

## JUDICIAL COMPENSATION AND THE DEFINITION OF JUDICIAL POWER IN THE EARLY REPUBLIC

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*Article III's provision for the compensation of federal judges has been much celebrated for the no-diminution provision that forecloses judicial pay cuts. But other features of Article III's compensation provision have largely escaped notice. In particular, little attention has been paid to the framers' apparent expectation that Congress would compensate federal judges with salaries alone, payable from the treasury at stated times. Article III's presumption in favor of salary-based compensation may rule out fee-based compensation, which was a common form of judicial compensation in England and the colonies but had grown controversial by the time of the framing. Among other problems, fee-paid judges were understood to have a financial interest in expanding their jurisdiction. By placing federal judges on salary, Article III may have provided subtle institutional support for the notion that federal courts were to be courts of limited jurisdiction.*

*This Article explores the role of judicial compensation in shaping the familiar jurisdictional landmarks of the early Republic. It shows that Congress chose a salary-based compensation scheme, and took early steps to rule out fee payments to federal judges. The Article also demonstrates that the judicial salary was understood to include compensation for official travel, a fact that sheds important new light on the Supreme Court Justices' hostility to the burdens, and expense, of riding the circuit. The Article suggests that financial self-interest may have played a role in shaping the early definition of judicial power and the willingness of the Justices to take on extrajudicial assignments. Such familiar episodes in the historiography of the early Republic as the refusal of the circuit courts to hear pension claims, the Court's refusal to issue advisory opinions, the paradoxical willingness of Chief Justice Jay to accept a position as ambassador to Great Britain, and the Court's complex*

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*response in Marbury v. Madison to the repeal and reestablishment of circuit duties all take on new meaning when viewed against the backdrop of financial self-interest. Concluding remarks focus on judicial independence and the way Article III frames debate over judicial compensation and workload.*

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## INTRODUCTION

Chief Justice John G. Roberts, Jr. drew headlines on January 1, 2007, when he devoted his year-end report to an argument for a judicial pay increase.<sup>1</sup> Whatever the report's merits as an advocacy piece,<sup>2</sup> its submission would not have surprised James Madison. Madison had proposed precluding any change in judicial pay, both increases and reductions, for fear that

1. John G. Roberts, Jr., 2006 Year-End Report on the Federal Judiciary (Jan. 1, 2007), available at <http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf>. Notable contributions to the literature on judicial pay and incentives include Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (noting that the federal judiciary operates as a form of nonprofit enterprise, with judges unable to supplement their salaries with filing fees and other forms of compensation); Adrian Vermeule, Essay, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501 (2002); and Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CAL. L. REV. 1029 (2003). See also Stephen J. Choi et al., *Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate*, 1 J. LEGAL ANALYSIS (forthcoming 2009) (manuscript at 1–5, available at <http://ssrn.com/abstract=1077295>) (summarizing the debate about proposals to increase judicial salaries).

2. Critics questioned both the report's numerical comparisons and its rhetorical style. See, e.g., Paul F. Campos, *Our Poor, Underpaid Federal Judges*, CAPITOL HILL BLUE, June 22, 2007, <http://www.capitolhillblue.com/cont/node/2759>; Matthew J. Franck, *The Unpersuasive Chief*, NAT. REV. ONLINE, Jan. 7, 2007, <http://article.nationalreview.com/?q=YzRmZWVkdNDRIMmFINzA5ZGQzYzNkMmU4N2VlNWRhNGQ=>.

judges would approach Congress hat in hand (to secure the one and avoid the other).<sup>3</sup> But Madison's colleagues at the Philadelphia convention did not agree. Madison was outvoted—twice—by those concerned less about the erosion of judicial independence than about the erosion of judicial salaries through wage and price inflation and the steady accumulation of additional work.<sup>4</sup> As a result, the final terms of Article III establish a one-way ratchet that permits Congress to raise but not reduce judicial compensation.<sup>5</sup> Such a provision encourages Congress to err on the low side of judicial pay, and assures the sort of interbranch dialogue exemplified by the Chief's report.<sup>6</sup>

Just as Article III's one-way ratchet structures interbranch dialog about the *adequacy* of judicial compensation, the *form* of compensation may shape the incentives of the federal judiciary. At the time of the framing, the judges of superior courts in England received two forms of compensation: a salary paid by the Crown and fees paid to the judges by the litigants themselves on a piecemeal basis.<sup>7</sup> (The winning party could recover its own court fees from the loser as part of the taxable costs of litigation.)<sup>8</sup> Fee-paid judges were also commonplace in colonial America; justices of the peace

3. For a summary of the debates over the framing of the Compensation Clause of Article III, see *infra* Part II.

4. See Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 311–18 (1976). For an account of the Constitutional Convention's votes against Madison's proposal, see *infra* text accompanying notes 82–84.

5. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

6. The history of judicial compensation reveals periods of wage inflation, when judicial salaries have declined in real terms, and of deflation, when judges gained in real terms. See Rosenn, *supra* note 4, at 343–50. Yet the Court understandably regards the nominal salary of judges as controlling for purposes of evaluating claims of unconstitutional salary diminution. See *United States v. Will*, 449 U.S. 200, 229 (1980) (holding that wage increases vest when they become due and payable, not when promised by Congress in legislation that would establish a future cost of living adjustment); cf. *United States v. Hatter*, 532 U.S. 557, 566–67 (2001) (upholding the application of a nondiscriminatory tax to all federal judges). With the one-way ratchet in place, Congress can adjust nominal salaries upward to account for inflation, but cannot respond to deflation except perhaps by increasing the judicial workload.

7. See DANIEL DUMAN, *THE JUDICIAL BENCH IN ENGLAND, 1727–1875: THE RESHAPING OF A PROFESSIONAL ELITE* 111–26 (1982) (collecting data on the salaries, fees, and perquisites of superior court judges in England during the eighteenth century). On the compensation of officers through a combination of fees and salaries in seventeenth-century England, see G.E. AYLMER, *THE KING'S SERVANTS: THE CIVIL SERVICE OF CHARLES I 1625–1642*, at 160–252 (rev. ed. 1974), and G.E. AYLMER, *THE STATE'S SERVANTS: THE CIVIL SERVICE OF THE ENGLISH REPUBLIC 1649–1660*, at 106–20 (1973) [hereinafter AYLMER, *THE STATE'S SERVANTS*].

8. On the collection of litigant fees in Massachusetts just prior to Shays' Rebellion, see Claire Priest, Note, *Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion*, 108 YALE L.J. 2413, 2423–29 (1999). On the incentives created by fee collection in England, see Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law: A Prospectus*, 8 AUSTR. J. LEG. HIST. 1 (2004) [hereinafter Klerman 2004] (sketching a proposal for studying the influence of fees on judicial decisions), and Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) [hereinafter Klerman 2007]. See generally Phillip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 VA. L. REV. 397 (1935) (describing the practice of fees and costs during the nineteenth century).

and the judges of the colonial vice-admiralty courts received a substantial share of their compensation in the form of fees.<sup>9</sup> But reliance on litigant fees to compensate judges had grown controversial during the eighteenth century. After the Declaration of Independence, new state constitutions often imposed restrictions designed to moderate the corrupting influence of fee-based judicial compensation. For example, Maryland's constitution called for a secure judicial salary, and foreclosed judges from both holding other offices and receiving any fees or perquisites of office.<sup>10</sup>

Article III does not follow the Maryland Constitution in expressly foreclosing fee-based compensation. But it may establish a presumption in favor of salary-based compensation.<sup>11</sup> The well-known terms of Article III require that federal judges receive for their services, "at stated Times" a "compensation" that shall not be diminished during their continuation in office. The word "compensation" is broad enough to encompass all forms of judicial pay, including both salaries and fees (and other emoluments of office). The requirement that this compensation be paid "at stated Times" appears to have been framed with judicial salaries in mind; fee-based compensation was paid at various times over the course of the litigation. Similarly, the no-diminution rule may contemplate the certainty of a salary rather than the fluidity of fee-based compensation; the ebbs and flows inherent in fee-based payment systems would not obviously comply with the no-diminution requirement.<sup>12</sup> Certainly, the debates in Philadelphia between Madison and Gouverneur Morris over the impact of inflation on fixed judicial salaries assume that Article III calls for the payment of salary-based compensation.<sup>13</sup>

To the extent that Article III establishes a presumption in favor of salary-based compensation, it apparently seeks both to ward off corruption in office and to provide subtle structural support for the view of federal courts as courts of limited jurisdiction. Founding era debates took for granted the fact that the English superior courts had expanded their jurisdiction through the use of legal fictions.<sup>14</sup> Fee-based compensation offered an obvious financial

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9. On the payment of fees to justices of the peace, see THOMAS K. URDAHL, *THE FEE SYSTEM IN THE UNITED STATES* 150–52 (Madison, Wis., Democrat Printing Co. 1898). On fees payable in the vice admiralty courts, see *infra* note 42 and accompanying text.

