In the increasing disputes between the colonies and the mother country preceding the war for independence, the nature of law and of the courts in British North America periodically came into question. Colonial leaders pointed retrospectively to the assumption, embodied in the earliest colonial charters, that the common law, modified to apply to the local needs of each settlement or "plantation," was the root stock of American jurisprudence. Once the issue of the authority of the common law in the colonies was belatedly raised, English authorities countered with the declaration that neither the common law nor the English Constitution followed the flag except as England decreed. Essentially, this was the impasse on which the hope of avoiding revolution ultimately perished.

Although their authority to do so might be called into question, the colonies proceeded to adopt or adapt the common law, setting up systems of courts resembling the judicial structure remembered from Eng-

1. For example, the frequently quoted language of the Virginia Charter of 1606 entitled the colonists to "all liberties, franchises, and immunities, ... as if they had been abiding and born, within this our Realm of England." 7 F. Thorpe, American Charters, Constitutions, and Organic Laws 3788 (1909).

2. The conflict between colonial and imperial viewpoints is discussed in the opening portion of Swindler, "The Rights of Englishmen" Since 1776: Some Anglo-American Notes, 124 U. Pa. L. Rev. 1083 (1976). Representative of the language that created the argument concerning the applicability of the English common law to the North American colonies is this passage from the Connecticut Charter of 1662: "We do for Us, Our Heirs and Successors, ordain, declare, and grant unto the said ... Subjects ... which shall go to inhabit within the said Colony, and every of their Children, ... all Liberties and Immunities ... as if they ... were born within the realm of England ... ." 1 F. Thorpe, supra note 1, at 533. The colonists believed the incorporation of the English common law set out in the charters was an entitlement; English authorities considered it a privilege granted and revocable by the Crown.

* John Marshall Professor of Law, College of William and Mary.

Editor--Portions of this paper will appear in a chapter in a forthcoming book, Justice '76, sponsored by the American Judicature Society and edited by Glenn R. Winters, retired director of the Society, and Tazewell Taylor Visiting Professor of Law, College of William and Mary.
land, but modified to the needs of each colony. Whatever the particular variations at the level of courts of first instance, one feature of the colonial judicial system was consistent: appeals lay from each colony directly to the Privy Council in London. Thus, when independence was declared, that appellate system became extinct for practical purposes. A new state constitution might undertake to create a new internal judicial system, both trial and appellate, but it could not fill completely the vacuum left by the defunct system of royal justice; beyond the individual jurisdiction of the state, there was no judicial machinery for the settlement of issues involving interstate and international questions.

The Declaration of Independence finalized the suspension of royal administration of justice in the colonies, but when that instrument was adopted by the Second Continental Congress in the summer of 1776, the royal courts had been closed for varying periods of time. The Massachusetts Government Act of 1774 had reorganized the administration of justice in that recalcitrant province, and the action of the provincial ad hoc assembly that responded to the parliamentary coercion marked the effective end of the royal court system in the colony. In the fall of 1775 Lord Dunmore extinguished the royal court system in Virginia by placing the colony under martial law. Indeed, the actions of all the colonies the previous winter, in assembling to elect delegates to the Second Continental Congress, had evidenced the end of the royal system.

Once before, in the Stamp Act crisis, the courts had closed their doors and suspended business. The finality of the break with England led to similar action; in Virginia the last session of the colonial assembly, acting in response to Dunmore's general suspension of civil power, pronounced it impossible for the civil courts to continue. Eighteen months later, the assembly enacted legislation to permit their reopening.


5. 14 Geo. 3, c. 39.


7. 9 Statutes at Large of Virginia 368 (ch. 3, 1777) (W. Hening ed. 1819-23, reprinted 1969) [hereinafter cited as Hen. (Va.)]:

Whereas the troubles in which this commonwealth hath been involved, and its distressed circumstances, induced the general convention, by several
most states where similar action was taken, the structure and procedure of the courts remained unchanged. What did change was the extrajurisdictional situation, from a relation between colony and Crown on a colony-by-colony basis, to an interstate, and finally to a national-state, relation. Independence had broad consequences for the administration of justice in the new United States. Not only did the official hiatus between the colonial system and the new federal-state system of judicial organization create disputes that required settlement following the Revolution, but there was also the problem of discontinuity of the system of law itself. The "reception" of the common law and the retention in force of selected parliamentary enactments required affirmative initiative by the new legislatures. Further, the question of judicial independence had to be resolved. Although some constitutional theorists assumed that the English concept of justice as an ingredient of the executive function would be retained, the prevailing doctrine of separation of powers moved in an opposite direction. What was of greater importance was the independence of the judiciary, not from the other branches of government, but from the electorate.

Thus, the nascence of the American judiciary was not an effortless duplication of English forms. States were required to develop judicial structures suited to their needs, and the new nation was obliged to devise judicial machinery to substitute effectively for the jurisdiction of the
Crown over interstate and international disputes. The steps taken to lay this foundation commenced the evolution of the American judiciary.

JUDICIAL STRUCTURES IN THE NEW STATES

Eleven of the thirteen states drafted constitutions for themselves following independence; Connecticut and Rhode Island were content to continue their governments under their colonial charters. The constitutional provisions generally eschewed innovative efforts to restructure the judicial power; the language assumed a continuation of the pre-Revolutionary court system. Another assumption was that the paramountcy of legislative power would limit and define the jurisdiction and authority of the judiciary. Thus, in the first decade after independence, the constitutional references to the court structure were concerned with general functions, and the details of organization, procedure, and jurisdiction were adjusted eventually by legislation.

