1998

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THE INDEPENDENCE OF THE JUDICIAL BRANCH IN THE NEW REPUBLIC

CHARLES GARDNER GEYH* & EMILY FIELD VAN TASSEL**

In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes popular resistance. It is requisite that the courts of justice should be able, at all times, to present a determined countenance against all licentious acts; and to deal impartially and truly, according to law, between suitors of every description, whether the cause, the question, or the party be popular or unpopular. To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station. Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights.

—Chancellor James Kent1

INTRODUCTION

Consistent with Chancellor Kent’s observations, contemporary understanding accepts the existence of both a specific and a general form of judicial independence, or as often termed, “decisional” and “branch” (or institutional) independence. Decisional independence concerns the impartiality of judges—the capacity of individual judges to decide specific cases on the merits, without “fear or favor.” Branch or institutional independence, on the other hand, concerns the general, non-case specific separation of the judicial branch—the capacity of the judiciary to remain autonomous, so that it might serve as an effective check against the excesses of the political branches.

No one disputes the existence or vitality of decision-making

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1. JAMES KENT, COMMENTARIES ON AMERICAN LAW *293-94 (O.W. Holmes, Jr., ed., 12th ed. 1873).
independence in the federal system. Article III of the United States Constitution affords federal judges tenure during good behavior and a salary that may not be diminished. Individual judges are thus enabled to decide cases without fear for their jobs should they make a "wrong" decision, subject to the increasingly topical question of whether the definition of "high Crimes and Misdemeanors" is broad enough to permit the impeachment and removal of judges who make "activist," or otherwise unpopular, decisions.2

Branch or institutional independence is not so well understood or clearly defined. Through the exercise of judicial review, the courts possess the means to protect their institutional integrity against unconstitutional political branch encroachments, but that merely begs the question of whether and to what extent such encroachments are unconstitutional. Apart from the good behavior and compensation clauses, which insulate the judges collectively as well as individually, the first three articles of the Constitution establish structural separation among the branches by delegating "all legislative powers" to Congress, "the executive power" to the President, and "the judicial power" to the courts. Although separation and independence are not synonymous, structural separation among the branches cannot be maintained unless each branch is independent enough to prevent the other two from usurping its powers, for which reason some measure of independence may be inherent in a system of separated powers. The extent of the judiciary's inherent structural independence, however, is obscured, if not undermined, by other provisions in the Constitution that empower Congress to establish (or disestablish), regulate (or overregulate), and fund (or not fund) the federal courts.

The cumulative effect of these provisions has been to create wildly varying conceptions of the extent—if not the existence—of the judiciary's institutional or structural independence. Although it is clear that Congress may not exercise "judicial power" by legislating in such a way as to decide or re-decide specific cases3 (even though it may regulate the substantive law that courts apply, and may do so retroactively4), it is far less clear whether the Constitution affords the judiciary any further institutional insulation.

At one extreme, some have argued that the judiciary possesses a

substantial and impenetrable core of institutional autonomy that Congress is duty-bound by the Constitution to respect. "[O]nce Congress creates federal courts and vests them with jurisdiction," Professor Linda Mullenix has argued, "it must also vest them with those powers necessary for them to administer justice and preserve their status as part of an independent branch." 

"[A]dministrative autonomy," she posits, must be counted among those inherent judicial powers, lest the judicial power lose all meaning. Professor Paul Carrington has concurred that Congress "cannot micromanage [the courts] without taking leave of its constitutional role." We can be sure," he continued, that the judiciary "ought not and would not" acquiesce if Congress attempted to "regulate the hours of holding court," ordered judges to submit to formulae allocating support staff on the basis of how many cases the judges decided, or penalized unproductive judges with night-court duty. For Carrington, these "ludicrous" and "far-fetched" examples merely "confirm[] that there is a core of control vested in the Supreme Court that is beyond the constitutional reach of Congress."

At the opposite extreme, some, like Professor John Yoo, former Chief Counsel to the Senate Judiciary Committee, have argued that as long as Congress does not usurp judicial power or abrogate judicial tenure and salary protections, it may regulate the courts freely:

Congress enjoys a broad discretion to structure the federal courts as it sees fit...

... [A]s long as judges receive their constitutionally-required protections of life tenure, irreducible salary, and removal by impeachment, their independence is protected as a constitutional matter. The framers certainly were familiar with many of the ways in which the legislative or executive branches could subvert the judiciary, if they had seen the need for other mechanisms to protect judicial independence, they would have included them in the Constitution.

Professor Martin Redish makes a similar point—that the judiciary's non-case specific institutional independence should be

6. See id. at 1322.
8. See id.
9. Id. at 972-73.
10. John C. Yoo, Testimony Before the American Bar Association Commission on Separation of Powers and Judicial Independence 6-7 (Feb. 21, 1997) (on file with author).
limited to the letter of the good behavior and compensation clauses. He argues: "[T]he framers avoided reliance on a case-by-case analysis of the effect of congressional actions on judicial independence in favor of an easily applied, bright-line standard." Redish speculates: "[T]hey did so probably in an attempt to avoid the very uncertainty and political friction that would plague an inquiry into the retributive nature of congressional action." He relegates the judiciary's power to regulate its practice, procedure, and (presumably) administration to the realm of "law-making independence," which in his view exists not as a matter of constitutional necessity, but as one of congressional sufferance.

Between these extremes are those who accept the judiciary's structural independence as a matter of principle, but who struggle to justify its existence and define its scope. Professor Daniel Meador, former Assistant Attorney General, has opined that branch independence, relative to decision-making independence, "has less claim in history, in practice, and . . . is indeed a murky area." Therefore, although "there is probably a hard core of inherent judicial authority that is beyond legislative reach," he is "not quite sure what is in that core." Russell Wheeler, Deputy Director of the Federal Judicial Center, has likewise acknowledged "a great deal of constitutional ambiguity" concerning the nature and extent of the federal judiciary's structural independence, which suggests the need for "a succinct explication of the constitutional theory of an independent judicial branch." Wheeler, like Meador, attributes the murkiness of the issue to a weak historical foundation: "[A]lthough those who wrote the Constitution surely intended to establish judicial independence, they had at best only a dim concept of an independent judicial branch in the sense that we use that term today."

Repeated recourse to history purports to inform these divergent perspectives on the nature and extent of the judiciary's independence

12. Id. at 703.
13. Id.
14. See id.
16. Id.
18. Id. at 1.
as an institution or branch. It is the purpose of this article to revisit
the early historical understandings of the organization of the judicial
branch in an effort to clarify the meaning and scope of the judiciary's
structural independence.

I. ESTABLISHING THE JUDICIAL BRANCH

A. Judicial Independence Prior to the Constitutional Convention

The dependence of colonial courts on the English monarch was
among the flashpoints that sparked the Declaration of Independence. English judges had been granted tenure during "good behavior" in
the 1701 Act of Settlement, as a means of protecting them against at-
will discharge of the crown. Colonial judges, in contrast, were made
to serve at the pleasure of the King, which Professor Richard Ellis
notes was "met with stiff resistance from colonial legislatures and
pamphleteers." In Massachusetts, the English governor insisted
upon colonial judges remaining dependent on the crown for their
salaries—rather than on monies raised by the Massachusetts
legislature—prompting the outcry that it would be "unconstitutional
for the judges to be independent of the people and dependent on the
crown." Such conflicts over tenure and salary ultimately gave rise to
the grievance in the Declaration of Independence, that the King "has
made Judges dependent on his Will alone, for the tenure of their
offices, and the amount and payment of their salaries."

On a related front, judicial independence issues were implicated
at least indirectly by the Monarch's repeated rejection of laws enacted
by state legislatures to reauthorize judicial systems in North Carolina,
Pennsylvania, and Virginia. These episodes brought the administra-
tion of justice in the affected states to a grinding halt and
precipitated an additional grievance in the Declaration of Independence, that the king "has
obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary

19. See Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional
20. See Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the
Young Republic 6 (1971); see also Joseph H. Smith, An Independent Judiciary: The Colonial
21. See Edward Dumkauld, The Declaration of Independence and What It
22. The Declaration of Independence para. 11 (U.S. 1776).
23. See Dumkauld, supra note 21, at 108-12.
24. See id.
One conceivable lesson that the colonists could have learned from these recurrent battles over control of the state judicial systems is that the integrity of the judicial branch and the separate power it exercises can and will be undermined unless the judiciary is afforded a measure of institutional independence. In 1776, John Adams made just such a point in a pamphlet on the Virginia Constitution: "[T]he judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both."26

This view, however, did not immediately win the day. "Despite John Adams's warnings," writes Professor Gordon Wood, "most of the early constitution-makers had little sense that judicial independence meant independence from the people."27 In other words, the perceived "problem," as articulated in the Declaration of Independence, was not judicial dependence per se but judicial dependence on the monarch. Accordingly, the perceived "solution" to judicial dependence on the executive was not judicial independence but judicial dependence on the legislature or the electorate.

Many of the early state constitutions thus imposed judicial term limits or made judges stand for reelection, while those that established tenure during "good behavior" often gave the assembly control over judicial salaries or subjected judges to removal upon a simple address of the legislature.28 Wood concludes:

These constitutional provisions giving control of the courts and judicial tenure to the legislatures actually represented the culmination of what the colonial assemblies had been struggling for in their eighteenth-century contests with the Crown. The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it. As Jefferson said to Pendleton in 1776, in relation to the legislature the judge must "be a mere machine."29

Against this backdrop, support for judicial dependence on the legislature becomes understandable, but it remains difficult to

25. The Declaration of Independence para. 10.
28. See id.; see also Smith, supra note 20, at 1153–55.
reconcile such support with the widespread commitment to constitutional separation of legislative, judicial, and executive power. That the judiciary could be wholly dependent on the legislature and still be expected to exercise judicial power in ways that justified separating legislative from judicial power in the first place underscores how supremely trusting the fledgling states were of their legislatures and how little they had actually thought about separation of powers as it applied to the judicial branch. As Julius Goebel observed, "For all the anxieties to make explicit the fundamentals proper to a constitution, the judicial generally came off with little more than an honorable mention because these anxieties were everywhere spent upon making less of the executive and more of the legislative branch."\textsuperscript{30}

Despite their good intentions, concluded Goebel, the framers of the state constitutions failed to recognize that "provisions for salary and tenure designed to assure the independence of judges were insufficient safeguards for the independence of the judicial function itself."\textsuperscript{31} In the years following the Declaration of Independence, a series of events deflated support for judicial dependence on the legislature and the electorate and created momentum for greater judicial independence. In 1784, a New York court effectively struck down state legislation as contrary to the law of nations, prompting an unsuccessful attempt to remove the opinion writer.\textsuperscript{32} In 1786, a comparable exercise of judicial review by the Rhode Island Superior Court culminated in an aborted attempt by the legislature to remove the judges who decided the case, followed by electoral defeat the next year for all but one of those judges.\textsuperscript{33}

These and like events catalyzed considerable support for two discrete forms of judicial independence by the eve of the Constitutional Convention: the \textit{decision-making} independence of individual judges to resist political branch interference with their rulings in isolated cases; and the \textit{structural} independence of the judicial branch to resist political branch encroachments on judicial power. In a speech at the Pennsylvania ratification convention in 1787, James Wilson made the case for the former species of independence, arguing that Article III tenure and salary protections

\textsuperscript{30} JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 97 (1971).
\textsuperscript{31} \textit{Id.} at 98.
\textsuperscript{32} \textit{See id.} at 133-37.
\textsuperscript{33} \textit{See id.} at 137-41.
were needed to give judges the independence state judges lacked, to enforce individual rights impartially:

[I]t has often been a matter of surprise, and frequently complained of even in Pennsylvania, that the independence of the judges is not properly secured. The servile dependence of the judges, in some of the states that have neglected to make proper provision on this subject, endangers the liberty and property of the citizen; and I apprehend that, whenever it has happened that appointment has been for a less period than during good behaviour, this object has not been sufficiently secured... .

Thomas Jefferson, on the other hand, had become troubled by the judiciary’s incapacity as an institution to resist legislative encroachments on the judicial power. His 1776 pronouncement that the judiciary should be “a mere machine” for the legislature was eclipsed eight years later by the concern that his state judiciary now lacked the independence needed to exercise judicial power without legislative branch interference:

[Under the Virginia Constitution, the judiciary... members were left dependant on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes... judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy... .

In sum, events leading up to the Constitutional Convention created a perceived need for judges to be independent individually as decision makers, and collectively as a separate branch of government. The distinction between these two forms of independence was, however, conflated to a considerable extent because the one sustained threat to judicial independence during this period—manipulation of judicial tenure and salary—simultaneously undermined decision making and structural independence. With all eyes focussed on threats to tenure and salary, comparatively little attention was paid to other ways in which the legislature could compromise the integrity of the judicial branch, such as by manipulating the courts’ duties or nonremunerative resources. To the extent such issues arose, judicial review provided an apparent remedy: judges otherwise secure in their

34. James Wilson, Debate in Pennsylvania Ratifying Convention (Dec. 11, 1787), in 4 THE FOUNDERS’ CONSTITUTION 139, 139 (Philip B. Kurland & Ralph Lerner eds., 1987).
35. Thomas Jefferson, Notes on the State of Virginia, Query 13, 120-121 (1784), in 1 THE FOUNDERS’ CONSTITUTION, supra note 34, at 319, 320.
stations could simply invalidate unconstitutional encroachments on their institutional autonomy.

Thus, for example, in January, 1788, the Virginia legislature enacted a statute that established district courts, by imposing on "the judges of the high court of appeals," the duty to "attend the [district] courts, allotting among themselves the districts they shall respectively attend." In a **Respectful Remonstrance of the Court of Appeals**, the Virginia Court of Appeals declared the act unconstitutional. At the outset, the court observed: "The propriety and necessity of the independence of the judges is evident in reason and the nature of their office . . . ." Judges must be dependent neither on the government nor the people, the court continued, "And this applies more forcibly, to exclude a dependence on the legislature; a branch, of whom, in cases of impeachment, is itself a party." The act in question, by imposing duties on the judges, which "though not changed as to their subjects, are yet more than doubled, without any increase of salary," was nothing short of "an attack upon the independency of the judges".

For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation ... by making it a part of the official duty to become hewers of wood, and drawers of water: Or, if, in case of a contrary disposition ... by lessening the duties, render offices, almost, sinecures: the independence of the judiciary is, in either case, equally annihilated.

Accordingly, the court concluded that "the constitution and the act are in opposition and cannot exist together; and that the former must control the operation of the latter."