10. See *infra* note 48 and accompanying text.

11. Others have viewed the jurisdictional terms of Article III as establishing a series of presumptions. See James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts*, 98 COLUM. L. REV. 696 (1998) (suggesting that Article III creates a series of jurisdictional presumptions that Congress may redefine).

12. This may explain why some observers have described paying judges for the quantity of their work as "constitutionally dubious." See Choi et al., *supra* note 1, at 4.

13. See *infra* notes 81–84 and accompanying text.

14. The tools of jurisdictional expansion in England were well known: King's Bench had developed the Bill of Middlesex to broaden its authority over trespass actions and the Court of Exchequer treated all debtors as debtors of the Crown to extend its authority to private litigation. For a summary of these jurisdiction-expanding fictions, see J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 41–47 (4th ed. 2002). On the relevance of English fictions to the debate over the ratification of the Constitution, see Letter from Centinel to the Freemen of Pennsylvania (Oct. 5,

incentive for judges to indulge in such fictional docket expansion. Indeed, Professor Daniel Klerman has suggested that fee-based compensation may have led not only to jurisdictional expansion but also to the development of plaintiff-friendly legal doctrines that would attract new business that only plaintiffs could steer to their courts.<sup>15</sup> If competition for fees tended to encourage judges to grasp for new judicial business, then salary-based compensation would have the opposite tendency. Rather than seeking new business, judges on a salary might predictably view new assignments with some suspicion.<sup>16</sup> Such assignments would bring the burdens of more work without the promise of any immediate compensation. A salary-based compensation system might help to encourage federal courts to stay within the boundaries of Article III, rather than competing for business with one another or with the state courts.

Congress followed Article III's lead in providing for the payment of salaries to federal judges.<sup>17</sup> Interestingly, the use of fictions to secure jurisdictional expansion does not appear to have characterized the practice of the early federal courts.<sup>18</sup> Indeed, to a striking degree, early jurisdictional

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1787), in 2 THE COMPLETE ANTI-FEDERALIST 140 (Herbert J. Storing ed., 1981) (“[P]erson[s] acquainted with the history of the courts in England, know[] by what ingenious sophisms they have, at different periods, extended the sphere of their jurisdiction over objects out of the line of their institution.”). For an explicit connection between fictional jurisdictional expansion and judicial compensation, see *Essay from Brutus to the People of the State of New York* (Feb. 14, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 427–28 (arguing that federal judges would have an incentive to use fictions to broaden federal jurisdiction and secure greater emoluments). See generally Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1232 (1985) (confirming founding-era concerns with the use of fictions to broaden jurisdictions).

15. See Klerman 2004, *supra* note 8; Klerman 2007, *supra* note 8.

16. Cf. John V. Orth, *Essay, Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287, 293 (1991) (suggesting that judges paid by the case, rather than by salary, would be less likely to complain about the size of their docket); Posner, *supra* note 1, at 10–11 (noting that judges on salary should be expected to work less hard, on average, than lawyers of comparable age and experience).

17. See Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 (setting forth stated annual salary figures for the Chief and Associate Justices of the Supreme Court and for each of the district judges and declaring these salaries to be payable on a quarterly basis at the treasury). For a summary of the salaries payable, see *infra* Appendix. In contrast to its provision for specified judicial salaries, Congress contemplated some variation in the compensation payable to members of Congress; members were to be paid on a per diem basis for attending sessions and a stated amount for each mile they traveled to attend the session. See Act of Sept. 22, 1789, ch. 17, 1 Stat. 70. Intriguingly, the congressional fee provision was described as “allowing Compensation,” *id.*, and thus avoided the reference to “certain Compensation” that appeared in the judicial compensation statute, Act of Sept. 23, 1789.