All of the original states provided for appointment of judges in the major courts: by the governor alone in two states, by the legislature alone in four, and by the governor and one or both houses of the legislature in the remainder. Nine states provided for life tenure (including tenure "during good behavior"), two for annual appointments, one for terms of 3 years, another for terms of 5 to 7 years (see table I). Except

12. The 11 original states, and the 3 admitted up to 1800, that drafted constitutions, adopted them on the following dates: New Hampshire, 1776, 1784, 1792; Massachusetts, 1780; New York, 1777; New Jersey, 1776; Pennsylvania, 1776, 1790; Delaware, 1776, 1792; Maryland, 1776; Virginia, 1776; North Carolina, 1776; South Carolina, 1776, 1778, 1790; Georgia, 1777, 1789, 1798; Vermont, 1793 (following prestatehood drafts of 1777 and 1788); Kentucky, 1792, 1799; Tennessee, 1796. Connecticut finally adopted a constitution in 1818; Rhode Island followed in 1842. For early state constitutions including all states in alphabetical order through Missouri, see SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (W. Swindler ed. 1973) [hereinafter cited as SOURCES AND DOCUMENTS]; for the remaining states, see F. THORPE, supra note 1.

13. See 1 J. GOEBEL, supra note 10, at 96-142.

[T]he affirmation of the status quo was a mere stop-gap subject to future correction not by constitutional amendment but by statute, and this because of a deep-rooted and pervasive belief that the ordering of the judicial system should be committed to the legislative branch. For nearly a century the veritable cordon sanitaire maintained by the Crown against legislative trifling with the judicial structure had prevented the translation of beliefs into action, but they remained animate because of an enduring sense of grievance.

Id. at 97.

in states requiring annual appointment of judges, where the legislature could choose not to approve reappointment, removal was by impeachment, according to specified procedures.\textsuperscript{15}

### Table I. Constitutional Structure of State Judiciary

<table>
<thead>
<tr>
<th>State</th>
<th>Appointment</th>
<th>Tenure</th>
<th>Removability</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>governor and council</td>
<td>life\textsuperscript{a}</td>
<td>impeachment\textsuperscript{b}</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>governor and council</td>
<td>life</td>
<td>impeachment</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>legislature</td>
<td>annual</td>
<td>nonreappointment</td>
</tr>
<tr>
<td>Connecticut</td>
<td>legislature</td>
<td>annual</td>
<td>nonreappointment</td>
</tr>
<tr>
<td>New York</td>
<td>governor and council</td>
<td>life</td>
<td>impeachment\textsuperscript{c}</td>
</tr>
<tr>
<td>New Jersey</td>
<td>governor and legislature</td>
<td>5-7 years</td>
<td>impeachment</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>governor</td>
<td>life</td>
<td>impeachment or address\textsuperscript{d}</td>
</tr>
<tr>
<td>Delaware</td>
<td>governor</td>
<td>life</td>
<td>impeachment or address</td>
</tr>
<tr>
<td>Maryland</td>
<td>governor and council</td>
<td>life</td>
<td>impeachment or address</td>
</tr>
<tr>
<td>Virginia</td>
<td>legislature</td>
<td>life</td>
<td>impeachment</td>
</tr>
<tr>
<td>North Carolina</td>
<td>governor and legislature</td>
<td>life</td>
<td>impeachment</td>
</tr>
<tr>
<td>South Carolina</td>
<td>legislature</td>
<td>life</td>
<td>impeachment</td>
</tr>
<tr>
<td>Georgia</td>
<td>legislature</td>
<td>3 years</td>
<td>impeachment</td>
</tr>
</tbody>
</table>

Source: See W. Smith, A Comparative View of the Constitutions of the Several States With Each Other, and With That of the United States 8-10 (1796).

\textsuperscript{a} i.e., "during good behavior."

\textsuperscript{b} Impeachment procedure took various forms, charges being brought by one branch of government and trial by another.

\textsuperscript{c} New York was the only state to provide for automatic retirement at age 65.

\textsuperscript{d} "Address" was a formal legislative request to the chief executive of the state to perform a specific act. In Pennsylvania, removal of a judge was an alternative to impeachment; in other states, address was the formal sequel to a conviction on impeachment.

Students of the first state constitutions insist that the documents comprised two classes, those trying to preserve the existing order and those attempting to replace it,\textsuperscript{16} but the provisions on the judicial power generally continued the organizational principles of the colonial era. Most state constitutions provided for the familiar general jurisdiction courts, including those charged with civil actions (superior courts, or courts of common pleas), criminal actions (oyer and terminer, gaol delivery, general sessions), and chancery. Some states had specialized and limited jurisdiction courts (orphans, small claims, probate), and all had some court of general appellate jurisdiction (supreme court, court of appeals, court of errors). Some continued the English practice of


putting the judicial system as a whole under a chancellor, though this plan of administration bore little resemblance to the “unified court system” of the 20th century.\textsuperscript{17} The constitutional language in the 11 states drafting such instruments varied from succinct and general statements, if it was manifest that the paramount responsibility over the judicial process was to be left to the legislature,\textsuperscript{18} to elaborate articles such as those developed by Delaware for its second constitution in 1792.\textsuperscript{19} Quickly ratifying the Constitution of 1787 as a means of insuring its permanent transition from its status as the semiautonomous “three lower counties” of Pennsylvania (having a separate legislature but a common governor in colonial times) to sovereign statehood, Delaware in its 1776 constitution had established final judicial authority in a court of appeals that had “all the . . . powers heretofore given by law in the last resort to the King in council, under the old government.”\textsuperscript{20}

When used to enforce unpopular enactments of Parliament, the judicial system “under the old government” had been one cause of the colonial grievances, but after 1776, by constitutional stipulation or by legislative provision, the states sought to convert the same system to their own purposes. Table II summarizes details of judicial organization in the 16 states that constituted the Union by the end of the first quarter century of independence. For the original 13 states, the common denominators and the contrasts in the judicial function serve both to emphasize the objectives of the formulation of a national court system in the Constitution of 1787 and in the Judiciary Act of 1789, and to underscore the initial objections to the federal courts.