In the contemporaneous debate over ratification of the U.S. Constitution in Virginia, Patrick Henry alluded to the **Remonstrance** in support his argument that an independent judiciary was needed to exercise judicial review and that judicial review was needed to preserve an independent judiciary:

Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were

36. Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 138 (1788).
37. Id. at 143.
38. Id.
39. Id. at 145.
40. Id.
41. Id. at 145-46.
42. Id. at 142.
43. See GOEBEL, supra note 30, at 129 n.120.
the judiciary, and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it.44

The landmark that Henry sought for federal court exercise of judicial review was, of course, later supplied in Marbury v. Madison.45 Before federal judicial review could enable otherwise independent judges to resist encroachments on their institutional independence, however, a second landmark was also needed: one in support of the proposition that legislative encroachments on the judicial branch akin to those deemed contrary to the Virginia Constitution in the Remonstrance would likewise be invalid under the U.S. Constitution. As discussed below, delegates to the Constitutional Convention may have unwittingly obscured this second landmark by delegating to Congress more regulatory authority over the courts than was consistent with the delegates’ expectation that the judiciary would possess the means to rebuff assaults on its institutional integrity.

B. Judicial Independence at the Constitutional Convention

In the years leading up to the Constitutional Convention, threats to judicial independence—in its institutional and decision-making forms—had been largely confined to issues of judicial tenure and salary.46 It is therefore unsurprising that efforts relating to the protection of judicial independence were focussed on insulating judicial tenure and salary from political branch manipulation. Accordingly, the ninth resolution of the Virginia delegation to the Constitutional Convention proposed that federal judges “hold their offices during good behavior” and receive a “compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time.”47

45. 5 U.S. (1 Cranch) 137 (1803).
46. See supra text accompanying notes 19-22. Recall that the Remonstrance of the Virginia Court of Appeals was not issued until 1788.
1. The Good Behavior Clause

The “good behavior” clause remained essentially intact throughout the Convention and was challenged but twice, only once directly. The direct challenge came on August 27, 1787, when Delegate John Dickinson moved to follow the good behavior clause with a proviso that judges “may be removed by the Executive on the application [by] the Senate and House of Representatives.” 48 The motion met with overwhelming opposition despite the prevalence of comparable restrictions on judicial tenure in many state constitutions established just a decade earlier. 49 James Madison reported Gouverneur Morris as arguing that it was “a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removable without a trial,” and concluded that it would be “fundamentally wrong to subject Judges to so arbitrary an authority.” 50 Delegate James Wilson agreed, saying: “The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government”; 51 and John Randolph likewise objected on the grounds that the amendment would “weaken[] too much the independence of the Judges.” 52 Dickinson’s motion was overwhelmingly defeated by a vote of seven delegations to one.

The indirect challenge to tenure during good behavior occurred less than two weeks later in the context of a debate over the scope of impeachable conduct. On September 4, it was proposed that impeachable offenses be limited to treason and bribery. 53 On September 8, George Mason moved to add “maladministration” to the list, arguing: “Attempts to subvert the Constitution may not be Treason,” yet should be impeachable. 54 James Madison opposed Mason’s motion, arguing that so vague a standard for impeachment would “be equivalent to a tenure during pleasure of the Senate.” 55

49. See WOOD, supra note 27, at 160-61.
50. Madison, supra note 48, at 428.
51. Id. at 429.
52. Id.
53. See Journal (Sept. 4, 1787), in 2 FEDERAL CONVENTION RECORDS, supra note 48, at 493, 493. This debate took place in the context of executive impeachment, but the clause the delegates were crafting was to apply to all civil officers of the United States.
54. See James Madison, Notes (Sept. 8, 1787), in 2 FEDERAL CONVENTION RECORDS, supra note 48, at 547, 550.
55. Id.
a compromise, Mason amended his motion without further explanation, substituting language that subjected civil officers to impeachment for "other high crimes & misdemeanors."\(^{56}\)

2. The Compensation Clause

The compensation clause, as proposed by the Virginia delegation, was modified at the Convention to permit periodic increases in judicial salaries (the original resolution forbade upward as well as downward adjustments). The debate on the modification underscored the tension between two competing aims: to insulate judicial salary from legislative manipulation and to permit the legislature to increase judicial pay to ensure that judges receive salaries commensurate with their status as members of an independent branch of government.

On July 18, 1787, Gouverneur Morris moved to permit periodic increases in judicial salaries on the grounds that "the value of money" may change during a judge's tenure, as may "the style of living" and the volume of judicial business, all of which could make upward adjustment of judicial salaries necessary.\(^{57}\) Madison opposed the amendment on the grounds that "[w]henever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter," and that "it will be improper even so far to permit a dependence."\(^{58}\) Madison was unmoved by the concern that judicial salaries would need to be adjusted for inflation, suggesting that a simple solution would be to establish compensation "by taking for a standard wheat or some other thing of permanent value."\(^{59}\) Morris's motion carried, but on August 27, Madison moved to have the bar on increases in judicial salaries reinstated. Charles Pinckney opposed Madison's motion, arguing: "The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can allow in the first instance."\(^{60}\) Granted, incoming judges could be appointed at higher salaries; nevertheless, Pinckney "did not think it would have a good effect or a good appearance, for new Judges to

\(^{56}\) See id.

\(^{57}\) See James Madison, Notes (July 18, 1787), in 2 FEDERAL CONVENTION RECORDS, supra note 48, at 40, 44-45.

\(^{58}\) Id. at 45.

\(^{59}\) Id.

\(^{60}\) Madison, supra note 48, at 429.
come in with higher salaries than the old ones.” Madison’s motion was defeated.

3. The Judicial Power Clause

In addition to the good behavior and compensation clauses, the ninth resolution of the Virginia delegation began by providing that “a national judiciary be established”—language that would be amended over the course of the Convention to state that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The “judicial power clause,” as finally approved, did not establish the lower federal courts, but merely authorized Congress to establish them. Contemporary acceptance of Congress’s authority to regulate the lower federal courts’ practice, procedure, and administration, derives from its power to constitute (or not to constitute) the federal courts, which, when taken in combination with the necessary and proper clause, is thought to include the power to regulate the operations of whatever lower courts Congress sees fit to create.

The Framers’ decision to authorize Congress to establish the lower federal courts, rather than to have the Constitution establish them directly, has thus dramatically limited the scope of the judiciary’s institutional autonomy. Even so, this appears not to have been an intended consequence, so much as a side effect of a decision having to do with reducing tension in the relationship between state and federal power.

As introduced, the Virginia delegation’s ninth resolution provided “that a national judiciary be established,” without any mention of the Supreme or lower courts. On June 4, 1787, when the resolution was initially considered, the first clause was amended (and later approved as amended) to state: “Resolved that a National Judiciary be established, to consist of one supreme tribunal, and of one or more inferior tribunals.” Early in the proceedings on June 5, the phrase “one or more” was deleted, so that the resolution, as it

61. Id. at 430.
64. See The Ninth Virginia Resolution, supra note 47, at 234-35.
65. See James Madison, Notes (June 4, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 96, 120-25.
66. See James Madison, Notes (June 5, 1787), in 1 FEDERAL CONVENTION RECORDS,
stood, provided for the establishment of a supreme court and an unspecified number of inferior courts. Later that day, Delegate John Rutledge moved for reconsideration of the clause establishing inferior tribunals. According to Madison's notes, Rutledge argued that "the State Tribunals might and ought to be left in all cases to decide in the first instance" and that establishing lower federal courts would make "an unnecessary encroachment on the jurisdiction [of the states]." Madison objected, arguing that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential," but Rutledge prevailed on a close vote and the phrase was deleted.

James Wilson and James Madison then moved to add a clause to the resolution, providing "that the National Legislature be empowered to institute inferior tribunals." According to Madison's notes, "They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them," and "repeated the necessity of some such provision." Pierce Butler protested that "[t]he people will not bear such innovations" and "[t]he states will revolt at such encroachments," but the motion carried by an overwhelming margin.

The issue of whether to grant Congress the power to establish inferior tribunals was revisited on July 18. Steadfast opponents argued that federal trial courts were unnecessary and would interfere with the operation of state courts. Steadfast proponents argued that federal trial courts posed no threat to state courts and were essential to the administration of national laws. It was only the ambivalent delegate Roger Sherman who alluded to the provision as a delegation of power to Congress, and then for the limited purpose of expressing his "wish[] that Congress make use of the State Tribunals whenever it could be done."

supra note 48, at 119, 119 ("The words, 'one or more' were struck out before 'inferior tribunals' as an amendment to the last clause of Resoln. 9th.").

67. See Robert Yates, Notes (June 5, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 126, 126.

68. Madison, supra note 66, at 124.

69. Id.

70. Among the opponents, Pierce Butler "could see no necessity for such tribunals. The State Tribunals might do the business," and Luther Martin agreed, arguing that the federal courts "will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere." Madison, supra note 57, at 45-46.

71. Proponents such as Nathaniel Gorham, on the other hand, argued that "Inferior tribunals are essential to render the authority of the Natl. Legislature effectual," while Randolph "observed that the Courts of the States can not be trusted with the administration of the National laws." Id. at 46.

72. Id.
In short, the decision to make the creation of the lower federal courts a matter of congressional prerogative, rather than constitutional mandate, was the product of a political compromise, designed to deflect the anti-Federalist fear that a national judiciary would usurp the role of the state courts. Little, if any, attention appears to have been given to the impact of that decision on the relationship between Congress and the federal courts or the limits of Congress's regulatory authority over the judiciary and the implications of that regulatory authority for judicial independence.

Rather, concern over the judiciary's dependence on Congress was confined largely to insulating judicial tenure and salary from political branch control. The delegates apparently gave no thought to the judiciary's dependence on Congress for nonremunerative resources, such as building, clerical, and circuit-riding expenses, which Congress could manipulate to the same effect as salaries. Nor did they appear to consider the possibility that congressional control over court practice, procedure, or administration might be exploited to compromise the judiciary's institutional integrity.

The oversight is, to some extent, understandable. As previously discussed, threats to judicial independence in the years leading up to the Convention were limited largely to legislative manipulation of judicial tenure and salary. With respect to manipulation of the judiciary's nonremunerative resources, it must be remembered that the monies appropriated to the lower courts, over and above judicial salaries, were relatively meager in the early years of the federal judiciary, and the possibility that such limited resources would or could be manipulated, may not have been anticipated. Other threats—to the extent they arose—could presumably be rebuffed through judicial review. James Madison's notes reflect that Delegate Elbridge Gerry prevailed on just such a point in opposing Madison's proposed "council of revision," which would have established a council comprised of judges, among others, empowered to veto proposed legislation: "Mr. Gerry doubts whether the Judiciary ought to form a part of [the council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality."
The delegates never focussed on the possibility that the courts’ authority to invalidate congressional encroachments on the judicial branch might be impaired by delegating to Congress the decision of whether to establish inferior courts, because that was the product of a compromise struck with anti-Federalists for an unrelated purpose. To the extent that the delegates nevertheless operated on the unstated assumption that the judicial power clause authorized Congress not only to establish the federal courts but also to regulate their administration, the delegates do not appear to have thought that such a power would undermine the judiciary as a coequal branch of government. To the contrary, the Convention was rife with discussion of the delegates’ intention to establish three separate, structurally independent departments of government. Madison’s notes of his own words at the Convention are illustrative: “If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary power should be separately exercised; it is equally so that they be independently exercised.”

The extent of the delegates’ resolve to preserve the independent institutional identity of the judicial branch was likewise manifested in its repeated rejection of the previously mentioned council of revision proposal. Despite several attempts by James Madison and others to win acceptance for a Council of Revision, the proposal was defeated, in part because it was feared that having judges play a formal role in enacting laws they would later interpret might compromise the structural independence and separation of the judicial branch.

75. James Madison, Notes (July 19, 1787), in 2 FEDERAL CONVENTION RECORDS, supra note 48, at 51, 56; see also James Madison, Notes (June 2, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 79, 86 (reporting Delegate John Dickinson’s observation that “the Legislative, Executive, & Judiciary departments ought to be made as independ[en]t as possible”); James Madison, Notes (June 4, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 96, 98 (reporting Delegate James Wilson’s statement that “the Legislative Exe[cutive] and Judiciary ought to be distinct & independent”); James Madison, Notes (June 6, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 132, 138 (reporting James Madison’s statement that “the Judiciary Departm[en]t ought to be separate & distinct from the other great Departments”).

76. Delegate Rufus King thought that “the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.” James Madison, Notes (June 4, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 96, 98. John Dickinson believed that “a junction of the Judiciary to [the Council of Revision], involved an improper mixture of powers.” James Madison, Notes (June 6, 1787), in 1 FEDERAL CONVENTION RECORDS, supra note 48, at 132, 140. Caleb Strong opined that “the power of making ought to be kept distinct from that of expounding, the laws.” James Madison, Notes (July 21, 1787), in 2 FEDERAL CONVENTION RECORDS, supra note 48, at 73, 75. Luther Martin noted if the Council were adopted, judges would be obliged to invalidate “popular measures of the Legislature” not only in the course of judicial review, but also as members of the Council, which could cause the Court to lose “the confidence of the people.” Id. at 77.
The perceived coequality of the three branches was further underscored when the Committee on Detail revised the first clause of Article III to vest "the judicial power" in the Supreme Court and whatever lower courts Congress established. By conforming Article III to parallel language in Article II, vesting "the executive power" in the President, and Article I, vesting "all legislative powers" in Congress, the delegates highlighted the parity they sought to establish among the branches.

This is not to suggest that the delegates perceived the judiciary to be "coequal" in the sense of being as powerful or as critical to day-to-day operation of government as the other branches—such a conclusion is belied by the judiciary's rank in the constitutional hierarchy as the third branch. Nor is it to suggest that as much reflection and energy was devoted to crafting language establishing the third branch as the other two. To the contrary, available evidence supports Julius Goebel's conclusion, that to some delegates, provision for a national judiciary was a matter of theoretical compulsion rather than of practical necessity. In other words, it was received more in deference to the maxim of separation than in response to clearly formulated ideas about the role of a national judicial system and its indispensability.

Consistent with Goebel's observation, our point is that the delegates were committed to an independent judicial branch, but that it was a commitment in concept only. Unhappy experiences with judicial dependence on the crown prior to the Revolution had given way to equally unhappy experiences with judicial dependence on the legislatures afterwards, leaving the delegates desirous of decision-making and structural judicial independence as a theoretical matter, but with precious little practical experience to guide them. In the absence of an established judicial independence culture, it was inevitable that the delegates would fix the tenure and salary problems they had recently encountered in their respective states and otherwise devote minimal attention to addressing other speculative threats to independence for which there was little or no precedent.

