drafters of the Judiciary Act of 1789, was reported to have justified the need for the lower federal courts principally on the grounds that state court juries “were too apt to be biassed [sic]” against foreign litigants.<sup>205</sup> A member of the first Federal Congress, William Smith of South Carolina, referred to “that order of people” who composed state juries and argued that they were likely to be prejudiced against foreign litigants.<sup>206</sup> Even some Anti-Federalists frankly admitted that they held the individuals who served on state court juries in low regard. Aedanus Burke of South Carolina complained that his state’s juries were “committed to poor, uninformed men, many of whom are unacquainted with the English language.”<sup>207</sup> Burke was in favor of reforms that would have increased the number of “men of capacity and independence” in his state’s juries.<sup>208</sup>

Framer William Pierce, delegate from Georgia to the 1787 Convention, was perhaps the most blunt in his criticisms of state court juries. In a September 1787 letter to a friend, Pierce defended the Convention’s decision not to guarantee the use of juries in civil cases:

I ask if the trial by jury in civil cases is really and substantially of any security to the liberties of a people. In my idea the opinion of its utility is founded more in prejudice than in reason. I cannot but think that an able Judge is better qualified to decide between man and man than any twelve men possibly can be. The trial by jury appears to me to have been introduced originally to soften some of the rigors of the feudal system . . . but applied to us in America . . . [it] is useless, and I think altogether unnecessary; and, if I was not in

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<sup>204</sup> See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 124 (June 5, 1787) (statement of James Madison) (“What was to be done [without a network of lower federal courts] after improper Verdicts in State tribunals obtained under the biassed [sic] directions of a dependent Judge, or the local prejudices of an undirected jury?”). Madison’s reference to “undirected” juries is a bit puzzling in light of the jury’s extensive prerogatives to render verdicts in contradiction to even the clearest directions from the bench. See *supra* notes 151–82 and accompanying text. It is possible, however, that Madison chose to couch his statements in political terms in order to avoid alienating those members of the Convention who represented debtor constituencies and supported the institution of the jury.

<sup>205</sup> Letter from William Smith to Edward Rutledge (Aug. 10, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1281, 1284.

<sup>206</sup> 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1283–84.

<sup>207</sup> Letter from Aedanus Burke to Daniel Desaussure (May 7, 1789), in 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 473, 474. For an account of Burke’s opposition to the lower federal courts, see *infra* note 370 and accompanying text.

<sup>208</sup> 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 474–75.

the habit of respecting some of the *prejudices* of very sensible men, I should declare it ridiculous.<sup>209</sup>

Few proponents of the Constitution could afford to refer to juries as “useless” and “ridiculous” during the delicate period when the document’s fate hung in the balance. The institution of the jury was sacrosanct to most Americans, who cherished it—often as much or more than the ballot box—as an opportunity to directly and fundamentally participate in their democracy.<sup>210</sup> If many of the Constitution’s drafters had been known to be as hostile to the institution as Pierce, the document’s chances for ratification would have been even more attenuated.

Hamilton, for example, was circumspect (or at least vague) in his public criticisms of juries. In *The Federalist No. 83*, he offered several instances in which civil juries would not be desirable:

I feel a deep and deliberate conviction, that there are many cases in which the trial by jury is an ineligible one. . . . Juries cannot be supposed competent to investigations, that require a thorough knowledge of the laws and usages of nations, and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their enquiries. . . .

. . . .

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails.<sup>211</sup>

Hamilton was undoubtedly being guarded in his criticisms of the jury. Even so, his “deep and deliberate convictions” led him to state publicly that the national interest would be better served if many cases were not tried before juries at all.<sup>212</sup> In his private correspondence during the Revolution, Hamilton was even more forthcoming. “When the deliberative or judicial powers are vested wholly or partly in the collective body of the people,” he wrote in a letter to Gouverneur

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<sup>209</sup> Letter from William Pierce to St. George Tucker (Sept. 28, 1787), in *GAZETTE ST. GA.*, Mar. 20, 1788, reprinted in 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 444.

<sup>210</sup> See RAKOVE, *supra* note 80, at 301–02 (comparing importance of jury favorably with that of ballot).

<sup>211</sup> THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 34, at 514–519.

<sup>212</sup> Cf. RAKOVE, *supra* note 80, at 328 (concluding that Hamilton’s argument in *The Federalist Papers* “marked an important shift” in balance between bench and jury).

Morris in 1777, “you must expect error, confusion and instability.”<sup>213</sup> While many Framers may have had the discretion to avoid publicly criticizing the jury as an institution, there is no reason to think that the sentiments of Pierce and Hamilton were unique.

*C. Unsuccessful Efforts to Eviscerate the Jury’s Power  
in Federal Court*

The Constitution’s treatment of civil juries strongly suggests an effort to transfer power in the nascent federal courts from the jury to the bench. On several occasions, proposals at the Convention to include a guarantee of civil juries were rejected.<sup>214</sup> Charles Cotesworth Pinckney of South Carolina argued that such a provision would be “pregnant with embarrassments.”<sup>215</sup> Were it not for the subsequent enactment of the Seventh Amendment, the Federal Congress would have had the power to limit, or even altogether eliminate, the types of civil cases that would be decided by jury.<sup>216</sup> Similarly, the jury’s traditional freedom to decide issues of law was left susceptible to legislative modification or repudiation with respect to both civil and criminal matters.<sup>217</sup>

As we have already seen, Framers William Pierce from Georgia and South Carolina ratifying delegate Robert Barnwell defended the Constitution’s treatment of civil juries by challenging the propriety of the institution’s survival in federal court.<sup>218</sup> Other Federalists, such as Hamilton, claimed that it was simply impractical to guarantee the use of civil juries because of the variety of state practices.<sup>219</sup> The argument that it was impractical to provide for civil juries, however, was likely disingenuous.<sup>220</sup> Every state constitution at the time of the

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<sup>213</sup> Letter from Alexander Hamilton to Gouverneur Morris (May 19, 1777), in 1 THE PAPERS OF ALEXANDER HAMILTON 1768–1778, at 254, 254–55 (H.C. Syrett ed., 1961).

<sup>214</sup> See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 587–88, 628 (citing two failed proposals to include guarantee of civil jury).

<sup>215</sup> 2 *id.* at 628.

<sup>216</sup> U.S. CONST. amend. VII.

<sup>217</sup> By contrast, the Georgia Constitution of 1777 expressly protected the jury’s right to decide issues of law. GA. CONST. of 1777, § 41.

<sup>218</sup> See *supra* text accompanying notes 110 (Barnwell) and 209 (Pierce).

<sup>219</sup> THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 34, at 511–14.

<sup>220</sup> See, e.g., Harrington, *supra* note 104, at 399 (arguing that Framers’ aversion to state court juries was “apparent from the rather disingenuous arguments used by the Framers to defend the omission”); Landsman, *supra* note 140, at 598 (“Most scholars have concluded that claims about drafting difficulties were disingenuous. Instead, there was a growing belief that the jury should play only a modest part in the governance of post-revolutionary America.”). For a typical example of a similar assertion by a contemporary, see *A Democratic Federalist*, PA. HERALD, Oct. 17, 1787, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 193, 194 (“It seems to me that [the Federalists’ position regarding the diversity of state civil jury practices] is much more disingenuous than the

Convention protected civil juries.<sup>221</sup> In light of the fact that criminal juries were guaranteed in the original text of the Constitution,<sup>222</sup> the absence of a similar guarantee for civil juries aroused the suspicions of the Anti-Federalists.<sup>223</sup> In fact, Hamilton's argument only makes sense if one presupposes an effort to limit the jury's scope in the federal system.<sup>224</sup> Otherwise, as contemporaries such as Thomas Jefferson pointed out, the solution could have been simply to adopt the practices of those states that made relatively expansive use of civil juries.<sup>225</sup>

This omission of civil juries from the Constitution represents, at least to one scholar, "a profound shift in the way an exceedingly powerful segment of society had come to view the institution."<sup>226</sup> Patrick Henry summarized the prevailing view of Anti-Federalists when he stated at the Virginia ratifying convention that the new federal courts were intended to operate without civil juries at all.<sup>227</sup>

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objection itself . . . . This answer is extremely futile, because a reference might easily have been made to the common law of England, which obtains through every State . . . ." (emphasis omitted)).

<sup>221</sup> See *supra* note 144 and accompanying text.

<sup>222</sup> U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

<sup>223</sup> See, e.g., Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 419 (2002) ("The omission of the right to jury trial in civil cases became a lightning [sic] rod during the ratification debates that followed. . . . On one side . . . were the Anti-Federalists who opposed [the Constitution's] adoption, in part, because of the lack of a civil jury guarantee.").

<sup>224</sup> See THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 34, at 519 ("The examples of innovations which contract [the jury's] ancient limits, as well in these states as in Great-Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose that future experience may discover the propriety and utility of other exceptions.").

<sup>225</sup> Jefferson wrote:

It was a hard conclusion to say because there has been no uniformity among the states as to the cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had wandered should be brought back to it, and to have established general right instead of general wrong.

Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955).

<sup>226</sup> Landsman, *supra* note 140, at 598.

<sup>227</sup> Patrick Henry, Remarks at the Virginia Convention (June 20, 1788), in 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 1419, 1425 ("As this Government stands, I despise and abhor it. Gentlemen demand it, though it takes away the trial by jury in civil cases, and does worse than take it away in criminal cases. It is gone unless you preserve it now.").

The Constitution's aversion to civil juries, furthermore, was not limited to its failure to affirmatively protect their existence in the federal courts. The Constitution also included a provision that appears to affirmatively deprive the jury of some of its most fundamental prerogatives. Article III of the original document provides that the "appellate jurisdiction" of the Supreme Court shall encompass not only the legal determinations of jury verdicts but the factual determinations as well.<sup>228</sup> This clause appears to have been intended to allow the Supreme Court to revise jury determinations of fact coming out of both state and federal courts, as well as perhaps to allow the Supreme Court to operate as a trial court for the retrial of such determinations.<sup>229</sup>

Some Federalists initially defended this provision by arguing that jury verdicts should be subject to reversal.<sup>230</sup> Sensitive to the dangers such an argument could pose to the Constitution's ratification, other Federalists quickly retreated from this position and offered strained interpretations of the language that were less threatening to jury proponents.<sup>231</sup> Most Anti-Federalists, however, interpreted the clause as effectively abolishing civil jury trials. In the Pennsylvania ratification debates, one delegate voiced the predominant Anti-Federalist interpretation of the Constitution in these terms:

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<sup>228</sup> Article III provides that "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." U.S. CONST. art. III, § 2, cl. 2.

<sup>229</sup> See Holt, *supra* note 38, at 1468 & n.175 ("It is an inescapable conclusion that the Framers assumed that the appellate jurisdiction extended to 'cases of . . . Civil law' and thus intended the Supreme Court to exercise a civil-law mode of review sitting without a jury to revise juries' factual determinations or damage awards." (quoting 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 431)).

<sup>230</sup> In the Pennsylvania ratifying convention, for example, James Wilson argued:

The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. . . . Those gentlemen who during the late war had their vessels retaken, know well what a poor chance they would have had, when those vessels were taken into other states and tried by juries, and in what situation they would have been, if the court of appeals had not been possessed of authority to reconsider and set aside the verdict of those juries.

James Wilson, Remarks at the Pennsylvania Convention (Dec. 7, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 514, 520–21.

<sup>231</sup> See, e.g., THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 34, at 498–99 ("I contend . . . that the expressions, 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a re-examination in the supreme court of facts decided by juries in the inferior courts."); see also FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 290 (1985) (describing Hamilton's defense in *The Federalist No. 81* as "highly technical and not especially convincing").

It was the design and intention of the Convention to divest us of the liberty of trial by jury in civil cases; and to deprive us of the benefits of the common law.

The word “appeal” is a civil law term; and therefore the Convention meant to introduce the *civil* law.

On an appeal the judges may set aside the verdict of a jury.<sup>232</sup>

Many Anti-Federalists saw the Constitution’s treatment of civil juries for what it was: a renunciation of direct democracy and a manifestation of distrust in the ability or willingness of the mass of citizens to wield political power responsibly. An attack upon the jury, which was perceived by Anti-Federalists as “the democratic branch of the judiciary power,” was tantamount to an effort to deprive citizens of their right to self-government.<sup>233</sup> As one Anti-Federalist pointed out, an abrogation of the trial by jury would deprive “the common people” of their “true proportion of influence” in the governance of the country.<sup>234</sup> Similarly, a Farmer from Maryland warned:

Why shall we rob the Commons of the only remaining power they have been able to preserve, for their personal exercise? Have they ever abused it?—I know it has and will be said—they have—that they are too ignorant—that they cannot distinguish between right and wrong—that decisions on property are submitted to chance;

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<sup>232</sup> John Smilie, Remarks at the Pennsylvania Convention (Dec. 8, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 525, 525; see also Holt, *supra* note 38, at 1468 n.175, 1469 n.176 (quoting numerous Anti-Federalist leaders expressing such sentiments); Letter from the Federal Farmer No. 15 (Jan. 18, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 191, at 315, 322 (“By the common law . . . there is no appeal from the verdict of the jury, as to facts, to any judges . . . but, by the proposed constitution, . . . the opposite principle is established. An appeal will lay in all appellate causes from the verdict of the jury, even as to mere facts . . .”); Luther Martin, Remarks to the Maryland Legislature (1787), in 1 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 76, at 344, 381–82 (making similar statements).

<sup>233</sup> See HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981) (“The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government.”); Essay by a Farmer No. 4 (Mar. 21, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 191, at 36, 38 (“The trial by jury is—the democratic branch of the judiciary power—more necessary than representatives in the legislature . . .” (emphasis omitted)).

<sup>234</sup> Letter from the Federal Farmer No. 4 (Oct. 12, 1787), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 191, at 245, 249–50 (“It is essential . . . that common people should have a part and share of influence, in the judicial as well as in the legislative department. . . . The trial by jury in the judicial department . . . [has] procured for them, in this country, their true proportion of influence . . .”); see also Letter of Centinel, No. II, FREEMAN’S J. (Philadelphia), Oct. 24, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 191, at 143, 149 (“[The jury] preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens.” (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES \*380)).

and that the last word, commonly determines the cause:—There is some truth in these allegations—but whence comes it—The Commons are much degraded in the powers of the mind:—They were deprived of the use of understanding, when they were robbed of the power of employing it.—Men no longer cultivate, what is no longer useful,—should every opportunity be taken away, of exercising their reason, you will reduce them to that state of mental baseness, in which they appear in nine-tenths of this globe.<sup>235</sup>

From the perspective of many Americans, the Constitution attempted to accomplish what the British authorities had failed to do when confronted with recalcitrant state jurors during the Revolutionary era. Like the British, the Framers were perceived to be attempting to eviscerate the power of juries by expanding the equity jurisdiction of the courts (i.e., by expanding the number of cases that would not require a jury trial) and by shifting power from the jury to the bench.<sup>236</sup> In at least seven states, the state ratifying conventions demanded an immediate amendment to guarantee civil juries.<sup>237</sup> The ultimate result was the adoption of the Seventh Amendment, which protected at least some of the civil jury's traditional autonomy in the federal context.<sup>238</sup>

Over time, the Framers' efforts to erode the jury's prerogatives were vindicated. Most lawyers today find it surprising to discover that the civil jury ever had the ability, much less the right, to adopt an interpretation of the law that directly contradicted the bench.<sup>239</sup> In

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<sup>235</sup> Essay by a Farmer No. 4, *supra* note 233, at 39; *see also* Aristocrotis, *The Government of Nature Delineated or an Exact Picture of the New Federal Constitution* (1788), reprinted in 3 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 191, at 196, 204–05 (parodying Federalists' arguments against the abilities of ordinary jurors); Letter from the Federal Farmer No. 4, *supra* note 234, at 245, 250 (“I am very sorry that even a few of our countrymen should consider jurors . . . as ignorant troublesome bodies, which ought not to have any share in the concerns of government.”).

<sup>236</sup> *See supra* notes 140–43 and accompanying text (discussing British attempts to limit jury adjudication, specifically including threat to try admiralty cases without juries).

<sup>237</sup> Landsman, *supra* note 140, at 600; *see also* Letter from the Federal Farmer No. 15, *supra* note 232, at 315, 320 (“The body of the people, principally, bear [sic] the burdens of the community; they of right ought to have a controul [sic] in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined.”).

<sup>238</sup> The adoption of the Seventh Amendment guaranteed the civil litigant's right to a jury trial and protected both the civil and criminal juries' factual determinations from intrusive appellate review. The jury's right to decide issues of law, however, was not protected. *See* U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

<sup>239</sup> For a discussion of the gradual erosion of the civil jury's powers after the Constitution, *see generally* William E. Nelson, *The Province of the Judiciary*, 37 *J. MARSHALL L. REV.* 325 (2004).

1788, however, any hopes for the immediate evisceration of the jury's autonomy proved unrealistic, and many Framers appeared to realize that the expression of such designs—even privately—could jeopardize the Constitution's adoption.

The Framers' determination to neutralize the majoritarian tendencies of state court juries, however, was not frustrated by the passage of the Seventh Amendment. As we shall see in the next section, circumventing these juries did not require a wholesale attenuation of the federal jury's prerogatives. Instead, it merely required control over the composition of the juries that decided cases in federal court. It was this control over the composition of federal juries that provided the real allure of diversity jurisdiction for the Framers and that provided a primary impetus for the creation of the lower federal courts.

### III

#### THE HISTORICAL ORIGINS OF DIVERSITY JURISDICTION AND FEDERAL CONTROL OVER THE COMPOSITION OF FEDERAL JURIES

As those who created the federal courts well understood in 1787, with the creation of the lower federal courts flowed a concomitant control over the composition of the juries that sat in them. Throughout the eighteenth century, it was not an uncommon practice for those who administered the courts to manipulate the composition of juries for political, social, or economic ends. As we saw in the prior section, the compositions of American juries were manipulated during the Revolutionary War period as a means of frustrating British policies.<sup>240</sup> The Framers must have realized that those charged with the operation of the early federal courts would have been in a similar position to control the composition of federal juries. As a result, the federal courts offered an attractive alternative to the hegemony of state juries.

Some of the private correspondence of the drafters of the Judiciary Act suggests that control over the composition of juries was an essential factor in the creation of the lower federal courts. In a letter to Richard Henry Lee, a Senator on the committee responsible for drafting the Judiciary Act, future Supreme Court Justice Samuel Chase argued that the selection of “the best and most capable” in society to serve on juries in the new federal courts should be a priority. To ensure this, Chase recommended setting “oppressively high” property qualifications for federal jury service:

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<sup>240</sup> See *supra* notes 130–39 and accompanying text.