18. Federal judges recognized very early that, as courts of limited jurisdiction, the circuit courts must presume that they lack jurisdiction unless the record shows otherwise. See, e.g., *Turner v. Bank of N.-Am.*, 4 U.S. (4 Dall.) 8, 11 (1799) (“This renders it necessary . . . to set forth upon the record of a Circuit Court, the facts or circumstances, which give jurisdiction, either expressly, or in such manner as to render them certain by legal intendment.”). This presumption against jurisdiction had also cropped up in earlier opinions of the circuit justices. See Michael G. Collins, *Judicial Exceptionalism*, 93 VA. L. REV. 1829 (2007) (collecting early jurisdictional cases). While judicial reliance on the pleadings to determine the existence of jurisdiction opened up the possibility that the record might support jurisdiction even where the underlying facts did not—thus potentially enabling the parties to expand jurisdiction to some extent—federal courts did not innovate but relied on the pleading system in the several states whose procedural law was made applicable in the lower federal courts. See *id.* at 1836–46.

controversies tended to flow from the *refusal* of the judges to take on new assignments. In *Hayburn's Case*, the Justices cited the lack of judicial finality in support of their refusal to sit as judges of the circuit courts to decide the pension claims of disabled war veterans.<sup>19</sup> Striking a similar tone in later correspondence, the Court refused to issue advisory opinions at the behest of the executive branch.<sup>20</sup> In both instances, the Justices couched their objections in terms of the separation of powers—and no doubt such principles played a central role in their refusal to act. But the subtle influence of their salary-based, rather than fee-based, compensation may have helped confirm the wisdom of their principles. Both tasks would have added a significant new share of work to their judicial obligations.

This Article explores the way judicial compensation and financial self-interest may have influenced the formative years of the federal judiciary.<sup>21</sup> Consider the influence of compensation on the Justices' attitude toward circuit riding, a chore they were assigned in the Judiciary Act of 1789.<sup>22</sup> While historians have emphasized the physical burdens of the circuit, they have paid somewhat less attention to the fact that circuit riding also represented an important pocketbook issue for the Justices. Congress paid federal judges a flat salary and the Justices were expected to pay their own expenses when traveling to attend their circuits.<sup>23</sup> As a result, any reduction in circuit-riding duties would effectively represent a significant, but to the public largely invisible, salary increase for the Justices. By contrast, the judges would experience any expansion of circuit duties (such as those involving the disability claims of war veterans) as an uncompensated addition to their official chores.

Understanding the financial self-interest that informed the Justices' complaints about circuit riding sheds new light on a variety of familiar episodes in the historiography of the early federal courts. Perhaps most notably, the decision of the lame-duck Federalist Congress to abolish circuit riding in the Judiciary Act of 1801 represented a significant (real) pay increase for sitting Supreme Court Justices.<sup>24</sup> By the same token, the Act's repeal one year later, along with the restoration of both the burden and expense of circuit riding duties, effectively cancelled the pay increase. More subtly, the salary implications of circuit riding help to explain the constitutional context

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19. 2 U.S. (2 Dall.) 409, 409–14 (1792).

20. See Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793), in RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 78–79 (5th ed. 2003) [hereinafter *HART & WECHSLER*].

21. Useful studies of the judiciary in the early Republic include Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 *CHI.-KENT L. REV.* 31 (1998), and Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 *BUFF. L. REV.* 301 (1987).

22. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

23. See *infra* notes 103–113 and accompanying text.

24. See *infra* notes 223–239 and accompanying text.

in which such important cases as *Marbury v. Madison*<sup>25</sup> and *Stuart v. Laird*<sup>26</sup> were decided.<sup>27</sup> When one understands that, from a certain perspective, the Justices had already been compensated for circuit riding in their salary, one can better understand the threat of impeachment that confronted the Justices who contemplated a refusal to ride their circuits in the wake of the 1802 repeal. By contrast, from the Justices' perspective, the legislation must have appeared to threaten a significant and constitutionally doubtful expansion in the burdens of their office.<sup>28</sup>

In exploring the influence of judicial compensation on the formative years of the federal judiciary, this Article proceeds in four Parts. Part I briefly sketches the English and colonial background of judicial compensation, with a special emphasis on the problems associated with fee-based compensation. While fees remained a common form of compensation among the lower courts, many states had abolished fee payments to superior court judges by the time of the Constitution's framing. Part II traces the evolution of Article III's judicial compensation provisions at the Philadelphia Convention, highlighting the textual and historical arguments for viewing the provision as presumptively requiring salary payments to federal judges. Part III examines evidence from the Federalist era about the manner in which federal judges were paid. It explores the case of Judge Bee's acceptance of admiralty fees, and evidence that his case may have been exceptional. Part IV reexamines some of the leading jurisdictional landmarks of the period, including the decision of Chief Justice John Jay to accept an appointment as envoy to Great Britain, with the better understanding of judicial motivation that this background on judicial compensation provides.<sup>29</sup> Concluding remarks consider the role that Article III and the statutory framework of judicial compensation may have played in shaping

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25. 5 U.S. (1 Cranch) 137 (1803).

