“The Least Dangerous Branch”: The British Common Law’s Influence on the Development of the US Constitution’s Article III

A Thesis submitted
to the Graduate School
Valdosta State University

in partial fulfillment of requirements
for the degree of

MASTER OF ARTS

in History

in the Department of History and Interdisciplinary Studies
of the College of Humanities & Social Sciences

July 2025

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B.A., Valdosta State University, 2023

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ABSTRACT

When examining the Constitution of the United States, it is easy to overlook Article III. After all, it is the shortest of the branch-dedicated articles, so it easy to assume that there was less time and energy devoted to its crafting. This is incorrect. Article III, and the later Judiciary Act of 1789, are the results of lessons learned, dating back thousands of years. The prior courts, namely the English and colonial courts, were profound influences on the Framers when crafting Article III of the Constitution and the Judiciary Act of 1789, the two documents that effectively created the Supreme Court of the United States. The only legal system that most of the Framers (and the populace of the newly formed country) were intimately familiar with was English common law. This necessitated the use of common law procedures within the newly constructed United States, but there was also a need to adjust the common law to the realities of life in America. The common law informed the Framers in the forming of the Supreme Court and the inferior courts of the United States. The creation of Article III and the Judiciary Act of 1789 was made up of the lessons of the past in order to create a successful justice system. Using primary source documents, I will argue that both the successes and failures of the courts that came before, dating back to the Norman conquest, were considered in the creation of a new judicial procedure.

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ACKNOWLEDGEMENTS

This thesis would not have been possible without the support of my thesis director, Dr. Mary Block, who always steered me in the right direction. I would also like to thank my partner, Davion, and my family and friends for always being there to bounce ideas off and for supporting me through this process. All of the professors in the Valdosta State Department of History shaped this thesis in some way with their wisdom and guidance. I thank all of them.

Introduction

In July 1776, the leaders of the Second Continental Congress had the most difficult project of their lives ahead, turning a revolutionary movement into a functioning nation. They also had to convince a handful of states, just assured of their independence, to band together and exchange some freedom for promised stability and security. These were difficult tasks, and only the beginning of the conversations that built America. Understandably, their first attempt was less than stellar, the Articles of Confederation failed to address the issues that the young nation faced early on, as the national government lacked the power to address them. One of the major difficulties with the Articles of Confederation was the lack of a federal judiciary. There were numerous problems that, as a British colony, would have been referred to the home county and their courts. But, shaken free from tyranny, some issues arose that had nowhere to go but to new Congress, which already had many responsibilities and not enough time. The Articles failed to resolve many issues, including land claims between states. These land claims were supposed to be handled by Congress, under the Articles, but Congress failed to address them quickly, as they also had legislating to do. The Articles of Conferderation also made raising funds and regulating commerce very difficult, as it did not give Congress enough power to force states to comply with their decisions. While it was not solely the Articles' lack of a federal judiciary that drew delegates together in September 1786, the potential establishment of it was brought up quickly. Many of the Framers studied law and were aware of the difficulties the courts of the mother country (and therefore the colonial courts modeled on them) had. In their attempt to create a federal judiciary, and the later inferior courts, the Framers mostly agreed on three tenets; that the

new court system had to be independent from the other two branches, that the jurisdiction of all courts created had to be clear and not overlap as much as possible, and that the courts had to function under the same law and procedures. The court system created was a product of compromise, balanced between the want for a strong national judiciary that could grow with the new nation but not strong enough to overwhelm the other branches and the state courts.

Various scholars have addressed the influences that went into creating Article III of the Constitution. Mary Sarah Bilder asserts in her book *Madison's Hand* that individuals (specifically James Madison) used their own education and experiences in the court system to inform their creation of the Supreme Court and lower courts. As many of the Constitution's Framers were lawyers, they had maneuvered in the colonial courts and learnt British common law.[1] Richard R. Beemen in *Plain, Honest Men* explores the reasoning behind some of the biggest debates during the creation of Article III and the Supreme Court. His work does not offer any new conclusions, but Beeman's work highlights the importance of compromise during the convention of 1787. Almost all of the Framers called for a federal judicial branch, as it was clear there was a need for a court who could address problems pertaining to the Constitution. Most agreed it needed to be independent from the other two branches as well, different from the English courts. The creation of the independent judiciary cements the three-branch system that now exists.[2] Beemen also cites James Wilson as a major voice in the judiciary debate. Wilson fought hard for an independent judiciary, owing to his push for the branches of government to be distinct from each other. This judiciary needed rules and procedures, and therefore it was

[1] Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2017), 118.
[2] Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House Trade Paperbacks, 2009), 159.

necessary to adopt a common law. It made sense to adopt the one most of the Framers and American citizens were familiar with, English common law.

A History of the Supreme Court by Bernard Schwartz provides some information about British Common law and the influence that it had on some of the Framers. He asserts the Supreme Court of the United States as the institution that best embodies the greatest component in the country's development, the idea that law is a check on governmental power. This idea can be connected as far back as the Magna Carta, a document of laws created to check the powers of King of England. Schwartz's introduction connects the ideas of Edward Coke, whose treatises and decisions many of the Framers studied to the Constitution and Article III. To show the relationship between British common law and the development of the Supreme Court, Schwartz demonstrates that the Framers were reading Coke and that Coke's ideas were written into Article III. Coke believed that judges should be in charge of the court, not the Monarch, as the Monarch was likely not as educated on the law as judges were. Coke's assertions were used to justify splitting the judiciary entirely from the executive.

Schwartz also proves that certain British ideas motivated the Framers to do the opposite of the British common law. In Britain, the monarch had the power to take any case from any court and decide it solely. Coke was against this and stressed that the monarch did not have the necessary law training to make decisions on his or her own. Coke again influenced some of the Framers, specifically those that fought against either executive involvement in appointing judges altogether or merely sole executive appointment power.[3] Coke also created the idea of judicial review, a power that would eventually be authorized by the Supreme Court. He believed that judges were the best candidates to do this, as neither executives (the monarch) or legislators

[3] Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 3-4.

(Parliament) had guaranteed law education as judges did.[4] Coke's ideas about the supremacy of law influenced the Framers to recognize the need for a Supreme Court. Schwartz's work effectively proves the influence of British common law and its contributors on the Framers of the Constitution.

The National Constitution Center authored an article called "The Most Underrated Founding Father: Oliver Ellsworth?" Oliver Ellsworth, as the article clearly states, is underappreciated in constitutional historiography. The article claims that Ellsworth is a very important Framer, deserving of coverage. Ellsworth was a successful lawyer and eventually a judge. He served as the third Chief Justice of the United States. His role is important to the development of judicial review, and he was the main drafter of the Judiciary Act of 1789. He also worked very diligently to get it passed. His role is important to study because the Judiciary Act of 1789 established the Supreme Court as it operates and fleshes out its jurisdiction. In order to understand the Judiciary Act of 1789, and the debates behind it, Ellsworth is an important character to study.[5]

Anthony Bellia's "The Origins of Article III 'Arising under' Jurisdiction" talks about the obstacles of the colonial courts. Bellia's argument on the colonial courts is that they were each established under different charters and different rules. This caused them often to act in conflict to each other. The different sources of judicial structures (royal charters, commissions, etc.) set out different rules for each court, meaning that they varied greatly from colony to colony. Bellia establishes this by citing some of those charters/commissions and by citing the Declaration of

[4] Ibid, 5.
[5] NNC Staff, "The Most Underrated Founding Father: Oliver Ellsworth?," National Constitution Center, constitutioncenter.org, April 29, 2022, https://constitutioncenter.org/blog/the-most-underrated-founding-father-oliver-ellsworth.

Independence, which specifically called this problem out.[6] The Declaration of Independence states, "He (George III) has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers."[7] This refers to the instances where royal authority was used to deny jurisdiction to colonial assemblies over certain judicial cases.[8]

"The Courts in the American Colonies" authored by Edwin C. Surrency provides similar information. It expands on the disorganization of the colonial courts. The colonial assemblies in the North American colonies could not create their own courts. During the earlier years of the colonies, they did have this power. New Jersey established a court with three justices and twelve "men of the neighborhood" to hear cases. But as the colonies grew, the amount of work became unsustainable for the poorly equipped courts.[9] Even the governors of the colonies could not establish courts without commission of English authorities and they had to follow the instructions of those commissions.[10] Unfortunately, because there was no established system (not all commissions/charters gave the same or even similar instructions) the various colonial courts had very irregular procedures. Colonial courts also had different session terms, causing significant delays in cases being heard. The courts were poorly staffed, as there was no established system of training judges in the North American colonies. When English judges were sent over, they found the system was too broken to fix on their own. These issues got back to the English Parliament eventually. As a result, the British Council of Trade requested a report in 1703 from the governors of Maryland, New York, Virginia, New Jersey, Massachusetts Bay, and

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[7] Declaration of Independence, 1776.
[8] Anthony J. Bellia, "The Origins of Article III 'Arising under' Jurisdiction," *Duke Law Journal*, Vol. 57, No. 2 (2007), p. 276-277.
[9] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 258- 259.
[10] Ibid, 258.

New Hampshire of the judicial proceedings in their colonies.[11] Citing these reports, Surrency claims that these reports confirmed the problems, but came up with no solution. Another thing Surrency touches on is that the colonial courts were not an independent judiciary. Surrency claims,

> No separation between the functions of the executive, legislative, and judicial branches existed in the colonies, and all three branches had a role at one point in the judicial process. Individuals would hold several positions simultaneously, and distinctions between different bodies or courts were blurred.[12]

Because the branches were so heavily entangled, this left the colonial court systems disorganized and susceptible to corruption. As it was out of the realm of this article, Surrency did not draw the connection between this and the intense fight for separation of branches in the U.S Constitution overall and as it relates to Article III and the Supreme Court.

George L Haskin's "The Legal Heritage of Plymouth Colony" establishes that the colonial courts were based on local borough courts of Britain rather than the larger courts in Britain like the Court of Common Pleas or the King's Bench.[13] While these latter courts are very important to help understand specifically the dynamics of the executive, legislative, & judicial branches that so heavily influenced the Framers, the colonial courts only loosely resembled those larger courts. This can be attributed to the fact that the Court of Common Pleas and the King's Bench aimed to serve the entirety of Britain, a much larger jurisdiction (both land and population wise) than the individual American colonies. Haskin compares and contrast English and colonial

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[11] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 254-256.
[12] Ibid, 253.
[13] George L. Haskins, "The Legal Heritage of Plymouth Colony," *University of Pennsylvania Law Review*, Vol. 110, No. 6 (1962), p. 852.

courts using studies of the 1636 Plymouth code, the surviving Plymouth Laws, and the Records of the Colony of New Plymouth in New England. He also refers to secondary studies of all these sources as well. Haskin does not have many secondary studies to refer to, as he says that it is neglected as source material and very few copies of the latter two sources have survived. The traditional historiography of Plymouth Colony in legal history is that Plymouth made very few permanent contributions to American heritage. Haskin disagrees on this point. While Haskin agrees that Plymouth colonists were not staging any intellectual revolutions, he argues that the contributions of Plymouth colony to legal institutions still exist today in some form or another. The Pilgrims created a system of law without a royal charter, achieving political maturity unmatched in the colonies. They also established the first American constitution and bill of rights.[14] His study provides an in-depth view of the Plymouth courts and provides insight into the very first colonial courts. Since this was one of the earliest colonial courts, it clearly influenced others that came after it. So, studying it is very important to draw a connection between the European systems, the colonial courts, and the later U.S Constitution.

William T Davis' *History of the Judiciary of Massachusetts* is useful to draw more conclusions about the colonial courts, especially the Plymouth and Massachusetts Bay courts. Davis in his introduction references a work that inspired him, Judge Emory Washburn's 1840 book *A Judicial History of Massachusetts*. While he admires the work, he points out Washburn's lack of coverage on the Plymouth Colony contributions to the Massachusetts judicial system. Davis aims to fix this issue, and cover Plymouth Colony's judiciary and its relation to later

[14] George L. Haskins, "The Legal Heritage of Plymouth Colony," *University of Pennsylvania Law Review*, Vol. 110, No. 6 (1962), p. 847-849.

colonial courts.[15] He uses numerous primary sources, ranging from the charter that established the Plymouth court to various accounts of the court by actors within it.

Dudley Odell McGovney's "The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto" examines the role of the British Privy Council in the colonial courts. McGovney expands on the power of the Privy Council to veto colonial statues if they violated British statutes or interests. The Privy Council rarely exercised this power against the colonies in the early years. This is mainly because the North American colonies were small and economically unimportant in comparison to others, so the Privy Council mostly ignored them. When the North American colonies started to grow during the 17th and 18th centuries, the Privy Council began to take more interest in them, according to McGovney.[16] He argues that this period of inaction led to local autonomy that inspired the American Revolution. McGovney directly contends that a veto is necessary in a federal system, and our veto system is very similar to the one the British Privy Council used. The idea of judicial review is related but not completely the same as the Privy Council is a legislative institution. Also, the Privy Council could veto a colonial statue for any reason they saw fit, while judicial officers have to prove that the Constitution or federal law in some way disallows the offending statute. McGovney's work provides insight into the creation of the veto power and British involvement in colonial courts.

Tracing the evolution of the English courts all the way back to the first national judiciaries in Britian, Ralph V. Turner in "The Origins of Common Pleas and King's Bench" determines that both courts can be traced back even farther to the *curia regis* of the Norman

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[15] William T. Davis, *History of the Judiciary of Massachusetts* (New York: Da Capo Press, 1974), Preface.
[16] Dudley Odell McGovney, "The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto," *University of Pennsylvania Law Review*, Vol. 94, No. 1 (1945), p. 59.

Kings.[17]. Turner bases his thesis on rolls of the cases put before the two courts, dating back to the 12th century as well as various secondary sources on the topic. The popular historiography claims that these courts evolved very slowly over time and was influenced mostly by two main authors, William Stubbs and F.W Maitland. Turner's claim is that this historiography needs to be reexamined, as new materials unavailable to the two authors have now become available to historians.[18] Using these now available materials, Turner and other historians have concluded that the process was far more complex than just a slow evolution. These courts are comparable to the Supreme Court, as many of the ideas surrounding jurisdiction, executive power, and the need for an independent judiciary originate from the successes and failures of the Court of Common Pleas and Kings Bench. For example, the monarch fully controlled the King's Bench, and had the final say in all cases. This was frightening to the Framers, who were worried about the tyranny that could come from that amount of power in the court. For that reason and others, separating the judiciary from the executive and the legislative branch was a priority when writing the US Constitution.

Another Turner work, "The Medieval English Royal Courts: The Problem of Their Origins" operates within the same historiographical sphere and reaches the same conclusion. Again, Turner references William Stubbs and F.W Maitland as the two major sources of influence on other works on this topic. Again, he references the materialization of administrative records as a catalyst for change in the historiography of the topic. These records were unavailable to Stubbs and Maitland, and so the accessibility of them fundamentally changes the conclusions of previous authors who have written on this topic. Turner references other authors,

[17] Ralph V. Turner, "The Origins of Common Pleas and King's Bench," *The American Journal of Legal History*, Vol. 21, No. 3 (1977), p. 239.
[18] Ibid. 238.

such as Doris M Stenton and G.O Sayles, and their introduction to the new published and translated rolls of King John, Henry III, and Edward I.[19] Turner's conclusions surrounding the two courts jurisdictions are relevant to the ideas of the Framers. The Framers wanted to avoid creating a Supreme Court that would echo the Kings Bench, as they did not want to place judicial power in the hands of the executive alone. They aimed to create an independent judiciary. Using Turner's work, this thesis will begin with a comparison of the jurisdictions and issues of both the Kings Bench and the Court of Common Pleas and connect them to the debates around the federal judiciary during the 1787 Constitutional Convention.