[T]he first object is to secure proper Characters for Jurymen. to effect this, take away all Exemptions, except of Clergymen. secondly. direct the Jurymen to be summoned by *Rotation*, to make the Burthen equal & easy—3rdly. direct the best & most capable only to be summoned & make the Qualification oppressively high, say 500£ & lay heavy penalties on the Returning Officer, & make it the Duty of the Judges to attend to the Return.<sup>241</sup>

Caleb Strong, a Convention attendee and one of the three primary drafters of the Judiciary Act, was similarly advised by Robert Treat Paine, attorney general of Massachusetts, regarding “the great Question of Appointing Jurors.” Paine hesitated to speak too openly in his letter but nonetheless expressed his desire that the “old habits” of the general public be avoided by instituting a method of jury selection that would ensure a “hearty desire to promote the common Cause of a well regulated Judiciary System.”<sup>242</sup>

In the short term, this control over the composition of federal juries meant that the Framers and their political allies would be in a position to influence, if not dictate, the outcome of federal litigation. The first administration was dominated by political elites who had fought for the Constitution’s adoption. George Washington had attended the Convention, and all four of the original cabinet positions were occupied by a Framers at one time or another during the course of his Administration.<sup>243</sup> Proponents of the Constitution controlled

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<sup>241</sup> Letter from Samuel Chase to Richard Henry Lee (July 16, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1039, 1039. Chase went on to make numerous other recommendations related to the courts. *Id.* at 1039–40.

<sup>242</sup> Letter from Robert Treat Paine to Caleb Strong (May 18, 1789), in 15 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 587, 589. The full passage reads:

[Y]ou will have to consider the great Question of Appointing Jurors. I suppose a Similarity in this respect doth not take place in the Several States, & if you make one general regulation (wch. I consider necessary) hard then will be the task to procure a facility of Execution, for this matter laying with the *Lay Gens* it will be hard to make them alter their old habits—you’ll excuse these loose hints, & attribute them to a hearty desire to promote the common Cause of a well regulated Judiciary System . . . .

*Id.*

<sup>243</sup> Attendees of the Convention who served in cabinet positions during the Washington administration included: Alexander Hamilton, Secretary of the Treasury from 1789–95; Edmund Randolph, Attorney General from 1789–94 and Secretary of State from 1794–95; and James McHenry, Secretary of War from 1796–1800. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 3 (2005) (listing executive officers in Washington administration); FRAMERS OF THE CONSTITUTION 154–56, 171–72, 194–95 (James H. Charleton et al. eds., 1986) (providing biographical information on attendees of Constitutional Convention). These four positions constituted the full cabinet until the Navy Department was created in 1798. 1 MARK GROSSMAN, ENCYCLOPEDIA OF THE UNITED STATES CABINET vii (2000).

both houses of the first Federal Congress.<sup>244</sup> Ten of the Senate's twenty-six members had attended the Constitutional Convention, while nine Framers were present in the first House of Representatives.<sup>245</sup> The Judiciary Act of 1789 was principally drafted by three senators, each of whom had attended the Constitutional Convention.<sup>246</sup>

Nevertheless, diversity jurisdiction was not simply a short-term effort by a select group of individuals to obtain power. Instead, it was an integral part of a broader effort to establish an institutional remedy for the perceived failings of the state governments, i.e., their unrestrained majoritarianism. The federal government, it was believed, would be able to check or remedy the failings of the state governments because it would be composed of a "superior" class of elected

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<sup>244</sup> During the first Federal Congress, the number of senators who had supported the Constitution's adoption ranged from twenty to twenty-one, due to William Paterson's resignation. *Birth of the Nation: The First Federal Congress 1789–1791, Members*, <http://www.gwu.edu/~ffcp/exhibit/p1/members/> (last visited May 18, 2007). The remaining five to six members of the Senate either had opposed the Constitution's ratification or did not have clearly articulated positions. *Id.* In the House of Representatives, thirty-nine of the chamber's sixty-five members had supported the Constitution's ratification. *Id.* Of the remaining twenty-six Representatives, twenty-five had either opposed the Constitution, were ambivalent, or did not have clearly articulated positions. *Id.* The only member who is unaccounted for in this list is Alexander White, for whom relevant biographical information is not available. *Id.*

<sup>245</sup> The ten senators were: Richard Bassett (Delaware); Pierce Butler (South Carolina); Oliver Ellsworth (Connecticut); William Few (Georgia); William Samuel Johnson (Connecticut); John Langdon (New Hampshire); Robert Morris (Pennsylvania); William Paterson (New Jersey); George Read (Delaware); and Caleb Strong (Massachusetts). The nine representatives were: Abraham Baldwin (Georgia); Daniel Carroll (Maryland); George Clymer (Pennsylvania); Thomas Fitzsimons (Pennsylvania); Elbridge Gerry (Massachusetts); Nicholas Gilman (New Hampshire); James Madison (Virginia); Roger Sherman (Connecticut); and Hugh Williamson (North Carolina). *Compare* H.R. Doc. No. 108-222, at 45–46 (listing members of first Federal Congress), *with* National Archives and Records Administration, *America's Founding Fathers: Delegates to the Constitutional Convention*, [http://www.archives.gov/national-archives-experience/charters/constitution\\_founding\\_fathers.html](http://www.archives.gov/national-archives-experience/charters/constitution_founding_fathers.html) (last visited March 9, 2007) (listing delegates to the Convention). Of these nineteen individuals, only three did not sign the finished document on September 17, 1787. National Archives and Records Administration, *supra*. Of these three, one (Elbridge Gerry) refused to sign the document for substantive reasons and two (Oliver Ellsworth and Caleb Strong) approved of the document but were absent on the day of its signing. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 260, 262 (1966).

<sup>246</sup> The three primary drafters were Oliver Ellsworth of Connecticut, William Paterson of New Jersey, and Caleb Strong of Massachusetts. *See* 4 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 22–23, 36 (Maeva Marcus ed., 1992) [hereinafter *DOCUMENTARY HISTORY OF THE SUPREME COURT*] (noting that these three sat on subcommittee charged with writing legislation and drafted Senate bill); Warren, *supra* note 15, at 59–60 (describing how these three senators, especially Ellsworth, took leading roles in committee); *see also* National Archives and Records Administration, *supra* note 245 (listing Ellsworth, Paterson and Strong as attendees of Convention).

and appointed officials.<sup>247</sup> In the words of James Madison, “The aim of every political Constitution is, or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society.”<sup>248</sup> The elevation of “the better sort” into positions of power was thought to be necessary in order to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom [could] best discern the true interest of their country, and whose patriotism and love of justice, [would] be least likely to sacrifice it to temporary or partial considerations.”<sup>249</sup>

Federal elected officials were expected to be superior to their state counterparts for several reasons. First, as there would be far fewer federal elected officials than state elected officials, a better class of individuals was expected to emerge from the electoral filtering process—particularly in the Senate.<sup>250</sup> Individuals such as James Madison believed that the superiority of federal elected officials would be a natural outgrowth of their being elected from much larger geographic areas.<sup>251</sup> These larger districts—in the case of the President, the nation as a whole, and in the case of senators, each state

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<sup>247</sup> See, e.g., McDONALD, *supra* note 231, at 165 (arguing that it was “crucial” to Framers such as Madison that federal government would be made up of “men who possess the most attractive merit” (quoting JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656), reprinted in *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 23 (J.G.A. Pocock ed., Cambridge University Press 1992); *THE FEDERALIST* NO. 10 (James Madison), *supra* note 34, at 56)); WOOD, *supra* note 80, at 513 (“In short, through the artificial contrivance of the Constitution overlying an expanded society, the Federalists meant to restore and to prolong the traditional kind of elitist influence in politics that social developments, especially since the Revolution, were undermining.”); WOOD, *supra* note 39, at 254–55 (“In an interest-ridden society the secret of good government was to enlarge and elevate the national government, . . . and thus screen out . . . ‘men of factious tempers, of local prejudices, or of sinister designs’—and replace them with classically educated gentlemen ‘whose . . . virtuous sentiments render them superior to local prejudices.’” (quoting *THE FEDERALIST* NO. 10 (James Madison), *supra* note 34, at 56–57)).

<sup>248</sup> *THE FEDERALIST* NO. 57 (James Madison), *supra* note 34, at 347.

<sup>249</sup> *THE FEDERALIST* NO. 10 (James Madison), *supra* note 34, at 55.

<sup>250</sup> See, e.g., LUTZ, *supra* note 184, at 85 (“Madison rehearsed the common notion that elections filter upward men of greater virtue.”); *id.* at 154 (“Madison argued that representation and the extended republic can control factions. Representation filters upward men of greater virtue, those who seek the common good rather than the partial good of any one faction.”); WOOD, *supra* note 39, at 253 (stating that proponents of Constitution believed federal government would be superior to state governments because members holding federal office would be more likely to be “disinterested gentry” and therefore uninvolved in “the interest-mongering of the marketplace”); see also *id.* at 506–18 (describing “filtration of talent” that Federalists expected to make federal elected officials superior to their state counterparts).

<sup>251</sup> See *THE FEDERALIST* NO. 57 (James Madison), *supra* note 34, at 350–51 (arguing that representatives in Congress would be elected by districts of five thousand to six thousand voters while representatives in lower houses of state legislatures were typically

as a whole—would help ensure that federal elected officials would govern more responsibly than their state counterparts. The larger districts would make federal officials more “disinterested” than their state counterparts, it was believed, because the increased size would decrease the likelihood that federal officials would come under the influence or control of any particular constituency or faction.<sup>252</sup> Furthermore, the increased prestige of federal office, inequities in the districting practices of the states, and the qualification standards for federal officeholders, also helped reassure the Framers that federal legislators and executives would be more apt to be drawn from the “better sort” than their state counterparts.<sup>253</sup>

By virtue of their control over the selection of federal juries, federal officials could be expected to translate their own superiority over state officials into a corresponding superiority of the federal courts. Like the officials who selected and placed them in the jury box, federal jurors could be expected to be drawn from the “better sort” of society. In the words of Samuel Chase, federal jurors were more likely to be “the best and most capable”;<sup>254</sup> in the the phraseology of James Madison, federal jurors were more likely than their state coun-

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elected from districts of five hundred to six hundred voters and suggesting more “fit representative[s]” would be elected from “so great a number”).

<sup>252</sup> See *THE FEDERALIST* NO. 10 (James Madison), *supra* note 34, at 58 (“[A] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it . . . .”); see also LUTZ, *supra* note 184, at 84–85 (summarizing Madison’s theory of extended republic); RAKOVE, *supra* note 80, at 46–56 (same).

<sup>253</sup> For the qualifications to hold elected office, see U.S. CONST. art. I, § 2, cl. 2, which establishes twenty-five years of age, seven years of U.S. citizenship, and inhabitancy in the electing state as the requirements for election to the House of Representatives; *id.* at art. I, § 3, cl. 3, which establishes thirty years of age, nine years of U.S. citizenship, and inhabitancy in the electing state as the requirements for election to the Senate; *id.* at art. II, § 1, cl. 4, which establishes birthright U.S. citizenship, thirty-five years of age, and fourteen years of residency in the United States as the requirements for election to the presidency. In some states, those areas that were most likely to contain and elect the “better sort” were underrepresented in those states’ districting schemes. In Pennsylvania, for example, Federalists believed that the city of Philadelphia had the highest concentration of well-educated and wealthy individuals who could be trusted to govern responsibly. See *infra* note 439. Under the scheme of representation employed by the state at the time, however, the inhabitants of Philadelphia were substantially underrepresented in the state legislature and in the executive council. See, e.g., *THE FEDERALIST* NO. 57 (James Madison), *supra* note 34, at 352 (noting that though Philadelphia contained “between fifty and sixty thousand souls. . . . [i]t form[ed] however but one county” and therefore elected only one member to council and state legislature).

<sup>254</sup> Letter from Samuel Chase to Richard Henry Lee (July 16, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1039, 1039.

terparts to possess the “wisdom to discern, and the . . . virtue to pursue the common good . . . .”<sup>255</sup>

What is more, the superiority of the federal courts would not be limited to a single issue, group of cases, or time period. Instead, the Framers had reason to believe that the composition of federal juries, controlled and regulated as they were by federal officials, would continue to be superior to their state counterparts long after the Framers themselves had ceased to play any role in government and long after the controversies of their day had been superseded by new and unforeseen developments.<sup>256</sup>

A. *Control over the Composition of Federal Juries by U.S. Marshals*

At the time of the Convention of 1787, most states did not employ today’s practice of empaneling jurors by lot. Instead, in the majority of federal districts—Delaware, Kentucky, Maryland, New Jersey, New York, Pennsylvania, Vermont, and Virginia—the sheriff was allowed to hand-select the jury.<sup>257</sup> By providing Congress with plenary power to establish the federal courts, the Framers (nineteen of whom went on to serve in the first Federal Congress)<sup>258</sup> knew that Congress would be free to employ this prevailing method of jury selection in the federal courts. The prospect of marshal selection

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<sup>255</sup> THE FEDERALIST NO. 57 (James Madison), *supra* note 34, at 347. Madison was referring to “rulers” when he employed this language but as discussed previously, Madison himself argued in *Federalist No. 10* that judicial determinations were (in the aggregate) the functional equivalent of legislation. *See supra* notes 192–93 and accompanying text.

<sup>256</sup> During the early years of the nation’s existence, the Framers’ faith in the superiority of federal officials (and hence federal jurors) appeared to be validated by their own political success and the success of their allies. *See, e.g., supra* notes 243–46 and accompanying text (describing sizeable number of Constitutional Convention attendees serving in legislative and executive branches). In all likelihood, the Jeffersonians’ success in the election of 1800 (the so-called “Revolution of 1800”) shook the faith of some Framers in the superiority of federal officials. *Cf. Nelson, supra* note 239, at 353 (“When Thomas Jefferson and his party won the election of 1800, it became clear to the Federalists that they could not protect fixed and fundamental principles of law and justice . . . through control of the executive and legislative branches of the national government.”). One can only speculate about the effect of Andrew Jackson’s presidency had more Framers lived to see it (only Madison did). Such observations, however, are beyond the scope of this Article. The argument here is that the lower federal courts were originally written into the text of the Constitution (at least with respect to diversity jurisdiction) because the Framers believed that the federal officials’ control over the composition of federal juries would make the federal courts perpetually superior to the state courts. Whether their faith in federal officials was always or ultimately vindicated does not alter this analysis of the Framers’ original purpose in drafting the Constitution’s text in 1787.

<sup>257</sup> *See* 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 271 (explaining that states that did not choose jurors by lot allowed sheriff to summon anyone he pleased).

<sup>258</sup> *See supra* note 245 and accompanying text.

alone, therefore, assured the Framers as early as 1787 that federal officials would likely possess total control over the composition of federal juries.

As Alexander Hamilton himself pointed out in *The Federalist No. 83*, this method of jury selection provided an easy mechanism for the manipulation of jury compositions:

The sheriff who is the summoner of ordinary juries, and the clerks of courts who have nomination of special juries, are themselves standing officers, and acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may fairly be supposed that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character.<sup>259</sup>

For Framers such as Hamilton who gathered in Philadelphia in 1787, this method of jury selection promised to ensure that federal cases would be decided by individuals of “the better sort” rather than by juries who were drawn, as in the state courts, “promiscuously from the public mass.”

In its initial draft of the Judiciary Act, the Federalist-dominated Senate proposed that jurors in all federal courts be hand-selected by federal marshals.<sup>260</sup> Caleb Strong, a Framers, was responsible for drafting the initial version of the provision.<sup>261</sup> The Senate version was resisted in the House of Representatives, however, where the Anti-Federalists were in the minority but enjoyed greater numbers.<sup>262</sup> Instead of allowing the marshals to hand-select jurors in every federal court, the House Committee proposed that federal juries be selected according to the practices of the forum state.<sup>263</sup> A minority of states at the time—Connecticut, Georgia, Massachusetts, New Hampshire, and South Carolina—selected jurors by lot.<sup>264</sup>

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<sup>259</sup> THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 34, at 510–11.

<sup>260</sup> Judiciary Act of 1789, § 27 (1789) (as presented to Senate prior to enactment), reprinted in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 93, 93; see also GOEBEL, *supra* note 10, at 490 (“[Under the original Senate Bill], [t]he jury list was to be made up by the marshal. . . . [This] left open the possibility of manipulation by the marshal.”).

<sup>261</sup> 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 36 & n.98.

<sup>262</sup> See *id.* at 91 (“Section 29, concerning the selection and composition of juries, was one of the most hotly debated sections in both the Senate and the House.”).

<sup>263</sup> See GOEBEL, *supra* note 10, at 506 (summarizing House Committee proposal that state law should govern formation of federal juries).

<sup>264</sup> 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 271.

The Senate, nevertheless, rejected the House proposal, and the debate over juror selection continued after most other provisions of the Judiciary Act had been finalized.<sup>265</sup> One of the drafters of the Judiciary Act, Framers Oliver Ellsworth, privately expressed concern that federal juries might be too “ignorant” were they to be selected by lot.<sup>266</sup> In the end, the Senate and House agreed to a provision that allowed for the selection of jurors “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 designations practicable by the Courts or Marshals of the United States.”<sup>267</sup> The compromise favored the Federalists. The inclusion of the “as practicable” qualifier provided the marshals with a possible means of evading lot selection altogether.<sup>268</sup> The addition of the phrase “now practiced,” furthermore, appeared to “freeze” the federal courts to the state practices in use as of 1789, thereby committing key federal districts such as New York and Virginia to marshal selection even in the event that those states’ legislatures subsequently moved to lot selection.<sup>269</sup>

The ultimate result of the Judiciary Act was that the majority of federal districts, including particularly key districts such as Pennsylvania, New York, and Virginia, employed a system in which the federal marshals were free to choose whomever they pleased to sit on the jury.<sup>270</sup>

The Framers’ confidence in the marshals’ ability to discern and select the “better sort” as federal jurors was validated by the types of individuals who chose to serve as federal marshals during the early decades of the federal courts’ existence. Unlike today, where the position of federal marshal is relatively obscure, the earliest federal marshals tended to be highly prominent political figures. In fact, the

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<sup>265</sup> See *id.* at 35 (describing legislative history of Judiciary Act).

<sup>266</sup> Letter from William Smith to Edward Rutledge (Aug. 10, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1281, 1284 (“The mode of drawing Jurors shod. be according to the customs & Laws of the sevl. States: Mr. Elsworth seemed to have no objections to that, but remarked that a very ignorant Jury might be drawn by Ballot.”).

<sup>267</sup> Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (codified as amended in scattered sections of 28 U.S.C.).

<sup>268</sup> See *infra* note 310.

<sup>269</sup> GOEBEL, *supra* note 10, at 507 (stating that statutory language “rescued” federal jury selection “from the whims of future state legislation”); *id.* at 659 (stating that Thomas Jefferson “conceived that the words ‘now practised’ in section 29 of the Judiciary Act froze the practice as of 1789”).