26. 5 U.S. (1 Cranch) 299 (1803).

27. On the background of *Marbury* and *Stuart*, see RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 19–68 (1971), and Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329. Ellis traces *Marbury*'s connection to *Stuart* and shows that, as a practical matter, the Justices' decision to ride their circuits in the fall of 1802 represented a conclusive validation of the Jeffersonian repeal of the Judiciary Act of 1801. See Ellis, *supra* at 53–68. On the threat of impeachment if the Justices had refused their circuit obligations, see *id.* at 69–82. On the failed impeachment of Justice Samuel Chase, see *id.* at 96–107; STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 156–58 (1991).

28. On the evolving conception of government office, see Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 STUD. AM. POL. DEV. 60 (1994).

29. Accounts of Chief Justice Jay's extrajudicial activities include WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 89–90, 174–83 (1995); Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1396–1406 (2006); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123. See also Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters? Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 489–94 (1998) (reviewing STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* (1997)).

judicial behavior. Perhaps the preference for salary was meant to provide institutional support for the conception of federal courts as courts of limited jurisdiction.

#### I. THE COLONIAL AND EARLY STATEHOOD CRITIQUE OF FEE-BASED COMPENSATION

In England, at the time of the Revolution, the judges of the courts at Westminster received both salaries (payable under the Act of Settlement)<sup>30</sup> and fees.<sup>31</sup> Fees were ordinarily paid by the parties during the course of the litigation and were ultimately recovered by the winner from the loser in the bill of costs.<sup>32</sup> Litigation fees were typically triggered at various stages of the process, with specified amounts due to initiate the litigation, to serve the defendant with process, to empanel a jury, and so forth. One portion of the fees went to the clerks, bailiffs, recorders, and sheriffs that performed the services in question. Another share went to the judges themselves. Scholars reckon that superior court judges in England received substantial fee-based income. Indeed, late eighteenth-century chief judges of the superior courts earned nearly as much in fees as they did in salary.<sup>33</sup>

England planted the fee system in British North America along with its first settlements. Governors, in particular, could earn substantial fees to supplement their salary.<sup>34</sup> These included judicial fees (in Virginia, the governor served as the chief justice and elsewhere participated in appeals to the colony's council or high court), and administrative fees, such as fees to record

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30. The 1701 Act of Settlement provides for tenure during good behavior for the twelve judges of the three superior courts of common law, King's Bench, Common Pleas, and Exchequer, and requires that their salaries be "ascertained and established." Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.). The required "establish[ment]" of salaries did not foreclose the continued receipt of litigant fees. Indeed, fees for English superior court judges were not abolished until 1799. On the use of fees and salaries to compensate English judges throughout the eighteenth century and the Bentham-inspired reform of judicial compensation in the 1830s, see DUMAN, *supra* note 7, at 125–26.

31. Reports of judicial salaries, fee income, and fees as a percentage of total compensation (salary and fees combined) in England, circa 1797, reveal the following for the chancellor (£5000; £5870; 54%), chief justice of King's Bench (£4000; £2399; 37%), chief justice of Common Pleas (£3500; £2025; 37%), and chief baron of Exchequer (£3500; £323; 13%). Klerman 2007, *supra* note 8, at 1188. Puisne or associate justices and barons received smaller salaries and fee incomes. *Id.*

32. The loser pays system developed in England, see WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 399–400 (Univ. of Chi. Press 1979) and was imported to the colonies of British North America. See Priest, *supra* note 8, at 2423–24, 2424 n.40. Conceptions of the costs of litigation in America evolved so as to exclude attorney's fees, giving rise to the "American" rule that each party pays his own attorney's fees. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9. The "fees" that parties must pay to the officers of court for performing their official functions (e.g., issuing and serving the summons, empanelling a jury, entering a judgment) differ from the "costs" that serve to compensate the opposing party, but the bill of costs typically includes both elements and both are typically paid by the losing party. See Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 856–59 (1929).