For this thesis, I pull from three distinct historiographies. First, the historiography surrounding the debates of the Constitutional Convention, specifically the debates on the federal judiciary and its role. The conclusion of many of my sources many of my sources is that the Framers' debate surrounding the federal judiciary was just as fierce as other, more covered, debates. Another conclusion of my sources is that examining the character and education of the Framers gives us major insight into why each fought for the provisions of Article III that they did. Second, I will examine the historiography of the development of the colonial courts. The historiography of this topic has taken a clear evolution. The earliest works failed to capture the full picture, specifically they omit the sources on the smaller, earlier, courts like the one in Plymouth Colony. As the historical field of colonial courts has grown and evolved, historians have examined these smaller, earlier courts more closely. Finally, it is necessary to examine the historiography of British common law and the evolving British court system. The main change in the historiography of this topic is the emergence of administrative records that were unavailable to the most important early scholars in the field, William Stubbs and F.W Maitland. The

[19] Ralph V. Turner, "The Medieval English Royal Courts: The Problem of Their Origins," *The Historian*, Vol. 27, No. 4 (1965), p. 472.

emergence of these new documents means that new conclusions can be reached. The main new conclusion is that the evolution of the court system is much more complex than originally assumed. The evolution of the British court system is very important as it informs the colonial courts and therefore the Constitutional debates of 1787. Examining all three historiographies, it is clear that they are readily evolving whether that be because of the emergence of new sources, the renewed focus on smaller courts and their significance, or the rise in attitudes about individuality of the Framers. A close study of all three fields and their historiographies is essential.

Chapter I: The English Courts

The courts the Framers were most familiar with, besides the colonial courts of their home colonies, were the English courts that those colonial courts were based on. Besides economic and cultural ties, one of the largest connections between the colonies and the British mainland would be the common law they were both bound to. This common law informed the Framers tremendously when they were setting up the court system in the American Constitution. Also informing them was the documented successes and failures of the British courts, which were tied closely to the Monarch, an institution the Framers wholly disagreed with by the time of the Constitutional Convention.

The first American colonists brought their understanding of the English legal system with them, to most it would be the only justice system they were familiar with. Regardless of their physical distance from the mainland, these colonists were English. "To them belonged Magna Carta and the Common Law; to them belonged the institutions and ideas that were inextricably bound up with Magna Carta and the Common Law; to them belonged the legal traditions of the Tudor age-the age that immediately preceded the period of colonization."[1] The American colonists inherited the institutions and legal rights of their mainland counterparts, an idea that the English government agreed with, at least at the time. The first Virginia Charter issued by James I and written in 1606 claims a large swath of the New World for Britian but also gifts the colonists in that territory all the constitutional rights of Englishmen on their home soil. This assertion was

[1] H. D. Hazeltine, "The Influence of Magna Carta on American Constitutional Development." In *Magna Carta Commemoration Essays* ed. Henry Elliot Malden (London: Royal Historical Society, 1917), 358.

repeated in many of the other charters given to colonies during the early colonial era. Even those colonies that were founded separately from royal charter, like Plymouth, assumed the constitutional rights of Englishmen because the British Crown claimed the territory of the colony.[2] In addition to asserting the colonists had the same rights as Englishmen as subjects dwelling in the British Isles, the royal charters also pushed the colonists to legislate themselves, as long as the laws they followed conformed to the English legal system. The Massachusetts Charter of 1691 states,

> And we doe … grant to the said Governor and the great and Generall Court . . . full power and Authority from time to time to ordaine and establish all manner of wholesome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England.)[3]

The laws that colonists established in their new homeland were as similar as possible to those in England, to comply with their royal charters. Because of the background of the colonists, they may not have been aware of much of the common law, or they may have preferred their own religious law over the English common law.[4] The colonial legislatures added to the common law many statutes that helped them in their new environment, as the New World presented unique challenges. Native Americans, ample unclaimed spaces, and dangerous environments presented issues for the colonists, who turned to the common law only to find that it held no sway over these issues, issues not faced in England for hundreds of years. The English mainlanders had

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[2] H. D. Hazeltine, "The Influence of Magna Carta on American Constitutional Development." In *Magna Carta Commemoration Essays* ed. Henry Elliot Malden (London: Royal Historical Society, 1917), 360.
[3] Massachusetts Charter, 1691.
[4] Herbert Pope, "The English Common Law in the United States," *Harvard Law Review*, Vol. 24, No. 1 (1910), p. 15-16.

long since addressed their own natives, divvied up most of the island, and had tamed their environment. To address these issues, colonial legislatures added laws and codes to adapt to their new homes. This resulted in the creation of the American common law, heavily influenced by British common law but different enough to be something else entirely.

The systems the colonists set up reflect their belief in the common law system. The American colonies kept much of the common law tradition, to varying degrees, depending on the size, demographic makeup, and outside influences present of the respective colonies. The extension of British legal institutions and ideas is clear to see in the way the first colonial courts were set up, the laws they enforced and how, and the education the judges held. One can trace that influence from the courts of Great Britain to the Supreme Court of the United States.

The Judiciary Act of 1789 established the Supreme Court of the United States. Provided for in the Constitution, the Founding Fathers of America deemed the new federal judiciary as critical. But the idea of federal courts was not a new one. It can be traced back hundreds of years to William I, or William the Conqueror, and his establishment of what would become the King's Bench and the Court of Common Pleas. The evolution of these two courts throughout British History heavily influenced the way that the Supreme Court was written and implemented. The issues that followed the Court of Common Pleas and the King's Bench were apparent to the American colonists and patriots that were in their jurisdiction. What became important to them when writing the Supreme Court into the Constitution and into the Judiciary Act of 1789 can be traced back to the common law courts of England. The Supreme Court of the United States was created with an emphasis on the separation of powers. The power of the monarch over the judiciary scared the Framers and inspired them to create a Supreme Court that did not rely on the executive for power and could not be overpowered by either the executive or legislative

branches. The confusing jurisdictions of the courts of England led to the Framers writing a very specific set of jurisdictions for their federal judiciary. To prove the connection between the Framers' thinking when writing Article III and the English courts, we must trace the issues all the way back to the Norman Conquest.

After the Norman Conquest in 1066, the King bestowed all justice himself. Even to the reign of James I (1603-1625), the monarch claimed this right. Over the years, as Britain grew, the King began to rely more and more on others, deputizing them to dispense justice.[5] They acted as deputies, commissioned and paid by him. They also served at his pleasure, and could be dismissed for any reason, at any time. [6] One of the first courts established in Great Britian was the *curia regis*. The *Curia Regis* handled all business of state, whether that be judicial, legislative, or diplomatic business. Any case could be taken to the *curia regis.*[7] In a single session of the court, the King could implement different facets of his power. He could seamlessly transition between deciding on foreign policy, writing or revising law, or decide on a dispute. This was very common and was not remarked upon as unique.[8]

It was a rotating group of advisors consisting of everyone from household servants to great officers of state.[9] Bishops, Earls, or Barons, those who are not regularly at court but come to serve on the King's Bench, were *barones*. Those members of court, who were in the King's service, like household officials, were *curiales.*[10] They operated as a smaller group called the

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[5] Lord Upjohn, "Evolution of the English Legal System," *American Bar Association Journal*, Vol. 51, No. 10 (1965), p. 918.
[6] Sam J. Ervin, "Separation of Powers: Judicial Independence," *Law and Contemporary Problems*, Vol. 35, No. 1 (1970), p. 110.
[7] Alan Harding, *The Law Courts of Medieval England* (New York: Routledge, 2020), 38.
[8] George Burton Adams, *The Political History of England, Vol. II.* (London: Longmans Green and Co. ,1905), 182.
[9] Ralph V. Turner, "The Medieval English Royal Courts: The Problem of Their Origins," *The Historian*, Vol. 27, No. 4 (1965), p. 472.
[10] William A. Morris, "The Lesser Curia Regis Under the First Two Norman Kings of England," *The American Historical Review*, Vol. 34, No. 4 (1929), p. 775.

lesser curia regis, but sometimes when needed it expanded to the *magna carta regis*. Both groups functioned the same and addressed the same issues, regardless of difficulty or importance. Which one it was depended entirely on how many advisors were available at the time.[11] This group, regardless of whether it was the smaller or larger version, only addressed the issues of great men or great causes. This system had its problems, and as Britain grew, the *curia regis* could no longer address all the causes and men brought before it efficiently. Under Henry I (1100-1135), members of the *curia regis* would travel around England to hear pleas. Under Henry II (1154-1189), the court greatly increased the number of pleas it heard and appointed five permanent members of the *curia regis* in 1178.[12] Because of Henry II and his successor Richard I's extensive travel, the *curia regis* had to evolve again. Instead of it traveling around the country for legal proceedings, it settled at Westminster.[13] By the end of the 12th century, the Court of Common Pleas replaced it.[14] The Court of Common Pleas, which is directly referenced and recreated in various colonies, replaced the *curia regis*.[15] The curia regis split off in the 13th century and its powers were split between new entities, including the Privy Council, Parliament, the Court of Common Pleas, the King's Bench, and more.[16]

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[11] George Burton Adams, "The Descendants of the Curia Regis," *The American Historical Review*, Vol. 13, No. 1 (1907), p. 12.
[12] Ralph V. Turner, "The Origins of Common Pleas and King's Bench," *The American Journal of Legal History*, Vol. 21, No. 3 (1977), p. 240.
[13] Ralph V. Turner, "The Medieval English Royal Courts: The Problem of Their Origins," *The Historian*, Vol. 27, No. 4 (1965), p. 479.
[14] Ralph V. Turner, "The Origins of Common Pleas and King's Bench," *The American Journal of Legal History*, Vol. 21, No. 3 (1977), p. 245.
[15] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 267.
See Also. Ralph V. Turner, "The Origins of Common Pleas and King's Bench," *The American Journal of Legal History*, Vol. 21, No. 3 (1977), p. 239.
[16] George Burton Adams, "The Descendants of the Curia Regis," *The American Historical Review*, Vol. 13, No. 1 (1907), p. 11.

The King's Bench and the Court of Common Pleas are the courts that most influenced the American colonial courts. The Court of Common Pleas was referenced and recreated in the North American colonies, but the Framers looked to the King's Bench as an example of what not to do. The Framers wanted to create a court not controlled entirely by the monarch, who alone could pick and choose cases at whim. Both courts evolved out of the curia regis, and both were an important influence on American colonials, pre- and post-revolution.

The origins of the King's Bench can be traced to King John (1199-1216). He, unlike his predecessors, remained in England for much of his reign because of the loss of Normandy to France.[17] As he was now on the mainland, King John drew much of the judicial business, and he had an interest in handling it. He had an extreme curiosity in the justice system, and desired to take an active role in administrative affairs.[18] He grew the *coram rege*, a court that followed the King and heard cases that the King decided on, in to a permanent body that kept plea rolls beginning in 1200.[19] When the King was away, there was no *coram rege*, and thus began the King's Bench. The King's Bench handled cases, or "pleas of the crown," that involved the King in some way. It also functioned as an appellate court for other courts, including local courts and the assize. By establishing a dual system of justice, King John contributed greatly to the evolving British court system. Eventually, King John undid his own contribution by closing the Court of Common Pleas in 1209. Like much of King John's legacy was undone, this closure was rescinded. The Court of Common Pleas was reopened by Henry III (1216-1272), in 1218.[20] Because of Henry III's young age, he was unable to conduct a King's Bench court and so the

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[17] Frederick Bernays Wiener, "Tracing the Origins of the Court of King's Bench," *American Bar Association Journal*, Vol. 59, No. 7 (1973), p. 754.
[18] Ralph V. Turner, "The Origins of Common Pleas and King's Bench," *The American Journal of Legal History*, Vol. 21, No. 3 (1977), p. 246.
[19] Ibid, 246.
[20] Ralph V. Turner, "The Origins of Common Pleas and King's Bench," *The American Journal of Legal History*, Vol. 21, No. 3 (1977), p. 247.

Court of Common Pleas was the only court until 1234. After 1234, the dual system was reestablished.

The King's Bench functioned as a court of appeal for most of the courts in England, only excluding the Court of Exchequer, as it did not fall under common law for most of its history.[21] The King's Bench did not have a clear jurisdiction, just a rough precedent of cases the court was likely to take. Plaintiffs could take cases to whichever royal court they wanted to, but the Kings Bench often took cases that requested correction of errors by lower courts, suits involving the king or people in his circle, and pleas involving royal grants, charters, or rights.[22] Under King John, litigants were more encouraged than ever to bring their cases before the King's Bench. Some scholars connect this increase in encouragement to King John's documented interest in hearing cases, whether that be from interest in legal proceedings or an interest in concentrating as much power as possible into his hands. Other scholars point to a simpler motivator: money. John did look for new revenues for his courts, but there is also significant evidence that he was genuinely interested in legal outcomes. Either way, the ease of moving cases around and the lack of clear jurisdictions were a concern of the colonists when creating their own courts, as the colonial courts lacked this particular issue.[23]

In 1215, during his reign, King John signed the Magna Carta. While it mostly focused on the rights of the nobles, it also imposed some judicial rules on the monarch. The Magna Carta bound the monarch to follow the law, even if he was presiding over the Kings Bench. The text gave the monarch no room for judicial corruption, "No freemen shall be taken or imprisoned

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[21] Frederick Bernays Wiener, "Tracing the Origins of the Court of King's Bench," *American Bar Association Journal*, Vol. 59, No. 7 (1973), p. 756.
[22] Ralph V. Turner, "The Medieval English Royal Courts: The Problem of Their Origins," *The Historian*, Vol. 27, No. 4 (1965), p. 493.
[23] Ibid. 494.

or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[24] This sentence is the origin of the idea of due process. By establishing that even the monarch had to respect the rule of law, a precedent was formed.

The Magna Carta also established the Court of Common Pleas as a distinct court, Section 17 of the Magna Carta states that common pleas (cases between subject and subject) be heard in "some fixed place."[25] This fixed place was Westminster Hall, so that claimants and defendants could travel there instead of chasing the King on his travels for justice. Section 17 also mandated that the common pleas must be heard separately from other pleas.[26]

What is certain is that the dual system was an evolving one, and neither were fully developed in the reigns of any of the Kings of the era. Even after 1234, the dual system was not secure. It had been reestablished, but Henry III began taking on cases to the King's Bench that belonged to the Court of Common Pleas.[27] Because the monarch could command any case to be placed in front of him, the jurisdiction of both of these courts was very unclear. Technically, the only cases that were referred to the King's Bench were cases that concerned the King himself. The other issues, "real actions relating to the ownership or possession or land and the personal actions of debt, detinue, covenant, and account." were referred to the Court of Common Pleas.[28] But these jurisdictions were ignored as soon as the monarch wanted to hear a case, whether it be of personal interest or the result of a bribe. Indeed, all of the medieval courts suffered from

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[24] Magna Carta. 1215.
[25] Magna Carta, 1215.
[26] George Burton Adams, "The Origin of the English Courts of Common Law," *The Yale Law Journal*, Vol. 30, No. 8 (1921), p. 799.
[27] Ralph V. Turner, "The Medieval English Royal Courts: The Problem of Their Origins," *The Historian*, Vol. 27, No. 4 (1965), p. 494.
[28] Ibid. 495.

"judicial competition." The lack of clear jurisdiction meant that plaintiffs could often choose which court to bring their cases to, and as judges received fees for each case, they were incentivized to attract plaintiffs. They did this by developing pro-plaintiff legal doctrines, making their procedures quicker and more effective for plaintiffs, and expanded their jurisdictions to give plaintiffs more choices. There was a substantial dip in cases decided for plaintiffs once the issue started to be looked at for regulation in the late 18th century.[29] Regulation began in 1799 with the passing of significant statutory reforms, meaning the Framers would have been aware of such an issue.[30] There is evidence that judges may have adjusted rulings to be more pro-plaintiff, even unconsciously, to up their own personal wealth by attracting plaintiffs. On the other hand, this intense competition also provoked courts to constantly improve, to constantly become more effective, cheaper, and quicker.[31]

Judicial competition is complicated, it succeeded in creating "better" courts, but it also created corruption and law that favored plaintiffs, rather than providing justice. The Framers aimed to create clear jurisdictions to avoid this particular pitfall of the British courts. The changes to the judiciary that were the result of judicial competition caused immense friction between courts who were willing to evolve and those that weren't. Because cases could be easily transferred, claimants and defendants would often take the case to whoever they could trust to be quick. This caused some difficulties for the common law courts during the 15th century, as the Chancery courts expedited their justice, cases flocked to them, leaving the common law court's case numbers to drop significantly between 1460 and 1540.[32] In response, the Common Law

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[29] Daniel Klerman, "Jurisdictional Competition and the Evolution of the Common Law," *The University of Chicago Law Review*, Vol. 74, No. 4 (2007), p. 1211.
[30] Ibid. p. 1179-1180.
[31] Daniel Klerman, "Jurisdictional Competition and the Evolution of the Common Law," *The University of Chicago Law Review*, Vol. 74, No. 4 (2007), p. 1182.
[32] J.H Baker, *The Oxford History of the Laws of England*, Volume IV (Oxford: Oxford University Press, 2003), 40-45.