<sup>270</sup> See 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 271 (noting states that followed this practice). The one limitation was that federal jurors had to satisfy any property qualifications for jury service in the courts in the forum state. § 29, 1 Stat. at 88.

marshals were usually as prominent, if not more so, than the federal judges under whom they served. Of the thirty-three marshals appointed by Washington during his eight years in office, for example, five were former state judges, six had previously been state legislators, three had served in the Confederation Congress, and three would subsequently go on to serve in the United States House of Representatives.<sup>271</sup> Five of the marshals had been members of state ratifying conventions, and one had been a presidential elector in 1788.<sup>272</sup> Several occupied elected political office concurrently with their service as marshal.<sup>273</sup>

A more detailed examination of the biographies of just a few federal marshals will help reinforce the point about the prestige of their office. Delaware's first federal marshal, Allan McLane, was a former state judge and delegate to the state's constitutional ratifying convention. While serving as marshal, McLane was simultaneously Speaker of the Delaware legislature.<sup>274</sup> Jonathan Jackson, the marshal for the district of Massachusetts from 1789 until 1791, had served in the Massachusetts House of Representatives, the Massachusetts Senate, and the Continental Congress before becoming marshal.<sup>275</sup> He was a merchant by trade and a close ally of Alexander Hamilton.<sup>276</sup>

John Brooks, Jackson's successor as marshal in Massachusetts from 1791 to 1792, was a prominent Federalist who had helped to quell Shays's Rebellion as a commander of the Massachusetts militia.<sup>277</sup> He was a member of the Massachusetts ratifying convention and, like Jackson, served in the state legislature as both a representative and senator.<sup>278</sup> From 1817 to 1822, he was the Governor of Massachusetts.<sup>279</sup>

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<sup>271</sup> See HENDERSON, *supra* note 70, at 33 (listing qualifications of marshals).

<sup>272</sup> *Id.* Many of the marshals had served with distinction during the Revolution; at least twenty-five of the thirty-three marshals appointed during Washington's tenure had been Revolutionary officers. *Id.* at 34.

<sup>273</sup> See, e.g., *infra* notes 274–97 and accompanying text.

<sup>274</sup> See HENDERSON, *supra* note 70, at 30, 33 (discussing McLane).

<sup>275</sup> MARQUIS—WHO'S WHO, INC., WHO WAS WHO IN AMERICA: HISTORICAL VOLUME, 1607–1896, at 274 (1963) (discussing Jackson's background).

<sup>276</sup> *Id.*; see also CARL E. PRINCE, THE FEDERALISTS AND THE ORIGINS OF THE U.S. CIVIL SERVICE 266 (1977) (noting Jackson's close identification with Hamilton).

<sup>277</sup> 3 DICTIONARY OF AMERICAN BIOGRAPHY 80 (Allen Johnson ed., 1935). Brooks was described in the *Dictionary of American Biography* as a "staunch Federalist" who "sympathized with the maritime rather than the manufacturing interests of Massachusetts." *Id.*

<sup>278</sup> *Id.* He had also served during the Revolution and was President of the Society of Cincinnati and the Massachusetts Medical Society. *Id.*

<sup>279</sup> *Id.* The period of Brooks's administration was referred to as the "Indian Summer of Federalism" in Massachusetts. *Id.*

Clement Biddle, marshal of Pennsylvania from 1789 until 1793, was a personal friend of Washington and served as a judge on the Pennsylvania Court of Common Pleas before becoming marshal.<sup>280</sup>

Nathaniel Rogers, marshal for New Hampshire, was a former state judge, legislator, and delegate to his state's constitutional ratifying convention.<sup>281</sup>

Lewis Richard Morris, who served as marshal in Vermont from 1791 to 1801, was a member of one of the nation's most prominent political families.<sup>282</sup> He attended the Vermont convention that ratified the Constitution in 1791.<sup>283</sup> While marshal, Morris concurrently served as the Speaker of the state assembly for two years.<sup>284</sup> Without relinquishing his position as marshal, he then went on to serve in the U.S. House of Representatives as a Federalist from 1797 until 1803.<sup>285</sup>

Washington's other appointees were also politically prominent individuals, and virtually all were Federalists.<sup>286</sup> Under John Adams, as politics in the country became more polarized between Federalists and Republicans, the marshal appointments became even more overtly political. Adams's appointments showed a "consistent attention to Federalist beliefs."<sup>287</sup> When Nathaniel Rogers resigned in 1798 to accept the position of Supervisor of the Revenue for the dis-

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<sup>280</sup> 2 *id.* at 239–40.

<sup>281</sup> HENDERSON, *supra* note 70, at 33.

<sup>282</sup> See MARQUIS—WHO'S WHO, INC., *supra* note 275, at 368 (discussing Morris's background). Morris was from an aristocratic and politically prominent New York family. His father, Richard Morris, was Chief Justice of the New York State Supreme Court from 1779 to 1790. One of his uncles, Lewis Morris, was a signer of the Declaration of Independence and a member of both the Continental Congress and the New York Senate. Another uncle, Gouverneur Morris, was a drafter of the Articles of Confederation, a member of the Continental Congress, U.S. minister to France under Washington, and a Federalist senator from 1800 to 1803. *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> After having been marshal, he returned to serve three terms as a Federalist representative in that body. *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Some of Washington's other choices to be marshal included: Edward Carrington, Virginia's first marshal, a Revolutionary War figure who served in the Continental Congress from 1785 to 1786 and in 1807 was the foreman in Aaron Burr's treason trial, MARQUIS—WHO'S WHO, INC., *supra* note 275, at 96; Nathaniel Ramsay, appointed Maryland's marshal in 1790, a Revolutionary War figure, and a representative in the Continental Congress in 1775 and from 1785 until 1787, who, in 1794, while still marshal, was made naval officer of the Baltimore district, a position he retained until he died in 1817, 15 *DICTIONARY OF AMERICAN BIOGRAPHY* 340 (Dumas Malone ed., 1935); and Thomas Lowrie, marshal of New Jersey, who was closely identified with Alexander Hamilton, PRINCE, *supra* note 276, at 266. John Huger and his brother Isaac Huger were chosen successively as marshals of South Carolina allegedly to "keep that important family group in the Georgetown area allied to the federal cause." See *id.* at 266 (quoting GEORGE C. ROGERS, JR., *EVOLUTION OF A FEDERALIST* 182 (1962)).

<sup>287</sup> HENDERSON, *supra* note 70, at 92.

trict of New Hampshire, for example, Adams appointed Bradbury Cilley after receiving a recommendation from the New Hampshire congressional delegation that Cilley was “as firm a federalist as the state affords.”<sup>288</sup> When a vacancy for marshal in Maine opened in 1799, Adams appointed Isaac Parker, who had just completed two years as a Federalist member of the House of Representatives.<sup>289</sup> During the 1796 and 1800 elections, several marshals used their positions to help campaign for Federalist candidates.<sup>290</sup> Delaware marshal Allen McLane was instrumental in producing the Federalist victory in Delaware in 1796, and John Huger, the South Carolina marshal, campaigned for Adams in 1800.<sup>291</sup>

Henry Dearborn, who served as the first marshal in the district of Maine, appears to have been the only marshal under any Federalist president who went on to hold a political office as a Republican. Dearborn served as a Republican from Massachusetts in the House of Representatives from 1793 until 1797 and became secretary of war during Jefferson’s administration.<sup>292</sup> He resigned his position to become collector for the port of Boston, served in the War of 1812, and finished his political career as a minister to Portugal.<sup>293</sup>

One likely consequence of the marshals’ selection of federal jurors was to contribute to the pro-commercial and pro-creditor orientation of the new federal courts. The marshals themselves tended to be merchants and often had strong ties to banking and commercial interests. Allan McLane ultimately resigned his position as marshal in 1797 to take the more lucrative post of collector of the port of Wilmington.<sup>294</sup> After his service as marshal, Jonathan Jackson went on to become the treasurer of Massachusetts from 1802 to 1806, inspector and supervisor of internal revenue, and president of the Massachusetts State Bank.<sup>295</sup> Clement Biddle was a prosperous merchant and importer.<sup>296</sup> While marshal, Nathaniel Rogers served

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<sup>288</sup> *Id.* at 93. Cilley was later a Federalist member of Congress from 1813 until 1817. *Id.*

<sup>289</sup> *Id.* at 94.

<sup>290</sup> For examples of marshals campaigning for Federalist candidates, see PRINCE, *supra* note 276, at 265.

<sup>291</sup> *Id.*

<sup>292</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, H.R. DOC. NO. 108-222, at 49 (2005); MARQUIS—WHO’S WHO, INC., *supra* note 275, at 141.

<sup>293</sup> MARQUIS—WHO’S WHO, INC., *supra* note 275, at 141. The city of Dearborn, Michigan is named after him. *Id.*

<sup>294</sup> 12 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 277, at 112–13; HENDERSON, *supra* note 70, at 30, 33.

<sup>295</sup> MARQUIS—WHO’S WHO, INC., *supra* note 275, at 274.

<sup>296</sup> 2 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 277, at 239–40.

concurrently as a state commissioner responsible for settling debts with the United States.<sup>297</sup>

The significance of marshal selection, however, was not limited to creditor or commercial issues. By virtue of their control over the composition of federal juries, the federal marshals had the power to control the resolution of all cases that were funneled into the federal courts under the umbrella of diversity jurisdiction. The Constitutional framework ensured that the marshals would be appointed by the two elective branches of the federal government least susceptible to majoritarian pressures (the executive and the Senate).<sup>298</sup> As the “optimates” of the nation, i.e., the best intentioned and “most enlightened” citizens, the marshals could be trusted to ensure that all of these cases and controversies would be resolved in what the Framers considered to be the most just and responsible manner. In fact, the evidence suggests that the marshals affirmatively used their powers to ensure that the juries that decided cases in the lower federal courts shared “the same manner of thinking as that of the marshals and judges themselves.”<sup>299</sup> The state courts might have been dominated by juries drawn “promiscuously . . . from the public mass,” as Hamilton phrased it,<sup>300</sup> but federal cases would be decided by juries drawn attentively and judiciously from the “better sort” of Americans.

The most glaring examples of the marshals’ manipulation of federal jury compositions to achieve political ends occurred during the criminal prosecutions under the Sedition Act of 1798.<sup>301</sup> The Act made it illegal for persons to libel or defame, in print or speech, the

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<sup>297</sup> HENDERSON, *supra* note 70, at 30.

<sup>298</sup> The Framers were careful to exclude the more democratically elected federal body—the House of Representatives—from the federal appointment process. See U.S. CONST. art. II, § 2, cl. 2 (requiring President to make appointments with advice and consent of Senate); see also LUTZ, *supra* note 184, at 91 (“The creation of a bicameral legislature, [Madison] said, especially with an upper house composed of ‘more virtuous men,’ seemed one way of dealing with concentrated power in a system in which the legislature tended to be supreme.”); RAKOVE, *supra* note 80, at 53 (“Madison thus recognized that legislative excess remained the crucial problem of republican constitutionalism. His proposed *institutional* remedies . . . [included] the creation of a true senate, safely insulated from popular pressure, to check the lower house . . .”).

<sup>299</sup> 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 42 (1919), *quoted in* JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 423 n.8 (1956); see also 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 155 (1981) (“It was well known that in many States the courts, and more often the United States marshals, picked whom they pleased to serve on . . . juries. Since the marshals . . . were Federalists to a man, they tended to select for jury service those who shared their own political views.”).

<sup>300</sup> See *supra* note 259 and accompanying text.

<sup>301</sup> Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

President, Congress, or government of the United States.<sup>302</sup> Between 1798 and 1800, fifteen indictments were handed down under the Act.<sup>303</sup>

During the ensuing trials, Republicans vociferously protested that the presidentially appointed marshals were packing the juries with Federalists in order to secure convictions.<sup>304</sup> In Virginia, for example, the marshal selected a jury composed entirely of Federalists for the sedition trial of James Callender.<sup>305</sup> Elsewhere, Charles B. Cochran, the marshal of South Carolina, was described by Republicans as “a factious and wrong-headed youngster” who “unremittingly checked the free course of justice by his partial selection of jurymen.”<sup>306</sup> The jury-packing efforts of these Federalist marshals were so successful that one historian claimed that “the practice of the marshals in empanelling Federalists for jury service converted the law into an engine of the Federalist political machine.”<sup>307</sup>

The repeated selection of Federalists to serve on federal juries drew protests from the Republican press. Since marshals were “creature[s] of the Executive,” one commentary in the press argued, it was inevitable that they would “pack a jury of [T]ories to try a [R]epublican.”<sup>308</sup> In response to the sedition trials, Republicans in Congress pressed for a more equitable means of jury selection.<sup>309</sup>

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<sup>302</sup> *Id.* at 596–97; *see also* GOEBEL, *supra* note 10, at 633–35 (describing motivations of, and congressional debate surrounding, Act of July 14, 1798, ch. 74, 1 Stat. 596).

<sup>303</sup> GOEBEL, *supra* note 10, at 637 n.107.

<sup>304</sup> *See, e.g.*, 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 271 (“[D]uring the sedition trials of Matthew Lyon, Thomas Cooper, and James Callender, marshals were persistently pilloried for rigging juries.”).

<sup>305</sup> A review of the jury lists appeared to “prove[] positively that the trial jury was Federalist to a man.” SMITH, *supra* note 299, at 348, 423; *see also* PRINCE, *supra* note 276, at 264 (“[M]arshals rigged juries during the wave of sedition trials in 1798–99. David M. Randolph, United States marshal for Virginia, . . . certainly cooperated with the presiding judges in the Callender trial in empanelling a wholly Federalist jury.”).

<sup>306</sup> PRINCE, *supra* note 276, at 264, 354 n.34 (quoting Letters from Charles Goodwin (Apr. 30, 1801) and Ephraim Ramsey (May 1, 1801) to Thomas Jefferson).

<sup>307</sup> MANNING J. DAUER, *THE ADAMS FEDERALISTS* 165 (1953); *see also* Frank M. Anderson, *The Enforcement of the Alien and Sedition Laws*, in AM. HISTORICAL ASS’N, ANNUAL REPORT FOR 1912, at 113, 125–26 (1914) (“[The juries in Sedition Act trials] were composed predominantly, if not exclusively, of Federalists.”).

<sup>308</sup> *Montezumazin, No. III*, AURORA (Phila.), Mar. 18, 1800, *reprinted in* 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 640, 640.

<sup>309</sup> On January 31, 1800, the Republicans in Congress introduced a bill to curb the freedom of the marshals to select jurors, providing a uniform system of random selection in the federal courts. 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 271–72.

Federalist opposition in Congress, however, effectively frustrated their efforts.<sup>310</sup>

Ultimately, the Republicans' concerns about the marshals' packing of juries were alleviated, to some extent, by Thomas Jefferson's inauguration in March of 1801. One month before his inauguration, on February 19, 1801, Jefferson had warned that "the prostration of justice by [the] packing of juries cannot be passed

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<sup>310</sup> *Id.* at 273. That same term, however, Congress did pass a slight modification of the existing law regarding jury selection. The statute read:

That jurors to serve in the courts of the United States shall be designated by lot, or otherwise, in each state or district respectively, according to the mode of forming juries to serve in the highest courts of law therein now practised; so far as the same shall render such designation practicable by the courts and marshals of the United States.

Act of May 13, 1800, ch. 61, 2 Stat. 82, 82 (codified as amended at 28 U.S.C. § 1861). Some legal historians have concluded that this legislation amounted to no more than a clarification of the Judiciary Act. GOEBEL, *supra* note 10, at 661 & n.184.

This author believes, however, that the law was intended to convert at least two federal courts—New York and Vermont—to a lot system of juror selection by "unfreezing" the connection between state and federal practice that had been established in the Judiciary Act of 1789 and by bringing it into line with the state practices as of May 1800. President Jefferson, for example, appeared to express just such a belief in his correspondence from the day the bill passed the Senate: "Our Jury bill in Senate will pass so as merely to accommodate N. York & Vermont." See GOEBEL, *supra* note 10, at 661 n.183 (quoting Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), in 7 THE WRITINGS OF THOMAS JEFFERSON 443, 444 (Paul Leicester Ford ed., 1896)). In the interim between 1789 and 1800, for example, the state of New York had changed to a system of selecting jurors by lot. See, e.g., Act of Apr. 3, 1798, ch. 75, 1798 N.Y. Laws 247, 247.

Despite Jefferson's confidence, the law did not immediately have the intended effect in New York federal court. The "as practicable" clause apparently left sufficient room for maneuvering, and marshals continued to hand-select jury panels for the district of New York until 1814. See C.C.D.N.Y. Minutes (1800–1813). Beginning with the jury pools of 1814, procedures in New York's federal courts were finally brought in line with the state's practice of random jury selection. The only apparent explanation for this sudden change was the arrival of a new district judge, William Van Ness, who, on September 7, 1818, ordered the marshal to:

repair to the office of the clerk of the City and County of New York with the clerk of this court which clerk shall in the presence of the said clerk of the said city and county and of the Marshal shall proceed to draw out of the Box kept by the clerk of the said city and county and containing the names of the jurors of the said city and county seventy two slips of paper, and their persons whose names are contained in such slips of paper which shall be drawn as aforesaid shall be the persons who shall be summoned by the Marshal to serve as jurors at the next term of this court. And the clerk of this court shall immediately make out and certify under his hand a panel of the names of such jurors so drawn out with their respective places of abode, and additions, and deliver the same to the Marshal.

C.C.D.N.Y. Minutes (Sept. 7, 1813), at 25–27.

over.”<sup>311</sup> Upon entering office, Jefferson immediately replaced six of the incumbent marshals.<sup>312</sup>

### *B. Juror Selection in the New York Circuit Court*

In order to analyze how federal juries differed from their state counterparts, the author conducted a detailed empirical study of the jurors who served in the New York federal court between 1791 and 1808. The results confirm that the marshals repeatedly selected the same individuals for jury service. The results also support the conclusion that the individuals repeatedly selected were Federalists who tended to share the same political and economic motivations as the marshals who selected them.

As in other federal courts, New York’s early federal marshals were “men of the better sort.” Washington’s first choice as marshal of New York, William Stephens Smith,<sup>313</sup> was a war hero who was Washington’s aide during the war, married John Adams’s daughter in 1786, and in 1813 won a seat in the U.S. House of Representatives as a Federalist.<sup>314</sup> Matthew Clarkson, marshal of New York from 1791 to 1792, served in the Revolutionary War, was a state legislator in both the New York Assembly and Senate in the 1780s and 1790s, and was a Federalist candidate for the U.S. Senate in 1802.<sup>315</sup> Aquila Giles, Clarkson’s successor, was a Federalist who used his office to campaign

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<sup>311</sup> HASKINS & JOHNSON, *supra* note 299, at 161. As one historian has summarized it: “Of all the incumbent Federalist officeholders whose official fates Thomas Jefferson pondered before his inauguration, he reacted most vehemently to the incumbent marshals.” PRINCE, *supra* note 276, at 263.

<sup>312</sup> PRINCE, *supra* note 276, at 263. These marshals were: John Hall of Pennsylvania, Samuel Bradford of Massachusetts, Robert Hamilton of Delaware, Jabez Fitch of Vermont, David M. Randolph of Virginia, and Isaac Parker of Maine. *Id.* Only one marshal who was set for replacement, Bradbury Cilley of New Hampshire, managed to lobby successfully for his retention of the position. *Id.* In light of the central role played by the marshals and how politicized their selection had become during the Adams Administration, it is surprising that Jefferson did not immediately replace more than six. See RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 33 (1971) (“Jefferson decided that all Federalist attorneys and marshals . . . were to be dismissed and replaced by Republicans.”). Jefferson’s temperance probably represented an effort to reconcile the Federalists with the mainstream of American politics. See *id.* at 32 (“Formulating a policy toward incumbent officeholders proved to be [Jefferson’s] most difficult problem in the months immediately following his inauguration. Many Republicans demanded a general removal of the opposition, while the moderates advised against a policy of sweeping removals in order to further reconciliation.”).

<sup>313</sup> HENDERSON, *supra* note 70, at 28–29.