\textit{The Theory of the Judicial Function}

The state constitutions implicitly or explicitly accepted the doctrine of separation of powers, though in many documents some control of

\textsuperscript{17} See Justice '76, supra note 11. See generally table II infra.

\textsuperscript{18} See, e.g., 4 F. THORPE, supra note 1, at 2451 (New Hampshire Constitution of 1776).

\textsuperscript{19} Articles 17 and 18 of the Delaware Constitution of 1776 essentially continued the colonial system without specific procedural details; the Delaware Constitution of 1792, however, had a 21-section judicial article. See 2 SOURCES AND DOCUMENTS, supra note 12, at 202, 210-12.

The Virginia Constitution of 1776 made only perfunctory reference to the court system, and left it to the state legislature to administer the judiciary. See 7 F. THORPE, supra note 1, at 3812, 3819 (Virginia Constitutions of 1776, 1830).

\textsuperscript{20} DEL. CONST. art. 17 (1776), in 2 SOURCES AND DOCUMENTS, supra note 12, at 202.
the judicial process was vested in the legislative branch. As table I indicates, the independence of judges generally was accepted, despite the animosity bred by the royal judges in the last years before the Revolution. Original and appellate jurisdictions, as one writer has observed, rarely were sharply distinguished, and few of the first constitutions made as definite a provision for last resort as did the Delaware instrument of 1792. Four states, Delaware, Georgia, New Hampshire, and South Carolina, scarcely mentioned the judiciary in their first sketchy constitutions; their succeeding instruments, however, generally set out in detail provisions on their courts.

**Jurisdiction**

By the time of the drafting of the judicial article in the Federal Constitution in 1787, a decade of experience in the states had enabled the delegates at Philadelphia to distinguish between original and appellate jurisdictions for the new national courts. This decade had marked the transition from the practices of colonial times, when final appeal lay to London, to the needs of a federal system, under which final appeal first had been carried of necessity to the judicial agencies established by the Continental Congress, and at last to the Supreme Court. In some states, the highest courts actually were limited to appellate jurisdiction, but until well into the 19th century a sharp distinction was not consistently drawn; hence the divisions of judicial functions suggested in table II can be considered only as general or potential. The first clear jurisdictional distinction was rather between general courts and limited or special courts.

**Procedure**

Most of the early state constitutions left the rules of procedure either to the courts themselves or to the legislatures, with the usages of the common law serving as a guideline. From the first decade after independence emerged a picture of state judicial systems retaining both the

22. See note 19 supra & accompanying text.
23. See 2 Sources and Documents, supra note 12, at 202, 210-12 (Delaware Constitutions of 1776, 1792); id. at 448, 454, 463 (Georgia Constitutions of 1777, 1789, 1798); 4 F. Thorpe, supra note 1, at 2451, 2453, 2471 (New Hampshire Constitutions of 1776, 1784, 1792); 6 F. Thorpe, supra note 1, at 3241, 3248, 3258 (South Carolina Constitutions of 1776, 1778, 1790).
24. See, e.g., Md. Const. art. 56 (1776), in 3 F. Thorpe, supra note 1, at 1700.
names and functions of the antecedent colonial period. This continuity is not surprising, because courts are designed to adjudicate the peculiar needs of social and economic, not political, organization. Therefore, a change in the social and economic character of American life was a prerequisite to a change in the judicial system; only the political structure of British North America had changed in 1781, with victory at Yorktown in the struggle for independence.

**Table II. Representative State Courts That Succeeded the Royal Court System**

<table>
<thead>
<tr>
<th>Type of Jurisdiction</th>
<th>Commentary</th>
</tr>
</thead>
<tbody>
<tr>
<td>appellate jurisdiction</td>
<td>colonial system usually vested final review in legislature; state constitutions established supreme courts (as in Massachusetts), courts of errors and appeals (as in New York, Delaware)</td>
</tr>
<tr>
<td>general civil jurisdiction</td>
<td>characterized by jury trials at common law, particularly in common pleas courts; nisi prius and superior courts retained nomenclature of colonial times</td>
</tr>
<tr>
<td>general criminal jurisdiction</td>
<td>general criminal courts were oyer and terminer and gaol delivery (as in New Jersey); quarter sessions courts usually were limited to minor offenses (as in Connecticut, New Hampshire)</td>
</tr>
<tr>
<td>equity jurisdiction</td>
<td>chancery courts (as in New Jersey, Virginia) were few, and the English office of chancellor as a general head of the judicial system was emulated only in one state (New York)</td>
</tr>
<tr>
<td>special and limited jurisdiction</td>
<td>these were of two general classes: courts for administration of estates and wards (variously called ordinary, orphans, prerogative, or probate), and courts for small claims or fines (including New York City exchequer, Georgia court of conscience, and generally the justices of the peace)</td>
</tr>
</tbody>
</table>

The constitutional statement of the judicial function in the new states typically was English colonial; this is borne out by the list in table II of representative courts of this post-independence period. "Americanization" had taken place, but it had been going on through most of the colonial period. 25 The manifest need in the new nation was for a judicial structure that would replace the only court apparatus that in fact had been extinguished by the Revolution: final appeal and review by the royal courts. In the view of many state leaders in the early period of in-

25. See table II supra.
dependence, the only necessary function of a national judiciary was to dispose of issues of first instance in the sovereign states that were fundamentally related to the national interest as formerly they would have been related to the imperial interest. The ultimate development of an American judiciary, state and national, thus had to await the lessons of experience under the transition from empire to a “perpetual union.” The prize cases and territorial disputes under the Articles of Confederation were to provide the most meaningful of these lessons.