Courts, including the King's Bench, developed a quicker judicial system, and gained a larger jurisdiction through the Writ of Quominus (which gave the Court of Exchequer jurisdiction over debt cases usually given to the Court of Common Pleas) and the Bill of Middlesex (which allowed for cases to be transferred from the Court of Common Pleas to the King's Bench by asserting the defendant had trespassed in the county of Middlesex, in which the King's Bench had criminal jurisdiction). The Court of Common Pleas responded by becoming increasingly conservative to avoid ceding cases, but because of political disagreements between its clerks, the Court of Common Pleas was unable to evolve meaningfully. At the same time, the King's Bench was quickly evolving, becoming quicker and more standardized, making it more enticing to claimants and defendants.

This friction continued into the Interregnum (1649-1660), the period between the execution of Charles I and the restoration of Charles II. At that point, the fines on original writs were abolished, granting some reprieve to the Court of Common Pleas. Unfortunately, those fines were reinstated in 1660. The Court of Common Pleas pushed for an act of Parliament to reverse this, but their requests fell on deaf ears. By 1685, the compromises made between the common law courts effectively merged their jurisdictions, meaning that all three courts had similar jurisdictions over most common pleas, with similar procedures. Their merger was so complete that it became common by the 18th century to refer to the "twelve justices" of the three courts, rather than speaking of them separately. At the point of the American Revolution and the writing of Article III of the American Constitution, this was the reality of the English courts.

During the Colonial Era, the courts were very important to the governance of the colonies. These courts had many issues. The issues of the courts of England translated to their colony. Because of their colony status, colonial governments could not create their own courts.

They would have to seek permission and instructions from the English government or their financiers, depending on the colony's mode of establishment. Once these courts were created, they were often left alone to evolve, leading to a very jagged court system. Another issue was the lack of an independent judiciary, there was,

> No separation between the functions of the executive, legislative, and judicial branches existed in the colonies, and all three branches had a role at one point in the judicial process. Individuals would hold several positions simultaneously, and distinctions between different bodies or courts were blurred.[33]

There are many cases found in the rolls of the King's Bench that mention one person acting as judge and attorney. Clerks acted as attorneys and pleaders, simultaneously. Walter of Wimborne, a clerk of orders, acted as both a justice of the King's Bench and as the king's legal representative from 1276 through 1289.[34] These instances added to the instability and corruption in these courts. In order to dispense justice properly, a member of the court must be solely devoted to one job, not split between multiple, which may have differing goals and motivations.

Many of the Framers arrived to the Constitutional Convention intent on a government separated into equal branches- the executive, the legislative, and the judicial.[35] The idea of separation of powers dates back to the 4th century BCE, to Aristotle's *Politics*. The government of Rome, taking inspiration from Grecian government structure and philosophy operated similarly, with a system of checks and balnces. While the separation of branches did not reappear until the birth of the English Parliament, it was different, with the three branches not being equal,

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[33] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 253.
[34] Frederick Bernays Wiener, "Tracing the Origins of the Court of King's Bench," *American Bar Association Journal*, Vol. 59, No. 7 (1973), p. 756.
[35] Sam J. Ervin, "Separation of Powers: Judicial Independence," *Law and Contemporary Problems*, Vol. 35, No. 1 (1970), p. 108.

nor exclusively separate. John Locke, another influence for the Framers, wrote about the English system, noting that the legislative branch was supreme, with the other two branches falling under the power of the monarch. *Spirit of the Laws,* written by Baron de Montesquieu, was well known to the Framers, and expanded upon the idea of separation of powers. Montesquieu, a Frenchmen, based his book on the English system, which he noted had a judiciary that ranked "next to nothing" compared to the other branches.[36] These works, and others covering the importance of separation of powers, were well known to many of the Framers who arrived at the Constitutional Convention. Most of these men had studied law and were aware of the struggle for judicial independence in England, a disorder that had festered in the colonies as well. The Articles of Confederation were not written with the separation of powers in mind, and this contributed to its failure.

The judiciary of 17th century England also lacked independence, an issue which bled into the colonies. The lack of an organized court system in the colonies created numerous issues. Courts had irregular procedure, had different session terms, and were subject to many delays.[37] The common law courts of England also overlapped, especially with their jurisdictions. From their establishment until the end of the minority of Henry III (1220s) the courts had no boundaries with each other. There are numerous examples of cases being held in one court, and judgement being rendered in the other.[38] The courts were also poorly staffed, since there was not an established system of training judges as much as there was in England. When trained judges

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[36] Charles de. Montesquieu, *The Spirit of Laws* (Amherst, NY: Prometheus Books, 2002), 156.
See also- Sam J. Ervin, "Separation of Powers: Judicial Independence," *Law and Contemporary Problems*, Vol. 35, No. 1 (1970): p. 109.
[37] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 254.
[38] Frederic William Maitland, *Three Rolls of the King's Court* (Pipe Roll Society, 1891), 1-59.
See also- George Burton Adams, "The Origin of the English Courts of Common Law," *The Yale Law Journal*, Vol. 30, No. 8 (1921), p. 804.

did come from England, they found the system to be too broken to fix by themselves. The numerous issues of the Colonial Courts provoked many complaints to Parliament. By the end of the 17th century, Parliament had become concerned. An account was then requested in 1703 from the governors of Maryland, New York, Virginia, New Jersey, the Massachusetts Bay, and New Hampshire that reported on the judicial proceedings of their colonies.[39] These reports just confirmed the issues. As in England, the judges of the colonies were also dependent on the legislative branch for payment, leaving them vulnerable to political corruption.[40] The legislators could and did influence judicial rulings and the judges themselves by threatening to decrease salaries or promising an increase in salaries.

The Framers, in Article III, addressed another issue they had with the English courts: the payment and dismissal system for judges. Under the English system, judges derived most of their income from fees paid by litigants.[41] As mentioned earlier, this caused courts to make changes, positive and negative, to attract cases so they could collect the fees. The Framers were aware of the friction judicial competition caused and did not want to replicate it in the new federal judiciary. Medieval judges also received part of their income from clients wanting legal assistance. Conflict of interest was not a concept in medieval life.[42] St. George Tucker, the author of an American version of Blackstone's Commentaries on the Laws of England, wrote in 1803, that the judiciary is in constant jeopardy of being influenced by those who have the

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[39] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 256.
[40] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 30.
[41] Daniel Klerman, "Jurisdictional Competition and the Evolution of the Common Law," *The University of Chicago Law Review*, Vol. 74, No. 4 (2007), p. 1182.
[42] Frederick Bernays Wiener, "Tracing the Origins of the Court of King's Bench," *American Bar Association Journal*, Vol. 59, No. 7 (1973), p. 756.

custody of the purse and the sword, the other two branches.[43] While Tucker's version of Blackstone was not available until 1803, many of the Framers were extremely familiar with Blackstone's original work, which also pointed to the importance of an independent judiciary. Blackstone was extremely popular in the colonies, selling around 2,500 copies before independence.[44]

Holding influence over someone's payment is a powerful position. Alexander Hamilton wrote in Federalist no.79, "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*."[45] The most important provisions to ensure judicial independence was to establish permanency in their offices and fixed income. That way, no judge would be unsure of the ground on which he stood, nor be deterred from his judicial duty. This same issue was present in England, where for most of their history, all judges served at the pleasure of the king. They could be dismissed for any time or any reason, and even if they held "life tenures" they could be removed by some procedure or another. Under Charles I, in 1628, as Parliament gained more power, they pushed against this. When Charles I disagreed with a decision made by a judge, Sir John Walter, Chief Baron of the Exchequer, he attempted to dismiss him. Walter fought back, arguing that his tenure was based on "good behavior", and not on the king's pleasure. Charles I gave in, but dismissed other judges over the next decade, resulting in Parliament forming a committee to study the tenure of judges. The result of this study was a petition to the King to change the tenure from his pleasure to "good behavior." Charles I complied. Regardless of this, Kings still dismissed judges until the Act of Tenure was

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[43] St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*. (Hackensack, N.J: Rothman Reprints, 1969), 23-30.
[44] Alan Harding, *A Social History of English Law* (London: Penguin, 1966), 303
[45] Alexander Hamilton, *The Federalist Papers*, No. 79, May 28th, 1788.

passed in 1701.[46] This issue came up again in the colonies. In 1761, at the advice of the Board of Trade, George III (1760-1820) made the tenure of colonial judges at royal pleasure, rather than "good behavior". In 1772, he also established a fixed salary for judges of the Superior Court of Massachusetts, removing the judges' ability to get their usual grants from the House of Representatives and Governor. This may have later inspired the complaint in the Declaration of Independence that George III "made judges dependent upon his will alone for the payment of their salaries."[47] Article III established that after Congress approved judges, they would owe neither their position nor their income to Congress. The friction caused by the English system was plain to see, and the Framers worked to prevent that friction by creating an independent judiciary, most unlike the English one.[48]

Along with all of the supplies to build new lives in the New World, English colonists brought with them the legal system of their homeland, with all of the successes and failures of that system. The legal system in England rested on the King, and while the King still lorded over the North American colonies, his lack of actual presence there allowed a new Common Law to be created, and the issues of the English legal system to fester. But a consequence of this festering, was that the issues were very apparent when it came time for the Framers to form their own legal system. The issues of unclear jurisdictions, lack of separation of powers, judicial competition, and legal education weighed heavily on the Framers' minds, as most had been educated by commentaries on the English system, which laid bare these issues. Blackstone, Coke, Locke, Montesquieu, all had much to say about the issues of the English system, and their

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[46] Sam J. Ervin, "Separation of Powers: Judicial Independence," *Law and Contemporary Problems*, Vol. 35, No. 1 (1970), p. 111.
[47] Declaration of Independence, 1776.
[48] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 30.

ideas on how to fix them became the backbone of Article III. At the same time, the Framers and the colonists before them were taking English common law and adjusting it to fit the American colonies and their needs. The Americanization of the Common Law also influenced the Framers, who wanted to have a clean break with England, but also saw the wisdom in preserving a system that had served them for almost two centuries.

Chapter II: The Colonial Courts

The architects of Article III of the Constitution did not create a federal judiciary based on purely European influences. The Framers had their colonial ancestors to look to, and even their own experiences with the colonial courts before the American Revolution. The colonial courts had successes and failures, mainly relating to their different adaptations of common law. The colonial courts that were the most efficient and fair at dispensing justice were those that adopted British common law quickly and to their own ends, adapting it to fit the colonial needs and issues. The most organized and efficient colonies implemented common law early on, while also adapting it to the realities of colonial life. Some issues in the colonies were unique to North America, and common law could not address them. Interaction with Native America, the vast amounts of "unclaimed land" and the lack of organized governments in the colonies presented distinctive challenges. Common law promotes stability and fairness. Corruption was often more present in other colonies that relied on religion or other means for the basis of their judicial system. Colonies including those of New England and Rhode Island were established with specific purposes in mind, namely escape from religious intolerance. But implementation of the common law required men educated in the law to correctly interpret it, and the colonies had a severe shortage of those.

In the British colonies the basis of colonial law was the English Common law, yet each colony developed its own legal system. Consequently, common law was adapted haphazardly around the North American colonies, and therefore the courts that implemented it were often haphazardly organized and functioned to varying levels of success. The benefactors of these

colonies assumed that setting up a common law legal system and a common law court system in the colonies would decrease potential profits. If the colonists were focused on building institutions and government, they would not be focused on the main goal of the benefactors, which was to find and to create profitable resources like crops, land, and slaves. Based on the profit motive, many of the initial colonies declined to fully adapt common law and a court system. Therefore, many of the early colonies were less than stable, and were clearly motivated by profit. The common law was only accepted and implemented fully by Massachusetts, New York, New Jersey, and Maryland by 1722.[1]

The British influence in North America began in 1607 with the establishment of Jamestown. Jamestown was the first permanent British settlement in the Americas. The residents of Jamestown had different priorities, namely survival, so governance took a back seat. When survival became easier, there was more time and energy to devote to setting up government, the priority was to maximize profits. The purpose of creating the Jamestown colony was to generate as much profit for English investors as possible, and implementing the common law would restrict profits. It takes labor, people, and time to build and sustain common law courts and government, resources that could otherwise be devoted to producing profit. Until 1619, the Virginia Company controlled the colony, and the company owned and controlled all labor, profits, and products. In 1619, Governor George Yeardley arrived in the Virginia colony, and he instituted reforms that lessened the Virginia Company's control over the colony. He did this by giving all residents the right to live under "those free laws which his Majesty's subjects live under in England."[2] Jamestown was not immediately reformed to common law, however, and it

[1] Richard C. Dale, "The Adoption of the Common Law by the American Colonies," *The American Law Register 1852-1891*, Vol. 30, No. 9 (1882), p. 554.
[2] George Yeardley, "Unnamed Proclamation", 1619.

took the Crown taking control of the colony in 1624 for British common law to be firmly established.

The Plymouth colony was the first settlement in New England, established in 1620. A group of Puritan Separatists (known commonly as Pilgrims) founded Plymouth Colony as a sanctuary from religious persecution. Their strong religious beliefs influenced the social and legal practices of the colony greatly. The Plymouth colony's main judicial body was the General Court. It also functioned as a legislative branch, writing legal codes and statutes. Plymouth colony's law was based upon a mixture of biblical precepts and British common law.[3] The Pilgrims who inhabited Plymouth fled Britain because of religious persecution, settling first in Holland, and then finding the Dutch Calvinists too worldly, requested permission to settle in North America, which the King granted. The General Court of Plymouth most closely resembled the local borough courts of Great Britain, rather than the King's Court.[4] The officers of the court consisted of the Governor of the colony, a Council of Assistants, and the colony's Freemen. Freemen, originally, were those that had signed the Mayflower Compact in 1620. As there were only 41 original signatories, the General Court amended the rules to allow the election of more Freemen. Men aged 21 and older in Plymouth Colony could be elected to freemen status if an existing freemen sponsored them, and the General Court accepted them. Some of these officers eventually became purely judicial officers as a part of the Plymouth General Court and were no longer involved in writing legal codes and statutes. This job was done by the Massachusetts Bay legislature after the Province of Massachusetts Bay took over the Plymouth colony. As the colony grew, there was a larger need for representation and more delegates. In 1639, the

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[3] Rose T Briggs, "The Court Houses of Plymouth: Pilgrim Hall," The Court Houses of Plymouth, Pilgrim Hall Museum, May 17, 1966, https://pilgrimhall.org/pdf/Court_Houses_Plymouth.pdf.
[4] George L. Haskins, "The Legal Heritage of Plymouth Colony," *University of Pennsylvania Law Review*, Vol. 110, No. 6 (1962), p. 852.

Plymouth government decided to allow Freemen to elect two more delegates from their body (Plymouth was allowed to elect four on account of its size). These delegates served as local magistrates to hear cases and served as members of the General Court.[5] The Plymouth General Court and its structure inspired various other judicial systems in the surrounding colonies, whose structure in turn informed the Framers.