<sup>314</sup> See 17 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 277, at 368–69; MARQUIS—WHO’S WHO, INC., *supra* note 275, at 494. He was also one of the founders of the Society of the Cincinnati, a prestigious and exclusive society of army officers, and served as the organization’s president. *Id.*

<sup>315</sup> 4 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 277, at 166.

for the Federalist candidates in the 1800 elections.<sup>316</sup> Moreover, the New York marshals had strong ties to the mercantile community. Smith was the son of a wealthy merchant and resigned his position as marshal of New York to become supervisor of the revenue and surveyor of the port of New York, successively.<sup>317</sup> Clarkson came from a prominent New York mercantile family and was president of the Bank of New York from 1804 until 1825.<sup>318</sup>

For the period from 1790 until 1814, which includes every year of this author's study, the federal marshals in New York were free to hand-select jury panels in whatever manner they chose.<sup>319</sup> Examination of the minute records indicates that the early federal marshals in New York repeatedly favored the same individuals for jury service. From 1790 until 1808, the court impaneled a total of 1108 distinct individuals to fill 1829 seats as grand and petit jurors.<sup>320</sup> The minute records indicate that 402 (36%)<sup>321</sup> of these jurors were impaneled on multiple occasions.<sup>322</sup> There were approximately 6700 adult white males in Manhattan in 1790.<sup>323</sup> To be eligible for jury duty, however, one also needed £60 of unencumbered property.<sup>324</sup> This represented a significant amount of wealth during that time and would have reduced

<sup>316</sup> PRINCE, *supra* note 276, at 265 & n.37.

<sup>317</sup> MARQUIS—WHO'S WHO, INC., *supra* note 275, at 494; 17 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 277, at 368–69.

<sup>318</sup> 4 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 277, at 166.

<sup>319</sup> The federal marshal had unfettered discretion to select jurors by virtue of an analogous state law that granted that right to the sheriff. The statute explicitly provided that the sheriff was to select a panel “without the direction” of the judges. Act of Apr. 19, 1786, ch. 41, 1786 N.Y. Laws 273, 276.

<sup>320</sup> This assertion is based on two assumptions. The first is that there was a one-to-one correspondence between names and jurors. It is possible, of course, that two jurors could have shared the same name. This would have resulted in an undercount in the total number of jurors and an overcount in the number of repeat jurors. The second assumption is that the clerk's spelling was consistent from panel to panel. In light of the variations in spelling that were common during this era, however, it is quite possible that the same juror was mistaken to be two jurors because his name was spelled differently in the records. This limitation in the methodology likely resulted in an overcount of the total number of jurors and an undercount in the number of repeat jurors. For a more complete explanation of the author's approach to spelling variations, see *infra* App. Part B.

<sup>321</sup> This assessment is also based on the two assumptions noted in the preceding footnote.

<sup>322</sup> For the author's study, juror appearances were tabulated by session. Frequently a petit juror would serve on more than one jury within a single session, but these were not counted as repeat appearances.

<sup>323</sup> BURROWS & WALLACE, *supra* note 131, at 330.

<sup>324</sup> 1786 N.Y. Laws at 275. In most areas of the state, the sixty pounds of property was required to be in the form of land. *Id.* (“[E]very of them . . . shall . . . have . . . a freehold in lands messuages or tenements, or of rents in fee or for life, of the value of sixty pounds, free of all reprises debts demands or incumbrances whatsoever . . .”). For the residents of New York, Albany, and Hudson, however, the property could be in the form of personal property. *Id.* (“[I]n the cities of New York Albany or Hudson a freehold of the value

the pool to somewhere between 1348 and 2000 eligible persons.<sup>325</sup> The result was that the property qualifications in place at the time ensured that the federal jurors would represent the wealthiest five percent of New York City in 1790 and the wealthiest twenty-five percent of the adult white male population in 1790.<sup>326</sup>

We should therefore not be surprised that the court impaneled some jurors more than once during the eighteen-year period. However, the marshals hand-selected preferred jurors on so many repeat occasions that the number of jurors who served “only” two or three times was actually *lower* than the number that would have been expected were the jurors selected at random.<sup>327</sup>

The clearest evidence of favoritism is revealed when one looks at the number of jurors who served four or more times during this eighteen-year period. Seventy-six jurors were impaneled on four or more occasions. Of these, forty-three were impaneled four times, seventeen were impaneled five times, five were impaneled six times, six were impaneled seven times, three were impaneled eight times, and two

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aforesaid, or a personal estate of the like value free from all reprises debts, demands or incumbrances whatsoever.”).

<sup>325</sup> According to reports in contemporary newspapers, there were 1209 residents of Manhattan with freeholds of £100 or more, and another 1221 residents of Manhattan with freeholds of between £20 and £100. THOMAS E.V. SMITH, *THE CITY OF NEW YORK IN THE YEAR OF WASHINGTON'S INAUGURATION 1789*, at 7 (Chatham Press 1972) (1889). Assuming a uniform distribution of freeholds valued between twenty and one-hundred pounds, the number of Manhattan residents with freeholds of sixty pounds or more would have been approximately 1820—midway between 1209 and 2430. It is possible that this figure slightly undercounts the number of potential jurors in Manhattan, however, because of the relaxation of the state requirement that Manhattan residents possess their property in the form of land. See *supra* note 324. Assuming there could have been as many as 180 individuals who owned sufficient personal property to qualify for jury service, an upper bound of 2000 potential jurors is assumed for the purposes of the statistical analysis presented in this section. According to another source, furthermore, the number of Manhattan residents with £20 freeholds was approximately 1800. BURROWS & WALLACE, *supra* note 131, at 330. Assuming the same distribution, this figure would have put the total number of eligible jurors with £60 freeholds at approximately 1348. It is possible that these figures slightly undercount the number of potential jurors in Manhattan, as well, because of the relaxation of the state requirement that Manhattan residents possess their property in the form of land. See *supra* note 324. For the purposes of the statistical analysis presented in this section, an upper bound of 2000 potential jurors will therefore be assumed. The result is that the total number of Manhattan residents who were eligible for jury service was likely between 1348 and 2000; taking the average, the jury-eligible population will be assumed at 1674.

<sup>326</sup> Virtually all of the jurors in New York were residents of Manhattan. See *infra* notes 380–85 and accompanying text. According to the 1790 census, there were 33,131 inhabitants of New York City at the time. See BUREAU OF THE CENSUS, DEP'T OF COMMERCE & LABOR, *FIRST CENSUS OF THE UNITED STATES 1790: NEW YORK* 9 (1908).

<sup>327</sup> Given a pool of 1674 jurors, we would expect that 365 would be selected exactly twice and that 122 would be selected exactly thrice. In fact, only 226 were selected exactly twice and only 100 exactly three times.

jurors appeared in nine separate grand or petit jury panels. An average of every three years, a litigant could expect to see each of the following individuals sitting on either a grand or petit jury: James Arden, Gilbert Aspinwall, William Bayard, Levinus Clarkson, James Constable, Abijah Hammond, Isaac Heyer, John Hone, Joshua Jones, Charles Ludlow, Moses Rogers, Peter Schermerhorn, Edmund Seaman, John Shaw, Samuel Tooker, and Henry White. A litigant in federal court would expect to see two of these individuals, Joshua Jones and Edmund Seaman, as often as every other year.

This distribution of jurors would appear to be imbalanced towards those jurors whom the marshals most favored and, indeed, statistical analysis bears this suspicion out. While seventy-six jurors appeared four or more times, only thirty would have been expected to have done so. This result could therefore be expected to occur less than one-tenth of one percent of the time in a random selection. Thirty-three jurors were impaneled five or more times; five would have been expected. The chance of such a result occurring randomly is essentially zero; so, too, is the chance of having had sixteen jurors appear six or more times, whereas only one could have been expected to have done so.

Among this list of those who served most repeatedly were the directors of the city's leading banking, insurance, and waterworks entities.<sup>328</sup> The Aspinwall, Bayard, Hone, and Schermerhorn families were among the wealthiest and most prestigious families in New York.<sup>329</sup> A search of the local directories from this period reveals that all or virtually all of these repeat jurors were merchants of one kind or another.<sup>330</sup> Peter Schermerhorn was one of the most well-known

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<sup>328</sup> Charles Ludlow was a director of the New York branch of the United States Bank from 1803 to 1804. 1803 LONGWORTH'S AMERICAN ALMANAC, NEW YORK REGISTER, AND CITY DIRECTORY 53 (1803) [hereinafter LONGWORTH'S AMERICAN ALMANAC]; 1804 LONGWORTH'S AMERICAN ALMANAC, *supra*, at 50. John Hone was a director of the Merchants' Bank in 1804. *Id.* Moses Rogers was a member of the Chamber of Commerce and a prominent merchant dating back to the Revolution. SIDNEY I. POMERANTZ, NEW YORK: AN AMERICAN CITY 90 (1965). "Ed" Seaman was a director of the New York Insurance Company in 1800. James Arden was a director of the Manhattan Company (a waterworks) in 1804. 1804 LONGWORTH'S AMERICAN ALMANAC, *supra*, at 50.

<sup>329</sup> See BURROWS & WALLACE, *supra* note 131, at 229 (Bayard), 455 (Hone), 457 (Aspinwall), 713 (Schermerhorn).

<sup>330</sup> A search through the 1791 to 1801 editions of *Longworth's American Almanac*, *New York Register*, and *City Directory* reveals that all but two of these jurors were listed as "merchants" for at least one of the years during this period. One of the two who were not so listed, Peter Schermerhorn, was one of the most well-known merchants in the city, 1796 LONGWORTH'S AMERICAN ALMANAC, *supra* note 328, at 284, while the other, Samuel Tooker, had no listing. *Cf. id.* at 308 (failing to list Tooker where he otherwise would have been listed).

shipping merchants in the city.<sup>331</sup> William Bayard was a founding partner of one of the leading commercial houses in New York.<sup>332</sup> Few New Yorkers, if any, possessed more securities from the southern states than Bayard, and during the first quarter of the nineteenth century he became one of the wealthiest individuals in the entire country.<sup>333</sup> After Alexander Hamilton was shot by Aaron Burr, it was to William Bayard's house that Hamilton was rushed and at which he subsequently died.<sup>334</sup>

The ease with which a marshal could dictate the outcome of a trial by manipulating the composition of the jury was demonstrated, ironically, by the criminal trial of New York's first federal marshal, William Stephens Smith. In 1806, Smith and Samuel G. Ogden, a New York merchant, were accused of aiding the Spaniard Francesco de Miranda in an attack on Caracas, in what is now Venezuela.<sup>335</sup> Smith and Ogden claimed that their enterprise had the support of the Republican administration of Thomas Jefferson, and the ensuing trial became one of the federal court system's most politically charged trials of the early nineteenth century.<sup>336</sup>

Perhaps out of personal friendship with Smith,<sup>337</sup> the marshal John Swartwout selected a large number of politically prominent Federalists who were hostile to the prosecution of one of their own at the hands of the Jefferson administration. The U.S. Attorney at the time, Nathan Sanford, complained that the marshal's ability to pack the jury with Federalists dashed the prosecution's chances of success against Smith and Ogden.<sup>338</sup>

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<sup>331</sup> POMERANTZ, *supra* note 328, at 160. Peter Schermerhorn was a director of the Bank of New York in 1796 and the New York branch of the United States Bank from 1803 to 1804. 1796 LONGWORTH'S AMERICAN ALMANAC, *supra* note 330, at ix; 1803 LONGWORTH'S AMERICAN ALMANAC, *supra* note 328, at 53; 1804 LONGWORTH'S AMERICAN ALMANAC, *supra* note 328, at 50.

<sup>332</sup> See 2 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 277, at 72–73 (describing partnership between Bayard and Herman Le Roy that formed “one of the leading commercial house[s] in New York”).

<sup>333</sup> BURROWS & WALLACE, *supra* note 131, at 302 (stating that Bayard and his partner owned \$580,000 worth of securities from southern states such as South Carolina, North Carolina, and Virginia, most of any New York firm). William Bayard went on to become president of the Bank of America and the Chamber of Commerce for the state of New York. 1 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 277, at 72–73.

<sup>334</sup> BURROWS & WALLACE, *supra* note 131, at 332.

<sup>335</sup> See generally JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 49 (1987) (recounting trial). Ostensibly, the purpose of the endeavor was to liberate South America from Spain. *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> According to one source, he was an “intimate friend of Smith.” *Id.* at 50.

<sup>338</sup> In an April 14, 1806 letter to prominent New Yorker Albert Gallatin, Nathan Sanford remarked:

Despite the overwhelming majority of Federalists on the jury, or perhaps because the Federalists thought a public trial was in their best interests, the grand jury issued an indictment.<sup>339</sup> The composition of that term's petit jury, however, was equally stacked against the prosecution, and Sanford harbored no illusions about his ability to convict the defendants.<sup>340</sup> When Smith and Ogden moved to continue the trial, Sanford elected not to oppose their motion, perhaps in the hope that even a slightly more favorable pool of petit jurors would be selected in the following term.<sup>341</sup>

In a letter to Albert Gallatin, Sanford expressed his frustration with the marshal's ability to dictate the course of the trial:

I mean rather to state facts than to make reflections, but I may be permitted to observe that when a question whether political in its nature or not can be made to assume a political aspect an officer who selects the jury at his pleasure has it in his power well nigh to insure the result of the prosecution. By the arts which have been practised these prosecutions have at this moment been brought to assume a political complexion in this City at least in the view of persons unfriendly to the administration. If this artifice can be continued or renewed at the time of trial and if the jury should then consist of men like those who composed the last jury I should not entertain much hope of success whatever might be the evidence adduced in support of the prosecutions.<sup>342</sup>

In the interim between trials, Sanford braced for another unsympathetic jury<sup>343</sup> and his fears were realized when the trials took place

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The Grand Jury and the petty jury are both selected by the Marshal at his pleasure. Twenty one Grand Jurors were sworn. Of these four or five were Republicans, four or five were Burrrites and the residue were Federalists. Among the two latter classes were some who as I am informed are the personal friends of Ogden and Smith. Much the greater part of these Federalists and probably some of the Burrrites are the most bitter and violent enemies of the administration.

Letter from Nathan Sanford to Albert Gallatin (Apr. 14, 1806) (on file with New York University Law Review).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> Of the forty-eight petit jurors selected for the court's April term, Sanford remarked: "[A] few were Republicans a few were Burrrites and a large majority Federalists and the greater number of the latter of the most bitter and violent complexion." *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> Sanford wrote:

I have before expressed to you my opinion that the fate of these prosecutions depends almost entirely upon the pleasure of the Marshal. The President and yourself have been informed of the conduct of the Marshal at the last term. I presume not to say what it may be at any future time.

Letter from Nathan Sanford to Albert Gallatin (June 9, 1806) (on file with New York University Law Review).

in July of 1806. Of the forty-eight petit jurors impaneled for the trial, Sanford stated that he could identify only six who were Republicans.<sup>344</sup> The greater number of the thirty-three identifiable Federalists, Sanford complained, were “men of the most decided and violent character in politics.”<sup>345</sup> “In a word,” Sanford summarized, “the prosecutions have been completely converted into an affair of party politics.”<sup>346</sup> The juries acquitted both Ogden and Smith.<sup>347</sup> After the trial, Jefferson promptly removed Swartwout from his office and appointed a new marshal.<sup>348</sup>

Although the selection of federal jurors by marshals was the most glaring example of how the composition of federal juries could be controlled and manipulated, it was not the only way that this could be achieved. The composition of federal juries was also dictated, as the next section will demonstrate, through federal officials’ control over the geography of the federal jury pools. In certain respects, this geographic control had a more pervasive and far-reaching impact on the political, social, and economic compositions of federal juries than did the marshals’ selection.

*C. Control of the Geography of Federal Jury Pools and Its Impact on the Political, Economic, and Social Composition of Federal Juries*

At the time of the Convention, the Framers must have been aware that it would be within the power of those charged with the creation and administration of the federal courts to dictate the compositions of federal juries simply by controlling the geographic area from which jurors would be drawn. By virtue of their belief that federal officials would, unlike their state counterparts, be drawn consistently

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<sup>344</sup> Letter from Nathan Sanford to Albert Gallatin (July 30, 1806) (on file with the New York University Law Review). Sanford identified thirty-three Federalists, six Republicans, and three Burrists, and he lacked “sufficient knowledge” to be able to identify the “political attachments” of the remaining six. *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* Ironically, one juror was dismissed from the proceedings for partiality toward the prosecution. The juror, John Fellows, was challenged for “utter[ing] expressions after he was summoned as a Juror, hostile to the defendant.” C.C.D.N.Y. Minutes (July 25, 1806). The court summoned three other jurors to “determine whether the said John Fellows is an impartial Juror in this cause or not . . . .” *Id.* Sanford stated:

If we had attempted, during the heat of a contested election, to persuade a great majority of these Jurors to vote for a Republican nomination in opposition to candidates of their own political sect, we should have had as much reason to expect success, as we had in attempting to persuade them to convict Ogden and Smith.

Letter from Nathan Sanford to Albert Gallatin, *supra* note 344.

<sup>347</sup> MORRIS, *supra* note 335, at 50.

<sup>348</sup> *Id.* at 50 & n.65.

from society's upper echelon, the Framers could expect that such officials would exercise their control over jury compositions to ensure that a "superior" class of individuals would be deciding cases as the jurors in federal court. In order to appreciate how dramatically the geography of the federal and state jury pools differed, and the socio-economic significance of those differences, we need to look first at the jury selection procedures existing in the states at the time the federal courts were contemplated and established.

### 1. *The Traditional Jury of the Vicinage*

At the time the Constitution was written, the existing common law practice in the states required that juries be drawn from the immediate vicinity, or vicinage, of the area in which the cause of action arose. Only a local jury, it was thought, would be in a position to judge the credibility and motives of the parties and witnesses.<sup>349</sup> British efforts to abrogate the vicinage principle by trying colonists in England drew some of the most vociferous American protests during the colonial period.<sup>350</sup> The principle of the vicinage jury was enshrined in many of the new states' founding constitutions.<sup>351</sup>

In the civil context, similarly, having a jury of the vicinage was an essential political right of individuals and the communities in which they lived. If juries were drawn from too large an area, their decisions would not adequately represent the interests and values of the local community. Most states, accordingly, dispersed their courts throughout their various counties.<sup>352</sup> A few, such as New York and

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<sup>349</sup> In criminal matters, for example, it was thought that only a local jury would be inclined to identify with a criminal defendant and serve as a counterbalance to the government's interest in prosecution. Patrick Henry defined the ideal body of jurors as "[t]hose who reside near [the defendant]—his neighbours—and who are well acquainted with his character and situation in life." 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 1466. Only neighbors, Henry argued, would be "acquainted with [defendants'] characters, their good or bad conduct in life, to judge of the unfortunate man who may be thus exposed to the rigour of that Government." *Id.*

<sup>350</sup> See *supra* notes 140–43 and accompanying text (discussing such British efforts).