33. See *supra* note 31.

34. For a general overview of fee payments to colonial governors, see URDAHL, *supra* note 9, at 97–99. See also Nicholas Parrillo, *The Rise of Non-Profit Government in America: A Preliminary Overview* (Nov. 15, 2006) (unpublished manuscript, on file with author).



land purchases and to admit estates to probate. Lesser officials earned fees as well.<sup>35</sup> Some of the fee payments went to officeholders who performed little real work, a fact of life that fueled colonial anger at do-nothing “placemen.” If no law required public notice as to the fees actually payable for a service, officers would often defraud citizens by demanding excessive fees.<sup>36</sup> Fee-based compensation helped to raise the price of securing judicial decrees in debt litigation and fueled both the Regulator Movement in North Carolina and Shays’ Rebellion in Massachusetts.<sup>37</sup>

Fee-based compensation attracted several other criticisms during the colonial period. First was the concern that fee-based payment systems could lead to the payment and acceptance of bribes.<sup>38</sup> Chancellors in England earned substantial fee income and, if Lord Bacon’s experience were representative, may have had some difficulty in distinguishing the acceptance of litigant fees from the acceptance of litigant gifts and bribes.<sup>39</sup> Indeed, Bacon’s defense—that he took the money from both sides and did not let it influence his resolution of any claims—may have struck a chord with his contemporaries at court, even as it led to the end of his public career.<sup>40</sup> By the time of the Commonwealth, critics of royal government had attacked fee-based compensation as an invitation to fraud and bribery, terms that were to anticipate the American critique.<sup>41</sup>

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35. See URDAHL, *supra* note 9, at 99–118 (describing fees for marriage and liquor licenses, church and school fees, and surveying and port fees).

36. See *id.* at 109 (noting that colonial legislatures fought excessive fees by requiring public officials to post their list of applicable fees in a public place).

37. For a general account of the Regulator Movement, see John Spencer Bassett, *The Regulators of North Carolina, 1765–1771*, 1895 AM. HIST. ASS’N ANN. REP. 141. The Regulators’ petition for redress seeks relief from excessive fees in several separate provisions:

7. That the Chief Justice have no perquisites, but a Sallery only.
8. That Clerks be restricted in respect to fees, costs, and other things within the course of their office.
9. That Lawyers be effectually Barr’d from exacting and extorting fees.
10. That all doubts may be removed in respect to the payment of fees and costs on Indictments where the Defendant is not found guilty by the jury, and therefore acquitted.

Petition of the Inhabitants of Anson County, N.C. (Regulators’ Petition) (Oct. 9, 1769), in 8 THE COLONIAL RECORDS OF NORTH CAROLINA 77 (William L. Saunders ed., 1968). Shays’ Rebellion also focused on the high cost of civil justice, especially for debtors in a loser-pays system. See Priest, *supra* note 8, at 2414, 2444–47.

38. See BERNARD BAILYN, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY 164 (1964) (noting the prevalence of “fees, bribes, and gifts” in the compensation of public officials).

39. On the history of bribery, emphasizing its origins as an offense involving the corruption of judges, see generally JOHN T. NOONAN, JR., BRIBES (1984). On Francis Bacon’s impeachment for accepting bribes during his service as Lord Chancellor, see CATHERINE DRINKER BOWEN, FRANCIS BACON: THE TEMPER OF A MAN 177–204 (1963).

40. DRINKER BOWEN, *supra* note 39, at 200.

41. Holdsworth reports that the judges’ positions in Stuart England, before tenure and salary protections, depended on “court influence, and even upon bribery and other forms of corruption.” 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 352 (1922). For insight into the discourse of

Fee-based payment systems were sometimes structured in ways that encouraged the judge to rule in a particular way, and the colonists vigorously attacked such systems. Consider, for example, the operation of the vice-admiralty courts in British North America. The judges of such courts were paid both salaries and fees, but both parts of their compensation packages were dependent on the condemnation of vessels to create a fund from which payments were made.<sup>42</sup> Fees, in particular, were payable only when the court agreed with the prosecutor or plaintiff that the defendant's breach of the navigation laws required a forfeiture of the vessel. In other words, vice-admiralty judges were paid fees when they condemned the vessel but denied any fee payment when they ruled in favor of its owner. Such a payment system gave the judges a clear financial stake in the outcome of the case, in direct contrast to fee-based systems in which both litigants pay and the winner recovers fees from the loser as part of taxable costs,<sup>43</sup> and would today violate the guarantee of due process of law.<sup>44</sup> Without juries to moderate judicial inclinations, the vice-admiralty courts understandably drew the colonists' fire.