The English were not the only European presence in the Americas. The Dutch established the colony of New Netherland in 1614, which became the British colony of New York in 1664. New Netherland courts were modeled on the Dutch system. They controlled the Delmarva Peninsula (what is now mainly Delaware) to southwestern Cape Cod, including what is now New York. The Dutch controlled this area for decades, though threatened by New Sweden from the South and the New England Confederation from the East. They surrendered Fort Amsterdam on Manhattan Island in 1664 to the English, paving the way for English governance in the region. That year, the new British governor Richard Nicolls had a complicated problem; two distinct law systems were being used, one inspired by a Dutch system on Manhattan Island and the Hudson Valley and the British common law system used in Long Island and Staten Island. It is important to note that the British common law practiced in Long Island and Staten Island was not the British common law system practiced in Great Britian, but a bastardized version handed down by Puritan New England and interpreted by untrained "lawyers." Nicholls' solution to this problem was to give government jobs to trusted lawyers in the area. In addition to putting educated men in these important jobs, they were able to continue in their private practice of law and inform the populace (common and within the court system) of the new system. They also were able to inform Nicholls of the common population's ideas and misunderstandings of the

[5] William T. Davis, *History of the Judiciary of Massachusetts* (New York: Da Capo Press, 1974), 8.

system. Since it was a mixture of Dutch and English law, the system required these additional considerations for its success. This court system was flawed. Nicolls had an interest in keeping more of the Dutch system because it gave hum more control of the law in Dutch settlements. But keeping more of the Dutch system also forced Nicolls to lean on Dutch lawyers, as English lawyers were unversed in Dutch law. [6] So, Nicolls had to strike a difficult balance both to keep himself in control of his settlement while also not relying on Dutch lawyers too much as to give them too much power.

Another colonial example of a court was New Jersey's combined court after the English acquired it in 1664. Under their English charter, they established a court with three justices and twelve "men of the neighborhood" to hear cases. These "men of the neighborhood" acted as a jury and directed the justices rather than the other way around. The justices were there to advise the jury on the law.[7] This idea was discussed later at the Constitutional Convention, that there was a need for an educated judiciary. There were no formal requirements to become a judge or justice, and they could serve their terms unimpeded during "good behavior." But the requirements were hidden between the lines. The Framers pointed out that the rule of law requires understanding that may not be achieved by those in the other two branches.

The establishment of a judiciary system was often not on the list of priorities of a new colony, especially some of the smaller ones. Historian George Athan Billias, wrote that "There was little room for lawbooks in the baggage of departing emigrants who might as well allot the precious space to a Bible."[8] The only exception to this rule is Georgia, where the founders created a court

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[6] William Edward Nelson, *The Common Law in Colonial America*, Vol. 2 (Oxford: Oxford University Press, 2013), 30-31.
[7] The Charter or Fundamental Laws, of West New Jersey, Agreed Upon, 1676.
[8] George Athan Billias, ed. *Law and Authority in Colonial America* (Barre, MA: Barre Publishers, 1965), vii.

and even provided for judge's robes early on.[9] This likely is because of Georgia's early goal of housing debtors and social criminals. The other colonies found no need to establish a court system in the face of so many other issues. During this colonial period in the early 17th century, the leader of the settlement, whether that be the proprietor or royal appointed governor, often settled any issues on an individual basis. For example, the Governor of West Jersey, Thomas Olive, doled out justice sitting on a stump in his meadow during the early years of West Jersey's English colonial history. So long as the colonies were small in size and population, this system worked. The English monarch gave the governors the power to create courts, but many early governors felt that the work needed to establish and staff them outweighed the benefits courts could provide. Instead of creating courts, governors presided over any issues that came up, sometimes with a council. Eventually, the growing colonies necessitated a establishing a judicial system. With more people, more issues arose. Another early assembly with a judicial function in the American colonies was the House of Burgesses of Virginia, which heard its first case in 1619 upon its first meeting. More assemblies, including one in Maryland, also began hearing cases. Eventually, the amount of work became unsustainable, these assemblies gave up their claim to judicial power in much of the colonies.[10] It is important to note that the British Privy Council could strike down any laws or judgements of colonial courts if it found them in conflict with British law or an attempt to curtail the Council's power.

The British Privy Council is an advisory committee to the monarch of England. It is often made up of senior members of Parliament and other leading figures of Britain. It advises the monarch on his or her power and the granting of royal charters. It could also issue its own

[9] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 257.
[10] Ibid. 258-259.

executive orders, otherwise known as Orders in Council. During the early years of the colonies, the Privy Council rarely overruled the colonial governments. The colonies were small and not as economically important as other colonies, so the Privy Council did not take a keen interest in their proceedings. As the colonies grew and started producing more for Great Britain during the 17th and 18th centuries, the Privy Council took more interest in making sure the colonies' laws were in accordance with British common law and interests.[11] Examples of this interest include the Navigation Acts, a series of laws beginning in 1651 that made it illegal for colonial ships to operate without an English owner, master, and a majority English crew. This increased surveillance of colonial activities created resentment of the British government for many colonists.

During the Colonial Era, the courts were very important to the governance of the colonies. They were essential not only to try and to punish criminals, but also to mediate disagreements. Regardless, the courts were far from perfect. The issues of the courts of England were passed to the colonies. During the early colonial period, the judiciary in England was struggling to begin its independence and establish clear boundaries between the different courts. The colonial assemblies of America could not create their own courts. The Governor had to either be commissioned or receive specific instructions to create courts, meaning the courts were often left alone to evolve, leading to a jagged court system.[12]

Another issue was the lack of an independent judiciary. In the colonies, the functions of the executive, legislative, and judicial branches were interchangeable between the branches. All three branches had a role at one point in the judicial process. People could hold several positions

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[11] Dudley Odell McGovney, "The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto," *University of Pennsylvania Law Review*, Vol. 94, No. 1 (1945), p. 59.
[12] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 253-258.

in different branches simultaneously, and divisions between the different courts were unclear.[13] The lack of distinctions between the branches of the colonial governments left the new judicial systems disjointed and susceptible to corruption. Many of the officers of the court also functioned as members of the various assemblies, or other legislative branches. The lack of educated, white males meant that they often had to play double duty, meaning there were very few people who had the keys to power, both judicially and legislatively. This issue lasted into the colonial period. For example, the General Assembly of Virginia did not lose its appellate jurisdiction until 1682, by order of the King. Virginia's system was especially entangled, as the Governor was also granted the ability to sit on the chief trial court for the entire colonial period.[14] While the General Courts of Virginia did stick to British common law closely (to be discussed later in this chapter) they deviated in structure. Instead of the traditional British system, the court system in the colony of Virgina consisted of one central court and multiple local courts that could establish their own rules and rule over civil and criminal cases. This caused a few issues, as the rules and laws became haphazard.[15] The Framers directly addressed this issue and fixed it by creating a clear system that both separated the branches of government and established a set of rules for each, namely that federal law and the Supreme Court's rulings always superseded state law and state courts.

The judiciary of 17th century England had the same issue. The lack of an organized court system in the colonies created numerous issues. All the courts in the colonies were established differently and with different rules. The judicial structures had differing origins for their

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[13] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 253.
[14] Ibid. 261.
[15] William Edward Nelson, *The Common Law in Colonial America*, Vol. 1 (Oxford: Oxford University Press, 2008), 39.

authority, including royal chatters, commissions, and colonial action.[16] Courts had irregular procedure, had different session terms, and were subject to many delays.[17] The courts were also poorly staffed, since there was not an established system of training judges in the colonies as there was in England. The institution of law in colonial America suffered because of a lack of educated lawyers and judges present in the colonies, especially in the earlier years. Additionally, it was difficult to convince those present in England to move to the colonies, where new diseases, Native Americans, and the untamed wildlife were very real threats. For those that did make the journey, they often came into a situation that was impossible to fix. When trained judges came from England, they were likely to find themselves among very different systems. Jurisdictions, number of courts and justices, and level of common law adapted varied widely from one colony to another. There were too many variances for one trained judge to make uniform. These variances made it difficult to uphold a standard of justice through the colonies, allowing corruption, long delays, and injustice to flourish. The numerous issues of the Colonial Courts provoked many complaints to Parliament. By the end of the 17th century, the British government had become concerned. In 1700, a pamphlet was presented to the British Council of Trade and Plantations to inform them of the issues present in the colonial courts. The author posited that proceedings were dragged out to run up costs, courts did not sit as often as necessary to clear their dockets, and that the lack of uniformly educated justices meant that justice was doled out incorrectly and confusedly. The author suggested that a Chief Justice be sent over from England, a suggestion that had been made many times by other concerned colonials. This suggestion was taken in the next few years in various colonies, though it did little to fix the

[16] Anthony J. Bellia, "The Origins of Article III 'Arising under' Jurisdiction," *Duke Law Journal*, Vol. 57, No. 2 (2007), p. 276.
[17] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 254.

problems. As a result, a report was requested by the British Council of Trade and Plantations in 1703 to be given by the governors of Maryland, New York, Virginia, New Jersey, Massachusetts Bay, and New Hampshire that covered the judicial proceedings of their colonies. These reports specifically requested the governors to see that justice was impartially administrated and that judges executed justice quickly and without corruption. Then the English government required those governors to send summaries of all the proceedings of their courts in perpetuity to the British Council of Trade and Plantations. Unfortunately for the British government, this practice of sending these reports ceased within a few years, regardless of it being required. Instead, these reports began to be included in the overall general account of the colony. After the 1720s, the Board of Trade clearly lost interest in keeping an eye on the American colonial courts, as they did not protest when the exhaustive reports on the colonies instead became footnotes in the general account.[18]

In Massachusetts Bay, common law was only the infrastructure of the courts for the first few decades of its existence. From 1628 to 1660, it was Puritan values and communitarianism that inspired the law of the Massachusetts Bay Colony. Motivated by growing sentiments of imperialism and mercantilism, it was in 1660 that England began taking a closer look at Massachusetts Bay's legislation. The English government discovered that common law was not the system that Massachusetts operated under and began pressuring the colony to adopt it.[19] After 1660, Massachusetts Bay began gradually accepting more common law procedure from England, in an attempt to appease London.[20] This was pretty superficial, as the only major

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[18] Erwin C. Surrency, "The Courts in the American Colonies," *The American Journal of Legal History*, Vol. 11, No. 3 (1967), p. 256-257.
[19] Bradley Chapin, "Written Rights: Puritan and Quaker Procedural Guarantees," *The Pennsylvania Magazine of History and Biography*, Vol. 114, No. 3 (1990), p. 338.
[20] William Edward Nelson, *The Common Law in Colonial America*, Vol. 3 (Oxford: Oxford University Press, 2016), 69-70

changes to justice in the colony was the acceptance of the writ system and the dismissal of pleas on technical grounds.[21] Otherwise, until the mid-1680s, religious values had a much larger role in Puritan justice than it did in England, or many other colonies that more effectively adopted British common law. As late as the 1680s, the courts fined people for missing church.[22] The justice system in Massachusetts Bay often promoted religious practice over actual justice, and judges were often biased in favor of biblical rules, rather than the rule of law. For example, a woman in Massachusetts Bay Colony was prosecuted for "keeping a disorderly house in her husband's absence."[23] Obviously, had British common law been the law of the land, there would have been no way to charge a wife with a "disorderly house" as that would not be considered crime under common law as it was under the Bible. In 1684, the charter for the Massachusetts Bay Colony was revoked, partially because of their justice system. It was absorbed into the Dominion of New England in 1686, and received new Courts of Common Pleas, General Sessions, and a Superior Court of Judicature with this change. This union collapsed in 1689, with the Glorious Revolution in England, and Massachusetts Bay began operating again under the old system. In 1691, they received a new charter, again becoming a royal colony, with a royal governor and the common law courts. This chaos was the backdrop of the Salem Witch Trials and may provide some context for that anarchy too.[24] Religious influence on the justice system continued, but to a lesser extent as Britain became more invested in the success of their colonies. The Colonies struggled to create the jurisdictions for their courts. They attempted to set up courts with general jurisdiction, the power to hear cases that had not been heard yet. The courts in

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[21] Ibid. 82.
[22] William Edward Nelson, *The Common Law in Colonial America*, Vol. 3 (Oxford: Oxford University Press, 2016), 74.
[23] Ibid. 79.
[24] William Edward Nelson, *The Common Law in Colonial America*, Vol. 3 (Oxford: Oxford University Press, 2016), 83-84.

England, the Kings Bench, and the Court of Common Pleas, are courts with general jurisdiction and the colonies attempted to recreate their system in their own backyard. They also limited their jurisdiction in the same way that Parliament and the Monarch in England did. Courts in England were limited to cases that originated in the territory in which the case arose. This is called trial by jury in the vicinage, established in the Magna Carta. Other matters considered when referring cases include the related subject matter of the case, the character of the parties, the kind of action involved, and the source of the law that would govern the case. The colonies attempted to limit their jurisdiction in the same way. Later, the Framers considered these jurisdictional guidelines when creating the authority for the future Supreme Court. When the Constitution and Article III was being written, all the factions called for a court of limited jurisdiction. The Declaration of Independence specifically cited Britain expanding its court's influence too far as justification for rebellion, stating that they had "expanded beyond their ancient limits."[25] In many colonists' minds, it was their right to punish their own criminals or "disorderlies," as they had their own courts. The overextension by the British, including transporting British officials to London to be for crimes they had committed in the colonies, frustrated colonists greatly and laid the groundwork for rebellion.

Because the Monarch or the Privy Council had rarely exercised their power over the colonies prior to the end of the French and Indian War, many Patriots (those that wanted independence from Britain, or at least less interference in the colony) felt that these were the limits that were established. After the French and Indian War, when Britain got more involved with colonial government, the Patriots felt that they had expanded their reach beyond what was established in the past. The Resolutions of the Continental Congress made clear their feelings on

[25] A Declaration by the Representatives of the United Colonies of North America, 1775.

British courts, that their unwieldy expansion subverted the rights and liberties of the colonists they were supposed to serve.[26] So, after gaining independence, the priority as it pertained to a judicial branch was creating one that could not do this, one small enough that it could be controlled but big enough that it could control its jurisdiction. Unfortunately, the solution of the newly independent patriots was to eliminate the judicial branch entirely, leaving this to the states. The Articles of Confederation, our first Constitution, did not attempt to create a federal judiciary.[27]

In the decade before the American Revolution, another court is important to examine: the Vice-Admiralty Courts. The Massachusetts Vice-Admiralty Court was the one of the primary enforcers of the Acts of Trade, which infuriated the colonists.[28] In fact, the Declaration of Independence mentions these courts as a prime source of agitation, accusing George III with "depriving us in many cases of the benefits of a Trial by Jury" as these Vice-Admiralty courts were juryless.[29] These courts were quite active until around 1733. This decline in activity could be attributed to British Parliament's grant of jurisdiction of evasions of the Molasses Act to the Vice-Admiralty Courts. This began a trend of harsher inspection of crime in the colony, one that was done by British judges without a colonial jury. By 1760, England fully abandoned the policy that had assured colonial cooperation, lax enforcement. The American Act of 1764 tightened the grip that Britian had on the colonies and transferred all violators of the Acts of Trade into the Vice Admiralty Courts' jurisdiction. This included the Stamp Act, even though all offenses of the act were committed on land. The British giving more power to juryless courts in America,

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[26] Resolutions of the Continental Congress. 1765.
[27] Christine Sellers, "The Articles of Confederation: The First Constitution of the United States: In Custodia Legis," The Library of Congress, September 16, 2011, https://blogs.loc.gov/law/2011/09/the-articles-of-confederation-the-first-constitution-of-the-united-states/.
[28] George Athan Billias, ed. *Law and Authority in Colonial America* (Barre, MA: Barre Publishers, 1965), 32.
[29] A Declaration by the Representatives of the United Colonies of North America, 1775.

while giving their homeland citizens the benefit of the Court of Exchequer (which had four to twelve common law judges presiding over cases) caused much controversy for colonists. It was this, and for other reasons, that they decided to declare independence in 1776. The British Vice-Admiralty Court was clearly overstepping in the colonists' opinion. This may be why the Supreme Court that was written into existence in 1787 accounted for a jury in all crimes (except in cases of Impeachment).[30] The Patriots, many of whom became involved with the writing and signing of the Constitution, spurned the idea that any American would be forced to rely on one judge (and a non-American one) for justice.

So, the colonial courts, the British Vice-Admiralty Courts, and the general courts of the early colonies, had something in common; they all failed or created intense controversy in some way. The colonial courts were disorganized, corrupt, and oftentimes staffed by men who lacked a legal education. The British Vice-Admiralty Courts were organized, but juryless and had a corrupt and confusing jurisdiction. The general courts of the early colonies could only sustain themselves as long as those colonies remained small in size and population. The failures of all these courts inspired the Framers to create a Supreme Court and judiciary system that had a clear jurisdiction, was made up of multiple educated justices, guaranteed trials by jury, and could grow with the new country, especially after the Articles of Confederation further proved that a federal court system and standards were necessary. Oliver Ellsworth wrote in 1787, that it was impossible to enforce the legislation of the new nation under the Articles of Confederation, because of its lack of judiciary.[31]

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[30] U.S Constitution, Article III, 1787.
[31] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 49.