<sup>351</sup> See William W. Blume, *The Place of Trial of Criminal Cases*, 43 MICH. L. REV. 59, 67–78 (1944) (explaining how idea of vicinage jury was included in Massachusetts Declaration of Rights in 1780, Maryland Constitution of 1776, New Hampshire Constitution of 1784, Pennsylvania Constitutions of 1776 and 1790, and Georgia Constitution of 1777). In 1776, Virginia included the right to "Trial by an impartial jury of his Vicinage" among the rights guaranteed to a criminal defendant by the state's Declaration of Rights. VA. DECLARATION OF RIGHTS, art. VIII (1776), *quoted in* ABRAMSON, *supra* note 182, at 23.

<sup>352</sup> See, e.g., MILLER, *supra* note 103, at 24–27 (describing Virginia system in 1787 in which judicial power was centered in each county court); see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 17 (Touchstone 2005) (1973) ("Judicial organization as such did not change fundamentally in the eighteenth century. . . . In most colonies, the county court functioned as a general trial court."); McDONALD, *supra* note 231, at

Massachusetts, followed the traditional British *nisi prius* practice, by which the highest court in the state met in a central location to conduct administrative and legal business but would then ride circuit each year in order to hear trials in every county of the state.<sup>353</sup> In states such as New York, jurors were required by law to be summoned from the immediate vicinity of the trial, which meant in practice that an action being tried in a particular county would be heard before a jury composed entirely of that county's residents.<sup>354</sup> In addition, state venue rules usually required a geographic connection between the subject of the litigation and the site where the case was tried.<sup>355</sup> New York's venue rules, for example, required trials to take place in the county where the cause of action "arose."<sup>356</sup>

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289 ("[T]he United States was a nation composed of several thousand insular communities, each of which exercised virtually absolute powers over its members through two traditional institutions, the militias and the juries."); RITZ, *supra* note 96, at 44 ("In 1789 the principal characteristic of state judicatories was their *horizontal* arrangement. 'Superior' courts as well as 'inferior' court were trial courts. The important function of the superior courts was the trial function, not the appellate-review function.").

<sup>353</sup> In New York, for example, the trial court of the state (the Supreme Court) was required by statute to ride circuit at least once every year in order to hear trials in every county. An Act for Regulating Trials of Issues, and for Returning Able and Sufficient Jurors, ch. 41, 1786 N.Y. Laws 273, 273; *see also* ELLIS, *supra* note 312, at 184–85 (describing court system of Massachusetts during Confederation era as having Courts of Common Pleas in every county and Supreme Court that rode circuit through every county of state each year in order to retry cases on appeal); Holt, *supra* note 38, at 1481 n.215 (stating that both Massachusetts and New York employed *nisi prius* system during this period).

<sup>354</sup> The statute read in relevant part:

That every venire facias for the trial of any issue in any action or suit civil or criminal, in any court of record within this State, shall be awarded of the body of the proper county where such issue is triable, excepting in such cases in which foreign juries shall be deemed necessary; in which cases the venire facias shall be awarded of the body of the county from which such foreign jury are directed to come.

1786 N.Y. Laws at 275 (1786).

<sup>355</sup> *See, e.g.,* NELSON, *supra* note 127, at 188 n.34 (discussing venue rules for Massachusetts).

<sup>356</sup> The statute read in relevant part:

That all issues joined or hereafter to be joined in the supreme court, or any other court . . . shall be tried in the proper counties where the lands tenements or hereditaments in demand or question shall be situated, or the cause of action, suit, controversy or offence shall arise or be committed, unless the supreme court upon motion in behalf of the people of this State if they be interested or upon motion of any plaintiff, demandant or avowant or tenant or defendant, shall think proper to order the trial to be at the bar of the said supreme court, which shall only be done in cases of great difficulty, or which require great examination. But this clause shall not extend to any action merely transitory, nor prevent the said supreme court from ordering trials by foreign juries in all cases where it shall be proper and necessary.

1786 N.Y. Laws at 273.

As we saw in the prior section, the dominance of local juries could make the state courts an unwelcome place for creditors pursuing their debts.<sup>357</sup> When early proponents of diversity jurisdiction spoke of “local prejudices” in the state courts, they may well have been referring to this phenomenon, the result of which was that local juries, on behalf of their communities, could impose their political, economic, and social preferences on the resolution of court actions.

## 2. *Repudiation of the Vicinage Principle for Federal Courts*

In order to circumvent the hegemony of local juries, it was essential to the Framers that the new federal court system be divorced from the traditional common law practice of employing local juries. The very purpose of creating an alternative federal forum—where the compositions of federal juries would differ dramatically from their state counterparts—would have been largely frustrated had the federal courts been required to use local juries drawn from the various counties according to the vicinage principle. The marshals’ freedom to empanel jurors of their own choosing, for example, would have been severely limited had the marshals been limited to selecting jurors exclusively from the area in which each cause of action arose.

In fact, for those who blithely assumed that the federal courts would not abandon the traditional principle of the vicinage jury, the very purpose of establishing the lower federal courts seemed inscrutable. As a member of the first Federal Congress queried:

Now, if we have a [federal] supreme court, to which appeals can be carried, and an admiralty court for deciding cases of a maritime nature, our system will be useful and complete. Why should we suppose that the administration of justice will not be continued with its wonted impartiality. Suppose a merchant gives a bond to pay 100 dollars duty, cannot that bond be recovered as well and speedily in the state courts as in any continental court whatever. But admitting the judges may be partial, will not the same jury be employed? The jurors must come from the vicinage, and in all probability the district judges will be composed of gentlemen who preside on the benches of the state courts. Now, in this case, it is the same to the government, to foreigners, and to citizens.<sup>358</sup>

Representative Livermore was soon to be disappointed, however, because the Federalists appeared to have no intention of saddling the federal courts with a vicinage requirement.

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<sup>357</sup> See *supra* notes 104–07 and accompanying text (providing examples of how juries in New York, Pennsylvania, and Virginia were inhospitable to creditor claims).

<sup>358</sup> Statement of Representative Samuel Livermore of New Hampshire, *THE CONGRESSIONAL REGISTER* (Aug. 29, 1789), reprinted in 11 *DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS*, *supra* note 93, at 1367.

The Constitution itself contains no limitations on the geography of federal civil juries, and in the criminal context it requires only that juries be drawn from the same state as the defendant.<sup>359</sup> The potential manipulation of the geography of federal jury pools constituted a rallying point for some of those opposed to the Constitution's ratification.<sup>360</sup> For a citizenry that had grown accustomed to the ability of authorities to manipulate the composition of juries, federal control over the geography of jury pools guaranteed federal control over the demographic of the juries drawn from those pools. At the Virginia ratifying convention, for example, William Grayson argued:

It may be laid down as a rule, that where the governing power possesses an unlimited controul over the *venue*, no man's life is in safety. . . . The idea which I call the true vicinage is, that a man shall be tried by his neighbors. But the idea here is, that he may be tried in any part of the State. . . . The jury may come from any part of the State. They possess an absolute uncontrollable power over the *venue*. The conclusion then is, that they can hang any one they please by having a jury to suit their purpose.<sup>361</sup>

In four states, demands were made to amend the Constitution to protect the vicinage principle for all criminal trials.<sup>362</sup>

The mere prospect that the federal courts would not employ local juries in civil cases led some Anti-Federalists to claim that the Constitution had abrogated civil juries entirely. As a Democratic Federalist argued:

[E]ven supposing that the superior court of the United States had the authority to try facts by juries of the vicinage, it would be impos-

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<sup>359</sup> U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .").

<sup>360</sup> See, e.g., 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 1424 ("Juries from the vicinage being not secured, this right is in reality sacrificed. . . . They [the federal government] may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors." (quoting Patrick Henry)). For similar remarks in North Carolina, see 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 76, at 149–51, 154 (speeches of Joseph M'Dowall, Timothy Bloodworth, and Samuel Spencer).

<sup>361</sup> 10 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 1449–50 (statement of William Grayson).

<sup>362</sup> Virginia and North Carolina passed twin resolutions calling for a Bill of Rights that would have recognized "trial by an impartial jury of [the accused's] vicinage." Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 803, 816 (1976). New York called for an amendment that would have recognized "an impartial Jury of the County where the crime was committed." See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 189–90 (1957) (quoting New York resolution). Rhode Island made a similar proposal after Congress had sent the Bill of Rights to the states for ratification. See *id.* at 31–32 (discussing Rhode Island's proposal); Kershen, *supra*, at 817 (discussing proposals of New York and Rhode Island).

sible for them to carry it into execution. It is well known that the supreme courts of the different States, at stated times in every year, go round the different counties of their respective States to try issues of fact, which is called riding the circuits. Now, how is it possible that the supreme continental court, which we will suppose to consist at most of five or six judges, can travel at least twice in every year through the different counties of America, from New Hampshire to Kentucky and from Kentucky to Georgia, to try facts by juries of the vicinage? Common sense will not admit of such a supposition. I am therefore right in my assertion, that *trial by jury in civil cases is by the proposed constitution entirely done away and effectually abolished*.<sup>363</sup>

Despite the Anti-Federalists' opposition, the Constitution was ultimately ratified, and the struggle for control over federal juries moved to the first Federal Congress. There, the Federalists vigorously resisted efforts to limit the federal officials' ability to dictate the geography of federal jury pools in either the civil or criminal context. In the House of Representatives, for example, a constitutional amendment was proposed which would have guaranteed that all criminal (but not civil) matters would be tried "by an impartial jury of freeholders of the vicinage."<sup>364</sup> Under this moderate proposal, Congress would have retained complete control over the geography of civil juries. Nonetheless, the proposal met with a determined and—according to Madison—"inflexible" resistance from the Federalist-controlled Senate.<sup>365</sup> The Federalists ultimately prevailed and the ref-

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<sup>363</sup> *A Democratic Federalist*, PA. HERALD, Oct. 17, 1787, reprinted in 2 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 193, 195.

<sup>364</sup> GOEBEL, *supra* note 10, at 437–38. An exception would have been made for crimes committed within a county in possession of the enemy, or in which a general insurrection had prevailed. In that case, the trial would occur "in some other place within the same state; and if [the crime or insurrection] be committed in a place not within a State, the indictment and trial may be at such place or places as the law may have directed." *Id.* at 438.

<sup>365</sup> Madison's bill met this resistance as soon as it was introduced to the Senate in late August of 1789. *See id.* at 449 ("Article X, in which the House had combined in antic fashion security for trial by a jury of the vicinage, etc., and the requirement for presentment or indictment, was disemboweled."). Madison described the Senate's opposition in a letter to the Chief Justice of Virginia, Edmund Pendleton:

[The Senate is] 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 County. 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.

Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), in 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1603, 1603.

erence to the vicinage was stripped from the language of the amendment.<sup>366</sup>

In the debates over the Judiciary Act, the Federalists defeated proposals which would have required the federal judges to ride circuit through the various counties of the forum states.<sup>367</sup> After acrimonious debate, furthermore, the Senate rejected various amendments that would have required a geographic connection between the jurors and the subject matter of the litigation in criminal cases.<sup>368</sup> Ultimately, the Judiciary Act provided that jurors would be drawn, in all cases except capital criminal trials, “from such parts of the district from time to time as the court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services.”<sup>369</sup>

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<sup>366</sup> See Conference Committee Report (Sept. 24, 1789), reprinted in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 47, 47–48 (detailing Senate’s amendment); House Resolution and Articles of Amendment (Aug. 24, 1789) reprinted in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 35, 38 n.15 (explaining Senate’s elimination of vicinage language). The proponents of the vicinage principle did win a victory of sorts on September 24, 1789, when compromise language was ultimately accepted as the Sixth Amendment. See GOEBEL, *supra* note 10, at 455 (describing compromise). “In all criminal prosecutions,” the Amendment provides, “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. CONST. amend. VI. By requiring the jury to be drawn from the “district” in which the crime had been committed, the Anti-Federalists had hoped to restrict the geography of the jury pool to an area that was smaller than the state in which the district was located. In the end, however, the Federalists in the first Congress succeeded in making the judicial districts coterminous with the states. Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (codified as amended in scattered sections of 28 U.S.C.). During the first several decades of the courts’ existence, therefore, this language in the Amendment was inconsequential. Over time, the Amendment grew more significant as the states were eventually divided into multiple districts. Today, there are ninety-four federal judicial districts encompassing the fifty states, the District of Columbia, and Puerto Rico. U.S. Courts, United States District Courts, <http://www.uscourts.gov/districtcourts.html> (last visited Aug. 17, 2007).

<sup>367</sup> See Diary of William Maclay (June 24, 1789), reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 88 (relating debates on Judiciary Act).

<sup>368</sup> See 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 91–92 (discussing debate over and rejection of vicinage principle). The proposed House amendments would have required trials “in the county, town or district wherein the offence shall have been committed.” *Id.* at 94; see also GOEBEL, *supra* note 10, at 500–01 (describing struggle between Senate and House over proposed language); Warren, *supra* note 15, at 105–06 (“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.”).

<sup>369</sup> § 29, 1 Stat. at 88 (codified as amended in scattered sections of 28 U.S.C.). The proponents of the vicinage requirement were successful in securing a last minute concession from the Senate regarding the trial of capital offenses. See 4 DOCUMENTARY HIS-

As some Anti-Federalists in Congress instantly recognized, the Judiciary Act of 1789 constituted a virtually complete repudiation of the vicinage principle in the federal courts. The “unnecessary expense” and “undue burden” provisions of section 29 were subjective enough to allow for complete discretion in the selection of jurors; nothing in the Act prohibited federal officials from drawing jurors exclusively from whichever geographic area suited their purposes. One Anti-Federalist congressman summarized the anticipated consequences of the Federalists’ victory:

Whoever drew that clause [section 29 of the Judiciary Act], did it artfully, and with a view of concealing the features of it: And I give him full credit for the share his head had in it. Read the words, and you see held out to the citizen a fair and impartial trial by jury of the vicinage, while it insidiously strips him of this happy privilege. For if a man be charged with treason, or other offence against the government, committed as far back as lake Ontario, instead of being brought to trial in the country, or district, where he is said to have committed the offence, as the state law directs at present, he is to be dragged down to the city of New-York, to take his trial here, not by a jury taken from the country at large, as at present, but this section is so subtilly framed, that a jury may be picked, not merely within the city, but within any particular ward of it.<sup>370</sup>

The Anti-Federalists’ fears were prescient. As we shall see in the next section, the federal officials’ control over the geography of federal jury pools ultimately dictated the compositions of federal juries at least as pervasively, if not more so, than the marshals’ hand selection.

### 3. *Control over the Composition of Federal Jury Pools*

As we saw in Part III.A, the Federalist marshals had ample freedom to pack juries in those districts which allowed for the hand-selection of jurors (Delaware, Kentucky, Maryland, New Jersey, Pennsylvania, Vermont, and Virginia). Even in those districts that drew jurors by lot, the Federalist marshals could heavily influence the outcomes of trials simply by manipulating the geographic areas from which the juries were drawn. In Matthew Lyon’s sedition trial in

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TORY OF THE SUPREME COURT, *supra* note 246, at 91–92 (describing House and Senate versions of vicinage language). Just before it passed, section 29 of the Judiciary Act was amended in order to provide 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.” § 29, 1 Stat. at 88.

<sup>370</sup> Statement of Representative Aedanus Burke of South Carolina, THE CONGRESSIONAL REGISTER (Aug. 31, 1789), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 93, at 1392.

Massachusetts, for example, the defendant alleged that the federal marshal confined his initial venires to those towns that had the highest concentration of Federalists.<sup>371</sup>

There were other pervasive ways, furthermore, in which the geography of jury pools could be used to dictate the sociopolitical compositions of federal juries without such assiduous attention on the part of the marshals. As part of their repudiation of the vicinage principle, the Federalists had defeated Anti-Federalists' proposals to require the federal courts to ride circuit through the various parts of the state.<sup>372</sup> Instead, the Judiciary Act established that each federal court would sit in only one or two locations in each forum state but would have jurisdiction over all diversity claims arising anywhere within that state.<sup>373</sup> The result, as some Anti-Federalists had foreseen, was that federal juries drawn exclusively from a small portion of the state could be given the power to decide cases involving parties and controversies originating hundreds of miles away.

In fact, logistics and the exigencies of travel alone dictated that a disproportionate share of jurors in every district would be drawn from the area immediately surrounding the federal courthouse. Travel was expensive and burdensome, and jurors were not adequately reimbursed for the time they spent getting to and from the court. Those districts that occasionally attempted to draw jurors from beyond the courthouse's immediate vicinity quickly discovered that such efforts were futile. The federal courts in Georgia, North Carolina, and Kentucky, for example, experienced substantial difficulty in compelling the appearance of jurors who were summoned from any distance.<sup>374</sup> These districts faced large juror default rates, and fines were raised to draconian levels in an attempt to compel appearances.<sup>375</sup> In the federal court in Georgia, for example, the court raised the fine for defaulting petit jurors from four dollars to eight, then to ten, and

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<sup>371</sup> See SMITH, *supra* note 299, at 235–36, 422–23 (noting Lyon's complaint that his trial jurors had been chosen from towns hostile to him). Lyon called the U.S. marshal, Jabez Fitch, a "hard hearted savage." PRINCE, *supra* note 276, at 264.

<sup>372</sup> See *supra* note 367 and accompanying text.

<sup>373</sup> §§ 3, 12, 1 Stat. at 73–74, 79–80.

<sup>374</sup> See HENDERSON, *supra* note 70, at 39 (noting, with respect to Kentucky and Georgia, that problem was intensified by "sparse settlement" in lower South and West).

<sup>375</sup> *Id.* Juries were discharged for lack of sufficient numbers in April 1794 and November 1796 in Georgia and in March 1793 in Kentucky. See *id.* at 39 & n.15 (quoting C.C.D. Ga. Minutes 1790–93, at 16; C.C.D. Ga. Minutes 1793–98, at 32, 201; and D. Ky. Orders 1789–1800, at 34).

finally, by November of 1798, to twenty dollars.<sup>376</sup> Fines in North Carolina were also twenty dollars.<sup>377</sup>

The other difficulty with summoning jurors from a larger area was that marshals were typically paid a flat fee to return a venire and would have found it burdensome to travel from location to location summoning panels of jurors. Even in those instances where a court did attempt to draw a geographically diverse body of citizens as jurors, therefore, it was financially impractical for the marshals actually to do so.<sup>378</sup>

In order to ascertain the degree to which the early federal juries were dominated by residents of the areas immediately surrounding the courthouse, the author conducted a study of the federal court in New York. With the exception of one session, the Circuit Court of New York met exclusively in the city of New York during the period of this study.<sup>379</sup> The court's minute records reveal that there were virtually no efforts by the court to draw jurors from a geographically diverse area.<sup>380</sup> An empirical study of the petit jurors appearing in the

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<sup>376</sup> *Id.* at 39. To have a sense of the severity of such a fine, it is worth noting that the average price for a barrel of beef in America in 1800 was \$11 and the average price for a bushel of wheat was \$2.10. POMERANTZ, *supra* note 328, at 169.

<sup>377</sup> HENDERSON, *supra* note 70, at 39.