Perhaps the subtlest criticism portrayed fee-based systems as encouraging the judges to compete for business. As one possible by-product of this competition, English superior courts adopted legal fictions that enabled them to expand their jurisdiction into areas of private civil litigation that had previously been the domain of the court of common pleas.<sup>45</sup> Critics understandably viewed these jurisdiction-expanding fictions as driven in part by

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royal corruption in seventeenth-century England, see AYLMER, *THE STATE'S SERVANTS*, *supra* note 7, at 113–14.

42. Thus, the colonists identified as a grievance the fact that the vice-admiralty judges received fees and salaries payable only when they upheld the alleged violation of the acts of trade and navigation and ordered a condemnation of the vessel. These fee- and salary-based incentives led to questionable forfeiture decisions that inflamed colonial opinion and turned merchants against Great Britain. See David S. Lovejoy, *Rights Imply Equality: The Case against Admiralty Jurisdiction in America, 1764–1776*, 16 WM. & MARY Q. (3d ser.), 459, 476–82 (1959) (recounting the apparently biased decision of admiralty courts in South Carolina and Massachusetts in cases involving Henry Laurens and John Hancock). When Parliament extended the role of the admiralty courts in the Townshend Act, it took the colonists' concern to heart at least in part by fixing the salary of the vice-admiralty judges and foreclosing their receipt of any fees and gratuities. See 8 Geo. 3, c. 22 (1768) (Eng.).

43. Under standard fee-based compensation systems, the parties each paid fees throughout the course of the litigation at the time court personnel performed the service in question. At the conclusion of the litigation, the winner could recover back the amount of such fees as part of the costs taxable to the loser. The virtue of a loser-pays system (in contrast to the vice-admiralty courts' approach) lies in the incentive it creates to mete out evenhanded justice. The judge will not view the entitlement to a fee as dependent on the outcome of the case.

44. See *Tumey v. Ohio*, 273 U.S. 510 (1927) (invalidating conviction obtained in state court before a judge who received a fee of twelve dollars for a conviction and no fee at all for an acquittal); see also *Connally v. Georgia*, 429 U.S. 245 (1977) (relying on *Tumey* to invalidate warrant issued by a justice of the peace who was paid a fee only for approving, and not for rejecting, warrant applications).

45. See *supra* note 14; see also Joseph H. Smith, *Administrative Control of the Courts of the American Plantations*, 61 COLUM. L. REV. 1210, 1213 (1961) (describing the "bewildering complexity" of the English court system and attributing the complexity in part to the view that "jurisdiction was a source of profit and was dominated by notions of property").

the judges' selfish desire to increase their fee revenue. Scholars today have begun to assess the impact of fees on the development of legal doctrine, hypothesizing that courts may have shaped substantive law to attract more business.<sup>46</sup> Whether fees influenced substantive doctrine or not, it seems fairly obvious that fees may have encouraged judges to adopt a broad view of their own jurisdiction and their competence to grant expansive forms of relief.<sup>47</sup>

By the time of the Constitutional Convention in 1787, these criticisms of fee-based judicial compensation had produced a number of state statutes and constitutional provisions that foreclosed payment of fees to superior court judges. Consider the language of the Maryland Constitution, which declared that "salaries, liberal, but not profuse, ought to be secured to the Chancellor and the Judges, during the continuance of their commissions."<sup>48</sup> It went on to declare that "[n]o Chancellor or Judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind."<sup>49</sup> Pennsylvania's constitution delivered a similarly twofold message, providing for a fixed salary for superior court judges in one provision and prohibiting inferior court judges from taking any fees or salaries except as provided by law.<sup>50</sup> Both the Maryland and Pennsylvania provisions explicitly ruled out fees for superior court judges.<sup>51</sup>

Other state constitutions were somewhat less definitive, favoring salaries for superior court judges but saying nothing in terms to rule out the receipt of fees. For example, the Massachusetts Constitution provided that "the judges of the supreme judicial court should hold their offices as long as they behave themselves well, and that they should have honorable salaries ascertained and

46. Klerman 2007, *supra* note 8.

47. Fees may also help to explain the common law's view of preenforcement arbitration agreements, although the story has its complicating wrinkles. *See id.* at 43–44; *see also* Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HIST. J. 137 (1993) (tracing the history of practice under the Arbitration Act of 1698 and showing that the statute both followed the lead of the courts in providing for the enforcement of arbitration agreements and received a relatively friendly reception from the King's Bench).