The courts present in the colonies must have had some success if the Framers saw any value in establishing a judiciary in their new country. Indeed, there was some success found in the courts of the American colonies. The closest thing to the US Supreme Court was the Privy Council and its King in Council. This was the last resort option for colonial judicial appeals. The relationship between the Privy Council and the colonies mirrors the relationship between the states and the United States Supreme Court of today. This is especially true considering that the Privy Council was practicing a form of justice comparable to the power later given to the Supreme Court of the United States, the power to declare invalid the act of another inferior legislature and/or judiciary. The appeals to this system were rare, as cases had a high bar to clear to even be considered to appear before the monarch and their Privy Council. Specifically, these cases must involve "(1) regulations of the home government affecting appeals, as expressed in orders of the king in council and in commissions and instructions to the colonial governors; (2) colonial charters and grants from the crown; and (3) laws passed by colonial legislatures affecting appeals."[32] When colonial cases did appear in front of council, they were decided relatively quickly, unbiased, and without complaint by the colonists.[33] Since this system seemed to work so well, it could be argued that it inspired the Framers to set up the Supreme Court as they did, especially considering the similarities between the two systems. When discussing setting up the federal judiciary, the Framers debated about the British and colonial systems, taking lessons from both. These lessons are reflected in the carefulness with which the Framers set about making the federal judiciary, disconnecting it from the other two branches, making the

[32] Arthur Meier Schlesinger, "Colonial Appeals to the Privy Council. I," *Political Science Quarterly*, Vol. 28, No. 2 (1913), p. 279-280.
[33] Arthur Meier Schlesinger, "Colonial Appeals to the Privy Council. II," *Political Science Quarterly*, Vol. 28, No. 3 (1913), p. 450.

judges tenure and payment not reliant on the legislature, creating clear jurisdictions, and more all to prevent the problems that England had been and was having.

Even the earliest colonial courts held some value. The General Court of Virginia (though lacking separation of branches) began as a puppet of the Virginia Company, but over time turned into a true common law court. In order to persuade British people to come settle in Virginia, the Virginia Company proclaimed in 1619 that settlers would live under the same laws as Britons did in England. Over the next few decades, in spite of the Virginia Company's protests, the General Court continually followed British common law, even reversing prior decisions that violated it. By the 1660s, the judges of the General Court requested a British law book, to adhere to British common law more accurately.[34] There were differences in court structure that were necessary because of the size of the colony. These differences included number of justices of the peace, number of courts, and types of courts. But clearly, British common law had some value and also could be adapted successfully (with some changes) to function in the American colonies.

The court system in Pennsylvania was successful from the beginning. This success can be attributed to its early adoption of common law. Pennsylvania was founded like Maryland and Plymouth as a religious sanctuary, for Quakers specifically. Pennsylvania quickly established a complex court system and a legal profession. A court actually existed in the area before William Penn received his charter, created by the Swedes and Danes that occupied the area first. This helped Penn, as there was already a system to build on there. The power of the court and the colony grew with the establishment of Philadelphia in 1682. Philadelphia became a center of

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[34] William Edward Nelson, *The Common Law in Colonial America*, Vol. 1 (Oxford: Oxford University Press, 2008), 26-29.

commerce and commercial litigation, and this attracted the very first English-trained lawyers to settle in the American colonies.[35] This system promoted stability, which promoted wealth, wealth that was protected by the legal and social stability that the common law courts brought. The system present in Pennsylvania was different than other colonies because it had little interest in the daily lives of its subjects. The court and the law there had little interest in control, instead focusing on facilitating economic development and on ensuring the rights of the inhabitants of the colony. The court and the law in Pennsylvania were successful in both.[36] The success of the Pennsylvania system proved the importance of educated lawmen, a lesson later taken by the Framers, who discussed many times during the convention the necessity of educated lawmen. Maryland also adopted a common law system early on, only a year after its founding. In 1635, Maryland adopted common law and began to establish a complex court system modeled on England's. Like other colonies, it consisted of one central court and local county courts. But, unlike other colonies, Maryland also hosted manorial courts.[37] Manorial courts were the lowest courts of law in England during the feudal period. The jurisdiction of these courts was civil matters that occurred or involved a lord of the manor or those who lived on the lands of the manor.[38] A legal profession was established in Maryland as early as the 1650s, and the provincial courts began to be admitted formally to the practice. The jury was also present early on in Maryland. From the second month of court records, there was a grand jury present. Common law vocabulary and doctrines litter Maryland's court records and statutes. Clearly, the adoption of common law was a priority for the colony of Maryland. But there were certain parts of the

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[35] William Edward Nelson, *The Common Law in Colonial America*, Vol. 2 (Oxford: Oxford University Press, 2013), 99-103.
[36] Ibid. 122-123.
[37] William Edward Nelson, *The Common Law in Colonial America*, Vol. 1 (Oxford: Oxford University Press, 2008), 106.
[38] Editors of Encyclopedia, "Manorial Court," *Encyclopedia Britannica*, February 15, 2007, https://www.britannica.com/topic/manorial-court.

common law that existed in England that were unnecessary and inconvenient for the colonists to adopt. For example, Maryland did not have a separate chancery court, rules governing time for appeals, and sometimes the judges and juries outright ignored common law procedure in certain cases.[39] It's clear that Maryland adopted the common law quickly but adjusted it for the colony's need. Indeed, it took Great Britian many years to come to the common law system that existed at the onset of the American colonial period. It would be foolish to think that it was possible for Maryland, or any other colony, to adopt the system in its entirety without the time, wealth, or population to support it. Instead, Maryland, Pennsylvania, Virgina, and other colonies adopted the common law to their benefit, ignoring the common law procedure, structure, and institutions that did not suit them.

Those people that did travel to the American colonies found a patchwork system that was difficult to discern. From the beginning, colonies were established by different methods (royal charters, proprietary colonies, etc.) with different goals (profit, haven for outcasts, glory), so it tracks that the systems within those colonies would be widely different. When creating a judiciary in their new nation, the Framers looked at the experiences of their colonial ancestors. The influence of successful colonial judiciaries is clearly seen in Article III. The best judicial systems were based on juries, of common people or judges, therefore the Supreme Court was to be a jury of judges, and all trials (excluding impeachment) were conducted in front of jury. The best judicial systems had clear original and appellate jurisdiction, so the Framers clearly spelled out the Supreme Court's. The best judicial systems had educated judges, who were uncorrupt and independent, so the Framers spelled out that judges could only hold office "during good

[39] William Edward Nelson, *The Common Law in Colonial America*, Vol. 1 (Oxford: Oxford University Press, 2008), 106-111.

Behavior."[40] The successes and failures of the colonial courts were lessons that the Framers looked to when creating Article III.

[40] U.S Constitution, Article III, 1787.

Chapter III: The Articles of Confederation & The Constitutional Convention

As the American Revolutionary War waned, the need for a governmental system was apparent. The answer in the moment was the Articles of Confederation (1781-1789). The Articles of Confederation heavily leaned away from federal systems, as the authors feared that a federal government would quickly become another form of tyranny. This is demonstrated by the extreme lengths the authors of the Articles of Confederation went to assure each states of "its sovereignty, freedom, and independence" and to assure that no one state could have more power than another. Each state had one vote, regardless of size or wealth, and no miliary action could be taken without nine out of the thirteen states approving.[1] To prevent another monarchy or another tyrant like King George III, the Founding Fathers went to the other extreme. The Articles of Confederation made the national government as weak as possible. Quickly, it became clear that the Articles were not strong enough to hold against the issues present in the new nation. Unfortunately for the new nation, the disjointed states were insecure, conscious of their own interests, and had different ideas for reform.[2] Very quickly, it became clear that the Articles were insufficient to resolve the difficulties in the new nation. The new Congress was unable to compel the states to provide them with funds or men to staff the Continental Army. They were unable to ratify the 1783 Treaty of Paris for months after it was informally agreed upon because they were unable to compel congressmen to attend Congressional meetings. Events like Shays' Rebellion proved that something new was needed. A group of elite politicians known as the Nationalists

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[1] Articles of Confederation, 1781.
[2] E. Allan Farnsworth and Steve Sheppard, *An Introduction to the Legal System of the United States* (Oxford: Oxford University Press, 2010), 5

called for a convention to try to amend the Articles. That call failed. They called for another convention that turned into something quite different from what anyone expected.

The Constitutional Convention held in Philadelphia, Pennsylvania from May 25th to September 17th, 1787, outlined the Supreme Court of the United States. Article III of the Constitution exclusively covered the judicial branch of the new United States government. The Constitutional Convention was made up of fifty-five delegates from each of the states, excluding Rhode Island, but including famous figures of the American Revolution such as George Washington, Benjamin Franklin, and James Madison. The delegates debated on many issues that were affecting the new nation under the Articles of Confederation, including the various judicial issues that arose because of the lack of a federal judiciary.

The need for a federal court was seen clearly during the years under the Articles of Confederation. The Articles were written during the years of the American Revolution, when there was a real possibility that America would remain under the tyranny of King George III and the British Empire. Therefore, the Articles of Confederation provided no federal courts and left the judiciary dealings to the states exclusively. The Articles in regard to state disputes provided that, "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever;"[3] This meant that there was no federal law or federal system for justice, with only a few systems for specific disputes. A Congressional committee handled any disputes involving the high seas or disputes between states.[4] State officials handled piracy cases.[5] States could petition Congress for a special

[3] Articles of Confederation, 1781.
[4] Articles of Confederation, 1781.
[5] John P. Frank, "Historical Bases of the Federal Judicial System," *Law and Contemporary Problems*, Vol. 13, No. 1 (1948), p. 8.

commission to hear interstate issues when they arose. Unfortunately for Congress, by 1780, this system was overwhelmed with petitions from states.[6] This commission was overall a failure, as of the six cases noted in the journals of Congress, only one made it to the final judgement, and the others were dropped or settled by the states because of the inefficiency of the commission.[7] Though, the commission did manage to resolve one notable case between Pennsylvania and Connecticut, averting an interstate war over Wyoming lands.[8] This lack of a federal judiciary left states to deal with their own disputes. If they could not figure it out among themselves, it was referred to Congress. As there was no federal judiciary, there was nowhere that citizens could file a complaint against Congress or the national government. The lack of a federal system meant that there was no forum of nationwide change, and this quickly became an issue. The Articles of Confederation failed to create a judicial system and that proved unsustainable in the new nation. A new government was needed, one that included a more judicial system.

A new faction, the Nationalists, began campaigning for a genuine national government. George Washington, Alexander Hamilton, and James Madison were members of this faction. They advocated for Congress to call for a Constitutional Convention in 1787. A combination of many issues, including economic problems and Shays' Rebellion, assured the Nationalists that the growing nation needed a stronger central government. The debate then became how much stronger that government should be. Those who disagreed with the Nationalists advocated for a small government, and a small judiciary, resembling the Articles. The non-Nationalists argued that the state courts could enforce national law. Many Nationalists later turned into Federalists at

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[6] William F. Swindler, "Our First Constitution: The Articles of Confederation," *American Bar Association Journal*, Vol. 67, No. 2 (1981), p. 169.
[7] William F. Swindler, "Our First Constitution: The Articles of Confederation," *American Bar Association Journal*, Vol. 67, No. 2 (1981), p. 168-169.
[8] John P. Frank, "Historical Bases of the Federal Judicial System," *Law and Contemporary Problems*, Vol. 13, No. 1 (1948), p. 8.

the Convention. The Federalists argued that a strong central government, a huge overhaul from the Articles of Confederation, was needed not only to address issues but to create a thriving nation. They argued that a federal court needed to be established to effectively deal with interstate conflict and other miscellaneous issues involving the high seas and national officers.

Even if there was a clear need for a federal judiciary, there were many other more important questions on the Framers' minds than the creation of one.[9] Echoing the thoughts of the colonists that first arrived in the new North American colonies, there were more important things to do when setting up a government than merely create a judicial system, such as establishing an executive and a legislative branch. The eventual Article III is the shortest of the three branch articles, by a large margin, reflecting that the framers' focus may have been on the other branches. Nonetheless, the Framers did have many issues to discuss about the judiciary during the convention.

The Framers' background informed their feelings about a federal judiciary. Many of the Framers were lawyers, had studied law, or were somehow involved in the justice system. One of these Framers was James Wilson. James Wilson was instrumental in creating the Supreme Court. He is often referred to as the "spiritual leader" of the Constitution, with James Madison as the Father.[10] James Wilson was born in Scotland and immigrated to the American colonies in 1765 at 23 years old. He studied law under fellow Patriot John Dickinson. The Pennsylvania law society held him in high regard.[11] Wilson established himself as a Patriot by writing and distributing a pamphlet in 1774 that denied Parliament's authority to pass laws on internal colonial matters. He

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[9] John P. Frank, "Historical Bases of the Federal Judicial System," *Law and Contemporary Problems*, Vol. 13, No. 1 (1948), p. 3.
[10] Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760-1840* (New York: Basic Books, Hachette Book Group, 2021), 211.
[11] Mark D. Hall, "James Wilson: Democratic Theorist and Supreme Court Justice." In *Seriatim: The Supreme Court Before John Marshall*, edited by Scott Douglas Gerber (New York: NYU Press, 1998), 127.

was a fierce advocate of democracy and aimed to include the people in as much as possible.[12] His Scottish identity did influence him, and some scholars argue that Wilson helped model Article III on some Scottish legal teachings.[13] While the Scottish court system has some similarities to the one built in Article III, there is little evidence that Wilson intentionally argued for Scottish influence when forming Article III. The Framers were looking primarily to English legal doctrines when forming Article III. James Madison is often said to be a "demi-lawyer" because he studied law but never entered the bar or held legal office. Madison independently studied law, reading Coke and Blackstone. He believed in "law through legislation" rather than the courts. This may have informed his decision to support giving the legislative branch power in appointing judges.[14] John Dickinson, James Wilson's legal tutor, was also a leader during the Constitutional Convention. He was trained at the Inns of Court in London. Upon his return to Pennsylvania, he opened what became one of the largest legal practices in the colony. The Second Continental Congress chose John Dickinson to serve as the chairman of the committee that drafted the Articles of Confederation.[15] John Jay was the first chief justice of the United States Supreme Court. He began to study law in 1764, clerking under Benhamin Kissam, a prominent lawyer and politician of the day. He was, eventually, a major supporter for the quest for American independence, as he believed that that Britian was "forging chains" to enslave the colonists."[16] But, Jay always preached moderation, and at certain points supported more reconciliatory

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[12] Nicholas Pederson, "The Lost Founder: James Wilson in American Memory," *Yale Journal of Law & the Humanities*, Vol. 22, No. 2 (2010), p. 259.
[13] James E. Pfander, "Article III and the Scottish Enlightenment," *Faculty Working Papers, Paper 105* (2010), p. 16-17.
[14] Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2017), 118.
[15] William F. Swindler, "Our First Constitution: The Articles of Confederation," *American Bar Association Journal*, Vol. 67, No. 2 (1981), p. 167.
[16] Milton M. Klein, "John Jay and the Revolution," *New York History*, Vol. 81, No. 1 (2000), p. 20.

solutions.[17] He believed that a strong government was needed to administer the American colonies, and this sentiment did not change once America gained its independence. Jay asserted that the Articles of Confederation were too weak to govern the new nation and thus joined the movement for a new Constitution. Jay believed that the Articles of Confederation had no powers to back it up. He wrote:

> they [the Confederation Congress] may partly regulate commerce, but without authority to execute their ordinance--they may appoint ministers and other officers of trust, but without power to try or punish them for misdemeanours--they may resolve, but cannot execute either with dispatch or with secrecy.--In short, they may consult, and deliberate, and recommend, and make requisitions, and they who please may regard them.[18]

These Framers, among others, had strong education in law and knew the value of a justice system for the new nation, they just disagreed on how it should be implemented. The Framers aimed to create a strong nation that could support its citizens without it devolving into a tyrannical system.