<sup>378</sup> The clerk of the court in Connecticut complained of the severe burdens imposed on the marshal by the impaneling of jurors from different areas of the state. *See* Letter from the Conn. Dist. Clerk to the Comptroller of the Treasury (Sept. 23, 1797), RG 217, Miscellaneous Treasury Accounts 1790–1894, No. 9264:

I have to observe that by the laws of this State, one set of Jurors are summoned to attend the Court as Jurors for the trial of all issues, without reference to any particular case, and to prevent the necessity of Talesmen from bystanders, it is a standing order of the Circuit court to summon 18 instead of 12 Jurors, these according to the law of this state are to be drawn by lot from the Jury boxes of those Towns named in the Venire. These towns are taken from different counties by direction of the court in rotation. As the laws of the United States require this service to be made by the Marshall or his deputy, he must necessarily travel many times several miles to the Jury box of the Town to draw the names, and then to the respective dwellings of the Jurors so drawn, and so from Town to Town till he obtains a Jury according to his warrant, the Towns being designated in his warrant. . . .

. . . .

Under these circumstances it is obvious that three dollars will be no compensation to the Marshal for executing a Venire according to this practice when he may be obliged by the directions of the warrant to travel 150 miles to execute it.

<sup>379</sup> The court did meet once at Albany, in October of 1790, but there were no cases tried and no jurors impaneled for that session. *See* C.C.D.N.Y. Minutes (Oct. 4, 1790). In anticipation of the court's one session at Albany, the court ordered a venire of grand jurors to be summoned from the counties of Albany and Columbia. *Id.* (Apr. 14, 1790).

<sup>380</sup> There was an initial, albeit very short-lived, effort to draw grand jurors from what would become the surrounding boroughs of Manhattan. In the court minute records for its first session on April 5, 1790, the court ordered that "a Venire be issued to the Marshall

New York Circuit Court between 1791 and 1808 reveals that the jury pools of this federal court were almost entirely composed of residents of the island of Manhattan. By cross-referencing the jury lists contained in the minute records with the United States census,<sup>381</sup> a total of 426 juror appearances were identified,<sup>382</sup> slightly more than ninety percent of which were by jurors from Manhattan.<sup>383</sup> In fact, one of

commanding him to summon a Grand Jury from the Counties of New York, West Chester, Kings, Queens, and Richmond . . . .” C.C.D.N.Y. Minutes (Apr. 5, 1790). These counties essentially constituted what are now the five boroughs of New York City. Richmond County encompassed Staten Island (and still does). NEW YORK: ATLAS OF HISTORICAL COUNTY BOUNDARIES 157 (John H. Long ed., 1993) [hereinafter NEW YORK ATLAS]. Kings County encompassed current-day Brooklyn. *Id.* at 99. West Chester encompassed the current-day Bronx as well as what is Westchester County today. *Id.* at 208. After 1895, the Bronx was no longer included in Westchester County. *Id.* at 209.

It is interesting to note that the court initially made an attempt to draw the grand jurors along some kind of proportional basis. Beginning with the October session of 1791, the court ordered that the marshal summon twelve grand jurors from the county of New York and three each from the counties of West Chester, Richmond, Kings, and Queens. C.C.D.N.Y. Minutes (Oct. 6, 1791 & Sept. 6, 1792). It is unclear why these instructions omitted any reference to petit jurors. There were extremely few trials during these first three years of the court’s operation, so it is possible that the selection of petit jurors was conducted in a more ad hoc manner. In any event, this limited attempt at drawing jurors from the neighboring counties was abandoned after the September term of 1792.

<sup>381</sup> Petit jurors appear in the minute records in two ways. Until 1801, they only appear as jurors summoned for trial. After 1801, however, the minute records list the actual panels that were summoned by the marshal. From these two types of records, the author compiled lists of jurors who appeared in each session.

<sup>382</sup> See *infra* App., note 383.

<sup>383</sup> The census lists were compiled on a county-by-county basis. New York County, as it is today, was limited to the island of Manhattan. NEW YORK ATLAS, *supra* note 380, at 118. The following is a chart of the appearances, listed by county:

County	Number of Jurors From County	Percentage of Total Appearances
New York	385	90%
Kings	7	2%
Queens	6	1%
Dutchess	6	1%
Albany	5	1%
Saratoga	3	1%
West Chester	2	0–1%
Orange	2	0–1%
Onondaga	2	0–1%
Richmond	1	0–1%
Herkimer	1	0–1%
Suffolk	1	0–1%
Schoharie	1	0–1%
Rockland	1	0–1%
Ulster	1	0–1%
Jefferson	1	0–1%
Columbia	1	0–1%

the most striking features of these results is the dearth of jurors even from nearby Kings, Queens, Richmond, and West Chester counties. The combined appearances from these counties account for less than four percent of the total. Three of the seven Kings County jurors sat on the same jury.<sup>384</sup> Due to the extremely low numbers of jurors from even the nearby counties, it seems quite doubtful that any of the jurors were actually drawn from the more distant counties. The presence of these counties in the data is probably the result of the methodological limitations of the study.<sup>385</sup> It seems likely, therefore, that the actual percentage of Manhattan jurors approached ninety-seven or ninety-eight percent, with the neighboring counties combining to account for the remaining two or three percent.

In New York, therefore, federal juries differed dramatically from their state counterparts with respect to their political, social, and economic orientations. In the New York state system, the justices of the Supreme Court rode circuit through the state and tried their cases before local juries drawn from each of the various counties. In New York federal court, by contrast, the juries were comprised of the wealthiest five percent of Manhattan residents.<sup>386</sup> All New York state juries outside of Albany, Hudson, and Manhattan, furthermore, were required by state law to be male landholders with freehold estates worth at least sixty pounds each.<sup>387</sup> Therefore, whereas New York

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<sup>384</sup> This jury was the only occasion in which the court attempted to take special measures to ensure an impartial jury. In a trial between James Culbertson and Thomas M.D.B. Godet in the September session of 1795, the court ordered a jury *de medietate linguae* because the defendant was an alien. See C.C.D.N.Y. Minutes (Sept. 5, 1794; Apr. 6, 1795; Sept. 5, 1795). The court, furthermore, ordered that the jury exclude individuals from the city and county of New York because “the Inhabitants of the said City and County are interested in this cause.” See *id.* The nature of the suit is unclear from the records, but it is known that the mayor of New York City was summoned as a witness. *Id.* The minute book lists only eleven jurors in the trial, five of whom were designated as aliens and the remaining six of whom were presumably drawn from the surrounding counties of Kings, Queens, West Chester, and Richmond. See *id.* The plaintiff was ultimately non-suited. See *id.*

<sup>385</sup> The study could not be expected to identify jurors with one hundred percent accuracy due to the imperfections of the census records, the inconsistency of the court clerks in spelling, and the practical limitations of the author’s methodology. See *infra* App.

<sup>386</sup> The Judiciary Act provided that federal courts were to adopt the state requirements for impaneling jurors. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88. In New York City, jurors were therefore required to be men between the ages of twenty-one and sixty who had a personal estate of sixty pounds, free from all “reprises debts, demands or incumbrances.” See *supra* note 324. According to the 1790 census records, only approximately five percent of Manhattan’s residents qualified for federal jury service. See *supra* note 326 and accompanying text.

<sup>387</sup> See *supra* note 324; An Act for Regulating Trials of Issues, and for Returning Able and Sufficient Jurors, ch. 41, 1786 N.Y. Laws 273, 275. New York State required its jurors to be men between the ages of twenty-one and sixty who each had “a freehold in lands messuages or tenements, or of rents in fee or for life, of the value of sixty pounds, free of

state juries were composed overwhelmingly of farmers, New York federal juries were far more likely to be merchants or to have derived their wealth from commercially related enterprises. A review of juror data from the first decade of the federal courts' existence suggests that approximately eighty percent of federal jurors in New York considered themselves to be merchants.<sup>388</sup>

The federal officials' control over the geography of federal jury pools had numerous repercussions for the diversity cases that were directed into federal court. As in New York, Congress chose to locate the vast majority of the early federal courts in the nation's commercial centers.<sup>389</sup> The fact that the federal courts drew their juries predominantly from the areas immediately surrounding the courthouse meant that the location of the federal courts in these commercial centers was of paramount importance to determining the compositions of federal juries.

One of the many ramifications of Congress's centralization of the federal courts in the commercial centers, for example, was to convert the federal courts into a highly favorable forum for creditors and commercial litigants, just as Friendly hypothesized eighty years ago. As we saw in the first Part of this Article, support for debtor interests and paper money legislation was strongest in the agrarian interiors of the nation.<sup>390</sup> In contrast, opposition to paper money legislation came predominantly from the commercial centers within or close to the seaboard.<sup>391</sup> Merchants in these urban commercial centers tended

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all reprises debts demands or incumbrances whatsoever . . . ." *Id.* An exception to this rule was made for inhabitants of the cities of New York, Hudson, and Albany, where the requirement that the requisite property holdings be in the form of land was dropped. *See id.* ("[I]n the cities of New York Albany or Hudson a freehold of the value aforesaid, or a personal estate of the like value free from all reprises debts, demands or incumbrances whatsoever.").

<sup>388</sup> The author cross-referenced all the grand and petit juror appearances for the years 1791 to 1801 with the corresponding years' volumes of *Longworth's American Almanac, New York Register, and City Directory*. An analysis of *Longworth's American Almanac, New York Register, and City Directory* reveals that 392 jury appearances have a corresponding entry or entries in the directory where a single occupation is listed for that juror. Three hundred and thirty-three of these entries were listed as "merchants" and fifty-nine entries had other listings. Many of these other listings included auctioneers, ship chandlers, shipmasters, and other commercially related occupations.

<sup>389</sup> For the locations of the federal circuit courts, see *infra* notes 408–15 and accompanying text.

<sup>390</sup> *See supra* notes 53–68 and accompanying text (describing paper money movement).

<sup>391</sup> *See, e.g.,* Holt, *supra* note 38, at 1430 (describing creditor/debtor relations of this period generally as conflict between "urban merchants, speculators in land and currency, and other relentless creditors" and "southern slaveholding planters and the overwhelmingly agricultural yeomen and peasants" who made up majority of citizenry in 1780s). As Gordon Wood explained:

strongly to oppose debtor-relief measures.<sup>392</sup> These merchants were often domestic creditors themselves, and the precious “hard money” that was circulating during this period tended to flow through their hands.<sup>393</sup> In addition, the commercial cities along the coast had the most to lose from trade interruptions or hostilities with Great Britain, in the event Britain went through with its threatened retaliation for the difficulties its creditors were experiencing in state courts.<sup>394</sup>

Occasionally, the Framers themselves spoke of the creditor/debtor controversy explicitly in terms of a struggle between mercantile and agrarian factions. For instance, James Madison argued the following to the delegates to the Constitutional Convention: “Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest.”<sup>395</sup> Elbridge Gerry argued that the U.S. Senate should be elected by the state legislatures because the legislatures would be more protective of the “commercial & monied interest” than would the people at large.<sup>396</sup> In *The Federalist No. 35*,

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These calls for paper money in the 1780s were the calls of American business. The future of America’s entrepreneurial activity and prosperity lay not with the hundreds of well-to-do creditor merchants who dominated the overseas trade of the several ports along the Atlantic seaboard. Rather, it lay with the thousands upon thousands of ordinary traders, petty businessmen, and market farmers who were deep in debt and were buying and selling with each other all over America.

WOOD, *supra* note 39, at 249.

<sup>392</sup> See, e.g., JENSEN, *supra* note 47, at 315–26 (describing opposition of merchants to paper money legislation in Pennsylvania, North Carolina, New York, and Rhode Island); *id.* at 178 (“In this case the dominant note was sounded by American merchants and business men who lived mostly in the seaport towns. . . . They were located at or near the seats of government and they were in direct contact with legislatures and government officers.”); NEVINS, *supra* note 46, at 527 (“Naturally, the men with capital—creditors, importers, wholesale merchants, and professional men—were against any measure which would depreciate their holdings and cut their investments in two.”). The exception in this regard was South Carolina, where merchants tended to favor the issuance of paper money. See JENSEN, *supra* note 47, at 315 (“Most merchants opposed paper money, but in South Carolina the American merchants supported it and maintained it at par value.”).

<sup>393</sup> See JENSEN, *supra* note 47, at 235 (“Most of the ‘hard’ money was in the hands of the merchants who were creditors of both the governments and of individual citizens. Not only did the creditor groups possess considerable amounts of specie, but they insisted that debts to them be paid in specie . . .”); see also *id.* at 314 (“The notes issued by the new banks circulated mostly among merchants.”).

<sup>394</sup> See GOEBEL, *supra* note 10, at 196–97 (“[The states] resorted to contrivances to obstruct the collection of debts by British creditors . . . [W]hat was most parlous of all to the seaboard interests was the deterioration of [U.S.] foreign relations.”); *supra* notes 197–203 and accompanying text (discussing friction between Britain and states following Revolutionary War caused by state courts’ discrimination against British creditors).

<sup>395</sup> 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 11, at 135.

<sup>396</sup> *Id.* at 154. Gerry went on to point out with favor that the state legislatures sometimes refused to enact paper money legislation even though the general population was in favor of it. *Id.* at 154–55.

Hamilton asserted that all interests in the country could ultimately be reduced to either those of a mercantile nature or those of a “landed” nature.<sup>397</sup> Shays’s Rebellion, the insurrection of disgruntled farmers from the interior of Massachusetts, was quashed by a militia that was drawn largely from the coastal and commercial areas of the state.<sup>398</sup>

The result was that commercial centers such as New York City,<sup>399</sup> Philadelphia,<sup>400</sup> Boston,<sup>401</sup> Providence,<sup>402</sup> Annapolis,<sup>403</sup> Savannah,<sup>404</sup> New Haven,<sup>405</sup> Exeter,<sup>406</sup> and Portsmouth<sup>407</sup> became the bedrock of opposition to paper money legislation.

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<sup>397</sup> THE FEDERALIST NO. 35 (Alexander Hamilton), *supra* note 34, at 199–200. Hamilton also referred to a third group, the “learned professions,” but in his mind these constituted not so much a separate interest in society but rather a neutral force that could serve as an arbiter between the two dominant factions. *Id.* at 200.

<sup>398</sup> See SZATMARY, *supra* note 56, at 81 (“The militia backing government usually came from commercially oriented areas. . . . In [the] largest display of support for government, the troops came mostly from Boston and its immediate vicinity and included the Massachusetts mercantile elite.”); see also RAKOVE, *supra* note 80, at 33–34 (discussing militia composition).

<sup>399</sup> In New York, paper money legislation was proposed in the state legislature in 1784, 1785, and 1786. The New York City Chamber of Commerce, a group composed exclusively of merchants, denounced paper money and demanded that if it were issued it not be considered legal tender. JENSEN, *supra* note 47, at 320–21; NEVINS, *supra* note 46, at 527 n.92. The votes in the state legislature reveal that the proposals appealed strongly to the northern counties, which were populated by farmers, while the merchant and commercial interests of the southern counties clustered around New York City tended overwhelmingly to oppose the measures. “On March 18, 1785, the Assembly voted (23 to 20), that a proposed issue of paper money should be legal tender for debts or taxes which had been owing prior to its issue.” JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788*, at 50 (1961) (citing *JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK* 98 (New York, S. Loudon 1785)). The bill was voted for by all but six delegates from the counties north of New York City, while all but one representative from the southern counties voted against it. *Id.*

<sup>400</sup> See NEVINS, *supra* note 46, at 520 (“From the mercantile interests of Philadelphia came a protest against the paper money feature, presented after a public meeting at the City Tavern that was fifty to one against the emission.”).

<sup>401</sup> See SZATMARY, *supra* note 56, at 44–55 (describing opposition of commercial interests to various paper money proposals in New England legislatures); *id.* at 48 (describing Boston as commercial center of Massachusetts and arguing that location of state capital in Boston was important factor in defeat of paper money proposals in Massachusetts).

<sup>402</sup> See JENSEN, *supra* note 47, at 324 (describing “violent opposition” to paper money legislation led by delegates from Providence).

<sup>403</sup> See NEVINS, *supra* note 46, at 532 (“Annapolis was the center of the opposition to paper.”).

<sup>404</sup> See *id.* at 524 (“Chatham County, in which lies Savannah, opposed the emission . . .”).

<sup>405</sup> See McDONALD, *supra* note 63, at 25 (“New Haven was a principal base of the state creditors faction.”).

<sup>406</sup> See SZATMARY, *supra* note 56, at 48 (explaining how location of legislative seats in commercial centers such as Exeter, New Hampshire, gave political advantage to commercial elites who opposed paper money).

<sup>407</sup> See NEVINS, *supra* note 46, at 538 (“Meetings in Portsmouth and other towns promptly resolved that the paper money plan was unwise.”).

To find convincing support for the proposition that the federal courts were intended to be a favorable forum for creditors and commercial interests, one need look no further than the locations which were chosen for the early federal courts. Every one of the commercial centers that formed the backbone of opposition to the paper money movement became the location of a federal court during the first decade of the nation's existence. The original locations for the eighteenth-century federal circuit courts were:<sup>408</sup>

Connecticut: Hartford and New Haven, alternately  
Delaware: New Castle and Dover, alternately  
Georgia: Savannah and Augusta, alternately  
Maryland: Annapolis and Easton,<sup>409</sup> alternately  
Massachusetts: Boston  
New Hampshire: Portsmouth and Exeter, alternately  
New Jersey: Trenton  
New York: New York City and Albany,<sup>410</sup> alternately  
Pennsylvania: Philadelphia and Yorktown,<sup>411</sup> alternately  
South Carolina: Columbia and Charleston,<sup>412</sup> alternately  
Virginia: Charlottesville and Williamsburgh,<sup>413</sup> alternately  
North Carolina: New Bern<sup>414</sup>  
Rhode Island: Providence and Newport  
Vermont: Bennington<sup>415</sup>

Pleas by constituents for the federal courts to be centrally located within the states, for purposes of the convenience of the litigants, went

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<sup>408</sup> For the original thirteen federal circuit courts, see Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 75 (codified as amended in scattered sections of 28 U.S.C.). For North Carolina, see Act of Apr. 13, 1792, ch. 21, § 1, 1 Stat. 252, 252. For Rhode Island, see Act of June 23, 1790, ch. 21, §§ 1-3, 1 Stat. 128, 128. For Vermont, see Act of Mar. 2, 1791, ch. 12, §§ 1-3, 1 Stat. 197, 197.

<sup>409</sup> Easton was dropped and replaced with Baltimore in 1797. See Act of Mar. 3, 1797, ch. 27, § 1, 1 Stat. 517, 517 (stating that circuit court in Maryland would be held at Annapolis and Baltimore).

<sup>410</sup> Albany was dropped in 1791, after which time all sessions of the Circuit Court of New York were held in New York City. Act of Mar. 3, 1791, ch. 22, § 2, 1 Stat. 216, 217.

<sup>411</sup> Yorktown was dropped in 1796, after which time Philadelphia became the sole location of the Circuit Court of Pennsylvania. Act of May 12, 1796, ch. 24, § 1, 1 Stat. 463, 463.

<sup>412</sup> In 1797, Columbia was dropped and Charleston became the sole location for the Circuit Court of South Carolina. § 1, 1 Stat. at 518.

<sup>413</sup> In 1791, both Williamsburgh and Charlottesville were dropped as locations of the Circuit Court of Virginia in favor of Richmond. § 3, 1 Stat. at 217.

<sup>414</sup> In 1793, New Bern was replaced with Raleigh as the location of the Circuit Court of North Carolina. Act of Mar. 2, 1793, ch. 23, § 2, 1 Stat. 335, 336.