THE CONFEDERATION EXPERIENCE: PRIZE CASE APPEALS

As the British and Continental armies maneuvered for confrontation, ships commissioned by the erstwhile colonies undertook their own offensive, aimed at harrassing the maritime commerce of the mother country. General Washington immediately perceived the legal problems that would arise as the captors brought their prizes into American ports, to have their claims adjudicated by local admiralty courts. The experience under the vice-admiralty courts established by England in the years prior to independence had been a major cause of colonial complaint; among a dozen new states acutely conscious of their own sovereignty, it was obvious that serious conflicts could develop. The remedy was equally obvious: an interstate judicial body to review the issues in dispute.

In October, 1775, Washington advised the Continental Congress of the problem, and on November 25 a committee that had considered the matter suggested the formation of a special committee on prize appeals. The models for the proposed body presumably were the standing or ad hoc judicial committees of the House of Lords and the general British procedures regulating privateering. This system operated in Congress from September, 1776, to the following January. A standing committee then was established, and functioned from January, 1777.

29. See 1 J. Goebel, supra note 10, at 148.
30. 5 Journals of the Continental Congress 542.
31. 7 Journals of the Continental Congress 75.
to May, 1780, when the first national court in American history was established: the Court of Appeals in Cases of Capture. The resolution creating this court outlined its structure and jurisdiction:

Resolved. That a court be established for the trial of all appeals from the courts of admiralty in these United States, in cases of capture, to consist of three judges, appointed and commissioned by Congress, either two of whom, in the absence of the other, to hold the said court for the despatch of business:

That the said court appoint their own register:

That the trials therein be according to the usage of nations and not by jury:

That the said judges hold their first session as soon as may be at Philadelphia; and afterwards at such times and places as they shall judge most conducive to the public good, so that they do not at any time sit further eastward than Hartford, in Connecticut, or southward, than Williamsburg, in Virginia . . . .

William Paca of Maryland, Titus Hosmer of Connecticut, and Cyrus Griffin of Virginia eventually were appointed as the first "national" judges, but Hosmer died within a few months and never sat on this court, and Paca resigned the following year to become governor of his state. George Read of Delaware and John Lowell of Massachusetts eventually were appointed to serve with Griffin, whose tenure was virtually coextensive with the life of the court, from 1780 until 1786.33

<table>
<thead>
<tr>
<th>State of Origin</th>
<th>No. Cases</th>
<th>Aff'd</th>
<th>Rev'd</th>
<th>Dism'd</th>
<th>No Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>11</td>
<td>6</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>7</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>4</td>
<td></td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>10</td>
<td>4</td>
<td>4</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>10</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>4</td>
<td>1</td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Maryland</td>
<td>3</td>
<td>1</td>
<td></td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

32. 16 JOURNALS OF THE CONTINENTAL CONGRESS 61.
As can be seen in table III, the record of the Court of Appeals in Cases of Capture was substantial, considering the specialized jurisdiction of the court. The considerable variation in procedural and substantive law at the level of first instance, and the disparity between the law construed and applied by the state courts and by the court of appeals, which was charged with conducting its review according to the practices of nations, emphasized the need for a uniform system to adjudicate disputes concerning prizes. Although records are incomplete, nearly 120 cases are known to have come before the Court of Appeals in Cases of Capture or its predecessor committee; eight of these decisions were reported in Dallas's second volume of court reports. The state judgments were upheld in 39 appeals and were reversed in 42; other appeals were dismissed or otherwise settled without review. These figures in themselves document the need at that time for a national judicial system.

From the outset, the reluctance of the states to acknowledge appellate jurisdiction hindered the functioning of the national system. The language of state legislation often explicitly limited appeals to a higher court within the state jurisdiction or was sufficiently ambiguous to enable states to determine the legality of an appeal to the national court. After

34. See, e.g., The Resolution, 2 U.S. (2 Dall.) 1 (Ct. App. Cas. Cap. 1781).
35. See table III supra.
36. See 1 J. GOEBEL, supra note 10, at 160-71.
the Revolution, several of the states amended their laws to prevent taking an appeal out of the jurisdiction.\textsuperscript{37} Although the court of appeals delivered opinions that appear to have been accepted as authoritative by other powers,\textsuperscript{38} and subsequently were incorporated into the rules of decision of the Federal Supreme Court,\textsuperscript{39} its accomplishments were manifestly unpopular with states whose judgments were overruled, and the subject area with which it dealt was too arcane to catch the popular imagination.