The Nationalists argued for a national judiciary, one powerful enough to enforce national law. The debate over the judiciary mainly revolved around not creating a system of corruption or tyranny. The path to do this was separating the branches, specifically separating the judicial and executive branches from the legislative. In England, the judicial system and the judges serving it were agents of the King, not of the law. This connection had to be severed in the new nation to prevent corruption through patronage that had existed in the former colonies and in Britain. Madison argued that "in England, whence the maxim itself had been drawn, the Executive had

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[17] Ibid. 26.
[18] John Jay, An Address to the People of the State of New-York, On the Subject of the Federal Constitution, New York, 1788.

an absolute negative on the laws…In short whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments."[19] By splitting the judiciary from the executive, the Framers created the judiciary as a third branch. The Framers agreed unanimously on June 4, 1787, to a national judiciary, one that consisted of "one supreme tribunal and one or more inferior tribunals."[20] John Jay, the first Chief Justice of the Supreme Court of the United States, put separation of powers best, "Let Congress legislate. Let others execute. Let others judge."[21]

With the judiciary now severed from the other two branches, the remaining issue was how the judges in the judiciary were going to be appointed. Two sides emerged, one that favored the national legislature and one that favored the President as the appointer. James Wilson, of Pennsylvania, argued that the Presidency needed more involvement in the judicial branch. Wilson argued that not only the President should be the appointer, but that the Executive should be able to select however many judges was convenient.[22] Wilson reasoned that a large legislature would produce intrigues that would be detrimental to the judiciary. Others called for more separation between the Executive and the Judiciary. John Rutledge of South Carolina argued that by concentrating judicial appointments in one person's hands, it would inevitably turn the executive into a monarchy.[23] The early British system concentrated the judiciary in the monarch's hands, and the Framers feared that by doing the same, they would create a monarchy accidentally. As discussed in Chapter 1, the monarch as the head of the early versions of the

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[19] Madison Debates, 1787.
[20] Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House Trade Paperbacks, 2009), 159.
[21] John Jay to George Washington, January 7, 1787, in Founders Online (Washington, D.C: National Archives) https://founders.archives.gov/documents/Washington/04-04-02-0427.
[22] Madison Debates, 1787.
[23] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 9.

British judiciary often meant that the court system was easily corruptible, as it was solely in the hands of the monarch. Some Framers worried that the executive would be seduced by the power of the judiciary, just as the British monarch often was. James Madison's Virginia Plan called for Congress to appoint federal judges. On June 5th, Benjamin Franklin proposed a compromise, one that invoked the Scottish way. According to Franklin's plan, the country's lawyers would appoint the judges of the judiciary. Franklin argued that America's lawyers were motivated to elect the ablest of them all, to get rid of their collective competition. This self-interest would assure that the best of the best would serve on the federal bench.[24]

The Connecticut Compromise decided that the executive and the legislature would have a role in the appointment of judges. The President would nominate them, and the Senate would confirm or reject the appointment. Nathaniel Gorham of Massachusetts set forward a plan echoing his own state, with the executive appointing the justices and the smaller branch (in this case the House of Representatives) would approve them. This was the origin of the New Jersey Plan, but Madison suggested the Senate instead of the House as the approving legislative branch. Because the Senate was viewed as the more qualified of the two houses, Madison favored them as the confirmers. Madison believed that the Senate was numerous enough to be trusted, but "not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments."[25] The House of Representatives would be too numerous. In the end, Madison suggested a combination of his and Gorham's plan, and Article III asserted that the President would nominate and the Senate would confirm or reject

[24] Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House Trade Paperbacks, 2009), 236.
[25] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 11.

the justices of the Supreme Court.[26] By using this system, the Judiciary serves at the pleasure of both the people, through the President, and the states, through the Senate (as Senators were originally appointed by state legislatures).

After a short reprieve from the judiciary debates, a new issue emerged among the convention delegates. What role would the judiciary play in the law besides upholding it? What power, if any, would the judiciary have to review the laws that Congress passed, to determine if they were constitutional? James Wilson and James Madison answered these questions. They proposed a "Council of Revision" made up of the President and the members of the judiciary. This Council of Revision would review Congressional and state laws. The Framers feared the state courts and legislatures. Madison, specifically, feared an abuse of power by many state legislatures, and a council of review, made up of the Executive and Judicial branches, would help check unwise legislation. This measure failed, mainly because of the efforts of Nathaniel Gorham, who argued that judges lacked the expertise to try legislation, as they were inexperienced in writing and enacting public policy. Gorham asserted that the Council of Revision would confuse the roles of the two branches too much, and his argument succeeded.[27] William Patterson presented the New Jersey Plan, which was very close to what became Article III. The only difference between it and what was ratified was the lack of a Senate, with it placing judicial appointment under Executive powers.[28] In the end, the delegates to the convention combined the Virginia Plan and New Jersey Plan to become the Connecticut Compromise, which was ratified. The Constitution stipulated that a federal judiciary would consist of at least a supreme tribunal, leaving Congress with the ability to create and staff lower courts. It also

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[26] Ibid. 9.
[27] Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House Trade Paperbacks, 2009), 237.
[28] Plan Presented by William Patterson, 1787.

provided the Senate with the power to confirm presidential appointments to the court. These judges would hold their office during good behavior, meaning there were no term limits on judicial tenure. The Constitution and Article III managed to handle balancing the need for a strong judiciary branch separate from the other two branches, without too much popular involvement.[29] Problems that arose around the judicial branch in Great Britain inspired the Framers. The English Bill of Rights asserted that the judiciary was too connected to the monarch, instead of the people who it served. By tying the new federal judiciary to the people via Congress, the Framers avoided this issue.[30] There was also historical precedent in America for the legislative body creating courts, as the framing for the new colony of Pennsylvania stipulated that the Provincial Council could create courts of justice and pick the officers for the court with a two-thirds majority.[31]

The controversies over the judiciary in terms of ratification was the mode of appointing the judges, the separation of the branches and the distribution of the courts, and the tenure of the judges. Alexander Hamilton addressed these concerns in the Federalist Papers, specifically in Federalist Paper No. 78. The Federalist Papers is a collection of 85 essays written by Alexander Hamilton, James Madison, and John Jay under the pseudonym "Publius." Pseudonyms were common in 18th-century America, especially those that have Hellenistic connotations, because authors wanted readers to focus on what they wrote and their ideas, not who wrote the ideas. The papers were written to promote the ratification of the Constitution in New York state. There were also various other publications arguing against Article III at the time of ratification, the most famous of which was the letters of "Brutus."

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[29] Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House Trade Paperbacks, 2009), 159.
[30] English Bill of Rights, 1689.
[31] Frame of Government of Pennsylvania, 1682.

Hamilton's Federalist Paper No. 78 asserts that the whole point of the separation of powers is that the branches are equal. Hamilton fought criticisms that the judiciary would overpower the legislative branch. The judges would decide based on fundamental law, not the will of the legislature, he argues. But the legislative branch has the power to appoint lower federal courts and judges and the Senate the power to confirm or deny appointments to the Supreme Court. The court has the power to give validity to statutes they decide coincide with the Constitution. They could also strike down statutes they see as going against the Constitution. Hamilton argues that this push and pull between the legislative and the judicial branch is for the betterment of the people and that it assures that the Constitution is upheld over anything else.

Hamilton asserted the need for longevity in the independent judiciary, claiming that the judges have to be permanent if they were to check Congress. In Federalist 78 Hamilton states,

> "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."[32]

Hamilton also argues that the sheer number and nature of the qualifications that the Supreme Court requires of its justices lends itself to permanence in their tenure. While the Constitution sets forth no qualifications for potential justices, in order for the President to select a judge and the Senate to confirm that judge, that person must be qualified. It is the option between temporary duration and qualified justices and judges. He acknowledges that there are disadvantages to a permanent tenure, but that the potential of appointment to less qualified

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[32] Alexander Hamilton, *The Federalist Papers No.78*, 1788.

individuals is a much greater risk. Hamilton also supports permanent tenure by pointing to the political risk of temporary office. If justices felt at risk or indebted to the executive or legislative branch for their continued job within the court, they might be bound to people within the government rather than the rule of law and the Constitution. The independence of these judges is paramount to guard the Constitution. While the courts of England were bound to the ever-changing whims and caprice of a monarch, the Supreme Court and the lower courts are bound to the Constitution. Judges hold their offices "during good behavior," and are therefore bound to the rule of law, not to the people or the other branches.

The biggest critic of the judiciary during the ratification period was Brutus, likely New York Anti-Federalist Robert Yates. The letters of Brutus, published in late 1787 and early 1788 asserted that he found the Supreme Court to be the most dangerous part of the Constitution. Brutus feared that the state courts would wither away in face of the new Supreme Court. He believed that the Supreme Court and potentially Congress would collude to eliminate state governments to create one nation under one government. By creating a jurisdiction that he believed was too broad for the federal courts, the Framers guaranteed that as the Federal government grew stronger (and this was inevitable to the Anti-Federalists) the Federal Courts would overtake the state courts. Brutus speaks on the separation between the communities and citizens the Supreme Court would judge and the justices themselves. He argued that the states should have original jurisdiction in all cases except those allowed for in the Constitution. Original jurisdiction is the right of a court to hear a case before any other court. Blackstone argued for a court system that brought "justice to every man's door" and Brutus echoed him.[33] Brutus argued that the Supreme Court could not possibly do that because it was built to try

[33] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768) 249.

causes from across the United States, and in a period where travel was difficult and long, the Supreme Court could not bring justice to everyone quickly and correctly.[34] The Supreme Court have a stationary seat with the seat of government, and those who would wish to try a case before the justices would have to travel to them. Brutus declares that this means that the more wealthy and powerful citizens of the new country would have advantages in their cases and even the decision to try their cases.[35] Brutus also argues that by placing their tenure as indefinite during "good behavior" the people and other branches have no ability to check them. This, Brutus says, means that there is no power above them, and they may feel no attachment to even the Constitution. He warns, "Men placed in this situation will generally soon feel themselves independent of heaven itself."[36] Brutus was worried that the Supreme Court was too supreme and would eventually overrule the state governments via its large jurisdiction. He also worried that the tenure of the justices being permanent "during good behavior" would lead to those justices overtaking their given powers. If justices did step out of good behavior, Congress retained the right to impeach them. The House has the right to bring charges against justices, and the Senate has the right to try those charges.

Brutus also feared that the Supreme Court had too few guardrails to prevent it from fundamentally changing the constitution. In his own words, "this power in the judicial, will enable them to mould the government, into almost any shape they please."[37] If the justices decided a law was unconstitutional, there was no appealing the decision to a higher court nor could the legislature overturn it. What if the Supreme Court made the wrong decision or

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[34] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 27.
[35] Brutus. "Brutus 14". Essay, February 28-March 6, 1788.
[36] Brutus. "Brutus 15". Essay, March 20, 1788.
[37] Brutus. "Brutus 11". Essay, January 31, 1788.

interpreted the Constitution wrong, whether that be for their own ends or from a simple misunderstanding? It could not be corrected, nor could the justices be removed from office. With these powers, Brutus argued that the judiciary would certainly start steering the constitution away from its intention and shape it differently. Based on a few of the later decisions made by the court, such as *Plessy v. Ferguson* (1896) or *Dred Scott v. Sandford* (1857), Brutus was correct to worry that the Supreme Court was capable of both very important and erroneous decisions.

There was also debate over the jurisdiction of the new Supreme Court. Because the Constitution did not specify the jurisdiction for the lower courts, their role in relation to the Supreme Court was unclear. The goal was to create a Court with jurisdiction that was strong enough not to be curtailed by the other branches, but not too strong as to overtake them. The worry was that the federal judiciary would unfairly defer state rulings or laws. The Framers "set out competing visions of a court system that established uniform federal justice and one that deferred to state courts on all but essential federal questions."[38] The Anti-Federalists worried that the judiciary could threaten the existence of the state courts, and even the state governments. William Smith of South Carolina was anxious that the Supreme Court and their justices would weaken the importance and authority of the state and inferior court judges if the Supreme Court was allowed to keep their power over Writs of Error.[39] Writs of Error allows for higher courts to direct inferior courts to review cases for mistakes during trial. The Framers solved this worry by outlining the specifics of the court's federal jurisdiction and then leaving the rest of the residual

[38] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 4.
[39] Charles Warren, *The Supreme Court in United States History* (New York: Cosimo Classics, 2011), 11

powers to the states or to the people.[40] Though, the point on "inferior tribunals" was reversed. There was now no inferior courts to split the federal judiciary, at least in the Constitution. The proposal agreed on in the end was to give Congress the power to "ordain and establish" any inferior courts as needed.[41] This gave Congress the freedom to experiment with the court system, and to allow it to grow with the new nation.[42] This proposal gave Congress the ability to organize the federal court system and tied the two branches closer together.

The limited jurisdiction that existed in the British courts, and eventually in the Colonial Courts, influenced the writing and implementation of the Supreme Court's jurisdiction in the Constitution and the Judiciary Act of 1789. The jurisdiction given to the Supreme Court in the Constitution and the Judiciary Act of 1789 is specifically those cases,

> arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[43]

This is the Supreme Court's original jurisdiction. The subject matter of the case, character of the parties, and the kind of action brought can be seen in Article III. For the Supreme Court to hear

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[40] E. Allan Farnsworth and Steve Sheppard, *An Introduction to the Legal System of the United States* (Oxford: Oxford University Press, 2010), 46.
[41] U.S Constitution, Article III, 1787.
[42] E. Allan Farnsworth and Steve Sheppard, *An Introduction to the Legal System of the United States* (Oxford: Oxford University Press, 2010), 45.
[43] U.S Constitution, Article III, 1787.

cases they must be affecting federal law, statues, or treaties, according to the Judiciary Act of 1789 and Article III. The federal judiciary only has original jurisdiction on cases that deal with federal matters. It also matters the source of the law, whether the case applies to federal law or not. The character of the parties also matters, whether the parties are two different states, citizens of different states or ambassadors determines if the federal courts can hear the case. Many colonial courts also established "amount-in-controversy" requirements, meaning that a case must involve a certain amount of money to progress to a higher court. While this was not given to the jurisdiction of the Supreme Court, the Judiciary Act established that in order to be heard federally, a case must involve at least $500 in damages.[44] The Convention and the Constitution established a direct link between the courts of England, to the courts of the colonies, to the Supreme Court and lower tribunals. The courts of England had an established jurisdiction outlined by the monarchs and charters of the courts, same for the colonial courts. The Constitution did exactly what the charters did, by establishing a detailed jurisdiction.

What truly established the Supreme Court, and these lower courts was the Judiciary Act of 1789. The Constitution established a Supreme Court in Article III, but the makeup of said court was left to Congress to decide. The Judiciary Act of 1789 set the number of Supreme Court justices. The Supreme Court has original jurisdiction over cases on the high seas between states, or in any cases that involved a state as a party established in Article III. Also, the Act established federal circuit courts. The Supreme Court was given appellate jurisdiction over the inferior federal courts and over the state courts in specific instances. Appellate Jurisdiction is the power of a higher court to review a lower court's decision. The Framers aimed to create a federal judiciary with both personal judicial independence for the judges and jurisdictional independence

[44] Judiciary Act of 1789, 1789.

for the whole federal judiciary.[45] The Framers declared in Article III of the Constitution that there would be a Supreme Court and inferior federal courts, but the Judiciary Act of 1789 established the jurisdiction of the Supreme Court, because it established lower courts.

Jefferson anticipated that the controversy with the relationship between the Supreme Courts and the state courts would reside in a fear that the Higher court would overtake the state courts, but he argued that it would be up to "Congress, to watch and restrain them."[46] By establishing lower federal courts, Congress provided a barrier between the state courts and the Supreme Court to prevent the Supreme Court from tyranny if the Justices were so inclined.