<sup>415</sup> In 1793, Windsor was added as an additional location for the Circuit Court of Vermont. *Id.* at 335. In 1796, Bennington and Windsor were replaced by Rutland and Windsor, sitting alternately, as the locations of the Circuit Court of Vermont. Act of May 27, 1796, ch. 34, § 1, 1 Stat. 475, 475.

unheeded.<sup>416</sup> In fact, soon after the passage of the Judiciary Act of 1789, small cities such as Albany, Yorktown, and Easton were discarded as judicial locales.<sup>417</sup> The commercial centers of New York City and Philadelphia replaced Albany and Yorktown, respectively, and became the exclusive locations of their states' federal circuit court.<sup>418</sup> The commercial center of Baltimore replaced the smaller city of Easton as one of two locations for the Maryland Circuit Court.<sup>419</sup> Charleston became the sole seat for the South Carolina Circuit Court in 1797.<sup>420</sup>

A more precise understanding of the effects of the location of federal courts on the resolution of creditor/debtor controversies in federal court would require further empirical study.<sup>421</sup> As in New

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<sup>416</sup> See, e.g., Letter from George Phillips to Benjamin Huntington, Jonathan Sturges, and Jonathan Trumbull (July 25, 1789), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 477, 477–80 (presenting letter from constituent asking members of Congress to retain more centrally located Middletown as seat of federal circuit court in Connecticut after draft of Judiciary Act had been amended to replace Middletown with Hartford and New Haven); Letter from Daniel Hiester to James Hamilton (Aug. 3, 1789), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 246, at 494, 494 (letter from Congressman to Pennsylvania constituent regarding decision to locate federal courts in Philadelphia and York despite more central location of Carlisle).

<sup>417</sup> See *supra* notes 409–11.

<sup>418</sup> See *supra* notes 410–11.

<sup>419</sup> See *supra* note 409.

<sup>420</sup> See *supra* note 412.

<sup>421</sup> In particular, an empirical comparison between federal and state jury verdicts would be instructive for the state of Virginia, where a large percentage of prewar debts were located. See *supra* note 47. The capital of Virginia, Richmond, became the seat of the federal circuit court in 1791. See *supra* note 413. Located in the heart of tobacco country in the James River Valley, however, Richmond was surrounded by debtor constituencies. MILLER, *supra* note 103, at 37–38. According to research conducted by F. Thornton Miller, the federal juries drawn in the federal circuit of Virginia routinely disallowed the collection of wartime interest in debt actions brought by British citizens. See *id.* at 41 (claiming that war interest was deducted in eighty-nine percent of British debt cases). Miller, however, did not compare the level of success British creditors experienced in the Virginia federal court to the treatment they received in analogous actions brought in Virginia state courts. For example, he cites statistics that suggest that creditors failed to compel the collection of damages in over fifty percent of the debt claims filed in the Virginia state courts between 1789 and 1792. See *id.* at 35–37 (providing data showing that in Prince Edward County, for years in question, creditor plaintiffs withdrew claims in forty-five percent of cases filed, largely in anticipation that state juries would rule unfavorably on their claims, and lost seventeen percent of verdicts that were reached). Miller fails to cite any equivalent statistics regarding the rate of success that creditors experienced recovering damages in the Virginia federal courts. The work of other historians suggests that creditors did in fact enjoy greater success in the federal courts of Virginia. See *supra* note 70 and accompanying text (discussing success of British creditors in securing favorable judgments in federal courts in Virginia and South Carolina in the 1790s). If creditors were able to compel the recovery of damages in over fifty percent of the actions they brought in federal court, the court's location in Richmond and the hand-selection of jurors by the U.S. marshal would likely have been the primary causes for the creditors' increased success.

York, however, it is highly likely that the federal juries drawn from commercial centers such as Boston, Hartford, New Haven, Charleston, Philadelphia, Savannah, Annapolis, Portsmouth, Providence, and Baltimore would have been appreciably more favorable to commercial litigants than those juries sitting in the corresponding state courts.<sup>422</sup>

Although he could not explain why, therefore, Friendly was indeed correct when he postulated that the federal courts were a more sympathetic forum for creditors and commercial litigants. Friendly was mistaken, however, when he assumed that the pro-creditor orientation of the federal courts was sufficient to explain the origins of diversity jurisdiction. The Framers were attempting to accomplish far more than simply ensuring that creditors would be able to collect their debts. The Framers' interest in creating diversity jurisdiction extended beyond any single socioeconomic issue and beyond even the political landscape of their own day. They were attempting to circumvent the majoritarian dictates of local juries altogether, and to replace them with a federal judiciary that could be trusted to decide all manner of cases "properly" by virtue of the superior class of individuals who would be selected as federal jurors. Their faith in the individuals who would decide cases as federal jurors led the Framers to believe that the federal judiciary would be superior to its state counterparts with respect to all political, social, and economic issues that could be funneled into the federal courts (through diversity or any other jurisdictional base that entailed a jury trial) during the life of the nation.

Land title cases present one illustration of the ways in which the compositions of federal juries could have affected the outcomes of litigation outside the creditor/debtor context. Between 1809 and 1815, the New York Circuit Court rendered judgments in approximately thirty-five ejectment suits.<sup>423</sup> In all of these cases, diverse plaintiffs

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<sup>422</sup> It is worth noting that, due to the varying geographies of federal and state jury pools, the compositions of federal and state juries continue to differ to some extent. See Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 80 (2004) ("'[F]ederalization' of so-called street crime, notably murders and robberies, has the effect in most states of widening the 'community' from which jurors will be drawn from a county within a state to a federal district or division encompassing several counties.").

<sup>423</sup> See C.C.D.N.Y. Judgment Roll (Sept. 26, 1809–Nov. 30, 1815) (containing judgments for thirty-five ejectment suits). It is difficult to ascertain the precise number of suits in which judgments were rendered during this period because of the limitations of the records themselves. In addition to the thirty-five cases contained within the judgment rolls, for example, minute records suggest that there may have been a few additional cases where a judgment was reached. See, e.g., C.C.D.N.Y. Minutes (Sept. 7, 1814) (recording jury trial in *Prevost v. Peters*, 19 F. Cas. 366 (C.C.D.N.Y. 1813) (No. 11,032)).

claimed title to the land and sought to eject a local inhabitant in an upstate county.<sup>424</sup> Twenty-six of the suits were brought by the British heirs of Donald Fisher to eject landholders in upstate Washington County.<sup>425</sup> The Fisher cases arose out of the New York confiscation laws, which had redistributed the lands of loyalists during the Revolution.<sup>426</sup>

Under New York law, all of these title disputes would have been tried in the counties where the land was located had they been litigated in state court.<sup>427</sup> One can speculate whether a British heir to a loyalist would have been successful in dispossessing a local inhabitant had the case been tried before a jury composed exclusively of local farmers. The federal juries, however, were composed of Manhattan residents who were predominantly merchants. The Fisher plaintiffs succeeded in dispossessing the local inhabitants in every one of their federal cases.<sup>428</sup> In fact, the judgment rolls reveal only one instance during this period where the federal jury found for the defendant in an ejectment case.<sup>429</sup>

This impact of urban juries on the resolution of land title cases in federal court was neither unanticipated nor unintended. In fact, Anti-Federalists had warned against such eventualities while the ratification

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<sup>424</sup> C.C.D.N.Y. Judgment Roll (Sept. 7, 1814). The lands in dispute were located in the counties of Broome, *id.* (Feb. 22, 1810); Cayuga, *id.* (July 20, 1814); Cortland, *id.* (Apr. 1, 1814, Sept. 6, 1814, Mar. 25, 1815 & May 17, 1815); Seneca, *id.* (Apr. 3, 1815); Tioga, *id.* (Feb. 22, 1810); and Washington, *see infra* note 425. The plaintiffs included citizens of Britain, *id.* (Sept. 26, 1809 & Feb. 22, 1810); *see infra* note 425 and accompanying text, as well as the states of New Jersey, C.C.D.N.Y. Judgment Roll (Apr. 1, 1814, Sept. 6, 1814 & Mar. 25, 1815); Connecticut, *id.* (July 20, 1814); and Massachusetts, *id.* (May 17, 1815).

<sup>425</sup> *See, e.g.*, C.C.D.N.Y. Judgment Roll (Nov. 26, 1811, June 30, 1812, July 10, 1812, Aug. 19, 1812, Dec. 16, 1812 & Nov. 30, 1815) (various suits brought by British heirs of Donald Fisher). In 1786, Washington County was located just above Albany County and extended all the way to the northern boundary of the state. *See* NEW YORK ATLAS, *supra* note 380, at 200. Some of our knowledge of the Fisher cases derives from an appeal taken to the U.S. Supreme Court. *See* *Harden v. Fisher*, 14 U.S. (1 Wheat.) 300 (1816). For a similar appeal from one of the other confiscation cases in the New York Circuit Court, *see Jackson ex dem New York v. Clarke*, 16 U.S. (3 Wheat.) 1 (1818).

<sup>426</sup> *Harden*, 14 U.S. at 302. Fisher's land was confiscated under an act that provided for the "forfeiture and sale of the estates of person who ha[d] adhered to the enemies of the state." *Id.* (citation omitted).

<sup>427</sup> *See supra* note 356 (setting out New York venue statute).

<sup>428</sup> The Fisher plaintiffs won the suits by a combination of an initial default, C.C.D.N.Y. Judgment Roll (Nov. 26, 1811), an early jury verdict in their favor, *id.* (June 30, 1812), and a series of subsequent admissions by the defendants, *id.* (July 10, 1812, Aug. 19, 1812, Dec. 16, 1812 & Nov. 30, 1815). *But see Harden*, 14 U.S. at 304 (1816) (reversing and remanding Fishers' jury verdict to New York Circuit Court for further factual findings).

<sup>429</sup> Defendant Aaron Baker of New York won a jury verdict against Connecticut plaintiff Robert Smith, Jr., who was claiming title to five thousand acres in Cayuga County. *See* C.C.D.N.Y. Judgment Roll (July 20, 1814).

of the Constitution was still being debated. As “A Countryman” from Massachusetts argued in January 1788:

Can you, ye wise men of Goshen, suppose or believe, that we shall submit to give up our County Courts, and go many days journey from home for that Justice we used to receive [at] our own doors? Can one Judge appointed by Congress, try all the causes which will arise under this constitution, and which the chicane of Lawyers will throw into that jurisdiction? Where are we to have our land titles tried? Not in our own Counties, but in the Metropolis, where the Judge is to hold his pompous court. Do you think that we are to lay ourselves liable to be tried upon the information of an Attorney-General, exhibited in any part of the State, he shall choose to pack a Jury in, and that we are to be deprived of that grand Barrier, the Indictment by Grand Jury, merely because the gulled and ignorant Tradesmen of—choose it, and will abuse us unless we submit to it?<sup>430</sup>

As with marshal selection, therefore, the Framers could have confidence that the federal courts would be superior to their state counterparts with respect to all political, economic, and social issues because Congress’s control over the geography of the federal jury pools would ensure that the “better sort” would predominate in federal juries. The locations of the federal courts facilitated the ability of the marshals to select the “right” people to serve as jurors in those jurisdictions that allowed for selection by hand. Even in those jurisdictions that selected jurors by lot, Congress’s decision to locate the federal courts in the commercial centers of the nation ensured that federal jurors would much more closely resemble the Framers than the ordinary citizens who dominated the state juries.

As with federal jurors, for example, the vast majority of Framers resided in those urban commercial centers in which the federal courts were located.<sup>431</sup> As with the Framers, federal juries were far more

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<sup>430</sup> A Countryman, Editorial, AM. HERALD (Boston), Jan. 21, 1788, reprinted in 5 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 12, at 757, 758.

<sup>431</sup> Every single delegate to the Convention of 1787 from the states of Connecticut, South Carolina, New Hampshire, and New York, for example, had a residence in one of the commercial centers that was ultimately chosen as a location for the federal circuit courts in the Judiciary Act. See McDONALD, *supra* note 63, at 22–23, 25–26, 34–35 (listing location of each delegate’s residences); see also *supra* text accompanying notes 408–15 (listing cities that were chosen as locations for federal courts). Seven of Pennsylvania’s eight delegates came from Philadelphia, while the eighth came from the city’s immediate environs. McDONALD, *supra* note 63, at 28–29. Three of Georgia’s four delegates came from Savannah and Augusta, the locations of that state’s federal courts. *Id.* at 36–37. For the residences of the other states’ delegates, see *id.* at 23–34. It is also important to bear in mind that forty-three of the fifty-five delegates had served in the Continental or Confederation Congress prior to the Convention. See FRAMERS OF THE CONSTITUTION, *supra* note 243, at 119–216 (containing short biographies of each delegate to Convention).

likely to support the development and maintenance of institutions associated with a vigorous form of federal government. The commercial cities of eighteenth-century America had provided the backbone of support for the Constitution's adoption.<sup>432</sup>

As with the Framers, furthermore, federal jurors were more likely to be lawyers or members of "learned professions." Thirty-four of the fifty-five delegates to the Convention were lawyers.<sup>433</sup> Hamilton, for one, expressed his belief that lawyers and professionals were better able to discern and pursue the national interest than those from other segments of society. "Will not the man of the learned profession," Hamilton wrote in *The Federalist No. 35*, "who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society?"<sup>434</sup> By locating the federal courts in major urban centers, the architects of the federal judiciary ensured that lawyers and other professionals would be more heavily represented in federal juries than they were in the state juries.<sup>435</sup>

As with the Framers, finally, those residents of the nation's commercial centers who qualified for federal jury duty were more likely to be wealthy and college-educated.<sup>436</sup> The majority of those who

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As a result, a substantial majority of the Framers had lived, at least part-time, in commercial centers such as Philadelphia and New York. Seven of the twelve who did not serve in the Continental/Confederation Congress had lived in their state capitals by virtue of their participation in state government. *Id.*

<sup>432</sup> ORIN GRANT LIBBY, *THE GEOGRAPHICAL DISTRIBUTION OF THE VOTE OF THE THIRTEEN STATES ON THE FEDERAL CONSTITUTION, 1787-8*, at 49 (Burt Franklin 1969) (1894). In New York City, between ninety-three and ninety-six percent of the voters supported the Constitution's adoption. See BURROWS & WALLACE, *supra* note 131, at 291 (summarizing results of statewide election for New York's ratifying convention, in which John Jay and Nicholas Low, both pro-Constitution, received ninety-six and ninety-three percent, respectively, of all votes cast).

<sup>433</sup> McDONALD, *supra* note 231, at 220.

<sup>434</sup> THE FEDERALIST NO. 35 (Alexander Hamilton), *supra* note 34, at 201.

<sup>435</sup> In 1785, for example, just two years before the Federal Convention, there were only ninety-two practicing attorneys in the state of Massachusetts. GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 14 (1979). Based on the fact that the city of Boston had twenty-two practicing attorneys in 1784, it seems fair to say that approximately twenty-four percent of all of the practicing attorneys in Massachusetts were located in Boston on the eve of the Convention. Boston accounted for less than five percent of the state's total population during this same general time period. According to the first U.S. census in 1790, the population of Massachusetts was 378,787 and the population of Boston was 18,320. BUREAU OF THE CENSUS, DEP'T OF COMMERCE & LABOR, *FIRST CENSUS OF THE UNITED STATES 1790: MASSACHUSETTS* 8, 10 (1908).

<sup>436</sup> For summaries of the financial backgrounds of all the delegates to the Convention, see FRAMERS OF THE CONSTITUTION, *supra* note 243, at 119-216; McDONALD, *supra* note 63, at 38-86. The location of the federal courts in the urban centers may have also ensured

attended the Constitutional Convention had some form of college education.<sup>437</sup> In the eyes of many Framers, wealth and education were important qualifications for the responsible exercise of political power.<sup>438</sup> As the president of Dickinson College summarized, men “of learning, leisure and easy circumstances” were far more suited “for every part of the business of government, than the ordinary class of people.”<sup>439</sup> The fact that federal juries would tend to be wealthier and more educated than the “ordinary class of people” which dominated state juries ensured that cases in the federal courts would be decided by those who were more suited to govern.<sup>440</sup>

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that a higher concentration of federal juries would be drawn from proponents of “rational” (as opposed to “evangelical”) Protestantism. For the religious implications of the urban/agrarian dichotomy, see, for example, ELLIS, *supra* note 312, at 253–54, who describes a concentration of “rationalistic” Protestant denominations such as Old Light Congregationalists, Old Side Presbyterians, and Anglicans in urban and commercial centers along seaboard, while more evangelical Protestants such as Baptists, Methodists, New Light Congregationalists, and New Side Presbyterians were concentrated in agrarian areas.

<sup>437</sup> Of the fifty-five delegates who attended the Convention, at least thirty-three had attended American or British colleges, with approximately twenty-seven of those thirty-three receiving degrees. See FRAMERS OF THE CONSTITUTION, *supra* note 243, at 119–216 (providing biographical sketches, including education, of each delegate). Many of those who did not have formal college educations had nonetheless been educated through private tutors, academies, law mentors, or self-reading. *Id.* Eight of those who did not attend college, for example, were “lawyers by training.” *Id.*

<sup>438</sup> See WOOD, *supra* note 39, at 247 (“[Ordinary citizens] lacked the requisite liberal, disinterested, cosmopolitan outlook that presumably was possessed only by enlightened and educated persons—only by gentlemen.”). Some proponents of the Constitution advocated that the federal representatives in Pennsylvania be elected at-large rather than by districts because there were “few men who have abilities and leisure and are fit objects for choice” outside the city of Philadelphia. *Id.* at 260 (quoting Letter from Thomas Hartley to Tench Coxe (Oct. 6, 1788), reprinted in 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790, at 304 (Merrill Jensen & Robert A. Becker eds., 1976)).

<sup>439</sup> See WOOD, *supra* note 39, at 254 (“Many gentry shared the certainty of Charles Nisbet, president of Dickinson College, ‘that men of learning, leisure and easy circumstances . . . if they are endowed with wisdom, virtue & humanity, are much fitter for every part of the business of government, than the ordinary class of people.’” (quoting statement of Charles Nisbet quoted in Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148, 1162 (1990))).

<sup>440</sup> See LUTZ, *supra* note 184, at 89 (“Thus, traditional Whigs saw nothing inherently unrepresentative in the majority of legislators being wealthy and highly educated. Having legislators with such backgrounds was a positive advantage.”); WOOD, *supra* note 39, at 246–47 (describing belief of political elites that only “gentlemen” were truly qualified to govern). Gordon Wood provides a contemporary example of this view that ordinary citizens were incapable of governing:

However whiggish and revolutionary some gentlemen might be, they were not prepared to accept the participation in government of carpenters, butchers, and shoemakers. It was inconceivable to someone like William Henry Drayton of South Carolina that gentlemen with a liberal education who had read a little should have to consult on the difficulties of government “with men who never were in a way to study, or to advise upon any points, but rules how to cut up a beast in the market to the best advantage, to cobble an old shoe in the neatest

## CONCLUSION

The origins of diversity jurisdiction warrant renewed analysis for several reasons. Although diversity cases may constitute a relatively small percentage of the federal docket today, they continue to funnel millions of dollars worth of civil litigation into the federal courts every year.<sup>441</sup> In many cases, the filing or removal of diversity claims in federal court can be outcome-determinative for the litigants or can radically alter the expected values of claims.<sup>442</sup> Future debates regarding the propriety of retaining diversity jurisdiction should proceed unencumbered by the weight of century-old misconceptions regarding the jurisdiction's origins.