Contemporary commentators sometimes argue that the authority Article III delegates Congress to establish inferior courts and to regulate the jurisdiction and (implicitly) size of the Supreme Court reflects the Framers' intention to give the judiciary no structural independence over and above that afforded by life tenure, a fixed

77. See The Ninth Virginia Resolution, supra note 47, at 239-40.
78. GOEBEL, supra note 30, at 206.
salary, and the exclusive right to exercise "judicial power." 79 Such an argument views eighteenth-century developments through a twentieth-century lens. All evidence suggests that the Convention delegates were committed to a structurally independent judicial branch. Their failure to protect the judiciary's structural independence by additional means may be more a function of their lack of experience, foresight, and time than of their lack of commitment to structural independence in principle.

C. Judicial Independence in the Ratification Debates

The ratification debates reinforce, amplify, and in some cases qualify the "original understanding" of Article III. The Federalist Papers underscore the influence of Montesquieu, Adams, and other like-minded theorists on the Framers of the judiciary article. In Numbers 78 and 79, Alexander Hamilton refers to the structural independence of the judiciary as a branch that enables it to resist encroachments by Congress and the President and thereby preserve its role as an institutional check on the political branches. He makes the point in defense of the good behavior clause:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. 80

And again, in defense of the compensation clause:

Next to the permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support. . . . [A] power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. 81

With respect to the good behavior clause, prominent anti-Federalists agreed that life tenure was a necessary and appropriate means to ensure judicial independence. 82 The compensation clause

79. See, e.g., Redish, supra note 11, at 703; Yoo, supra note 10 and accompanying text.
likewise drew only occasional fire. Of greater concern to the anti-Federalists was that the Constitution did not counterbalance judicial independence with a more powerful institutional check to ensure judicial accountability:

[J]udges under this system will be independent in the strict sense of the word... [T]here is no power above them that can control their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.\(^8\)

In the minds of these anti-Federalists, an insufficiently accountable federal judiciary would, through the exercise of judicial review, usurp the role of Congress. The best known of the anti-Federalists, writing under the pen name "Brutus," argued that "If... the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature."\(^4\)

Moreover, Brutus concluded, impeachment is unavailable to remedy such judicial excesses because judges are "removable only for crimes," and "errors in judgment" are not crimes, in the absence of "wicked and corrupt motives."\(^8\)

Alexander Hamilton responded to this charge in *The Federalist*. First, in *The Federalist No. 78*, Hamilton explicitly acknowledged that the federal courts *would* possess the power to void unconstitutional acts of Congress:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority.... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.\(^8\)

Second, Hamilton argued that this power posed no real threat to Congress. "[T]he supposed danger of judiciary encroachments on the legislative authority ... is in reality a phantom," he declared.
Conceding that "[p]articular misconstructions and contraventions of the will of the legislature may now and then happen," Hamilton was nevertheless confident that "they can never be so extensive as to amount to an inconvenience," given the "comparative weakness" of the judicial branch (meaning its lack of control over sword or purse) and the availability of impeachment:

There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.87

At first blush, Brutus and Hamilton appear to disagree as to whether impeachment and removal would be available to remedy bad judicial decision making. A closer look, however, reveals that their interpretations are in accord. Hamilton and Brutus agreed that judicial "errors in judgment," (Brutus's phrase) or "misconstructions and contraventions of the legislature," (Hamilton's phrase) are not high crimes and misdemeanors, subject to impeachment—although Brutus wished it were otherwise. They were likewise in accord, that a "series of deliberate usurpations on the authority of the legislature," (Hamilton's phrase), which would clearly imply the presence of "wicked or corrupt motives," (Brutus's phrase) would subject judges to impeachment. In short, The Federalist Papers and The Anti-Federalist Papers reinforce the view, apparently shared at the Convention, that impeachment and removal were available to remedy crimes politically defined,88 but would not reach errors in judgment in isolated cases.89

The ratification debates thus reflect an appreciation for the

88. In THE FEDERALIST No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961), Hamilton reiterates the point: "A well-constituted court for the trial of impeachments" would have as

[t]he subjects of its jurisdiction ... those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.

89. James Wilson went so far as to say that Congress would not dare to impeach and remove judges who did their duty by invalidating unconstitutional legislative enactments:

It is said that, if [judges] are to decide against the law, one house will impeach them, and the other will convict them. I hope gentlemen will show how this can happen; for bare supposition ought not to be admitted as proof. The judges are to be impeached, because they decide an act null and void, that was made in defiance of the Constitution! What House of Representatives would dare to impeach, or Senate to [convict], judges for the performance of their duty?

James Wilson, Statement at the Pennsylvania Ratification Convention (Dec. 4, 1787), in 2 ELLIOT'S DEBATES, supra note 44, at 453, 478.
tension and balance the Constitution created between accountability and independence. Like the Convention debates, however, discussions of the perceived need for judicial accountability to counterbalance life tenure, nonreducible salaries, and judicial review, began and ended with the impeachment mechanism. Noticeable by its absence from the debates over judicial accountability is any meaningful discussion of Congress's general powers to organize the third branch.

Most explications of the clause authorizing Congress to establish the lower courts characterized it not as a means to regulate court operations, but as a means to adjust the size of the lower court system in response to changing circumstances the Framers could not anticipate and to avoid cluttering the Constitution with details.90 There was, however, some sporadic recognition that Congress's power to establish the courts subsumed a power to regulate them. One prominent anti-Federalist, writing as "The Federal Farmer," saw "some good things" in Article III, one being that "[t]he inferior federal courts are left by the constitution to be instituted and regulated altogether as the legislature shall judge best."91 James

90. See, e.g., A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (May 17, 1788), reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 686-87 (John P. Kaminski & Gaspare J. Saladino eds., 1990) ("To have entered minutely into the subject, to have filled in all its parts, would have employed almost as much time as the framing the Constitution itself, and would have spun out the work to a tedious length. In that case the Constitution must have ascertained the number of inferior courts necessary, the number of judges and other offices, with their salaries, the times of holding the federal courts . . . the introduction of which in a system of government would have made a strange appearance. They therefore properly left to Congress the power of organizing by law the Federal Court."); Edmund Pendleton, Statement at the Virginia Ratification Convention (June 18, 1788), in 3 ELLIOT'S DEBATES, supra note 44, at 517, 517 ("The first clause contains an arrangement of the courts—one supreme, and such inferior as Congress may ordain and establish. This seems to me to be proper. Congress must be the judges, and may find reasons to change and vary them as experience shall dictate. It is, therefore, not only improper, but exceedingly inconvenient, to fix the arrangement in the Constitution itself, and not leave it to laws which may be changed according to circumstances.").

91. THE FEDERAL FARMER, supra note 82, at 99. As The Federal Farmer elaborated: [T]he legislature does not appear to be limited to improper rules or principles in instituting judicial courts: indeed the legislature will have full power to form and arrange judicial courts in the federal cases enumerated, at pleasure, with these eight exceptions only. 1. There can be but one supreme federal judicial court. 2. This must have jurisdiction as to law and fact in the appellate causes. 3. Original jurisdiction, when foreign ministers and the states are concerned. 4. The judges of the judicial courts must continue in office during good behavior—and, 5. Their salaries cannot be diminished while in office. 6. There must be a jury trial in criminal causes. 7. The trial of crimes must be in the state where committed—and, 8. There must be two witnesses to convict of treason. In all other respects Congress may organize the judicial department according to their discretion.

Id. at 99-100.
Monroe made a similar point in the course of the Virginia ratification debates:

It will therefore be the duty of Congress to organize this branch, by the establishment of such subordinate courts, . . . in such manner as shall be found necessary to support the authority of the government . . . . What mode may be best calculated to accomplish this end, belongs to that body to determine.92

This occasional recognition that the congressional power to establish the courts may have subsumed the power to regulate them, however, did not give rise to the perception that the power was a tool for promoting judicial accountability or confining judicial independence. At most, it was seen as a power to serve the greater good of the national government by enabling Congress to contour the size, shape, and operation of the third branch to meet the changing needs of the nation. As a consequence, the contemporary view that such regulatory authority engenders a dependence of the third branch on the first93 was lost on the Framers. Edmund Pendleton was therefore able to opine that “the power of that Judiciary must be coextensive with the legislative power,” and to credit the good behavior and compensation clauses for “securing an important point—the independency of the judges,” in the same breath as he concluded, without apparent irony, that “Congress must be the judges” of whether to establish inferior courts, “and may find reasons to change and vary them as experience shall dictate.”94 For Pendleton, the operating assumption was that tenure during good behavior and a salary that could not be diminished were all that was necessary to preserve judicial independence; the possibility that Congress could undermine the independence of the judicial branch by exploiting its power to “change and vary” court structure and nonremunerative resources appears not to have occurred to him.

In short, a study of the Convention and ratification debates reveals the Founders’ shared aspiration for the judiciary to be one of three “coequal” branches of government, in the sense of being equally separate, equally independent, and equally capable of


93. See, e.g., William H. Rehnquist, 1996 Year-End Report on the Federal Judiciary 1 (Jan. 1, 1997) (“I am struck by the paradox of judicial independence in the United States: we have as independent a judiciary as I know of in any democracy, and yet the judges are very much dependent on the Legislative and Executive branches for the enactment of laws to enable the judges to do a better job of administering justice.”).

94. Pendleton, supra note 90, at 517.
resisting encroachments from the other two branches. Tenure and salary protections alone were perceived to be the necessary and sufficient means to guarantee independence for both the individual judges and the judicial branch. Individual judges insulated by tenure and salary protections, the theory went, would resist unauthorized political branch incursions upon the structural independence of the judicial branch through the exercise of judicial review—and since, in the Founders’ minds, the Constitution provided for a structurally independent judicial branch, any incursions on that independence would necessarily be unauthorized. By delegating to Congress the power to establish inferior courts, however, the Framers may have inadvertently authorized Congress to undermine the judiciary’s structural independence by empowering it to manipulate court structure, practice, procedure, jurisdiction, administration, and nonremunerative resources.

The explanation for this inadvertent oversight is at least threefold. First, threats to judicial independence in the years leading up to the Convention and ratification debates had been limited largely to threats against tenure and salary. Other threats to the judiciary’s institutional integrity had been insufficiently frequent to prompt vigilance in guarding against more speculative political branch encroachments.

Second, authorizing Congress to establish inferior courts (or not) was the product of a compromise in a disagreement over intersystem, not interbranch relations. As a result, when the fight between those who wanted federal trial courts and those who wanted only state trial courts was settled by letting Congress decide, the extent to which that compromise authorized the first branch to impose its will on the third escaped notice.

Third, the Founders’ conceptual commitment to an independent judicial branch was a reaction to bad prior experiences with dependent judiciaries, rather than the outgrowth of a preexisting culture of judicial independence. As a consequence, the delegates lacked the experience and enthusiasm needed to devote as much attention to establishing the third branch as they had the first two. Indeed, the compromise to postpone deliberation over the fate of the inferior courts by delegating the task to Congress without regard to the implications for the balance of power between the first and third branches underscores the Founders’ comparatively tepid interest in plumbing the depths of the subject.
D. Judicial Independence and the Judiciary Act of 1789

When the Convention delegates authorized Congress to establish inferior courts, there is no indication that they did so intending to create a new mechanism for Congress to hold the courts accountable for their behavior or to circumscribe their independence. Convention discussions of judicial accountability were confined to debates over the impeachment clauses, while discussions of congressional power to establish inferior courts were confined to disputes over the need for national trial courts in a federal system. The notion that Congress’s power to establish the courts subsumed the power to make the third branch dependent on the first was so unfamiliar that some feared the opposite was true—that the Constitution had left Congress without power to structure and oversee the courts in any meaningful way. Samuel Osgood, who would later serve as the first postmaster general, raised this concern in a letter written in the aftermath of the ratification:

The Arrangement of the Judicial should be left perfectly free for the Legislature, for otherwise however inconvenient the Manner of administering Justice may be found, there can be no legal Remedy other than by an Appeal to those who can alter the Constitution itself.

There was a Necessity of drawing some Kind of a Line between the General & the State Judiciarys. The Line being drawn, the Powers of arranging the general Judiciary ought to have been vested solely in the Legislature. But they are not; Rights are vested in the Judiciary which may affect the Happiness of the People extremely & it is not in the Power of the Legislature or the Judiciary to alter them.95

When the first Congress convened to draft and enact the Judiciary Act of 1789, there is little indication that attitudes had changed. Those who supported the Act construed their authority to establish inferior courts not as a discretionary power over the life or death of the federal judiciary to be suspended above it like the sword of Damocles, but as a duty to implement the constitutional framework.

Debates over the bill in the House (Senate debates were not transcribed) reflect the surprisingly widespread view that the Constitution left Congress with no choice but to establish inferior

courts—never mind that two years earlier, the Founders had rejected a proposal directing Congress to establish inferior courts in favor of the "Madisonian compromise," which was explicitly designed to give Congress the latitude not to establish inferior courts at all. Many members of Congress focused on the Article III, Section 1 pronouncement that the judicial power "shall" (not may) be vested in the Supreme Court and whatever inferior courts Congress may establish. Congress thus had no choice but to vest federal judicial power, the argument went, and could only vest it in Article III courts. Vesting judicial power in the Supreme Court alone was not an option, since Article III, Section 2 clearly contemplated that the Supreme Court would exercise appellate jurisdiction. If the Supreme Court were to decide appeals, those appeals had to come from somewhere, and since many of the state trial courts lacked Article III powers and protections, Congress lacked the authority to vest judicial power there. Accordingly, the argument concluded, Congress had no choice but to establish inferior federal courts. Even some opponents of federal trial courts grudgingly conceded what they perceived to be an ineluctable constitutional mandate to create them. Representative Aedanus Burke professed to have "turned himself about to find some way to extricate himself from this measure; but which ever way he turned, the constitution still stared him in the face, and he confessed he saw no way to avoid the evil."