**The Confederation Experience: The Interstate Land Disputes**

The Court of Appeals in Cases of Capture, despite its deficiencies, represented an attempt to provide a national court structure for interstate disputes. An ad hoc body under the control of the Continental Congress was charged with resolving another subject of legal controversy in which extrastate jurisdiction was manifestly needed: the numerous disputes over boundaries and the "western lands" claimed by several of the former colonies. As a general proposition, the "landless" states demanded as a price of ratification of the Articles of Confederation that the great western tracts be turned over to the nation; indeed, these cessions had been made by the time the Articles took effect, on March 1, 1781. There remained a substantial number of questions that became subject to article 9, which in part provided: "The United States, in Congress assembled, shall . . . 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 . . . ."\textsuperscript{40} The procedure for congressional disposition of such issues then was set out in detail:

\begin{quote}
[W]henever the legislative or executive authority or lawful agent of any State, in controversy with another, shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commis-
\end{quote}

\textsuperscript{37} See 13 Journals of the Continental Congress 281-84.
\textsuperscript{38} See H. Carson, \textit{supra} note 33, at 61-64.
\textsuperscript{39} See Penhallow v. Roane's Administrators, 3 U.S. (3 Dall.) 54, 116 (opinion of Cushing, J.).
\textsuperscript{40} 9 Journals of the Continental Congress 916.
sioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons, each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause, shall agree in the determination ... 41

Half a dozen such disputes were presented to Congress under this provision: only one was pursued to final judgment, one was never formally submitted to the national jurisdiction, and the remainder were settled out of “court.” 42

Two cases illustrate the difficult experiences of the attempted adjudication of interstate land claims by the Continental Congress: the lengthy controversy over the “Hampshire grants,” which ultimately became the state of Vermont, and the equally protracted dispute over the Wyoming Valley in northern Pennsylvania. The first dispute reached a 20-year climax in January, 1777, when the settlers in the region between New York and New Hampshire declared themselves an independent state. 43 New York delegates petitioned the Congress to undertake an arbitration of the matter, the procedures under the Articles not yet having been drafted. Three years later, New York and New Hampshire formally laid their claims before Congress, but sporadic discussion of the issue was unavailing. 44 In 1781, Massachusetts formally recognized Vermont as an independent state; New Hampshire took similar action in the same year. A decade later New York gave up the struggle and the Federal Congress admitted Vermont to the Union. 45

The Wyoming Valley issue was the only full-scale adjudication carried out by Congress under the Articles. Pennsylvania claimed the region under the grant of 1681 to William Penn 46; Connecticut insisted that it held

41. Id. at 916-17.
42. See H. Carson, supra note 33, at 66-79.
43. 8 Journals of the Continental Congress 491.
44. See 18 Journals of the Continental Congress 833.
46. See 5 F. Thorpe, supra note 1, at 3035. See also H. Carson, supra note 33, at 68-75.
prior title to the region under its charter of 1662.\textsuperscript{47} The Susquehannah Company, chartered by Connecticut, had organized and settled the valley, and the state had formally established the settlements as Westmoreland county, which was duly represented in the Connecticut legislature. In 1778, however, combined bands of Tories and Indians invaded the valley and decimated the population. Three years later, as new settlers and surviving claimants from Connecticut began moving back, Pennsylvania petitioned for a settlement of the jurisdictional issue under article 9.\textsuperscript{48}

In 1782, a five-judge court was convened at Trenton, New Jersey, and sworn in by Justice Isaac Smith of the state supreme court. The judges selected were Welcome Arnold of Rhode Island, David Brearly and William C. Houston of New Jersey, William Whipple of New Hampshire, and Cyrus Griffin of Virginia, who was already serving on the Court of Appeals in Cases of Capture.\textsuperscript{49} The court took testimony for more than a month and then returned a unanimous verdict in favor of Pennsylvania. Two years later an effort was made to reconvene the court to hear claims of individual tenants of the Wyoming grants, but the petition was dismissed. The judicial function of Congress obviously was limited to disputes between states, and did not extend to disputes between individuals and states.\textsuperscript{50}

Aside from enabling the Hampshire grants and the Wyoming Valley claims to be heard, the boundary resolution process included in the Articles accomplished little. A border dispute between Virginia and Pennsylvania, in 1779, was settled without recourse to Congress.\textsuperscript{51} The lack of a forum in which individuals could litigate interstate claims was demonstrated in another controversy that began as a territorial conflict between New Jersey and Virginia, but involved the property and contract interests of George Morgan, one of many agents for seaboard states seeking to develop western settlements as revenue devices. At issue was whether New Jersey legally could promote a settlement in territory claimed by Virginia; the controversy was complicated by the negotiations undertaken by Virginia for cession of the "Ohio" lands to Con-

\textsuperscript{47} Connecticut continued to function under this charter until adopting a constitution in 1818. See 2 Sources and Documents, supra note 12, at 131, 144.
\textsuperscript{48} 11 Journals of the Continental Congress 721; 12 Journals of the Continental Congress 1070.
\textsuperscript{49} 23 Journals of the Continental Congress 533.
\textsuperscript{50} See 9 Journals of the Continental Congress 918 ("private right of soil").
\textsuperscript{51} 131 U.S. liii-liv (J. Davis, Appendix 1889).
gess. In 1784 the cession was accepted, and an accompanying petition by Morgan was dismissed.52

A territorial dispute between Massachusetts and New York, in 1784, led to the selection of judges for a congressional court to meet in Williamsburg that fall, but the meeting was not held; after 3 years of direct negotiations between the states, the matter was announced to Congress to have been settled.53 A similar interstate settlement in 1786, known as the "treaty of Beaufort," disposed of a dispute between South Carolina and Georgia.54

THE JUDICIAL ARTICLE IN THE CONSTITUTIONAL CONVENTION

In August, 1786, a “grand committee” of the Continental Congress, charged with undertaking to strengthen the nearly moribund Articles of Confederation, recommended the addition of 7 new articles to the original 13, the 19th being essentially a new judicial article amending and repealing the 9th. Although this recommendation came to naught, it merits attention for two reasons: first, it was virtually recapitulated in the so-called Pinckney plan for a new constitution submitted the following year at the Constitutional Convention; second, its language, seeking to continue in a different form the limited authority of a national government, contrasted fundamentally with what ultimately became article III of the new Constitution. The article read:

The United States in Congress Assembled shall have the sole and exclusive power of declaring what offenses against the United States shall be deemed treason, ... and power to institute a Federal Judicial Court for trying and punishing all officers appointed by Congress for all crimes, offenses, and misbehaviour in their Offices and to which Court an Appeal shall be allowed from the Judicial Courts of the several States in all Causes wherein questions shall arise on the meaning and construction of Treaties entered into by the United States with any foreign power, or on the Law of Nations, or wherein any question shall arise respecting any regulations that may hereafter be made by Congress relative to trade and Commerce, or the Collection of federal Revenues pursuant to powers that shall be vested in that body or wherein questions of importance may arise and the United States shall be a party ... .55

52. See id. at lix-lii.
53. See id. at lii-liii.
54. See id. at liii-liiv. See also South Carolina v. Georgia, 93 U.S. 4 (1876).
55. 31 JOURNALS OF THE CONTINENTAL CONGRESS 497.
At the convention that met the following year in Philadelphia "for the sole and express purpose of revising the Articles of Confederation," 56 Charles Pinckney of South Carolina and Governor Randolph of Virginia submitted their respective state plans for revision on May 29. 57 On June 15, William Paterson of New Jersey submitted a plan, agreed upon by his state and by some of the New York delegation, 58 that soon superseded the Pinckney proposal. The ultimate shape of the new Constitution would be influenced by the compromises between the Randolph and Paterson plans. On the question of the judiciary, the Virginia proposals originally were as follows:

Resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution, that the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony. 59

The Paterson plan closely resembled the Randolph plan in its treatment of the judicial function, as both plans looked to the creation at the national level of a court system having both original and appellate jurisdiction in matters of national interest. The Virginia plan, however, envisioned trial courts separate from the court of last resort; the New Jersey plan provided for a single tribunal discharging both functions. 60

The opposition dissented to the idea of separate trial courts, or of any federal trial jurisdiction, and John Rutledge of South Carolina and Roger Sherman of Connecticut quickly joined forces to oppose the suggestion

56. 3 RECORDS OF THE FEDERAL CONVENTION, supra note 26, at 13.
57. See 1 RECORDS OF THE FEDERAL CONVENTION, supra note 26, at 20-23 (Randolph plan); 3 RECORDS OF THE FEDERAL CONVENTION, supra note 26, at 595-609 (Pinckney plan).
58. 1 RECORDS OF THE FEDERAL CONVENTION, supra note 26, at 242-45.
59. Id. at 244.
60. See 1 J. GOEBEL, supra note 10, at 204-24.
that plenary judicial power be vested in the national government.\footnote{Id. at 211.} James Madison of Virginia and James Wilson of Pennsylvania became the nucleus of the movement in support of such power.\footnote{Id. at 211-12.}

Madison believed that, unless a system of inferior courts with final jurisdiction in appropriate cases was created, the supreme tribunal would be overwhelmed by duplicative and unnecessary appeals. Remand to the state court from whose decision an appeal lay, in Madison's opinion, merely would complete a circular process, because the bias of the judge or prejudice of the jury was likely to be reimposed. Furthermore, Madison noted the great inconveniences associated with trial de novo in a national supreme court, particularly pertaining to the presentation of witnesses.\footnote{See 1 Records of the Federal Convention, supra note 26, at 124.}

Wilson agreed with Madison, and, perhaps thinking of the experience of the Court of Appeals in Cases of Capture, contended that admiralty subjects were of national interest and ought to be within the exclusive jurisdiction of a national court system.\footnote{Id.} Rufus King of Massachusetts supported Madison's position, and responded to Sherman's objection to the national judiciary with the assertion that trials and appeals under a single system of law would tend to reduce litigation and, therefore, costs.\footnote{Id. at 125.}

More controversial were other issues that arose in the course of the debates, particularly concerning the power of the national court to review decisions of the highest state courts. Some delegates argued that the national legislature should be allowed to negate state laws; the supremacy clause, however, clearly focused on the judiciary as the ultimate arbiter.\footnote{See 1 J. Goebel, supra note 10, at 238-39.}

The advocates of a strong, broadly endowed, and independent national court system carried all their points, probably because the Virginia and New Jersey plans had been largely in agreement on this function of the new national government. As finally drafted and ratified, the judicial article of the Federal Constitution in many respects reflected the basic features of the antecedent state instruments, though it also incorporated provisions that varied significantly from the prior state models.
Section 1 of article III provided only for a Supreme Court, leaving to the legislative branch the initiative for establishing other federal judicial bodies, if any. In effect, however, and inferentially in the distinction in section 2 between original and appellate jurisdiction, a complete federal court structure was anticipated. The first section also committed the federal system to lifetime tenure of judges, free from the potential legislative pressure of threatened salary reductions.

Section 2 undertook to define the nature of federal jurisdiction, using language somewhat reminiscent of provisions in the Articles of Confederation but distinctly different from the jurisdictional statements of state constitutions. The division of trial and appellate jurisdiction between the Supreme Court and “inferior” (subordinate) tribunals left to Congress the primary responsibility for defining details.

Section 3 anticipated a substantial role for the federal courts in the adjudication of treason against the United States, but few threats to the national interest invoking this jurisdiction were to occur. The trial of Aaron Burr early in the national history, and a few others in the Civil War and in World War I, attest to the paucity of the threats to state interests. Early drafts of article III envisioned provisions for removal of executive officers by the judicial process, but impeachment, a function of the legislative rather than the judicial branch, finally was adopted to perform this function.