There was another element to consider. What role would the judiciary have in checking the legislative branch? Presently, the Supreme Court has the power of judicial review, a doctrine that gives the Supreme Court the sole ability to declare a legislative or an executive act unconstitutional, and therefore void. But this power is not specified in the Constitution nor was it ever discussed during the Convention. Though some of the Framers would have assumed the Supreme Court had that right.[47] James Wilson spoke to the Convention on the topic, when he wrote,

For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.[48]

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[45] Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan," *Columbia Law Review*, Vol. 86, No. 8 (1986), p. 1618.
[46] Letter from Thomas Jefferson to James Madison, June 20, 1787.
[47] E. Allan Farnsworth and Steve Sheppard, *An Introduction to the Legal System of the United States* (Oxford: Oxford University Press, 2010), 7
[48] James Wilson Speech: Pennsylvania Convention, December 1, 1787.

The closest thing to judicial review during the convention was a power under the Council of Revision. This Council of Revision would have the authority of an absolute veto when it came to laws violating the Constitution.[49] When the Framers nixed the Council of Revision, its constitutional review power went with it, not to appear again for some time. When Congress passed the Judiciary Act of 1789, it gave the federal Supreme Court the ability to hear appeals of cases decided by state supreme courts, which was the first step to gain the concept of judicial review.[50] The Supreme Court eventually officially achieved the power of judicial review in the 1803 *Marbury v. Madison* case. It had been seen as implied as a power of the Supreme Court by some of the Framers, including Alexander Hamilton.

The Framers saw the law as a tool to check governmental power.[51] The Supreme Court checks the governmental power of the states, by being able to take on cases appealed from them. It checks the executive branch, with the Chief Justice presiding over the impeachment trial. The oversight power the Court holds over the legislative branch is more complicated, with the ability to interpret the laws developing later. The ability for the Supreme Court to determine the constitutionality of the laws can be traced back to 1608, to Sir Edward Coke. James I of England asserted that he had the royal power to take any case from any court and decide it as a monarch. Edward Coke, Chief Justice of the Common Pleas court refuted the assertion claiming that the King in "his own person cannot adjudge any case . . . but that this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England."[52] James I's response was that if law was based on reason, then he had the same amount of reason as the

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[49] C. Perry Patterson, "James Madison and Judicial Review," *California Law Review*, Vol. 28, No. 1 (1939), p. 25.
[50] NNC Staff, "The Most Underrated Founding Father: Oliver Ellsworth?," Constitution Center, April 29, 2022, https://constitutioncenter.org/blog/the-most-underrated-founding-father-oliver-ellsworth.
[51] Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press 1993), 3.
[52] Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press 1993), 3-4.

judges, and therefore the same ability to judge cases. Then came Coke's thesis, that his Majesty had many gifts, but laws were not decided on natural reason, but by the artificial reason and judgement of law. To understand this, it takes study and experience, and, concluded Coke, the King did not have this. Just as the U.S Congress, or the President may not have it. Many politicians had some experience with the law, like John Adams and James Wilson. Many others were not as familiar with it, like George Washington, who was a surveyor and military man. Coke's assertion that the executive could not be trusted with judicial matters was also extended to Britain's Parliament. Coke also contested their ability to understand the laws and confirmed that even Parliament could and have passed laws against common right and reason. With that, he asserted that the Courts could "adjudge such Acts to be void."[53] From this comes the idea that there might need to be judicial review. But, as many of those drafting the Constitution were wary of giving the unelected justices more power than necessary, it makes sense that the Supreme Court had to grab that power through adjudication.

The Judiciary Act of 1789 created the lower federal courts and clarified and provided new functions of the federal judiciary. It was authored mainly by Oliver Ellsworth, a foremost voice during the Constitutional Convention (though he left early and did not sign the final document). It established the Supreme Court's first makeup, consisting of one Chief Justice and five associate justices. The makeup of the court was not included in the Constitution, to allow for the Court to grow or reduce if it was in the nation's interest as it evolved. The other major purpose of the Judiciary Act of 1789 was to explain the original jurisdiction of the Supreme Court and the lower federal courts,

[53] Ibid. 5.

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.[54]

This needed to be expanded upon, as the delegates of the Constitutional Convention pushed off the problem of inferior tribunals to the First Congress.

[54] Judiciary Act of 1789, 1789.

Chapter IV: The Judiciary Act of 1789

One of the first items of business in the first Congress under the new Constitution was dealing with those "inferior Courts" that "Congress may from time to time ordain and establish."[1] President George Washington understood how important it was that legislators create those inferior courts, writing that he considered that "the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system."[2] Congress passed the law and President George Washington signed the Judiciary Act of 1789, on September 24th, 1789. The law set the structure of the Supreme Court and provided for the establishment of an inferior court system. It created their respective jurisdictions and set out some of the procedures for all those courts. Considering the Judiciary Act of 1789 was Senate Bill No. 1 of the first session of the first Congress, cementing the structure, jurisdictions, and procedures of the judiciary was clearly a major priority for Congress.[3] The Judiciary Act of 1789 reflects the difficulties the Framers expected to face based on their previous experiences with colonial courts and the absence of a judiciary under the Articles of Confederation. It was understood that the new Government could not function effectively without establishing the inferior courts and the procedures of the Judiciary.[4] After all, the Articles of Confederation only provided Congress the right to appoint courts for the trial of pirates and crimes committed on the high seas. Disputes between states (about land or otherwise), which could not be handled by the

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[1] U.S Constitution, Article III, 1787.
[2] Washington, X, letter of Sept 27, 1789.
[3] Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, Vol. 37, No. 1 (1923), p. 49
[4] Ibid. 57.

state courts for obvious reasons, were handled by Congress. As these are the only mentions of judicial-like powers in the Articles, it's clear that the creators of the Articles of Confederation shied away from creating a full judicial system.

The idea of a national judiciary scared many Framers, as they believed that a federal judiciary could threaten individual liberty, overwhelm state judiciaries, and the states themselves. Brutus, an Anti-Federalist writer, laid out his fears plainly, writing, "It is easy to see, that in the common course of things, these courts will eclipse the dignity, and take away from the respectability, of the state courts."[5] Federalists responded that the Antifederalists worried too much, and that the judicial branch would be the "least dangerous" branch as it only had the power of judgement, puny powers compared to Congress's power of the purse and the sword or the Executive's power of the veto.[6] But what was clear was that there were cases that state judiciaries could not handle, and that Congress could not continue to decide on cases between states. So, Anti-Federalists relented during the Convention to a clause in Article III that would provide Congress the power to create inferior federal courts, putting off the issue to another time. When the time came to debate Senate Bill No. 1, the Judiciary Act of 1789, the arguments began anew. There was a shared belief that more courts were necessary. John Brown, a Congressmen from Kentucky who feared the potential conflict a tiered judiciary could create, wrote that although he feared, "great embarrassment and clashing" he also believed it "absolutely necessary to pass a Judiciary Law at this session."[7] Nonetheless, the Judiciary Act of 1789 passed both

[5] Brutus. "Brutus 1". Essay, October 18, 1787.
[6] "The Debate over the Judicial Branch," Center for the Study of the American Constitution, https://csac.history.wisc.edu/document-collections/constitutional-debates/judiciary/.
[7] Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, Vol. 37, No. 1 (1923), p. 52-53.

houses of Congress and gained the President's signature creating the national judiciary, a system that allowed for interpretation of federal law and the Constitution.

Even if it was decided on as a priority rather quickly, there were significant disagreements among the political elites about the structure, jurisdiction, and procedures of the federal courts, and how they would interact with each other. These debates mirrored many of the debates of the Constitutional Convention and the Ratification Era. Namely because one faction, the Anti-Federalists, feared that the federal government and its courts would smother existing state apparatuses. The other faction, the Federalists, believed that a powerful judiciary was necessary for the continued survival of the new nation. Regardless of the disagreements, the nation's new federal politicians agreed some amendments to the Federal Judiciary Bill as necessary. First, there needed to be an express provision securing the right to a jury in civil cases as well as criminal cases. Second, appellate power needed to be restricted to questions of law, not of fact. Third, the Supreme Court's original jurisdiction must be clear and limited. Fourth, federal question cases must be tried in state courts first, then if appealed, they would go to the Supreme Court. Finally, jurisdiction based on diverse citizenship or foreigner status needed to be eliminated. The day after the Senate reached a quorum, on April 7, 1789, a committee formed to draft the bill that would become the Judiciary Act of 1789. The Committee members were Oliver Ellsworth (CT), who acted as the chairman, William Paterson (NJ), William Maclay (PA), Caleb Strong (MA), Richard Henry Lee (VA), Richard Bassett (DE), William Few (GA), and Paine Wingate (NH). On April 13th, Charles Carroll (MD) and Ralph Izard (SC) were added to the committee.[8] Ellsworth later became the third Chief Justice of the Supreme Court. With ten members, the committee contained half of the Senate at that time.

[8] Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review*, Vol. 37, No. 1 (1923), p. 56-57.

The committee had a very difficult task ahead of them. Committee member Paine Wingate wrote to Timothy Pickering, Revolutionary veteran and eventual third Secretary of State (1795-1800), on April 29th, in which he said, "It is a very intricate and difficult matter to adjust, so as to answer the design of the Constitution by securing impartial justice and not make it burdensome and inconvenient for the people. It would take too long to give you any idea of the progress that is made and it is not unlikely that it may appear in a different shape from what has yet been proposed."[9]

Ellsworth and Paterson mostly wrote the first draft of the bill, providing the rough outline of the final bill. When the draft bill was released, many members of Congress sent copies or summaries to friends, mostly lawyers, for comments. Dozens of replies contained not only comments, but objections and questions about the bill.[10] George Turner, wrote to James Madison in August 1789, that it made sense that the courts be able to appoint their own inferior officers.[11] Roger Sherman wrote to John Adams in July 1789, that the implied power of judicial review was too similar to the powers of Parliament of the tyrannical Britian, and that this should be adjusted or changed.[12] These are only two of dozens upon dozens of advice from lawyers and judges around the country. Once the act was close to passing and had passed, these replies also often

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See also- Wythe Holt, "'To Establish Justice': Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts," *Duke Law Journal*, Vol. 1989, No. 6 (1989) p. 1485-1486.

[9] Pickering Papers, Mss. in Mass. Hist. Soc. Library, Wingate to Pickering, April 27, I789, unpublished.

[10] Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 668.
See Also- Maeva Marcus, *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (New York: Oxford University Press, 2023), 13.

[11] "To James Madison from George Turner, 5 August 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Madison/01-12-02-0212. [Original source: *The Papers of James Madison*, vol. 12, *2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789*, ed. Charles F. Hobson and Robert A. Rutland. Charlottesville: University Press of Virginia, 1979, p. 324.]

[12] "To John Adams from Roger Sherman, 20 July 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Adams/06-20-02-0061. [Original source: *The Adams Papers*, Papers of John Adams, vol. 20, *June 1789–February 1791*, ed. Sara Georgini, Sara Martin, R. M. Barlow, Gwen Fries, Amanda M. Norton, Neal E. Millikan, and Hobson Woodward. Cambridge, MA: Harvard University Press, 2020, pp. 93–95.]

included the writer humbly offering himself or colleagues to be considered for judicial appointment. Before the bill entered final committee, Ellsworth shared the basic elements with a fellow member of the Connecticut bar, outlining jurisdiction, structure, and reasoning. In another letter, Ellsworth explained that he set up the system the way he did because the state courts did not have judicial independence, lacked experience in trying admiralty cases, and were not trustworthy enough to try federal criminal cases.[13]

The Judiciary Act took five months to be enacted, from the committee forming to it being signed into law. The debates during these five months included many of the same arguments that took place during the Ratification period, mainly the fear that the creation of inferior tribunals could overwhelm the state courts. These debates coincided with the creation of the Bill of Rights, and they influenced each other. The Bill of Rights included more protections for civil liberties in response to the fear of judicial tyranny, and the Judiciary Act of 1789 was able to pass because the Bill of Rights quelled that fear. The debates over the Judiciary Act resulted in a compromise between those Congressmen who wanted a powerful court system, able to exercise its full jurisdiction, and those Congressmen who were reluctant to even have inferior courts at all. These compromises including creating provisions to ensure the use of state rules and procedures for the inferior courts, making the court districts coincide with state boundaries, and requiring district judges to be living in the district they represented.[14]

The structure of the new national judiciary would be the Supreme Court with thirteen judicial districts under it. The districts were the eleven states that had ratified the Constitution by

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[13] Letter from Oliver Ellsworth to Richard Law, August 4, 1789.
See Also- Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 668-670.
[14] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 54.

September 1789, and the extra two districts being in Virginia and Massachusetts on account of their larger population. North Carolina and Rhode Island had not ratified the Constitution at the time, but when they did in 1790, they became judicial districts as well. Each state had one district, except for Virginia and Massachusetts, which had two. These extra districts were eventually transferred to serve Maine and Kentucky. These judicial districts contained a circuit court and a district court. The circuit courts were staffed by one Supreme Court justice each, who "rode circuit," saving Congress money by not forcing them to appoint and pay another judge, but also providing an experienced judge to oversee those cases that would likely be the most important.[15] This "riding circuit" funnily enough had unintended consequences, it discouraged future Supreme Court picks from accepting the nomination because of the hazards of travel in the day and prevented Washington from choosing certain citizens who may be the best for the job, on account of their old age or failing health.[16]

The circuit courts that the Judiciary Act of 1789 created, were granted jurisdiction over civil suits not involving federal law or the Constitution and appellate jurisdiction over the newly formed district courts. Originally there were three circuits: Eastern, Middle, and Southern.[17]

Congress intended to add more courts to the federal judiciary. The jurisdiction of the Supreme Court was limited, and all jurisdictions not included in the original jurisdiction needed to be taken up by some other court. It was necessary for Congress to create inferior courts to take

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[15] Wythe Holt, "'To Establish Justice': Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts," *Duke Law Journal*, Vol. 1989, No. 6 (1989) p. 1488-1489.

[16] "From George Washington to Thomas Johnson, 28 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0069. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 103–104. See also, "From George Washington to the United States Senate, 24 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0053. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 75–80.]

[17] Brevia Addenda, "The First Judges of the Federal Courts," *The American Journal of Legal History*, Vol. 1, No. 1 (1957), p. 76.

up other areas of federal jurisdiction, as the Supreme Court had appellate jurisdiction over all other cases not mentioned as under their original jurisdiction. It was also necessary that those courts be tied back to the federal government, as the patchwork system of the state courts could not be trusted with the execution of the federal laws, according to James Madison.[18] In this period, the state judiciaries held much closer ties with the state legislatures. The state legislature appointed judges to the state courts in Connecticut, Georgia, Pennsylvania. In Georgia and Pennsylvania judges' terms were short, so they were extremely dependent on legislative favor to get reappointed. These are only a few examples, but in almost every state judges were dependent on the legislature for their jobs. This was concerning to the Framers, and Article III addressed this concern.[19] Madison and others believed that this dependence would make the new judicial system operate similarly to the Articles of Confederation, the system they had replaced with the Constitution. The Framers' insistence on judicial independence was written into the Judiciary Act of 1789. Serving for life terms of "good behavior" gave the judiciary extraordinary independence.