In an exhaustive study of the issue, Professor Michael Collins argues that contrary to the accepted wisdom that Article III gives Congress the discretion to create inferior federal courts or not, the dominant view at the time was that the Constitution compelled their creation. Professor Collins concedes that such a view is difficult to

96. See supra notes 62-72 and accompanying text.
97. See Representative William Smith, Debate in the House of Representative (Aug. 29, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789-MARCH 3, 1791, at 1348, 1348 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DOCUMENTARY HISTORY OF THE FIRST CONGRESS]; see also Representative Egbert Benson, Debate in the House of Representatives (Aug. 29, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, supra, at 1368, 1368 ("It is not left to the election of the legislature of the United States whether to adopt or not, a judicial system like the one before us; the words in the constitution are plain and full, and must be carried into operation."); Representative Elbridge Gerry, Debate in the House of Representatives (Aug. 31, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, supra, at 1385, 1386 ("We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequence.").
reconcile with the terms of the "Madisonian compromise" at the Constitutional Convention, but argues persuasively that the terms of the compromise were less than completely understood by Convention delegates and unfamiliar to participants in the ratification debates.\textsuperscript{100}

This is not to suggest that the first Congress was united in the view that Article III compelled them to establish inferior courts. Apart from those in the minority, who argued that the state courts could and should be utilized in lieu of federal courts,\textsuperscript{101} there were those who argued for establishing inferior courts, not because the Constitution deprived them of discretion to do otherwise, but because doing so was necessary to implement policies underlying the constitutional structure.\textsuperscript{102} The overriding point remains, however, that Congress's power to establish inferior courts was viewed not as a mechanism for engendering judicial branch dependence or accountability. It was, rather, the foundation for a constitutional duty to establish a separate and independent judicial branch that would stand up to antagonistic state interests and impartially uphold the constitutional order. Representative John Vining's impassioned speech on the floor of the House is illustrative:

I conceive that the institution of general and independent tribunals, are essential to the fair and impartial administration of the laws of the United States. . . .

The gentleman has told us, that the people do not like courts—that they have been opposed and prevented by violence—nay, by insurrection in Massachusetts: Surely this operates as a powerful reason to prove that there should be a general, independent, and energetic judicature—otherwise, if either the State Judges should be so inclined, or a few sons of faction choose to assemble, they could ever frustrate the objects of Justice . . . .\textsuperscript{103}

Prior to the 1789 Act, discussions of independent judges and an independent judicial branch were coterminous: tenure and salary

\textsuperscript{100} See id. at 105-19.

\textsuperscript{101} See, e.g., Representative Michael Stone, Debate in the House of Representatives (Aug. 31, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, supra note 97, at 1380, 1385 (arguing that Congress has the discretion not to establish inferior courts and arguing against them because "this system cannot in its nature be agreeable to the state governments, or to the people. I do not think this, then, the proper time to establish these courts").

\textsuperscript{102} See James Madison, Debate in the House of Representatives (Aug. 31, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, supra note 97, at 1359, 1359 ("It will not be doubted that some judiciary system is necessary to accomplish the objects of the government; and that it ought to be commensurate with the other branches of government. . . . The legislative power is made effective for its objects; the executive is co-extensive with the legislative, and it is equally proper that this should be the case with the judiciary.").

\textsuperscript{103} Representative John Vining, Debate in the House of Representatives (Aug. 31, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, supra note 97, at 1376, 1376-77.
protection provided for independent judges, who would possess the fortitude to preserve the independence of the judicial branch through the exercise of judicial review. Precious little discussion was devoted to elaborating on the Founders’ conception of the independent judicial branch they sought to create, separate and distinct from the independent judges who would constitute it. Indeed, the Framers consciously declined to sweat the details that might have provided us with a picture of the independent judiciary qua “branch” as they visualized it: the size of the Supreme Court, where it would sit and how often, the scope of its appellate jurisdiction, whether there would be inferior trial courts or intermediate courts, and if so, how many, where they would sit, and what their jurisdiction would be, were all questions that the Framers left to Congress for a later day.

It was not until that later day arrived in 1789 that a more detailed conception of the judiciary as a unified branch began to emerge. In the Act, a tri-level court structure was instituted with district courts, regional circuit courts, and a Supreme Court. To overcome the concern that federal court litigation would force state citizens to litigate in distant and unfamiliar federal fora, Congress drew federal judicial district boundaries along state lines and located a federal district court in each state.

That solved one problem but left another: a centrally located Supreme Court might rapidly lose touch with the geographically dispersed district courts and the communities they served. As Massachusetts Supreme Court Justice David Sewall worried in a letter to Representative George Thatcher, "to have [the Supreme

104. See The Judiciary Act 1789, ch. 20, 1 Stat. 73.
105. See BRUTUS, THE POWER OF THE JUDICIARY (pt. 4) (Mar. 6, 1788), reprinted in THE ANTIFEDERALIST PAPERS, supra note 82, at 236, 237 (“No man can say where the supreme court are to hold their sessions; the presumption is, however, that it must be at the seat of the general government. In this case parties must travel many hundred miles, with their witnesses and lawyers, to prosecute or defend a suit. No man of middling fortune, can sustain the expense of such a law suit...”); THE FEDERAL FARMER, LETTER III (Oct. 10, 1787), reprinted in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN, supra note 82, at 13, 23 (“I do not, in any point of view, see the need of opening a new jurisdiction to these causes... of suffering foreigners, and citizens of different states, to drag each other many hundred miles into the federal courts.”); Letter from Edmund Pendleton to James Madison (July 3, 1789), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95, at 444, 444 (“This [judicial] department is the Sore part of the Constitution & requires the lenient touch of Congress. To quiet the fears of the Citizens of being drag’d from large distances from home, to defend a suit for a small sum, which they had better pay however unjust, than defend with success, is... worthy of attention.”).
106. See GOEBEL, supra note 30, at 473 (“[T]he localization of the federal inferior courts revealed an intention to quiet the alarums raised regarding the threatened inconvenience of the federal system.”).
Court] Stationary, at the place where Congress reside (6 or 700 mile) so far distant from the Extremes of the union such a fixation will not be Satisfactory." To unify the court system, Congress lit upon the idea of assigning the three regional circuit courts to hear cases semiannually in each judicial district within their respective circuits and staffing the circuit courts with the local district judge and two Justices of the Supreme Court. Massachusetts Supreme Court Justice Nathaniel Sargeant offered a justification for such an approach in a letter to Vice President John Adams:

[N]othing in my view of things tends more to Strengthen Government in [the] extream Parts, than sometimes to have a court come among them—perhaps [the] want of this may be one reason among many, why large & extensive Governments have not been so quiet & happy as smaller ones.108

Precedent for “circuit riding” could be found in several state court systems, which in turn borrowed the practice from the English courts at Westminster.109 Sir Matthew Hale’s The History of the Common Law of England, which Julius Goebel characterized as “a basic text for those commencing the study of law” in the mid to late eighteenth century,110 touted the virtues of the English corollary to circuit riding in terms that underscore the impact of the practice on administrative unification of the courts:

[B]y this Means their Judgments and their Administrations of Common Justice carry a Consonancy, Congruity and Uniformity one to another, whereby both the Laws and the Administrations thereof are preserved from that Confusion and Disparity that would unavoidably ensue, if the Administration was by several incommunicating Hands . . . .111

It would be over a hundred years before the centralized, bureaucratized, independent judicial branch as we know it today would begin to emerge with the establishment of circuit courts of appeals in 1891, the Conference of Senior Circuit Judges in 1922, a process for court-promulgated rules of procedure in 1934, and the Administrative Office of the United States Courts in 1939.112 Even so,
it would be an overstatement to suggest, as some have, that as of 1789 the drafters of the Judiciary Act had no shared concept of the judiciary as a branch independent of the courts that constituted it.\textsuperscript{113} They regarded themselves as duty bound to establish the Supreme and inferior courts, but were troubled by the notion of a stationary, geographically-isolated Supreme Court exercising appellate review over a sprawling contingent of atomized judges scattered across the United States. To facilitate the development of a cohesive judicial branch in the teeth of geographical dispersion, they introduced circuit riding as a means to guarantee systematic interaction among the Justices of the Supreme Court, district court judges, and citizens of the several states. In the words of Representative Fisher Ames, these provisions for the establishment of the courts ought to be read together and “treated as a system.”\textsuperscript{114}

To say that the first federal Congress manifested a rudimentary grasp of a cohesive judicial branch is not to suggest that the grasp was especially firm. Well before the Act was passed, the circuit-riding “solution” was recognized as an imperfect one that would facilitate interaction among judges of the federal judiciary at the expense of considerable hardship to the circuit-riding Justices.\textsuperscript{115} “[T]he middle circuit . . . is so extensive,” wrote Judge Edward Shippen to Senator Robert Morris on July 13, 1789, “that it will be scarcely practicable

\textsuperscript{113} See, e.g., WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 3 (1990) (noting that the so-called “judiciary” act of 1789, was in fact titled an act providing for the establishment of “courts,” and arguing that concept of the courts qua “judiciary” is a modern development).

\textsuperscript{114} Letter from Fisher Ames to William Tudor (July 12, 1789), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95, at 461, 461.

\textsuperscript{115} It is interesting to note that at no point did these expressions of concern acquire a constitutional dimension, despite the fact that one year previously, the Virginia Court of Appeals held that a state statute requiring court of appeals judges to double as district court judges violated the principles of judicial independence and separation of powers imbedded in the Virginia Constitution. See supra text accompanying notes 36-44. One possible explanation is that the burden of circuit riding had less to do with the additional cases the Justices would have to decide than with the travel associated with getting there to decide them, and since there was state and English precedent for obligating judges to travel throughout the jurisdiction to hold court, imposing a comparable burden on the Justices of the Supreme Court may have seemed unremarkable from a constitutional standpoint. See supra text accompanying notes 109-11. A second explanation may be that the Virginia legislature imposed additional duties on sitting court of appeals judges without additional compensation—a fact critical to the court of appeals holding—whereas the Framers of the 1789 Act imposed circuit-riding duties on Supreme Court Justices, not as an uncompensated “add-on,” but as a fully compensated part of the original package of duties associated with the office. Finally, the goal of the first Federal Congress was to get the general government up and running; if there was a perceived antagonist in that process, it was the state governments and not the inchoate Supreme Court. Congress simply did not devote much attention to the possibility that the Supreme Court might undermine Congress’s efforts by declaring portions of the Act unconstitutional.
for two Judges twice a year to perform it, and at the same time attend the Sitting of the Supreme Court at the Seat of Government.”

More generally, there was a widespread recognition among proponents of the Act that it was an imperfect first pass at an enormously complicated subject that would need to be revisited early and often. Wrote Representative James Madison:

It is pregnant with difficulties, not only as relating to a part of the constitution which has been most criticized, but being in its own nature peculiarly complicated & embarrassing. . . . The most that can be said in its favor is that it is the first essay, and in practice will be surely an experiment. In this light, it is entitled to great indulgence . . . .

Representative Thomas FitzSimons was even less sanguine: “[W]e are in our house totally incompetent to such a business,” he lamented, and “tho the one preparing in the Senate May be found defective it will possibly go down because we are incapable of producing a better.”

Edmund Randolph, soon to be named the first Attorney General, likewise questioned the competence of Congress to structure the courts in detail and argued that the judicial branch itself should be consulted before a permanent plan was implemented:

The minute detail ought to be consigned to the judges. Every attempt towards it must be imperfect, and being so may become a topic of ridicule to technical men. I wish this idea had been thought worthy of attention; thus the bill would have been less criticized. I wish even now, that the judges of the supreme court were first to be called upon, before a definitive step shall be taken.

Randolph’s suggestion may have been impractical, in the sense that it would have been difficult to suspend passage of a bill pending consultation with judges who had not yet been nominated and whose

116. Letter from Edward Shippen to Robert Morris (July 13, 1789), in 4 Documentary History of the Supreme Court, supra note 95, at 464, 465; see also Letter from Robert Livingston to Oliver Ellsworth (June 24, 1789), in 4 Documentary History of the Supreme Court, supra note 95, at 420, 420 (“I am not clear that more than one circuit in a year will be necessary, & whether the number of Judges you assign will be sufficient to ride two circuits & execute the other duties of their departments with due deliberation.”); Letter from Edmund Pendleton to James Madison, supra note 105, at 444 (discussing “[t]he fatigue of the Circuits & other accidents” that would inevitably diminish the participation of Supreme Court Justices on the circuit courts).

117. Letter from James Madison to Samuel Johnson (July 31, 1789), in 4 Documentary History of the Supreme Court, supra note 95, at 491, 491.

118. Letter from Thomas FitzSimons to Benjamin Rush (June 2, 1789), in 4 Documentary History of the Supreme Court, supra note 95, at 400, 400.

119. Letter from Edmund Randolph to James Madison (June 30, 1789), in 4 Documentary History of the Supreme Court, supra note 95, at 432, 433.
offices would not exist until such time as a bill was passed. Nevertheless, his comments reflect an appreciation for the judiciary as an autonomous branch of government that ought to be delegated some measure of self-regulatory power.

Those who drafted and ratified the Constitution desired to establish an independent judicial branch but lacked the time, experience, or inclination to translate that desire into a detailed blueprint. And so, they assigned Congress to serve as architect, to complete and implement the governmental framework consistent with the Framers' very general directives. In the Judiciary Act of 1789, Congress began the business of establishing the independent and cohesive judicial branch that—in its view—the Constitution demanded. The first Congress’s conception of the judiciary as an independent branch may have been rudimentary but was nonetheless extant; and like the Founders, Congress exhibited no awareness that its power to organize (or reorganize) the courts was in tension with the principle that the judicial branch should be independent of the political branches. It would not be long, however, before this tension became manifest. Once the Judiciary Act was passed, and the courts created, the judges would be consulted for their insights on judicial structure and practice, but the expectation of branch autonomy would receive several blows, with the most debilitating setback flowing from the partisan division of government that occurred after the end of the first decade.