Most of the debates over the judicial article in the ratifying conventions repeated the views of delegates at Philadelphia. Preservation of the common law heritage of jury trials was a primary concern that led ultimately to the reiteration of this guarantee in the Bill of Rights. The need for written safeguards of individual rights, also to be embodied in the first ten amendments and tacitly directed to the attention of the new national judiciary, frequently was stressed. Aside from some grumbling

68. Id. at 186.
69. See notes 18-19, 23 supra.
70. Cf. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (limited jurisdiction of inferior federal courts; not all actions cognizable by state tribunals fall within federal jurisdiction).
71. See table IV infra.
73. See, e.g., United States v. Greiner, 26 F. Cas. 36 (No. 15,262) (E.D. Pa. 1861).
75. See The Federalist Nos. 65, 66 (A. Hamilton).
over the expense of a dual system of courts and over the prospective conflicts between separate bodies of state and national law, article III generated few of the passionate disputes that arose over the legislative and executive articles.\textsuperscript{76}

Ratification progressed with moderate speed. In December, 1787, some 90 days after the Philadelphia convention rose from its labor, Delaware, Pennsylvania, and New Jersey had given their approval. Georgia and Connecticut followed in January, 1788, and Massachusetts in February. The first setback in the momentum came in March when Rhode Island voted in the negative, but since Rhode Island had not participated in the Philadelphia convention the action was less than cataclysmic.\textsuperscript{77} Maryland gave its approval in April and South Carolina in May; New Hampshire on June 21 became the ninth state to ratify.\textsuperscript{78} Because, under the terms of article VII, this gave the necessary majority to put the new instrument into effect, the Constitution was nominally adopted, but as a practical matter it was obvious that the approval of the two strategic states of Virginia and New York was necessary. Virginia ratified June 26, and New York a month later on July 26.\textsuperscript{79} As perorations to the advocacy for the new Constitution, two particularly pregnant statements on the national judicial power were recorded in these final conventions. Alexander Hamilton wrote:

\begin{quote}
[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things, some of which are incompatible with the interests of the union, and others with the principles of good government... No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to overrule such as might be in manifest contravention of the articles of Union.\textsuperscript{80}
\end{quote}

\textsuperscript{76}See Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot ed. 1836) [hereinafter cited as Elliot's Debates].
\textsuperscript{77}See 1 J. Goebel, supra note 10, at 357-59.
\textsuperscript{78}See S. Bloom, Formation of the Union Under the Constitution 60 (1937).
\textsuperscript{79}Id.
\textsuperscript{80}The Federalist No. 80, at 516 (E. Earle ed. 1937).
In June, 1788, in the course of the debates of the Virginia ratifying convention, John Marshall spoke in rebuttal to the objections of George Mason and Patrick Henry to article III:

Here are tribunals appointed for the decision of controversies which were before either not at all, or improperly, provided for. That many benefits will result from this to the members of the collective society, every one confesses. Unless its organization be defective, and so constructed as to injure, instead of accommodating, the convenience of the people, it merits our approbation. . . .

. . . With respect to its cognizance in all cases arising under the Constitution and laws of the United States, [Mr. Henry] says that, the laws of the United States being paramount to the laws of the particular states, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? . . . If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.81

THE STATUTORY BASIS FOR A NATIONAL JUDICIARY

To implement article III of the Constitution, a Committee for Organizing the Judiciary was established by the Senate on April 7, 1789. It consisted of a representative of each of the 10 states then represented in the upper house of the First Congress82: Paine Wingate of New Hampshire, Caleb Strong of Massachusetts, Oliver Ellsworth of Connecticut, William Paterson of New Jersey, William Maclay of Pennsylvania, Richard Bassett of Delaware, Charles Carroll of Maryland, Richard Henry Lee of Virginia, Ralph Izard of South Carolina, and William Few of Georgia.83 Five of the members had attended the Philadelphia Convention, seven had served in the Continental Congress, and two had helped draft the constitutions for their states.

Ellsworth, the future third Chief Justice of the United States, had the most extensive judicial experience, 4 years (1777-81) on the standing

81. 3 Elliot's Debates, supra note 76, at 551-53.
82. The Senators from New York did not take their seats until the second session of the First Congress. North Carolina and Rhode Island did not ratify the Constitution until 1789 and 1790, respectively.
83. See 1 J. Goebel, supra note 10, at 458-59.
committee on prize case appeals of the Continental Congress, as well as service as a member of the governor's council (1784-1807) and as judge of the Superior Court of Connecticut (1785-89). At the Philadelphia Convention, though he represented one of the small states not generally sympathetic to a concept of a strong central government, he had firmly advocated giving adequate power to the legislative, executive, and judicial branches, and at the Connecticut ratifying convention in January, 1788, he had declared: "If the United States . . . make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." 84

Ellsworth's vision of a strong and independent federal judiciary was reflected in the final form of the Judiciary Act. 85 The statute dealt with three major areas: organization, 86 jurisdiction, 87 and procedure. 88 Although it failed to satisfy all parties, the Act carried forward the concept of a national judiciary envisioned in article III while satisfying the most strenuous objections of the anti-Federalists.