These concerns did not necessarily create agreement amongst the Framers. The Framers also had to address the main concerns of their Antifederalist brethren. The Antifederalists did acknowledge that there was a need for lower courts than the Supreme Court that could decide important federal cases, mostly because they believed that citizens should be able to find justice without undue burden. If there was one Supreme Court, even if it traveled once a year into the Eastern and Southern extremes of the country, it could not properly distribute justice in a timely

[18] 1st Cong., 1st Sess., Aug. 31, I789, p. 827.
[19] Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 653.

manner.[20] Just as the English King's Bench could not adjudicate properly, even following the King in his travels, as England grew in populace and cases to decide, the US Supreme Court alone could not adjudicate properly all cases falling under its jurisdiction. Federal Farmer, one of the most famous Antifederalist writers during the Ratification period, acknowledged that "inferior courts might be properly placed in the different counties, and districts of the union." There was a need for sufficient inferior courts to bring justice within a day's ride for everyone, as the Federal Farmer wanted, but also not so many courts or so powerful federal courts to overwhelm the existing state courts. Edward Pendleton, Chief Justice of the Virginia Court of Appeals, wrote that the lower tribunals, namely the circuit courts, would only succeed in ensuring justice if the populace believed that justice was easily available.[21] Pendleton believed in a strong judiciary, and even in the implied power of judicial review, so he was clearly not an Antifederalist. The Antifederalists made compelling arguments and Federalists did not see those arguments as melodramatic. Even Federalists were aware that creating lower tribunals could, if not properly curtailed, overwhelm state courts. This was a main concern of Brutus, another Anti-Federalist writer. He was worried, as many antifederalists were, that inferior courts would inevitably "eclipse the dignity, and take away from the respectably" of the state courts.[22] These concerns, shared during the ratification process, did not prevent the Constitution from being ratified, but they were extremely influential in the production of the Judiciary Act of 1789, as the drafters had to acknowledge them sufficiently in order to pass the Act through Congress. These arguments were also influential to James Madison, who at the same time as the Judiciary Act

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[20] John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, Vol. XIX (Madison, WI: Wisconsin Historical Society Press, 2003), 203-245.
[21] "Edmund Pendleton to James Madison, July 3, 1789," Marcus, et al., eds., Documentary History of the Supreme Court of the United States, 1789–1800, vol. 4, Organizing the Federal Judiciary: Legislation and Commentaries, 444–45.
[22] John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, Vol. XIX (Madison, WI: Wisconsin Historical Society Press, 2003), 103–15.

debates, was working on the Bill of Rights. Madison, originally a harsh opponent of a Bill of Rights during the Constitutional Convention, ended up promising voters a Bill of Rights in order to win a congressional seat in the First Congress. The Judiciary Act debates influenced Madison to include rights protecting civil liberties and rights of defendants in federal courts.[23] Just as the Bill of Rights was written to insure Anti-Federalist cooperation, many provisions were added to please Anti Federalists, including a provision that prevented a district judge from having a vote in any case of error or appeal of his own decision.[24] The final Judiciary Act of 1789 reflects a great deal of compromise, creating strong federal courts while also giving them all limited jurisdiction to prevent judicial overreach over state courts.

The Judiciary Act set the initial number of justices at six, one Chief Justice and five Associate Justices. Because the number of justices was written in the Judiciary Act and not in Article III of the Constitution, it allowed Congress to exercise discretion to expand the Court if needed, a power they exercised in 1801,1802,1807,1837,1863, 1866, and 1869. President Franklin D. Roosevelt attempted to expand the court in 1937 but failed miserably when members of his own party joined opponents to defeat his plan, branding it "unconstitutional." The Judiciary Act of 1789 made it possible for Congress to expand the court, but this power hasn't been used successfully since 1869.

Why didn't these provisions make it into Article III if it was clear to the Framers that a federal judiciary was necessary? Articles II & III include provisions that allow for the creation of inferior tribunals by Congress but only Article III created the Supreme Court. The creation of inferior tribunals was too difficult for the Framers to touch during the Convention because of the

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[23] Bruce A. Ragsdale and Daniel S. Holt, *Debates on the Federal Judiciary: a Documentary History*, Vol. I: 1787–1875 (Washington, DC: Federal Judicial Center, Federal Judicial History Office, 2013), 57.
[24] John T. Noonan Jr, "Judicial Impartiality and the Judiciary Act of 1789," *Nova Law Review*, Vol. 14 (1989), p. 123.

sensitivity of the federalism issue. Anti-Federalists argued during the Ratification period, that the states would revolt against the encroachment of potential inferior courts. Luther Martin, a Framer from Maryland, asserted that lower federal courts would "create jealousy and hostility by interfering with the state courts."[25] The Anti-Federalists were right, there were state courts that viewed potential inferior tribunals as overpowered and overreaching. Because there were plenty of other sensitive issues to argue over during the Convention already, the Framers handed the creation of inferior tribunals to the future Congress. These arguments were repeated when it came to Congress to create those inferior courts.[26]

Thankfully, there were plenty of lawyers in Congress to create a clear jurisdiction, new processes and procedures, powers, remedies, and personnel and sessions. Unfortunately for them, these lawyers who became congressmen came from different states with different legal practices. The common law to each of them was slightly different, as the states when they were colonies adopted the common law slightly differently including procedures, jurisdictions, and understandings. William Maclay, a member of the committee, wrote that the committee was overwhelmed by lawyers, the judiciary bill "fabricated by a knot of Lawyers who Join hue and cry to run down any Person, who will venture to say one Word about it."[27] Once the Act was completed, Maclay's opinion was echoed in publications that asserted that the Act was created by lawyers, for lawyers, to create infinite business for themselves.[28] Those members of the committee who were not lawyers, such as moderate Anti-Federalist Richard Henry Lee, relied on

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[25] Records of the Federal Convention, 45-46.
See Also- Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 655.
[26] Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 655-657.
See Also- Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House Trade Paperbacks, 2009), 160.
[27] William Maclay Diary Entry, July 2, 1789.
[28] Independent Chronicle Federal Government, Sept. 16, 1790.

lawyer and judge friends to help mold their vote, so the bill and the passage of it was definitely overtly influenced by lawyers of the country.[29] John Quincy Adams wrote to his father, John Adams, of his own friends opinions of the Judiciary Act, writing that "Parsons thinks 6 Judges will not be enough; and objects to the joining the district Judge to the other two in the circuits. Because it gives him a casting voice in affirming his own decisions."[30] This last part made it into the final bill, with district court judges being forbidden from voting on appeals of their own decisions.

One of the easier procedures to cement was the dates and places where and when the circuit courts would sit. Towns hoping for the honor lobbied for it. The Act established rules for adjourning court, appropriate quorum and procedures for lacking quorum, and provided for necessary personnel like clerks. The Judiciary Act also responded to future needs, establishing that Maine and Kentucky, not yet states, would have circuit courts as well.[31]

Just as in the English courts and the colonial North American courts, jurisdiction was one of the stickiest issues. While Congress agreed on the need for a Supreme Court, as it was successfully included in Article III, Federalists and Anti-Federalists disagreed on the need for inferior tribunals, let alone their size and number. The Supreme Court's jurisdiction had been mostly established by Article III, with the Court having original jurisdiction over cases involving states as a party, ambassadors, and other public ministers and consuls. The Supreme Court would have appellate jurisdiction involving cases arising under the Constitution, federal law, and

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[29] Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 671.

[30] "John Quincy Adams to John Adams, 28 June 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Adams/04-08-02-0207. [Original source: *The Adams Papers*, Adams Family Correspondence, vol. 8, *March 1787–December 1789*, ed. C. James Taylor, Margaret A. Hogan, Jessie May Rodrique, Gregg L. Lint, Hobson Woodward, and Mary T. Claffey. Cambridge, MA: Harvard University Press, 2007, pp. 380–383.]
See Also- Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review*, Vol. 46, No. 5 (1995), p. 671.

treaties, admiralty, and maritime cases.[32] Article III did not provide the inferior tribunals, just the power to create them, and so jurisdiction for these inferior tribunals was not provided and left for Congress to decide.

Another controversy of the Judiciary Act of 1789 was the act's provided salaries for court officials, especially justices. Article III determined that, in the interest of judicial independence, federal judges could not have their salaries diminished during their time in office. The chief justice's salary was set at $4,500, close to six figures when adjusted for modern inflation. The associate justices would earn $3,000.[33] There was significant concern from some members of Congress that this was too high a salary, even though this was a very difficult undertaking. Many of the replies from lawyers and judges for advice about the Judiciary Act mentioned this as a major concern.[34] This was James Madison's exact reasoning to reject these concerns, saying that understanding all of the laws of every state and treaty would take up quite a bit of time and energy, and that they should be adequately compensated. Also, Madison considered the justices to be the guardians of the laws and of the Constitution, and that paying them properly would shield them from temptation, especially when dealing with larger entities like foreign governments.[35] On the other side, Senator William Grayson wrote that the salaries were quite high for "the temper and circumstances of the Union and furnish another cause of discontent to those who are dissatisfied with the government."[36]

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[32] U.S Constitution, Article III, 1787.
[33] "Judicial Salaries: Supreme Court Justices," Federal Judicial Center, January 1, 2025, https://www.fjc.gov/history/judges/judicial-salaries-supreme-court-justices.
[34] Maeva Marcus, Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789 (New York: Oxford University Press, 2023), 14.
[35] "Salaries of Judges, [18 September] 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Madison/01-12-02-0264. [Original source: *The Papers of James Madison*, vol. 12, *2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789*, ed. Charles F. Hobson and Robert A. Rutland. Charlottesville: University Press of Virginia, 1979, pp. 411–412.]
[36] Grayson to Patrick Henry, 29 Sept. 1789, in Tyler, *Letters and Times of the Tylers,* Lyon G. Tyler. *The Letters and Times of the Tylers*. 2 vols. Richmond, Va., 1884–85. 1:169–71).

As soon as George Washington signed the Judiciary Act into law on September 24th, 1789, he prepared thirty-nine nominations to the various courts, for justices, judges, attorneys, and marshals. Clearly, Washington shared the other Framers' sense of urgency in establishing the judiciary. The Senate confirmed these nominations on September 26th, 1789, mostly without controversy. Some Framers still held deep reservations about the judiciary system, but most were satisfied with the choices.[37] George Washington knew the importance of these first nominations, as he wrote to many of his fellow Framers and friends of the importance. He considered the judiciary the keystone of the political fabric, the judiciary the chief pillar on which the national government would rest.[38] He wanted to raise the best and wisest of the citizens that would give "dignity and lustre to our national character" to these high offices.[39]

Even if most Framers agreed that Washington's picks were satisfactory, many Congressmen were still dissatisfied and worried about a powerful federal judicial system. Some felt that their worries about the federal courts overwhelming the states were not properly quelled. Brutus wrote during the Ratification debates, that inevitability the inferior courts would "eclipse the dignity" of the state courts.[40] George Mason, speaking during the Convention, shared his worry that by referring cases to the Supreme Court that did not concern federal law, namely cases between citizens of different states, the Framers were in a way saying the state

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[37] "From George Washington to the United States Senate, 24 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0053. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 75–80.]

[38] "From George Washington to John Jay, 5 October 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0094. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 137–138.]

[39] "From George Washington to William Cushing, 30 Sept. 1789," *Founders Online,* National Archives. See also- "From George Washington to Edmund Pendleton, 28 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0071. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 104–106.]

[40] Brutus. "Brutus 1". Essay, October 18, 1787.

courts were unable to dispense justice.[41] These concerns did not prevent the establishment of inferior courts, nor the establishment of the Supreme Court's jurisdiction, but nonetheless they are important to acknowledge.

Unfortunately, in the effort to bring justice to all, the Judiciary Act committee neglected to consider the burden that "riding circuit" would place on potential selections to the new judiciary. At this time, travel was extremely difficult and time consuming, and often damaged health. The designated salaries for the new judiciary reflects this difficulty, but many of Washington's first picks declined the high salary and job because of health and family concerns. Robert Harrison, Chief Judge of Maryland's General Court, was offered the position of associate justice on the newly established Supreme Court in a letter dated September 28th, 1789. The Senate had already confirmed his appointment. But Washington received a letter from Harrison in late October declining the appointment, citing failing health and family concerns. Washington and Hamilton urged him successfully to reconsider, and Harrison began his trip to New York. On the way, his health failed, and he returned home, again declining the appointment. Harrison's story demonstrates that there were real concerns surrounding the travel involved in sitting on the new judiciary. Harrison, in his first rejection, referred to the duties required of a judge of the Supreme Court as "extremely difficult and burdensome" even to a man in perfect health, which he was not. Harrison was honored to receive the appointment but found the expectations too difficult and the job too important to undertake.[42] John Rutledge, while accepting Washington's nomination of associate justice, also acknowledged the difficulties of the position. He was honored to be nominated but lamented the loss of a life of ease and retirement. Nonetheless, he found the position too important to turn down and endeavored to promote the stability of the new

[41] George Mason Speech, Virginia Convention, June 19, 1788.
[42] "From Robert Hanson Harrison to George Washington, 27 October 1789," *Founders Online,* National Archives

government.[43] Even George Washington acknowledged the difficult position he was putting his nominations in. Edmund Pendleton, President of the Supreme Court of Appeals in Virginia, received a nomination for the judgeship of the District Court of Virginia, even though Washington wanted to nominate him for associate justice of the Supreme Court. Writing to James Madison on September, 23rd, 1789, Washington shared his fear that Pendleton would not be able to undertake "riding circuit" and decided to offer him district judgeship as it was a similar workload to his then-position and the salary was greater.[44] Regardless, Pendleton rejected this district judge nomination, citing failing health and the importance of the job he was already undertaking.[45]

The Judiciary Act of 1789 set up the inferior court system, and fleshed out procedures, rules, size, and jurisdictions of the Supreme Court and the created district and circuit courts. While the Framers mostly agreed on the need for an organized, clear judiciary, there was significant disagreement on the need for inferior tribunals and how they would overlap with existing state courts. Most of the Federalists, were very wary of the state courts, whose differing colonial origins, demographics, procedures, and size made the judiciary system patchwork at best, corrupt at worst. Considering this, the Committee writing the Judiciary Act of 1789 aimed to create clear jurisdictions and universal procedures while also satisfying Anti-Federalists

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[43] "From George Washington to John Rutledge, 29 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0077. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 114–115.]
See also- "From John Rutledge to George Washington, 27 October 1789," *Founders Online,* National Archives

[44] "From George Washington to James Madison, 23 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0046. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 67–68.]
See Also- "From George Washington to the United States Senate, 24 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0053. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 75–80.]

[45] "From Edmund Pendleton to George Washington, 13 October 1789," *Founders Online,* National Archives

anxieties about judicial tyranny. While the Framers pushed off the creation of inferior tribunals to the First Congress to limit the number of controversial issues going into the Ratification debates, Congress immediately took up the responsibility. Many Congressmen commented on the importance of getting it right, as the judiciary had the potential to be the source of tyranny as much as the source of justice. The debates during committee and on the House and Senate floor reflected the original debates during the Constitutional Convention and the Ratification debates. These debates and comments from lawyers and judges from around the country created a bill that reflected the lessons learned over hundreds of years of dispensing justice. Largely, the system set up by the Judiciary Act of 1789 is the same one operating today, only larger, with a few exceptions.

Conclusion

The result of hundreds of years of judicial evolution in England and North America was Article III of the Constitution. Alan Harding wrote that the original function of courts was "the maintenance of peace by the settlement of disputes between individuals, and second, the maintenance of the social dominance of the king or noble who held the court."[1] The purpose of the courts created for the new nation of America was the same, but replaced the social dominance of a king with the dominance of the Constitution. Instead of being beholden to an old word hierarchy, the Framers placed our founding document at the top. The creation of the federal judiciary in the new nation was influenced by the successes and failures of the courts dating back to the Norman conquest. The creation of Article III had to be one made up of the lessons of the previous courts if the new judiciary was going to succeed. It had to strong, with the ability to grow alongside the new nation, without overwhelming the other branches and the state courts. This was an extremely difficult balance to strike, thus the months of debating during the Constitutional Convention, and later the creation of the Judiciary Act of 1789. The result of these debates was not satisfying to everyone, consequently there were a few Framers who actively fought against ratification. But, overall, the Framers were mostly pleased with the Supreme Court they created and the inferior tribunals later created in the Judiciary Act of 1789. The Supreme Court has grown and changed much since its creation; in ways the Framers intended and did not intend. While it has always been more political than the Framers would

[1] Alan Harding, *The Law Courts of Medieval England* (New York: Routledge, 2020), 1.

have hoped, the problem has gotten significantly worse in the past few decades. The Framers agreed on a few things, one was that the judiciary should be beholden to the Constitution above all else and should have as many influencing factors as possible removed to ensure as much as possible, an uncorrupted and clear court. Unfortunately, while the Framers did ensure the Supreme Court justices would not be beholden to Congress for payment, they failed to account for the growth of the private sector, and its increasing influence on the Supreme Court justices behind closed doors. Because the Framers aimed to cleave and balance the three branches (and increasing political partisanship) it is more difficult than ever to create new regulations that would prevent this undue influence. The Framers created a powerful court, and not one that could be easily changed. The unintended result of this is the Supreme Court has failed to catch up with evolving attacks on its conscience. To strike the balance between keeping the Constitution as a powerful, original document and being able to adjudicate it with changing times is a very difficult balance indeed.

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"From George Washington to John Rutledge, 29 September 1789," *Founders Online,* National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0077. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 114–115.]

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