II. Putting the Experiment to Its Trial: The First Decade of the Judicial Branch

On February 2, 1790, the Supreme Court of the United States opened for the first time. A spectator commented that this event made us "now in Every Respect—A Nation." Nation we might be but perhaps not "in Every Respect." The import of this comment is, however, unmistakable: until the third branch was formed, the United States could not properly claim to be a fully functioning government under the Constitution. Yet even after the Judiciary Act of 1789 created a multi-tiered judicial structure, it would take nearly a century before the independent judicial branch implicit in our constitutional structure would assert its existence consistently as a matter of constitutional principle. In the early years of the

120. Letter from Peter Allaire to George Yonge (Feb. 4, 1790), in 1 Documentary History of the Supreme Court, supra note 95, at 688, 688.
Constitutional Republic, strict separation between branches and the
development of a truly independent judicial branch were far less
evident than they would later become. Although many clearly felt
that one of the most important innovations of the new constitutional
structure was the creation of a national judiciary, the mechanics of
this were to be worked out through a measure of experimentation.
The Constitution and the 1789 Judiciary Act did not end the
delineation of powers but in fact opened up the debate. In elaborating
the structure and meaning of the Constitution and new government to
an early grand jury, Chief Justice John Jay explained:

[W]ise and virtuous Men have thought and reasoned very
differently respecting Government, but in this they have at Length
very unanimously agreed vizt. That its Powers should be divided
into three, distinct, independent Departments—The Executive
legislative and judicial. But how to constitute and ballance them in
such a Manner as best to guard against Abuse and Fluctuation, &
preserve the Constitution from Encroachments, are Points on
which there continues to be a great Diversity of opinions, and on
which we have all as yet much to learn.121

As Jay indicates, how the three branches were to interrelate was
uncharted territory, territory that the founding generation seemed in
no drastic hurry to definitively map.

It has been suggested that the low regard for the independence
of the judiciary as a coequal branch resulted from a pragmatic
favoring of political expediency over constitutional principle or,
alternatively, from a simple failure to contemplate or foresee
pressures on judicial independence beyond the power to control
salary or terminate employment.122 As Russell Wheeler put it: “[T]he
first decade of the Republic saw the creation of the courts but
decidedly not of the judicial branch....”123 As we have averred in the
first part of this essay, however, an independent branch was certainly
in the contemplation of the architects of the Constitution (both
Framers and ratifiers). And constitutional principle was assuredly on
the minds of many in the founding generation, even as they struggled

121. John Jay, Charge to the Grand Jury of the Circuit Court for the District of New York
(Apr. 12, 1790), in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95, at 25,
26-27.
122. Russel Wheeler quotes the Long Range Plan of the Federal Courts to contrast with
what he takes to be the limited view of the first decade: “[I]t has become apparent in the
interdependent modern world that a judge’s ability to function independently can be affected by
more than a simple threat of job loss or salary reduction.” Wheeler, supra note 17, at 1 (quoting
COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES,
PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1995)).
123. Id. at 1.
to work out the practical ramifications of the inherent tensions and contradictions of a mixed system of separation of powers and checks and balances. What we hope to show in this section is that in the first decade of the Republic, the men charged with putting the machinery into motion likewise contemplated an independently functioning judicial branch and similarly recognized that "a judge's ability to function independently can be affected by more than a simple threat of job loss or salary reduction." Arguably, the first judges to serve the new Republic recognized the other sorts of threats to their independence precisely because they were more than theoretical abstractions: encroachments on branch integrity in fact did affect the judges' ability to function independently. The early years of the Republic saw the concept of branch independence undermined by both indifference and direct challenge. Although the weakest branch did not completely succumb to external pressure in the early years, its weakness was manifest in its failure, under pressure, to assert its independence as a coequal branch of government.

The federal judiciary was constrained in organizing itself as a fully functioning independent branch in part because it was insufficiently institutionalized in the early years of the Republic. We now have a constitutional culture, but it took time to develop, and was not fully formed at the outset. Article III, with its protection of compensation and tenure, creates an insularity for individual judges deciding particular cases. Yet Article III does not by its explicit terms prevent judges, acting in concert in the interest of branch integrity, or perhaps even branch survival, from refusing to cross Congress at times when Congress appears to be in a position either to bestow desired benefits on the branch (as with relieving judges from riding circuit) or to do damage to the integrity of the branch (as in the aftermath of the repeal of the 1801 Act and the judicial impeachment campaign). Thus, what we see in the early behavior and beliefs of the federal judiciary is not a failure to comprehend a place for branch independence alongside individual decisional independence, but a failure of branch independence in operation. That is to say, because branch independence is protected only by the structure of the Constitution and not by the particularized and explicit language of

124. Id. at 2 (quoting COMMITTEE ON LONG RANGE PLANNING, supra note 122).
126. See infra text accompanying note 139.
127. See infra text accompanying notes 181-92.
Article III, decisional independence probably was undermined in some cases in the early years of the Republic.\(^{128}\) What this suggests is that the value of branch independence must first be recognized by Congress and then respected through a doctrine of implied limitations found in the structure of the tripartite Constitution and in the experience of the early Republic.

The early development of a recognizable branch administrative structure for the federal judiciary was retarded for reasons practical, political, and prudential. Although the reasons would change in their relative emphasis by the end of the decade with the partisan division of the branches, while the Federalists controlled all three branches true branch independence fell victim not to principle so much as expediency. As foreshadowed by the Judiciary Act debates, the courts were perceived as a major expense for the infant government, they represented the most visible and pervasive symbol of the threat to state sovereignty that nascent Jeffersonian-Republicans saw in the federal government, and the expansive and expanding geography of the new nation created serious practical problems for centralized, hierarchical administration. Given the tenuous position of the judiciary in the early years of the Republic, the judges most often chose not to assert their independence as a branch, in favor of maintaining a low profile in the eyes of their perceived enemies. As Chief Justice John Jay noted in the early 1790s:

> The federal Courts have Enemies in all who fear their Influence on State objects. It is to be wished that their Defects should be corrected quietly. If these Defects were all exposed to public view in striking colors, more Enemies would arise and the Difficulty of mending them be encreased.\(^{129}\)

The expense of the federal judiciary was an issue that plagued discussions of its structure from the very beginning. Some who would not have supported the proposal to use the state courts as lower federal courts for reasons of anti-Federalism were persuaded for fiscal reasons to get behind the proposal. Caleb Strong, who would later become a member of the committee appointed to draft the Judiciary Act of 1789, commented in March of that year that the judicial system “I think ought at present to be formed in such Manner as to be as little expensive as possible.”\(^{130}\)

\(^{128}\) **Stuart v. Laird**, 5 U.S. (1 Cranch) 299 (1803), discussed infra text accompanying notes 210-11, is the most obvious example.


\(^{130}\) Letter from Caleb Strong to John Lowell (Mar. 11, 1789), in 4 DOCUMENTARY
Fisher Ames thought that limiting federal court jurisdiction might both "prevent expence" and "allay jealousy." Another observer noted of the judiciary that '[t]he salaries . . . are rather high for the temper or circumstances of the Union and furnish another cause of discontent to those who are dissatisfied with the Government." The decision to make judges do double duty—having district court judges and Supreme Court Justices staff the circuit courts—seemed a reasonable efficiency measure, if not a measure friendly to the best administration of justice. Rhode Island district court judge Henry Marchant summed up the quandary between the practical and principled approaches that bedeviled Congress early on, noting to Senator Theodore Foster that

"Altho' I have ever seen, as I think, some Impropriety in the Judges of the Supreme Court sitting as a Circuit Court with the Judges of the District Court, and an Indelicacy at least, in Appeals to themselves from their respective Decisions—Yet—There are some conveniences, and much Economy in the Mode—Very necessary in the first setting out—and until Our publick Debt is considerably lessened."

Yet for all the limits on the development of an autonomous branch structure, there is evidence that separation of powers concerns implied that branch autonomy was not outright rejected. The judiciary was to make its own rules, admit attorneys, hire its staff (such as was provided for), and create its seal.

As previously noted, many saw the judicial branch structure as defective and in need of revision even as they voted for or supported the passage of the 1789 Judiciary Act. Commentators repeatedly expressed the opinion that the structure was experimental and would require significant adjustment. Elbridge Gerry proposed an
amendment in the House to limit the duration of the Act, "as it is acknowledged the bill is an experiment." Congressman Theodore Sedgwick, who was worried about whether constitutional reform of the judicial system might "excite all the agitations of federal and antifederal passions which now seem to lie dormant," asked a friend in 1791 "whether it is not on the whole most prudent to do nothing until the inconveniences resulting from our present situation shall be more severely felt?" New York attorney Peter Van Schack replied that

with Respect to the Judiciary of the General Government, I incline to think that it must be left to Time and Circumstances to give it a proper Establishment. Premature Attempts to amend, may check the good and increase the Evils of the present System. We have Seen So little in Practice under the present System, in this State, that We derive no Light from Experience.

From the Justices, to the President, to the Attorney General and on through the executive branch and among members of Congress, the assumption was that the judiciary would be reformed in light of the experiences of the courts in action. Most particularly, many assumed that the circuit system, at least regarding the Supreme Court Justices, would be abolished. For it was this system, requiring onerous physical duties of the Justices and setting up a questionable appellate process, that became most problematic for branch independence in principle, if not in practice. The judges' attempts to persuade Congress to alleviate the personal and physical burdens of circuit riding presented an unseemly aura of dependence on Congress. The judges' pleas to relieve the Justices from lower trial court duties because having the judges sitting in review of their own opinions did not favor the appearance of impartial justice likewise highlighted the dependence of the judicial branch on the congressional. In spite of very real concerns about the circuit system on those grounds, the judges very soon ceased pressing such concerns with Congress, because of the fear that their position would be dismissed as stemming solely from interests of personal comfort and perhaps because their first experience with challenging congressional


137. Letter from Theodore Sedgwick to Peter Van Schack (Nov. 20, 1791), in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95, at 566, 567.

administration of the judiciary on constitutional grounds raised such ire in Congress.\textsuperscript{139}

The issue of the constitutionality of the circuit court system was first raised by the judges in the first year of the judiciary's existence. In response to a request by President Washington,\textsuperscript{140} the Justices met in August of 1790 to discuss problems with the 1789 Judiciary Act.\textsuperscript{141} At this point, having met only briefly for the first time earlier that year, the Supreme Court had no judicial business before it. The Justices discussed a variety of administrative matters, including the contentious issue of circuit assignment, but they also began contemplating the constitutional defects in the system as structured by the first Federal Congress. Two days after that meeting, Justice Blair wrote to John Jay with some afterthoughts about the points discussed. This is the first expression of a constitutional argument against the circuit courts, an argument that Jay would adopt as well. Blair thought that

the circuit system may not be perfectly consistent with the spirit of the Constitution, which intended the supreme court as a dernier resort only, . . . & it is perhaps rather nice to distinguish between a court & the judges of that court—But the constitution seems also to have intended, that the judges of such inferior courts as Congress might see fit to establish should be a sett of judges \emph{distinct} from those of the \emph{supreme} court—“The judges both of the supreme & inferior courts shall hold their offices during good behaviour” &c—While the same judges receive an unapportioned salary for both duties—to be secured in the enjoyment of the inferior jurisdiction does not look like an advantage, & yet, an advantage was certainly intended by the constitution in respect to both jurisdictions.\textsuperscript{142}

Blair's reference to the constitutional designation of the Supreme Court “as a dernier resort only” calls into question giving \emph{Justices} of the Supreme Court original jurisdiction while sitting on circuit, when the Constitution denies the \emph{Supreme Court} that jurisdiction. In this context, Blair was not satisfied with the distinction between the Court and its Justices. Blair's concern with the “unapportioned” salaries for Supreme and Circuit Court duties echoed the constitutional

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\textsuperscript{139} See Letter from the Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), \textit{in 2 Documentary History of the Supreme Court}, supra note 95, at 289; \textit{see also} discussion of \emph{Hayburn's Case}, infra text accompanying notes 165-70.

\textsuperscript{140} Letter from George Washington to the Justices of the Supreme Court (Apr. 3, 1790), \textit{in 2 Documentary History of the Supreme Court}, supra note 95, at 21.

\textsuperscript{141} See Draft of a Letter from John Jay to George Washington (Nov. 13, 1790), \textit{in 2 Documentary History of the Supreme Court}, supra note 95, at 107, 108.

\textsuperscript{142} Letter from John Blair to John Jay (Aug. 5, 1790), \textit{in 2 Documentary History of the Supreme Court}, supra note 95, at 83, 84.
\end{flushright}
objections expressed by the Virginia judges in their *Remonstrance* of 1788.\(^\text{143}\) Blair was a member of the Virginia court at the time of the *Remonstrance*. Since he and his brethren on that court had successfully convinced the legislature to withdraw the offensive circuit duties, he may have hoped for a similar response to a missive from the judges at the federal level. In a draft letter to President Washington, drawn up by Chief Justice John Jay at the direction of the other Justices, Jay fleshed out and elaborated the constitutional objections to which Blair alluded.\(^\text{144}\) Jay's draft listed three main objections to the circuit court structure, which Jay identified as constitutional concerns. The arguments were linked by the common thread of concern over assigning the same judges to two different courts with different and exclusive jurisdictions. The first point elaborated Blair's concern over the Constitution's exclusion of the Supreme Court from certain original jurisdiction cases while Congress admitted its Justices to exercise the excluded jurisdiction. The second was the incompatibility problem of appointing judges to both inferior and supervisory positions, giving them the power to sit in judgment upon themselves. Because the circuit courts were primarily trial courts, this meant that the Justices would be reviewing their own dispositions of cases without any intervening appellate process. And finally, Jay raised the appointments clause problem that appeared with the apparent legislative appointment of judges to offices to which they had neither been nominated nor confirmed.

Another ominous portent for the structural independence of the federal judiciary from Congress occurred at that same summer meeting of the Justices in 1790. At the first meeting of the Supreme Court in February of that year, the Justices (only four of whom were present) assigned circuit duty based on residence in the circuit. The reasoning at the time was ostensibly that the Justices "could with most propriety determine on the applications for the admission of Lawyers in the Districts wherein they respectively lived."\(^\text{145}\) James Iredell was not present at that first session, having received his

\(^{143}\) See supra text accompanying notes 36-42.

\(^{144}\) See Letter from Justices of the Supreme Court to George Washington (ca. Sept. 13, 1790), in *2 Documentary History of the Supreme Court*, supra note 95, at 89, 89-91. Although this draft was circulated to the Justices and to the Attorney General, it may not have been sent on to the President. See Letter from John Jay to James Iredell (Sept. 15, 1790), in *2 Life and Correspondence of James Iredell* 292, 293-96 (Griffith J. McRee ed., New York, D. Appleton & Co. 1858).