Article III stipulated that there was to be "one supreme court" and assumed a system of subordinate courts, which the Committee for Organizing the Judiciary quickly determined should be federal courts rather than state courts vested with jurisdiction over federal matters. 89 Although the Committee might have modeled the lower federal courts after the system of separate tribunals for law and equity that existed in a few states, 90 the more common two-tier state court organization of nisi prius and circuit tribunals was followed. 91 This structure was better suited to a federal system: each federal district court had jurisdiction only within one state, thus assuaging an expressed concern that federal judicial districts otherwise would tend to obliterate state lines and ex-

84. THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 228 (L. Friedman & F. Israel eds. 1969) (biographical sketch by M. Kraus).
85. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
86. Id. §§ 1-8.
87. Id. §§ 9-13.
88. Id. §§ 14-35.
89. See 1 J. GOEBEL, supra note 10, at 458-63.
90. Cf. id. at 475-79. Chancery was a separate court only in a few states, such as New Jersey, Delaware, and Virginia.
91. Cf. id. at 472. The concept of district courts was not a novel one; Virginia and North Carolina had organized their trial courts by district. See, e.g., 12 Hen. (Va.) 730 (ch. 67, 1788).
tistinguish or subordinate state jurisprudence. The three circuits effectively utilized the time of the Supreme Court Justices, who were kept “in touch with the country” by sitting with the district judges. In practice, the statutory plan soon proved cumbersome; the Act required amendment regularly as new states came into the Union, and circuit lines had to be continually redrawn.

### Table IV. Organization of First Federal Judiciary

<table>
<thead>
<tr>
<th>Type of Court</th>
<th>Organization</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>court of final instance</td>
<td>Chief Justice; five Associate Justices</td>
<td>suits between states, or with states as party; suits involving foreign officers</td>
</tr>
<tr>
<td>Supreme Court</td>
<td></td>
<td>all other cases</td>
</tr>
<tr>
<td>courts of primary instance</td>
<td>Eastern, Middle, Southern</td>
<td>felonies; civil suits over §500d</td>
</tr>
<tr>
<td>circuit courts</td>
<td></td>
<td>cases from district courts</td>
</tr>
<tr>
<td>district courts</td>
<td>one for each state and for the Maine district of Massachusetts, and the Kentucky district of Virginia</td>
<td>misdemeanors; admiralty; civil suits up to §500f</td>
</tr>
</tbody>
</table>

\[a\] U.S. Const. art. III, § 2, cl. 2; Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73.

\[b\] Id.

\[c\] Act of Sept. 24, 1789, ch. 20, §§ 4, 5, 1 Stat. 73. The Eastern Circuit was made up of New Hampshire, Massachusetts, Connecticut, and New York; the Middle Circuit consisted of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia; the Southern Circuit included South Carolina and Georgia.

\[d\] Id. §§ 11, 12. The latter section provided for removal of causes from state courts in cases of diversity of citizenship.

\[e\] Id. § 11.

\[f\] Id. § 9. District courts were given concurrent jurisdiction with state courts in tort actions involving aliens or foreign law, and exclusive jurisdiction over local foreign officials, such as consuls. Section 10 gave certain broader powers to the district courts in the Maine and Kentucky districts.

92. Act of Sept. 24, 1789, ch. 20, § 2, 1 Stat. 73.

93. Id. § 4.

94. See Act of June 4, 1790, ch. 27, 1 Stat. 126 (establishing federal courts in North Carolina); Act of June 23, 1790, ch. 21, 1 Stat. 128 (establishing federal courts in Rhode Island).
Subject matter jurisdiction and original and appellate jurisdictions of the national courts largely had been determined by section 2 of article III, but the statutory provisions sought to accommodate the states by further limiting causes cognizable in the federal district courts. These tribunals were granted exclusive jurisdiction in criminal matters "cognizable under the authority of the United States," in admiralty cases, and in cases involving minor foreign officials. They had concurrent jurisdiction both with state courts and with the new circuit courts in tort claims arising out of international law and in suits brought by the United States when the amount in controversy exceeded $100. The jurisdiction of the circuit courts was original as to suits brought by the United States involving amounts in excess of $500 after costs, diversity of citizenship, and major federal criminal acts; appellate jurisdiction existed over certain cases from the district courts. A guarantee of jury trials, soon to be reiterated in the Bill of Rights, offered further assurance to those who believed that interstate litigation under a national judiciary posed a threat to an individual removed from his vicinage.

The procedural provisions of the Judiciary Act followed the familiar common law traditions adapted in colonial times and continued in the new states. Section 34 stipulated that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." By providing for deference to state law, except in federal questions, the authors of the Act further appeased opponents of an extensive national judiciary.

The seedtime for the American national judiciary had extended for the 14 year period from 1775 to 1789; in the ensuing 11 years, until John Marshall became Chief Justice of the United States, the seedlings were cultivated as the new court system was tested in operation. This was a period of relative quiescence; the extensive usurpation of state judicial authority that had been feared by some did not materialize. By 1801, of 87 cases appealed to the Supreme Court, only 7 had come from state tribunals. Admiralty cases, for which exclusive jurisdiction

95. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73.
96. Id. §§ 11, 12.
97. See 2 Records of the Federal Convention, supra note 26, at 635-40.
98. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73.
99. See 1 J. Goebel, supra note 10, at 802.
in the federal courts had been demanded, constituted nearly half of the litigation before the Supreme Court during its first decade. Moreover the decisions of the Supreme Court in this period had no striking effect on decisions in state courts or in federal courts applying state law: two-thirds of the 61 cases pursued to final adjudication resulted in affirmances of the judgments of the courts of origin. Although the jurisdiction of the federal courts was being imposed, and to that extent the power of state courts diminished, the quiet manner of this accomplishment created an environment in which the seedlings of both state and national judicial processes at last could take firm root.

100. See id. at 807.
101. See id. at 811.