In addition, diversity jurisdiction offers significant insight into the historical origins of the lower federal courts. Diversity, and, to a lesser extent, admiralty claims, dominated the caseloads of the lower federal courts for nearly one hundred years after the founding of the nation. Federal questions, the supposed *raison d'être* of the federal courts, were not permanently entrusted to the lower federal courts until 1875. It is quite possible, therefore, that the lower federal courts were created in large part for the purpose of adjudicating diversity claims.

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manner, or to build a necessary house." Drayton was willing to admit that "the *profanum vulgus*" was "a species of mankind," even that mechanics were "a useful and necessary part of society," but, he said, with more courage than discretion, such men were not meant to govern. "Nature never intended that such men should be profound politicians, or able statesmen . . . ."

*Id.* at 246 (quoting WILLIAM HENRY DRAYTON, *THE LETTERS OF FREEMAN* 30–31, 49 (Robert M. Weir ed., Univ. of S.C. Press 1977) (1771)).

<sup>441</sup> See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 1, at 22 (citing fact that 80,370 diversity cases were filed in U.S. District Courts in fiscal year 2006). The statutory minimum for each case filed is \$75,000. 28 U.S.C. § 1332(a) (2000).

<sup>442</sup> Diversity jurisdiction is often outcome-determinative for litigants by virtue of, *inter alia*, substantially differing state and federal rules regarding jury practice. In federal court, for example, jury verdicts must be unanimous unless the parties stipulate otherwise. FED. R. CIV. P. 48(1). In most state courts, by contrast, plaintiffs need only some level of supermajority in order to secure a verdict. See, e.g., Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. REV. 201, 203 (2006) (noting that eighteen states require unanimity for civil juries, three states accept non-unanimous verdicts after six hours of deliberation, and all remaining states permit civil jury verdicts by supermajorities ranging from two-thirds to five-sixths). For these and numerous other reasons, the perceived value of a plaintiff's claims usually drops significantly the moment a case is transferred to federal court. See, e.g., Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 424–25 (1992) (finding that approximately eighty-five percent of surveyed attorneys chose federal or state forum based at least in part on expectation that forum could have impact on outcome of litigation and that plaintiffs' attorneys generally expected higher verdict and settlement amounts for cases that remained in state court).

Despite its implications for modern practice and its potential importance to our historical understanding of the federal courts, there have been no persuasive accounts of the origins of diversity to date. All existing accounts are deficient because, ultimately, they rely too heavily upon putative differences between the state and federal benches. Any discussion of the origins of diversity jurisdiction, however, must begin with an appreciation for the central role played by the jury in eighteenth-century American courts. Juries, rather than judges, were primarily responsible for the interpretation and application of the law during this period.

The failure to address the central role of the jury has debilitated prior accounts of the origins of diversity jurisdiction in numerous ways. Friendly, for example, was correct insofar as he postulated that the early federal courts were intended to be a favorable forum for creditors and commercial litigants. He failed to identify, however, the very feature of the federal courts most responsible for converting them into such a forum: their jurors. Friendly hypothesized that there was a “vague” feeling that federal courts would be sympathetic to creditors, but even a cursory examination of the compositions of federal juries reveals that there was nothing “vague” at all about the federal courts’ propensity to favor creditors and commercial litigants.

Equally important, the pro-creditor accounts for diversity’s origins are deficient because they are far too myopic in their depiction of the Framers’ interests in creating diversity and the lower federal courts. The modern commercial/creditor accounts essentially posit that a single sociopolitical issue provides the entire explanation for the origins of diversity jurisdiction. As important as creditor/debtor relations were at the time, it is unlikely that any single issue could alone have been responsible for the Framers’ desire to create diversity jurisdiction. The reality is that the state courts’ propensity to favor debtors, and the state legislatures’ enactments of paper money legislation (and other debtor-friendly measures), were perceived as mere manifestations of a much broader and more fundamental problem that the Framers were trying to address in 1787.

The Constitution was largely an effort by the Framers to construct a federal government that could control what were perceived to be the pernicious effects of unrestrained democracy in the states. State juries represented perhaps the greatest danger of majoritarian rule because they were the most direct form of democracy. Unlike state legislatures, which enjoyed the mitigating influence of representatives who were sometimes drawn from the “better sort” of society, juries bestowed ordinary citizens with the power to adjudicate issues

of political and socioeconomic importance without the intervention of the bench.

The creation of diversity jurisdiction and the lower federal courts offered the Framers a critical opportunity to circumvent the majoritarian hegemony of state court juries. Differences between state and federal benches and even between state and federal laws would have amounted to little had that hegemony not been broken. As the Framers foresaw, however, the creation of the federal courts provided federal officials with plenary power to control the compositions of federal juries. Federal officials could (and did) wield that power to ensure that the jurors deciding cases in the lower federal courts would differ dramatically from their state counterparts with respect to their political, social, and economic orientations. The Framers' faith that federal officials would be superior to their state counterparts, therefore, translated into a confidence that the federal juries selected by these officials would be drawn from the "better sort" of society—not just for a decade or two, but for the life of the nation. It was a desire to ensure that the most important cases in the country be decided by these jurors, rather than a putative desire to wrest cases away from state court judges or legislatures, that constituted the single most important force behind the creation of diversity jurisdiction and the lower federal courts.

In summary, it appears quite evident that many of the Framers were wary of state court juries when they gathered in Philadelphia in 1787. It is also evident that the political, economic, and social compositions of federal juries were controlled and manipulated during the first few decades of the federal courts' existence. The only real question would appear to be whether we can infer a causal connection between these two developments—i.e., whether the Framers actually intended such a result in 1787 when they established diversity jurisdiction and the federal courts. One could argue that it was mere coincidence, rather than design, that federal jurors more closely resembled the Framers than did state court jurors in terms of their wealth, occupations, and levels of education; coincidence, rather than design, that the federal juries had a more nationalistic perspective than their state counterparts; coincidence, rather than design, that the federal juries were more sympathetic to commercial and creditor litigants; and so on.

For several reasons, it is difficult to believe that these two developments were simply coincidental. First, when the Framers met in 1787 it was eminently foreseeable that federal officials would manipulate the composition of federal juries. The manipulation of jury compositions was relatively common in the period leading up to the

Constitutional Convention. The Framers knew that the majority of states allowed for the hand-selection of jurors. They must have known, therefore, that it was within Congress' power to adopt this same means of juror selection in the federal courts. The presidentially appointed marshals' manipulation of jury compositions during the first decades of the federal courts' existence could not have been unexpected. Quite the contrary, it was the single most likely scenario to develop in the federal courts, as anyone who understood court procedures in 1787 would have recognized.

Second, the Constitution provided the first Federal Congress with complete control over the geography of federal jury pools. It was therefore eminently foreseeable, in 1787, that federal officials could use that power to ensure that the "better sort" of society would decide cases as jurors in federal courts. It was readily apparent, as the anti-Federalist criticism during the ratification debates demonstrated, that Congress would have the power to establish federal jury pools that differed radically from their state counterparts, given that the Constitution failed to provide any of the traditional limitations on the jury's vicinage. In light of the difficulties of travel, furthermore, the location of the federal courts clearly would be crucial to dictating the composition of federal juries. Merely by locating the federal courts in the urban, commercial centers of the eastern seaboard, the Framers knew that Congress could ensure that federal juries would much more closely resemble the Framers than would state juries.

Finally, the role the Framers themselves played in the early manipulation of federal juries suggests that they established diversity jurisdiction largely because they anticipated federal officials would be able to control the composition of federal juries. The Framers and their political allies dominated the early Federal Congresses and the first two presidential administrations. Almost half of the first Federal Senate was composed of Framers. The Judiciary Act itself was primarily drafted in the Senate by three Framers.

These very same individuals that drafted the Constitution in 1787 and supported its adoption during the ratification debates, therefore, were largely responsible for the ways in which the compositions of the federal juries were pervasively controlled during the first decades of the federal courts' existence. When opposition was voiced in Congress against the hand-selection of jurors, for example, it was the Federalists who ensured that the federal marshals would have that power over juries in federal court. It was the Federalists who selected and approved the marshals who dictated the composition of federal juries. It was the Federalists, furthermore, who steered the federal courts away from the universal state practice of employing local juries.

Proposals that would have established a *nisi prius* system, by which the federal courts would conduct trials in the various regions of the states, were rejected. Instead, the Judiciary Act provided that the federal circuit courts would be located in only one or two cities within each forum state. The result was that federal juries would necessarily be drawn overwhelmingly from those cities. It was the Federalists, finally, who chose those commercial centers on the seaboard as the locations for the early federal courts.

Although subsequent conduct can never provide absolute proof of prior intentions, it is unlikely that the notion of controlling the composition of federal juries suddenly overtook the proponents of the Constitution during the two-year period between 1787 and 1789. It is far more likely, in light of the history of similar types of manipulation and control during the preceding seventy-five years, that it was the very prospect of such control that most motivated the Framers to establish diversity jurisdiction and the lower federal courts when they met in Philadelphia.

## APPENDIX: METHODOLOGY

*A. Geographic Identification of New York Federal Jurors*

The geographic identification of jurors was accomplished by consulting name indexes of the censuses. On occasion the author consulted the actual census records to verify the accuracy of these tools. On only one occasion did the author feel that an index was in error.<sup>443</sup>

The first question was whether to count jurors or juror appearances. Should the three appearances of James J. Roosevelt, for example, be counted once in the data or three times? The author decided to list it three times, for two reasons. First, it would more accurately reflect the jury's composition. The statistics are designed to demonstrate the likelihood that a litigant would have faced a jury of New York City residents. It was highly relevant, therefore, to ascertain the geographic provenance of those jurors who tended to repeat most often, and this data was reflected in the figures by counting appearances separately. Second, there was the possibility that some of the repeat names were, in fact, different jurors. The author assumed, using common sense, that the vast majority of repeat names represented the same juror. Nevertheless, it is possible that some of the most common names could have represented the appearances of two or more different jurors. Since it is impossible to know if or how many times this happened, separate accounting of appearances was felt to be preferable. Each appearance, therefore, was treated separately from all other appearances.

The second decision involved choosing the proper census to cross-reference. Censuses were taken every ten years. A decision had to be made concerning jury appearances that occurred in between census years. The author decided to cross-reference each juror appearance to one census if that appearance came within two years of the census. For example, a jury appearance occurring in 1798, 1799, 1800, 1801, or 1802 would be cross-referenced to the 1800 census. If there was no listing in that census for that appearance, the next closest census was consulted. For example, a juror appearing in 1802 who did not appear in the 1800 census would be cross-referenced to the 1810 census. For jurors appearing in 1790, 1800, or 1810, the two censuses on both ends were consulted in the event that the juror did not have a corresponding entry in the year of his census. For appearances occurring in the "off" periods—those that were more than two years from

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<sup>443</sup> In analyzing the handwriting of the actual census of 1800 (reel 23, page 660) the author felt that the index listing of "Charles L. Common" for the 1800 census should in fact have been listed as "Charles L. Cammon." The author used his own reading in making the geographic identification of the appearances for this juror.

any census, i.e., 1793–1797 and 1803–1807—the two censuses on either end of the dates of appearance were consulted. For example, an appearance in 1803 would be cross-referenced to both the 1800 and 1810 censuses.

On many occasions, there were multiple listings for a juror. In these cases, the juror was deemed to be “unknown”—provided that all the listings were not for the same county. For example, a juror with four listings, three for New York and one for Albany, would be listed as unknown. A juror with two listings both in Albany, however, would be listed as a resident of Albany.

In those cases where two censuses were consulted, very often the juror would appear in only one of the censuses. In these cases, the one listing was considered to be definitive and the juror was listed as being from that location. In cases where the two censuses contradicted one another in any way, the juror was listed as “unknown.” For example, if the 1800 census listed a juror as being from New York County, but the 1810 census contained a New York listing and a Albany listing, the juror was marked as “unknown,” since there was no way to discern which of the three listings accurately corresponded to the juror.

### *B. Variations in Spelling*

In an effort to curtail subjectivity and to maximize the integrity of the results, the author was scrupulous in matching names from the census reports to the minute records and in matching jurors from one panel to another. Identical spelling of names was required and no exceptions were made. Two jurors were never assumed to be the same person if one possessed the designation “Junior” and the other did not. If a juror had a middle initial, he was never assumed to be the same person as a juror who had an identical name but lacked that same initial. Likewise, a juror with a middle initial was never matched to a census listing that did not have the initial. John C. Smith was never assumed to be “John Smith,” even if the census listed only one version. However, a juror who appeared in one panel with a middle initial was matched with another juror in a different panel if the second juror had a spelled-out middle name, the first initial of which corresponded to the middle initial of the first juror.

On two occasions, a juror whose first name was spelled out in the minute records appeared in the census with a shortened version of the same first name, and in each case the juror was matched with the census listing. The Alexander Cranston who appeared in the minute records of April 1807 was matched with the Alex Cranston of New

York County who appeared in the 1810 census. Likewise, the Ebenezer Watson who appeared in the minute records of April 1804 was assumed to be the same Eben Watson of New York County who appeared in the 1810 census.

Undoubtedly, the requirement that names match identically resulted in an undercount of identifiable jurors. Spelling in the eighteenth century was not quite the art it is today, and both the tabulators of the censuses and the clerks who maintained the minute records would have inevitably spelled the same name in a variety of ways. Sometimes individuals changed the spelling of their own names during the course of their lives. On a number of occasions within the same panel at the same session, for example, one juror's name would appear with slightly different spellings on different days. The most common types of these variations involved a silent "e," double consonants such as "l," "t," or "r," a silent "h," the presence of a "c" before a "k," and the interchangeability of "e" and "ie" in the middle of a name and "d" and "dt" at the end.

Despite the fact that the similarities between two slightly different names could appear compelling, particularly when only one of the variations appeared in the census, no exceptions were made to the complete-matching requirement.<sup>444</sup> If any exceptions had been allowed, the biggest difficulty would have been in drawing a meaningful line between those variations that were "slight" enough to constitute the same person and those that were not. Since this would involve subjective decisions, the author decided the integrity of the methodology would be better served by a hard and fast rule against exceptions.

In regard to a juror whose name was spelled differently within the same panel in the same session, the author had to decide which version to adopt with regard to matching the juror to other panels and to the census. The author took the liberty, in those cases where the name was spelled in two versions within the same panel, of adopting the version that matched the spelling used in other panels. In light of the very high percentage of repeat jurors, the author decided that it was more likely than not in cases of variation that the two records represented the same juror. If neither variation corresponded to another juror in a different panel, then the census records were consulted. If only one of the variations appeared in the census, then that variation was adopted as the true spelling.

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<sup>444</sup> For example, one would think that the juror who was listed as "Peter H. Schenck" in the minute records was in fact the same person who was listed in the 1810 census as "Peter H. Schenk." The "Frederick DePeyster" that appeared in the minute records was most likely the same person as the "Frederick DePyester" that appeared in the census.

### *C. Juror Default*

In compiling data about the jury's geographic composition or the number of times a juror repeated, a decision had to be made about the relative significance of juror default. The author decided to leave defaulters in the compilations and not to signify in the data which jurors were defaulters and which were not.

The reason for this decision was logistical. Default was a common occurrence and on some occasions the majority of the panel was in default. On occasion, a juror would default from an entire session. The more common occurrence, however, was for jurors to attend certain days during a session and to miss others. Generally, the clerk would list a panel on the first day of the session signifying which jurors were present. Throughout the session, however, the clerk would continually list the panel in the records to signify which jurors were absent. Jurors who were listed as "defaulters" on the court's first day of the session would frequently appear in subsequent panels. Likewise, jurors who were present on the court's first day of session would frequently be listed as defaulters in subsequent entries.

It would be a laborious process, therefore, to try to track every juror through each session to compile a list of days in which he was present or absent, and it would unnecessarily complicate the data. It is not clear why jurors chose to be absent on particular days. It is quite possible that many jurors chose to default on those days on which there was little court business and little or no likelihood of a trial. In light of the geographic homogeneity of the jury pool and the relatively small number of "total" defaults, it was felt that such distinctions would prove to be unnecessarily detailed.

The assumption in this analysis is that absences, in and of themselves, did not influence the selection process. It is possible, however, that a limited number of jurors repeated because of an earlier default or excuse from service. There is no evidence that marshals kept records about who attended, but it is within the realm of possibility that they made notes (mental or otherwise) and that jurors who failed to appear or who were excused from one session would be prime candidates for selection at immediately subsequent sessions. A few examples seem to demonstrate this possibility. Michael Allison was excused from service in April 1807 but subsequently appeared in the panel for April 1808. Abraham Bussing was excused in November of 1806 but subsequently appeared in April of 1807. This appears to be most relevant, then, for jurors who appeared only twice and for those who were impaneled in quick succession. The author decided that the best course would be to note those occasions where a repeat juror was

excused in an appendix list of all repeat jurors on file with the *New York University Law Review*, thereby allowing the reader to speculate for herself if and when repeat appearances were influenced in this manner.

*D. Explanations for Jurors Listed from Outside Manhattan*

There are three principal explanations for why the data would erroneously suggest the presence of a few jurors from far outside Manhattan. First, the names may have been incorrectly entered in either the minute records or the census reports. In light of the haphazard manner in which names were spelled in both records, it is extremely likely that this accounts for some portion of the upstate jurors. For example, Francis Cooper of Onondaga County (who accounted for both of that county's appearances) could in fact have been Frances Cooper of New York County. John Barbarie (of Saratoga County) could in fact have been John Barbaree of New York County. Some degree of error in the survey, furthermore, is to be expected from undercounts in the census. Undercounts were fairly common in the large cities because the censurers tended to omit those who were not home at the time the census was taken.

Second, some of the individuals who appeared as jurors in New York City may have been nominal residents of other counties by virtue of their land holdings. William Neilson, for example, is responsible for both of the Orange County listings and appeared a total of five times as a grand and petit juror during the first decade of the nineteenth century. However, we know from Alexander Hamilton's papers that a William Neilson owned the Marine Insurance Company. Undoubtedly, the professional responsibilities of this William Neilson would have required his extended presence in New York City. Either he lived in New York City—and the census missed him—or he made his official home in Orange County and lived for extended periods of time in New York City.

Third, a juror may have moved to or from New York City in between the time that the census was taken and the time that he appeared as a juror. According to the author's methodology, an individual who appeared within two years of the census was identified without reference to the next closest census. Any individual who moved to New York City during the first two years of the decade and appeared as a juror in those two years would be misidentified. Similarly, a juror who lived in New York City could have appeared in 1808 and subsequently have moved to Albany in 1809 to appear in the 1810 census as an Albany resident. Jacob Barker, for example, is listed as a

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resident of Herkimer County because his 1802 appearance corresponds to an 1800 listing from that county. In the 1810 census, however, he is listed as a resident of New York County. Jonathan Lawrence, Jr., appeared as a juror in 1801 and was listed in the 1800 census as a resident of Rockland. The 1810 census, however, records him as a New York County resident. Thomas Gardiner was listed as an Albany resident for his 1791 appearance but has a New York County listing in the 1800 census.