\(^{145}\) Letter from James Iredell to John Jay, William Cushing, and James Wilson (Feb. 11, 1791), in *2 Documentary History of the Supreme Court*, supra note 95, at 131, 131.
commission only after its close. He was, with some justification, dismayed when without prior notice, the question of whether to make the initial circuit assignments permanent was put to a vote at the August meeting. Three of the five Justices present voted for permanent assignments based on the original allocation of circuits. The result was that Iredell, along with Rutledge (who had not been present at either meeting), was saddled with the largest and most onerous circuit, the Southern. In spite of Iredell's repeated pleas and arguments, Jay, Wilson, and Cushing could not be budged from their position that as long as the Justices were required to hold circuit courts, permanent assignments were the only practicable and perhaps even the only legal means of carrying out that duty.\textsuperscript{146} As a consequence, Iredell lobbied Congress for a legislative rotation. Congress responded by passing an act (originally drafted by Iredell) providing for the rotation of circuit assignments, so that no Justice would be required without his consent to ride the same circuit twice until every other Justice had ridden that circuit.\textsuperscript{147} Instead of protesting congressional control over an important aspect of branch/court administration, contention within the Court itself seems to have resulted in unthinking acquiescence in what was arguably a blending problem that could have had serious implications for judicial independence. What Congress had left to the Court to determine was thus removed by Congress, not only without protest from the judiciary, but at the behest of one of its Justices because several members of the Supreme Court were not prepared voluntarily to share the excessive burdens of riding the southern circuit. This cession of power over administration of the branch took place without careful consideration, by either Court or Congress, of its implications for judicial independence.

Sometime after their summer meeting in 1790, the Justices dropped their constitutional arguments to Congress and resorted solely to arguments addressed to the difficulties and inequities, both for Justices and litigants, of the circuit system devised by the Judiciary Act of 1789. An early plan that would have entailed each of the Justices voluntarily relinquishing $500 of his salary in return for abolition of the circuit system went nowhere when unanimity among

\textsuperscript{146} See Marcus & Van Tassel, supra note 135, at 46-49. The Judiciary Act did require district court judges to reside in their districts but of the circuit court it said only that they "shall consist of any two Justices of the Supreme Court" and the district judge. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74 (emphasis added).

\textsuperscript{147} See Act of Apr. 13, 1792, ch. 21, 1 Stat. 252-53.
the Justices was too late in coming for submission of the plan to Congress. Justice Thomas Johnson had urged presenting the plan to Congress without waiting for the views of two of the Justices (Cushing and Jay), observing that "if this Opportunity is lost we shall not have another soon so good." It is not a little ironic that the Justice who would rebuff the constitutional challenge to the circuit system in *Stuart v. Laird* would owe his appointment to the Supreme Court to Thomas Johnson's resignation when Congress failed to eliminate the circuit system. With the terse comment that "it is sufficient to observe, that practice and acquiescence under [the circuit system] for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and have indeed fixed the construction," Justice Paterson rewrote the history of the first decade of the judicial branch and elevated the politically expedient acquiescence in circuit riding to the level of constitutional construction.

While the Justices, Iredell chief among them, were circulating among themselves the voluntary salary reduction plan that they hoped would relieve them from circuit duties altogether, Congress passed legislation on March 23, 1792, just before the Spring Circuits were to commence in April, that added an extra component to their existing circuit duties. The Justices would now be required to keep each of the several courts held in their circuits open for at least five days to hear claims for pensions from disabled Revolutionary War veterans. Within days of passage, in at least one case without even waiting for a case to come before them, five of the six Justices and three district judges shot off three separate responses, from courts in all three circuits to Congress through the President, declaring the Invalid Pension Act unconstitutional. What Congress had asked

150. See discussion of *Stuart v. Laird*, *infra* text accompanying notes 210-12.
152. See Letter from Justices Jay and Cushing and Judge Duane, Circuit Court for the New York District (Apr. 10, 1792), in 1 American State Papers 49 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales & Seaton 1832); Letter from Justices Wilson and Blair and Judge Peters, Circuit Court for the Pennsylvania District (Apr. 18, 1792), in 1 American State Papers, *supra*, at 51; Letter from the Judges of the Circuit Court for the District of North Carolina (Iredell, Justice and Sitgreaves, District Judge) to the President of the United States (June 8, 1792), quoted in Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 n.* (1792). Due to illness and family concerns, Justice Johnson did not ride the Southern Circuit in the spring and so did not join in the communications to the President and Congress. However, he appears to have been in agreement with the rest of the members of the Supreme Court, since in the fall
them to do in the Act was to hear the claims of disability of Revolutionary War veterans and to report their findings to the Secretary of War. The Act then directed the Secretary to place the applicant on the pension list, unless he suspected imposition or mistake, in which case he would report the same to Congress. The judges responded by determining that Congress could not impose this duty on the courts (i.e., the judicial branch), but could "ask" the judges to undertake the duties as individuals, which the individuals could determine to do or not as they saw fit.

In the case of the Invalid Pension Act, principle seems actually to have come to the fore in the decisions of the judges. The available evidence suggests that the judges believed the Act to be an unconstitutional encroachment on the judicial branch, rather than an imposition on themselves individually. They did not hesitate to tell Congress that the duty that had been imposed on the circuit courts was not within Congress's power to require; but they likewise determined, with the exception of James Wilson and Thomas Johnson, to undertake the duties as individually designated "commissioners."153 It seems, then, that the judges resisted the Invalid Act as a matter of constitutional principle, rather than self-interest. And the language of their various opinions and remonstrances suggests a defense of branch independence—that not only must Congress refrain from imposing duties not in their nature "judicial" on the courts, but that the judiciary had the power and authority to refuse to accept Congress's imposition on behalf of the courts. Wilson, Blair, and Peters explained that the separation of the judicial and legislative branches was "a principle important to freedom." The "revision and control" of judicial determinations of pension eligibility by Congress was "radically inconsistent with the independence of that judicial power which is vested in the courts."154

Did most of the judges then proceed to carry out the duties imposed out of fear for what Congress might do to the judiciary if

153. This is not to say that the judges were "waiving" any future claim for individual judges to refuse similar requests: as Judges Jay, Cushing, and Duane, sitting as the Circuit Court for the District of New York, put it: "[T]he judges of this court regard themselves as being the commissioners designated by the Act, and therefore, as being at liberty to accept or decline that office." Hayburn's Case, 2 U.S. (2 Dall.) at 410.

154. Id.
they did not? There is no evidence to suggest that motivation. The extra burden was in some cases quite substantial, however, and no extra compensation was offered for the duty—which included holding the court open for a full five days for the purpose of hearing petitions.\textsuperscript{155} Aside from humanitarian motivations, given the Justices' hopeful dependence on congressional good will to relieve them of circuit duty altogether, acting as commissioners may have stemmed from less disinterested motives as well. James Iredell, for instance, struggled to keep up with the extra work involved, writing to his wife on September 30: "We have had a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing the Invalid-business out of Court. Judge Wilson altogether declines it."\textsuperscript{156} Again, four days later he complained that "[t]he Invalid-business has scarcely allowed me one moment's time, and now I am engaged in it by candle-light, though to go at three in the morning."\textsuperscript{157} The reading of the statute that justified accepting the duty as "commissioners" was enormously strained and can only be explained by a reluctance on the part of the judges to appear in open confrontation with Congress or insensitive to the needs of disabled Revolutionary War veterans.\textsuperscript{158} Justice Iredell wrote out a sustained defense of his interpretation of the Act, but even he conceded that the "commissioner" interpretation "is not an obvious construction."\textsuperscript{159}

In spite of the judges' efforts to be conciliatory and soften the blow of their decisions, their action was greeted with dismay by many, particularly Federalists.\textsuperscript{160} Congressman Fisher Ames complained to a

\textsuperscript{155} At this time, circuit courts (with some exceptions) typically stayed open for less than a week. For instance, in the fall 1791 term, immediately preceding the passage of the Invalid Pension Act, the longest session was in Connecticut, which lasted seven days; most of the courts met for only one or two days. See 2\ DOCUMENTARY\ HISTORY\ OF\ THE\ SUPREME\ COURT, \textit{supra} note 95, at 536-37.

\textsuperscript{156} Letter from James Iredell to Hannah Iredell (Sept. 30, 1792), \textit{in} 2\ DOCUMENTARY\ HISTORY\ OF\ THE\ SUPREME\ COURT, \textit{supra} note 95, at 301, 301.

\textsuperscript{157} Letter from James Iredell to Hannah Iredell (Oct. 4, 1792), \textit{in} 2\ DOCUMENTARY\ HISTORY\ OF\ THE\ SUPREME\ COURT, \textit{supra} note 95, at 304, 304.

\textsuperscript{158} The Supreme Court was to decide two years later that the judges' actions as "commissioners" under the Pension Act were invalid, either because the Act simply could not be read to accommodate the individual commissioner interpretation that the judges had used to try to save it or because assigning such duties to the judiciary was unconstitutional. No explication of the decision in this case survives to explain which ground supported the decision. See United States v. Yale Todd (Feb. 17, 1794) (unreported decision summarized by Taney, C.J., in United States v. Ferreira, 54 U.S. (13 How.) 40, 51-53 (1851)).

\textsuperscript{159} Iredell's struggle here is manifest. After acknowledging all the language indicating that Congress was reposing this duty in the circuit courts, he valiantly struggles to support the "probable supposition" that Congress "may have contemplated" the duty to be personal rather than judicial. See The Unpublished Notes of Justice James Iredell (on file with authors).

\textsuperscript{160} The Supreme Court never passed on the constitutionality of the Pension Act, although
friend in Massachusetts that

The decision of the Judges, on the validity of our pension law, is
generally censured as indiscreet and erroneous. At best, our
business is up hill, and with the aid of our law courts the authority
of Congress is barely adequate to keep the machine moving; but
when they condemn the law as invalid, they embolden the states
and their courts to make many claims of power, which otherwise
they would not have thought of.161

Oddly enough, Philadelphia's anti-Federalist paper was
supportive of the judges. After noting that the "high-fliers, in and out
of Congress . . . talk of nothing but impeachment! impeachment!
impeachment!" the General Advertiser brought the independence
issue directly to the fore: "But if a Secretary of War can suspend or
reverse the decision of the circuit judges, why may not a drill sergeant
or a black drummer reverse the decision of a jury? Why not abolish at
once all our courts, except the court martial?"162 The National Gazette
recognized that the Court's action was "the first instance in which that
branch of the government has withstood the proceedings of the
others."163 Clearly, declaring on the constitutionality of an Act of
Congress was, in the view of the Gazette, "another resource admitted
by the Constitution for its own defense, and for the security of the
rights which it guarantees to the several states and to individual
citizens."164

Congress was dismayed enough to order an investigation, and
shortly thereafter the executive department, in the person of the
Attorney General, attempted to stick in its oar. At the August term of
the Supreme Court, Attorney General Edmund Randolph indicated
he would move the Court for a writ of mandamus to the Circuit Court
for the District of Pennsylvania "to command the said Court to
proceed on the petition of the said William Hayburn" to be placed on
the invalid pension list.165 In a letter to James Madison, Randolph
explained that he "pressed an examination of the conduct of the New

all of the Justices let their feeling be known on circuit.

161. Letter from Fisher Ames to Thomas Dwight (Apr. 25, 1792), in 1 WORKS OF FISHER
162. GENERAL ADVERTISER (Philadelphia), Apr. 20, 1792, quoted in 1 WARREN, supra
note 132, at 73-74.
163. NATIONAL GAZETTE, May 11, 1792, quoted in 1 WARREN, supra note 132, at 75-76.
164. Id. at 76.
165. See Minutes of the Supreme Court (Aug. 11, 1792), in 1 DOCUMENTARY HISTORY OF
THE SUPREME COURT, supra note 95, at 205, 206. The best elaboration and discussion of what
transpired in Hayburn's Case is Susan Low Bloch, The Early Role of the Attorney General in
Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L.J. 561, 591.
York and Penna Circuit courts on the pension law.” According to Randolph, before he actually made the motion, “Mr. Jay asked me if I held myself officially authorized to move for a mandamus.” Randolph gave his reasons for believing himself authorized but refused to make the motion until the Court had decided the question of his authority.

Randolph believed that the office of the Attorney General included the duty to oversee the lower federal courts in the enforcement of the law. As the Gazette of the United States reported, the Court asked “whether it was part of the duty of the Attorney General of the United States to superintend the decisions of the inferior courts, and if to him they appeared improper to move the Supreme Court for a revision.” Although no definite decision was ever reached on this point, Hayburn’s Case has been understood to stand for the proposition that the courts will not proceed in a matter without a case or controversy, it also may be read as a judicial independence case in the context of the Attorney General’s contention that he possessed the authority, ex officio, to “supervise” the lower federal courts. The debate over this issue continued for several days. As reported by several newspapers of the day:

In favor of the Attorney General’s exercising this power, the following are the heads of the principal arguments insisted on . . .

The Court was evenly split as to the Attorney General’s power, so Randolph got a disappointed pension applicant, William Hayburn, to retain him in his private capacity in order to get the Court to reach the merits of the constitutional question. The Court allowed Randolph to proceed in this capacity but held the case over to the February term, presumably because the Justices hoped that Congress would make the issue moot, which in fact it did.

166. Letter from Edmund Randolph to James Madison (Aug. 12, 1792), quoted in 1 WARREN, supra note 132, at 79.
167. Gazette of the United States, Aug. 25, 1792, quoted in 1 WARREN, supra note 132, at 78.
168. Id.
169. Attorneys General were part-time officials in the early years of the country, and were paid relatively low salaries with the expectation that they would earn their primary living through private practice. See Bloch, supra note 165, at 567.
From the very beginning of the government the judges were painfully aware of the tenuousness of their branch's position. The ratification debates, particularly in divided states like Virginia, had made clear just how much a flashpoint the notion of a centralized federal judiciary actually was.\textsuperscript{171} This awareness colored many actions and perhaps inactions of the federal judges for the next decade and beyond. For even when the judges and the judiciary were not under the direct partisan attack that would mark the presidencies of Jefferson and Jackson, it was clear while the Federalists were in power that "the federal Courts [had] Enemies" in the states.\textsuperscript{172} When the Federal Circuit Courts of New York, Pennsylvania, and North Carolina all questioned the constitutionality of the Invalid Pension Act in 1792, members of Congress responded with calls for impeachment and cries of betrayal.

The next communication from the Justices, which the President forwarded to Congress in August of 1792, forebore any constitutional commentary, saying only:

That the distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court, which it is so essential to the public Interest should be reposed in it.\textsuperscript{173}

By 1793, if not before, Chief Justice John Jay, who had strong personal objections to circuit riding in addition to his constitutional objections, seems to have concluded that indirect efforts at political change were preferable to a constitutional showdown\textsuperscript{174}—perhaps in part because of the furor created by the Justices' declarations about

\begin{itemize}
  \item \textsuperscript{171} See supra Part I.C.
  \item \textsuperscript{172} See Letter from John Jay to Rufus King, supra note 129. Shortly after the Federal Circuit Court for North Carolina was organized, for instance, the state court clashed with the federal court over the authority of the federal court to issue a writ of certiorari to the state court. The state court refused to comply, stating that they did not conceive themselves as "amenable to the Authority of any other Judicatory" and consequently that matters depending before them were not subject to be taken from them "by the \textit{mandatory writ} of any other Court or Jurisdiction whatever." Declaration of the Judges of the Superior Court of North Carolina (Nov. 19, 1790), \textit{in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95}, at 111, 112. By far the most contentious political contests occurred between the federal judiciary and the state legislatures, executives, and judiciaries, rather than between the branches of the federal government.
  \item \textsuperscript{173} Letter from the Justices of the Supreme Court to the Congress of the United States, supra note 139, at 290. It should be noted that the Justices were not hostile to a court/judge distinction in other contexts. See, e.g., Marcus & Van Tassel, supra note 135, at 36, 48-49.
  \item \textsuperscript{174} See Letter from John Jay to Rufus King, supra note 129, in which Jay opined that any defects in the federal judiciary should be corrected quietly to avoid arousing any additional animosity toward the judiciary.
\end{itemize}
the unconstitutionality of the Invalid Pensioner's Act that had occurred in 1792, which included talk of impeachment.\textsuperscript{175} Indeed, as early as 1790, Jay concluded that working out the appropriate constitutional balance and separation between the branches required experimentation and patience, for "if the most discerning and enlightened Minds may be mistaken relative to Theories unconfirmed by Practice . . . and if the Merits of our opinions can only be ascertained by Experience, let us patiently abide the Tryal."\textsuperscript{176} Justice Iredell's views on the constitutional arguments of Jay and Blair were revealed in the context of this issue—the Invalid Pension "decision"—in which he, along with District Judge Sitgreaves, wrote:

That the legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.\textsuperscript{177}

Significantly, Iredell and Sitgreaves qualified their acquiescence in congressional authority to regulate judicial duties with the caveat that judges must carry out only those duties that were in effect at the time of their appointment.

Six months after their August 1792 communication requesting relief, the Justices again petitioned Congress for legislative changes in the system, noting that uniformity and predictability were not being served under a system in which different judges in the same court were deciding cases "in direct opposition to each other" where no writ of error would lie to establish conformity. But they were again hesitant to make any direct suggestions because any suggestions they made as judges would nevertheless "be capable of being ascribed to personal Considerations."\textsuperscript{178} It may be that the intensity of congressional reaction to the Invalid Pension decisions counseled prudence on the part of the Justices in overtly seeking radical change in the system, especially on constitutional grounds. Unfortunately for them, and for the concept of branch independence, their prudence

\textsuperscript{175} See supra text accompanying notes 162-72.

\textsuperscript{176} Jay, supra note 121, at 27.

\textsuperscript{177} Letter from the Judges of the Circuit Court for the District of North Carolina (Iredell, Justice and Sitgreaves, District Judge) to the President of the United States, supra note 152, quoted in Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 n.* (1792).

\textsuperscript{178} Letter from the Justices of the Supreme Court to the Congress of the United States (Feb. 18, 1794), in 2 DOCUMENTARY HISTORY OF THE SUPREME COURT, supra note 95, at 443, 444.
and forebearance succeeded in “fixing the construction” of the circuit system as constitutional when the matter finally came before them as a serious controversy in 1802–1803.179

“[N]ow the constitutional independence of the Judges is a mere cobweb”180: The Dismantling of the Circuit Courts in 1802 and the Hobbling of Branch Independence

The practical implementation of a functioning concept of branch independence received its most severe setback with the election of a Democratic Republican to the presidency and a Democratic Republican majority to Congress in 1800. Ironically, the blows to judicial independence came from both sides, amid conflicting protestations about motive and effect. The defeated Federalists engaged in a major court-packing scheme that marked the judicial branch for particular attack by the Republicans, while the Republicans began to wage all-out war on the concept of judicial independence under the initial guise of efficiency. The result was not to be a crippled and dependent Supreme Court—quite the contrary—but it was to be a limping and stunted concept of branch independence. The story of the Jeffersonian attack on the judiciary is well known, but it is worth a careful reexamination from the perspective of its effect on the concept of an independent judicial branch, as opposed to the more familiar aspects of individual judicial independence, or the emergence of a powerful Supreme Court under the Chief Justiceship of John Marshall.

Dissatisfaction on the part of Republicans with the federal judiciary of course predated the Judiciary Act of 1801. The vigorous enforcement of the Alien and Sedition Acts was the most recent source of political irritation, with the conduct of trials and political if not partisan grand jury charges the cause of much Republican ire. It is important to reiterate that the emergence of a notion of an independent judicial branch was both hampered and facilitated by the circuit structure imposed on the system by the Judiciary Act of 1789. The practice of staffing the circuit courts with no separately commissioned judges facilitated branch functioning in an otherwise small and widely scattered judiciary through the face-to-face communications between judges and Justices in the circuit courts. On

179. See infra text accompanying notes 210-12.
180. Letter from James Hillhouse to Simeon Baldwin (Feb. 4, 1802), quoted in 1 WARREN, supra note 132, at 213.
the other hand, because Supreme Court Justices also staffed the circuit courts, the need for any sort of bureaucratic structure to take the place of the twice yearly meetings among judges did not arise. The important discussions of constitutional and structural branch independence therefore took place most often in the context of conflicts that also featured threats to individual decisional judicial independence, thus often obscuring the importance of branch independence to the participants.

As John Marshall took office as the third Chief Justice in the late winter of 1801, the federal judiciary appeared poised to take its place as a fully coequal branch of government. Congress had just passed legislation reorganizing the judicial branch and expanding federal court jurisdiction to encompass the entire jurisdiction contemplated by the Constitution. With the ascendancy of Marshall to Chief Justice, the creation of a middle tier of appellate judges, and the final repair of that persisting anomaly of having Justices sit in review of their own lower court decisions, the federal judiciary was in an ideal position to organize and cope with problems of practice and procedure that had plagued its first decade. Instead, with the first real transfer of governmental power from the Federalists to the Republicans, the judicial branch found itself in a battle for its very survival as an independent branch of government.

Although the Judiciary Act of 1801 contained much that lawyers and judges had sought almost since the ink was dry on the 1789 Act, it also contained the seeds of its destruction in the timing of its passage and in its structural attack on judicial independence. It had been under consideration for some time before the outcome of the election of 1800 changed the political landscape, wresting control from the Federalists, and turning it over to the Jeffersonian-Republicans. But it was hurriedly passed just before President John Adams left office, and Adams' great hurry to fill all the new positions with Federalists, leaving no judicial appointments for his successor, did not sit at all well with the incoming Jeffersonians. The 1801 Act was the culmination of years of attempts to put the judiciary on a sounder footing within the constitutional structure, but it was also the first partisan court-packing plan, and as such was seen by Jeffersonians as a blatant undermining of judicial branch independence through

181. See Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).
182. Of course, the Appointments under the 1789 Act were also partisan, but they were not done in the face of an impending shift in makeup of government.
packing the entire federal bench with partisan political players. Jefferson was to complain to Abigail Adams later that the only action of her husband that he had ever found "personally unkind" was the unalterable appropriation of so many offices for Federalists when Adams was already on his way out the door.\textsuperscript{183} The Federalist courtpacking became the impetus (although not the justification) for the Republicans' counterattack on branch independence. If the Federalists could try to put their stamp on federal law through court creation and staffing, then the Republicans ought to be able to insure their stamp on the law by dismantling courts and ousting those same partisan judges. The first step would be removing judges by abolishing the new courts of appeals; the second would be removing judges through impeachment; and the third would be changing the rules under which the judiciary operated. Only the first would be successful, and it was successful arguably because it was as direct an attack on the judicial independence of the judges who were not removed as on those who were.\textsuperscript{184}

The story of the repeal has been well told.\textsuperscript{185} It became a priority among some Republicans immediately; although the precise point at which President Jefferson determined to seek repeal is subject to disagreement, it clearly became a priority for him as well.\textsuperscript{186} A few days after Jefferson's inauguration, his friend and political ally Congressman William Branch Giles wrote him that "the only check upon the Judiciary system as it is now organized and filled, is the removal of all of its executive officers indiscriminately."\textsuperscript{187} Sometime later that year he again wrote to Jefferson decrying the judiciary's "misapplied ideal of 'Independence.'" The only proper step for the new administration was "an absolute repeal of the whole judiciary system, terminating the present offices, and creating an entire new

\textsuperscript{183} The last appointments "were from my most ardent political enemies." "It seemed but common justice to leave a successor free to act by instruments of his own choice." Letter from Thomas Jefferson to Abigail Adams (June 13, 1804), quoted in 1 WARREN, supra note 132, at 201 n.2.

\textsuperscript{184} See, e.g., ELLIS, supra note 20, at 43-52.


\textsuperscript{186} In his first address to Congress, he obliquely suggested reform of the judicial system. "The judiciary system of the United States, and especially that portion of it recently erected, will of course, present itself to the contemplation of Congress." Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 314, 319 (Washington, Bureau of Nat'l Literature 1897).

\textsuperscript{187} Letter from William Giles to Thomas Jefferson (Mar. 16, 1801), in DICE ROBINS ANDERSON, WILLIAM B. GILES: A STUDY IN THE POLITICS OF VIRGINIA AND THE NATION FROM 1790 TO 1830, at 76, 77 (1914).
system defining the common law doctrine, and restraining to the proper Constitutional extent the jurisdiction of the courts.”¹⁸⁸ Federal judges as a group, and the Supreme Court Justices particularly, were well aware of the danger their branch was in under the new regime. The more radical of the newly empowered Jeffersonian-Republicans made no secret of their hostility to an independent judicial branch; as Congressman Roger Griswold dourly noted: “Giles & Company are decidedly of opinion that the Supreme Court should be swept away together with those created at the last Session, and this opinion they have openly declared in all companies.”¹⁸⁹

Jefferson would base his case for repeal on efficiency and fiscal responsibility arguments, sending on a detailed (albeit inaccurate) report of the business before the federal courts to indicate the lack of need for the new middle tier of courts.¹⁹⁰

The congressional debate over repeal centered on questions of constitutionality and independence. Proponents of repeal argued for complete congressional control over the contours and very existence of the lower federal courts, based on the language of Article III entrusting creation of the lower federal courts to congressional discretion. Those opposed to repeal revived the imperative creation argument from the 1789 Act debates to protect the courts from abolition and invoked the tenure and salary provisions to protect the judges from ouster.¹⁹¹ Neither argument prevailed. The 1801 Act was repealed by a straight partisan vote. Rather than simply reinstate the structure in place prior to the 1801 Act, Congress in a subsequent act restructured the circuits and cut down the sittings of the Supreme Court from twice a year to once a year. This was done in such a way as to prevent the court from sitting for fourteen months.¹⁹² The import of this exercise of congressional power over the Supreme Court would not be lost on the Justices.

¹⁸⁸. Letter from Willian Giles to Thomas Jefferson (June 1, 1801), in ANDERSON, supra note 187, at 79, 80. ¹⁸⁹. Letter from Roger Griswold to John Rutledge (Dec. 14, 1801), quoted in ELLIS, supra note 20, at 43. ¹⁹⁰. See ELLIS, supra note 20, at 45; FRANKFURTER & LANDIS, supra note 185, at 28 n.79. ¹⁹¹. On the debates, see WILLIAM S. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES WITH ESPECIAL REFERENCE TO THE TENURE OF FEDERAL JUDGES (1918); and ELLIS, supra note 20, at 36-52. ¹⁹². See Judiciary Act of 1802, ch. 31, 2 Stat. 156. The 1801 Act had changed the terms of Court from February and August to December and June, on request of the Justices who wished not to be in Washington for both the coldest and hottest months of the year. The Repeal Congress reinstated the February term, but not the August term, so the Court, which had sat last in December 1801, would not meet again until February 1803.
After repeal of the 1801 Act, and while the 1802 Act was pending, the Justices of the Supreme Court exchanged anxious correspondence on the constitutional implications of both the repeal and the replacement system to be put in place under the 1802 Act. John Marshall wrote to William Paterson on April 6 expressing his relief that the duties of the Justices under the 1802 Act would be "less burthensome than heretofore," (this because the 1802 Act reduced the sittings of the Supreme Court from twice a year to once and restructured the circuits to make traveling them less onerous) but also admitting to some "strong constitutional scruples." The objection expressed by Marshall had nothing to do with the validity of the repeal, however; it was the dual office-holding that concerned him. "I cannot well perceive how the performance of circuit duty by the Judges of the supreme court can be supported."

After passage of the 1802 Act, Marshall communicated his constitutional concerns to the rest of the Justices for their consideration, requesting that each communicate their sentiments so that they all might "act understandingly & in the same manner." As for Marshall himself, he elaborated his concerns stemming from the study of the question that he had undertaken in response to the "late discussions." "The result of this investigation," he informed Paterson, "has been an opinion which I cannot conquer that the constitution requires distinct appointments & commissions for the Judges of the inferior courts from those of the supreme court." Samuel Chase was of similar opinion. Paterson agreed that the issue, "if the point had been started at first," "doubts would have arisen." Cushing likewise thought that "[i]f open for discussion," "it would merit serious consideration."

The problem, as both Marshall and Chase explicitly recognized, was that "[i]t is a subject not to be lightly resolvd on." Congress had just summarily abolished sixteen circuit courts and judgeships, and the Justices observed the Republican hostility to the judiciary as

194. Id.
196. Id.
197. Letter from William Paterson to John Marshall (June 11, 1802), in 6 THE PAPERS OF JOHN MARSHALL, supra note 193, at 120, 120.
198. Letter from Hannah Cushing to Abigail Adams (June 25, 1802), in 6 THE PAPERS OF JOHN MARSHALL, supra note 193, at 118 n.6.
a whole with mounting alarm. The sentiments of the congressional majority responsible for repeal had been expressed with great vehemence in the recent debates, and congressional success in suspending the functions of the Supreme Court for fourteen months put the judiciary on notice as to the tenuousness of the very existence of the branch. It is not surprising therefore to find Chief Justice Marshall observing that "[t]he consequences of refusing to carry the law into effect may be very serious." Nevertheless, Chase argued to his brethren that the Constitution placed both obligations and limits on congressional action *vis-a-vis* the judiciary that had been ignored in the repeal of the 1801 Act. Chase conceded the existence of significant congressional discretion in determining the number of courts and judges, the extent of jurisdiction, and even in the imposition of additional judicial duties so long as those duties fell within the provisions of the Constitution: "But still," he went on,

> the Judges, and their Offices must remain independent of the Legislature. If Congress should require of the Judges duties that are *impracticable*; or if congress should impose duties on them that are unreasonable, and for the manifest purpose of compelling them to resign their Offices; such Cases (if they should ever happen) will suggest their own Remedy.

Chase thought that the Repeal Act unconstitutionally deprived the circuit judges of their offices and was of the decided opinion that the Supreme Court Justices ought to refuse to accept their new circuit assignments because to do so would be likewise to act unconstitutionally. Significantly, he wished to have the Justices meet together in Washington to decide the question, not as the Supreme Court, but as members of the judicial branch, whose "opinions would have great weight with the District Judges." Like Marshall, Chase saw the decision of this issue as an enormously dangerous one "under the present circumstances," even for "all the Judges assembled." He concluded that for a judge acting alone, the burden of declining to take a circuit would be such that he "must sink under it."

The meeting advocated by Chase between the Supreme Court Justices out of court did not take place that summer of the canceled June term. The conclusion the majority reached without meeting was that, as regards circuit riding, "[p]ractic[e] has fixed construction,

200. See, e.g., ELLIS, supra note 20, at 61-62.
203. Id. at 116.
which it is too late to disturb."\textsuperscript{204} Justice Cushing was of the opinion that "[e]leven years practical exposition of the Laws & Constitution by all federal Judges" would allow for no reconsideration, in spite of Chase's "good sense & argument" to the contrary.\textsuperscript{205} Justice Washington likewise thought that "the constitutional right of the Judges of the supreme court to sit as circuit Judges ought to be considered as settled & shou[l]d not again be mov[e]d."\textsuperscript{206} John Marshall concluded, as he had suggested when he began the discussion, that "policy dictates this decision to us all."\textsuperscript{207} Thus, though several Justices questioned the constitutionality of the judicial structure created by Congress, "policy" dictated that the constitutional boat not be rocked lest Congress be led to more drastic action against the judiciary. For similar reasons, the constitutionality of the repeal itself was sidestepped, as it would be again when the issue came before the court in the "case or controversy" raised by \textit{Stuart v. Laird}.

The blow to branch independence that the Repeal Act struck is also evident in the actions of the deposed circuit court judges. The Supreme Court Justices had effectively decided the validity of the Repeal Act in their private correspondence and by their actions in deciding to hold the circuit courts in place of the ousted circuit judges. This was done in the absence of the usual give and take of formal argumentation presented by the interested parties, because the decision occurred outside the context of a "case or controversy." The circuit judges settled on presenting memorials to Congress in which they requested the assignment of judicial duties to their offices, and expressed their belief that "notwithstanding any modification of the judicial department" their right to compensation was mandated under the Constitution. The judges firmly stated their conviction that "among the first and best established principles in the American constitutions" was that "judges shall not be deprived of their offices or compensations, without misbehavior."\textsuperscript{208} The judges, although obviously quite personally interested in the outcome of this dispute,

\textsuperscript{204} Letter from Hannah Cushing to Abigail Adams, \textit{supra} note 198, at 118 n.6.
\textsuperscript{205} Letter from Hannah Cushing to Abigail Adams (June 25, 1802), \textit{in} 6 \textit{THE PAPERS OF JOHN MARSHALL}, \textit{supra} note 193, at 116 n.5.
\textsuperscript{207} \textit{Id}.
also claimed it as a duty of their office to publicly argue their position. In presenting their case to Congress they concluded that “they ought not voluntarily to surrender rights and authorities intrusted to their protection, not for their personal advantage, but for the benefit of the community.”

Thus, they acted not solely as individuals (as might have been the case in a judicial action for payment of salary), but as members of the judicial branch on behalf of the interests of that branch. Not surprisingly, however, neither House of the legislative branch was inclined to entertain the judges’ position. The question of the constitutionality of the repeal act was left to private parties to argue, before a Supreme Court that had already effectively, albeit obliquely, decided the issue months before.

*Stuart v. Laird* came before the Supreme Court in December of 1802 and was handed down just six days after *Marbury v. Madison* in 1803. Although Charles Lee presented lengthy arguments on behalf of the plaintiff in error on both the unconstitutionality of the Repeal Act and on the unconstitutionality of staffing the circuit courts with Supreme Court Justices, Justice Paterson, in his opinion for the Court, completely sidestepped the issue of the Repeal Act’s constitutionality. His opinion, all of four paragraphs long, addressed the constitutional authority of Congress to *establish* inferior courts and to transfer actions from one court to another, but made no mention, even in passing, of congressional authority to *abolish* courts and judgeships. Without any elaboration or constitutional analysis, he held that staffing the circuit courts with Supreme Court Justices was constitutionally permissible because the practice of the Supreme Court in accepting the duty (over all the years they were trying to change it) “ha[s] indeed fixed the construction.” John Marshall did not join the opinion, having heard the case on trial in the circuit below; Justice Cushing did not participate because of illness. Paterson’s views on the constitutional question may well have been foreordained; he was, after all, on the Senate committee that drafted the Judiciary Act of 1789; and indeed, the first nine articles of the original draft of that Act were in his handwriting, including section 4 that created the circuit system. When all was said and done,

209. *Id.*
210. 5 U.S. (1 Cranch) 299 (1803).
211. *Id.* at 309.
212. See HASKINS & JOHNSON, *supra* note 208, at 89.
however, the entire court had made up its mind on this issue months before, and the official public decision, such as it was, said as little as possible on the validity of the 1802 repeal. The only oblique reference was to say that Congress may transfer actions from one court to another. Thus was all the turmoil over congressional power to abolish courts and judgeships left unresolved.

Branch independence was uncertain and challenged from the very beginning, although in the early period it was most often from reasons of federalism and practicality rather than as a counter to the notion of judicial supremacy. The Judiciary Act of 1789 was not friendly to branch independence in a number of respects, but because the intent appeared to be more fiscal than political, at least as far as separation was concerned, reactions were not defensive. The Justices of the Supreme Court chose, after some deliberation, not to view the control of Congress as a constitutional question. Blair and Jay perceived, perhaps following the lead of the Virginia judges (of whom Blair was one) with their Remonstrance, that congressional control over dual, uncommissioned court appointments was constitutionally problematic. Recognizing the precariousness of the federal judiciary's existence as a coequal branch of government, they forebore challenge. Their concerns were to be borne out in the conflicts of 1800–1802; however, had the 1801 removal of Supreme Court Justices from circuit duty been accomplished by a Republican Congress, with the goal of controlling circuit court outcomes by removing the Federalist judges from the trial courts, would the Constitution's tenure protections have been of any use? The Supreme Court Justices, as Blair and Jay had pointed out in 1790, were neither appointed nor commissioned as circuit court judges, and thus might not have been able to maintain that they had been removed from office unconstitutionally under the above supposition. Likewise, when the Republicans cited the 1801 Act as legal support for removal of Federalist circuit court judges by abolishing the circuit courts, they ignored or overlooked the fact that there were no judges commissioned to the original circuit courts who were removed by the 1801 reorganization. Congress has never again encroached on branch independence in such extreme fashion.\textsuperscript{213}

\textsuperscript{213} When Congress abolished the Commerce Court, for instance, it did not similarly abolish the judgeships, but left those five judges in place as roving circuit court judges. See Frankfurter & Landis, \textit{supra} note 185, at 168-73.
CONCLUSION

With respect to the relevance of the federal judiciary’s formative period on the contemporary judicial independence debate, our findings counsel against strident generalizations about “the original understanding” and how it should define the contours of the judiciary’s structural autonomy. From the standpoint of those who drafted and ratified the Constitution, the judiciary was not only the least dangerous branch, it was also the least interesting. Yes, the Founders shared a principled commitment to a separate and independent judicial branch. To that end, they delegated judicial power to the courts alone and shielded judicial tenure and salary from the threats that had plagued the state and colonial courts. But that is where the effort began and ended. The Framers neither considered nor guarded against other, more speculative political branch encroachments upon the judiciary’s institutional autonomy—not because they “intended” to authorize such encroachments, but because they never gave the matter all that much thought.

The Framers’ inattention to the varied ways in which the political branches might undermine the judiciary’s structural independence does not necessarily imply indifference. Their dedication to an independent—and in some sense coequal—judicial branch, was very real. Accepting as much, when the Founders granted Congress the power to establish the courts, they did so not because they were content to see Congress undermine the judiciary’s structural autonomy, but because they intended to impose a duty on Congress to complete the constitutional framework by instituting an independent judicial branch. Indeed, that was the prevailing interpretation of Article III among the legislators who enacted the Judiciary Act of 1789 (many of whom had assisted in drafting Article III two years before)—that the Constitution compelled them to establish an independent judicial “system” of Supreme and inferior courts.

In short, the contemporary notion that the Constitution renders the judiciary wholly dependent on Congress except as to the tenure and salaries of its judges is not an originalist one. Rather, the current view is better understood as an outgrowth of the battles of 1801 and 1802, in which the Federalists and the Jeffersonian Republicans set the aspirations of the founding generation to one side, and exploited the open textual weave of Article III to maximum political advantage. For the outgoing Federalists, that meant disregarding the institutional
integrity of a coequal branch by packing the judiciary with lame duck partisans. For the incoming Jeffersonian Republicans, that meant shaking the independence of the third branch to its foundation by destroying judgeships occupied by political opponents.

"The theory of three distinct departments in government is, perhaps, not critically correct," opined William Giles six years after the 1801 Act repeal, "although it is obvious that the framers of our Constitution proceeded upon this theory in its formation . . . ."214 For Giles, "the word independent, as applicable to the Judiciary, it is not correct, nor justified by the Constitution," because an independent branch would have "powers to organize itself, and to execute the peculiar functions assigned to it without aid, or in other words, independent of any other department."215 That, concluded Giles, "is not the Constitutional character of our Judicial department."216 Giles was, of course, no neutral observer, but events surrounding the 1801 Act and its repeal, followed by the Supreme Court's de facto acquiescence in *Stuart v. Laird*, set a powerful precedent for his point.

From the standpoint of constitutional law, the powers delegated to Congress in Article III may be stated in terms sufficiently broad to give the first branch wide latitude to encroach upon the autonomy of the third, intentions of the Drafters to the contrary notwithstanding. But the business of determining what Congress can get away with as a matter of constitutional law is ultimately of less importance than deciding what Congress ought to do as a matter of constitutional policy—recognizing that Article III entrusts Congress to make and implement such policy as it relates to the structure and operation of the courts. From the more critical perspective of constitutional policy, the question becomes whether Congress ought to restrain its regulation of the courts, consistent with the Framers’ desire to preserve an independent judicial branch, or should feel free to regulate the courts as it sees fit, consistent with the precedent set by the 1801 Act and its repeal.

For us, the answer seems clear. Far more often than not, the political branches have remained true to the aspirations of those who drafted and ratified the Constitution, by overseeing the courts in a spirit of restraint and respect for the judiciary's institutional prerogatives. The result has typically been good government, as exemplified

214. 17 ANNALS OF CONG. 114 (1808) (statement of William Giles).
215. Id. at 114-15.
216. Id. at 115.
by the Judiciary Act of 1789,\textsuperscript{217} the Circuit Court of Appeals Act of 1891,\textsuperscript{218} the Rules Enabling Act of 1934,\textsuperscript{219} and the Administrative Office Act of 1939.\textsuperscript{220} There have been other times, however, when Congress and the President have tested the constitutional limits of their power over the courts. Here, the result has typically been a constitutional crisis. Some obvious examples include the 1801 Act and its repeal,\textsuperscript{221} the 1805 impeachment proceedings against Justice Samuel Chase,\textsuperscript{222} the 1937 court-packing plan of Franklin Roosevelt,\textsuperscript{223} and the 1989 nomination of Robert Bork to the Supreme Court.\textsuperscript{224}

Constitutional crises are occasionally unavoidable and instructive, but they are hardly to be encouraged or held aloft as defining features of a constitutional democracy in good repair. The notion that Congress should feel free to regulate the courts as it sees fit, simply because it did so in 1801 and got away with it—never mind the


\textsuperscript{218} See FRANKFURTER & LANDIS, supra note 185, at 101 ("The remedy [provided by the Circuit Courts of Appeals Act to relieve Supreme Court docket congestion by establishing intermediate courts of appeals] was decisive. The Supreme Court at once felt its benefits. A flood of litigation had indeed been shut off.")., 103 ("The Act issued after long legislative travail, and its authors hoped for their handiwork a permanence not unlike that of the First Judiciary Act. Their hopes were amply realized.").

\textsuperscript{219} See Benjamin Kaplan, \textit{A Toast}, 137 U. PA. L. REV. 1879, 1879 (1989) (remarking of the legislation that first empowered the Supreme Court to promulgate rules of practice and procedure that "viewed in their historic setting, the Rules, under the aegis of the Rules Enabling Act, were a positive achievement of the first magnitude").

\textsuperscript{220} See PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 165 (1973) (concluding that the circuit councils—which the Administrative Office Act established in tandem with the Administrative Office of U.S. Courts to administer the federal judiciary—"were the cornerstone of the federal judiciary's administrative institution... Although limited in their real competence, the mere existence of these formal organs was an important innovation.").

\textsuperscript{221} See supra notes 181-92 and accompanying text.

\textsuperscript{222} See WILLIAM H. RENQOUST, GRAND INQUESTS 277 (1992) (characterizing the question posed by the Jeffersonian Republicans' efforts to impeach and remove Federalist Justice Samuel Chase, as being whether "the dominant role played by political parties [would] make the Senate a partisan tribunal, which would be willing to undermine the fundamental principles of the Constitution in order to remove a political enemy from office").

\textsuperscript{223} See WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT vii-ix, 26 (1995) (discussing the "constitutional crisis" created by President Roosevelt's plan to increase the size of the Supreme Court as a means to "pack" the Supreme Court with Justices sympathetic to New Deal legislation).

\textsuperscript{224} See Stephen Carter, \textit{The Confirmation Mess}, 101 HARV. L. REV. 1185, 1193 (1988) (concluding from the Bork episode—in which Judge Robert Bork was nominated by the President and rejected by the Senate because of his conservative political views—that "[f]or the scholar who believes in the possibility of constitutional theory, the collapse of the nomination and confirmation process into a battle over concrete results carries the potential for disaster").
destabilizing impact on the interbranch relationship—seems remarkably shortsighted.