48. *See* MD. CONST. of 1776, art. XXX, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 819 (Ben Perley Poore ed., 2d ed. 1924) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

49. *Id.*

50. *See* PA. CONST. of 1776, § 23, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 48, at 1545 ("[J]udges of the supreme court of judicature shall have fixed salaries."); *id.* § 30, at 1546 ("No justice of the peace shall . . . be allowed to take any fees, nor any salary or allowance, except such as the future legislature may grant."). The two provisions, read in combination, apparently foreclose the payment of fees to superior court judges.

51. The South Carolina Constitution of 1790 also rules out fees for superior court judges. *See* S.C. CONST. of 1790, art. III, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 48, at 1632. It states:

The judges of [the superior and inferior courts] shall hold their commissions during good behavior; and judges of the superior courts shall, at stated times, receive a compensation for their services, which shall neither be increased or diminished during their continuance in office; but they shall receive no fees or perquisites of office.

*Id.*

established by standing laws.”<sup>52</sup> Massachusetts thus followed the Act of Settlement in linking good-behavior tenure to an “ascertained and established” salary. But just as the Act of Settlement was seen as compatible with the continued receipt of fees, so too could one argue that the Massachusetts Constitution left open the possibility of fee payments to judges on salary. Other state constitutions stopped short of expressly foreclosing the payment of fees but specified fixed salaries for judges of superior courts. These constitutions may have thus implicitly ruled out fees, a source of compensation that would vary with the caseload of the court.<sup>53</sup>

Founding era hostility to fee-based compensation can also be seen in the history of the first federal court, the Court of Appeals in Cases of Prize and Capture.<sup>54</sup> Set up during the Revolution to hear appeals from the state courts on the prize claims of American naval vessels and privateers,<sup>55</sup> the Court of Appeals employed judges commissioned by Congress and paid a salary. Although the salary was hard to settle in light of the declining value of continental money,<sup>56</sup> Congress initially ruled out any fee-based compensation. Thus, an early version of the oath of office for judges included an affirmation that the judge “will take no fee, gift or reward.”<sup>57</sup> A one percent share of any prize awarded was set aside for deposit in the Treasury to help defray the cost of the court, but (in contrast with the colonial vice-admiralty court) none of this money went to the judges directly.<sup>58</sup>

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52. MASS. CONST. of 1780, art. XXIX, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 48, at 960; *see also* N.H. CONST. of 1784, art. XXXV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 48, at 1283 (same as Massachusetts). Use of the term “salary” leaves open the possibility that fees might be paid as part of the compensation package.

53. *See* DEL. CONST. of 1776, art. XII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 48, at 275 (“An adequate fixed but moderate salary shall be settled on [the judges of the superior courts] during their continuance in office.”); GA. CONST. of 1789, art. III, § 5, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 48, at 386 (“The judges of the superior court and attorney-general shall have a competent salary established by law, which shall not be increased nor diminished during their continuance in office . . .”). Of course, one might contend that a fixed fee schedule would satisfy the requirement that the judge’s compensation neither increase nor decrease during continuance in office. The absolute amount of compensation might vary, but the rate of compensation would be fixed. For a discussion of this possibility, *see infra* notes 70–73 and accompanying text.

54. *See generally* HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775–1787* (1977) (describing the origins and operation of the court).

55. On the system of bounties that encouraged the taking of prizes by both naval officers and privateers, *see* Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 *YALE J.L. & HUMAN.* 1 (2007).

56. Thus, the judges were initially told that they would have fixed salaries, but the amount was not specified due to concerns about the value of money, and they were given an advance on the sum eventually due. *See* BOURGUIGNON, *supra* note 54, at 115–17. Later, the salary was fixed at \$30,000 per annum for the judges’ “services and expences.” 15 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 1350 (Worthington Chauncey Ford ed., Gov’t Printing Office 1909).

57. 17 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 458 (Gaillard Hunt ed., Gov’t Printing Office 1910).

58. *See* BOURGUIGNON, *supra* note 54, at 115–17. Eventually, as the workload of the court lightened after the conclusion of active hostilities, Congress substituted a fee-based system under

States did not entirely foreclose the payment of fees to judges, however. For one thing, some states continued to permit fee payments to superior court judges well into the nineteenth century.<sup>59</sup> For another, most states permitted justices of the peace and the judges of other inferior courts to receive their compensation through the payment of fees. These fee-paid judges often served on a part-time basis and often mixed their judicial work with administrative chores.<sup>60</sup> The fee system thus tended to moderate the cost of government and to compensate part-time judges in accordance with the amount of work they performed.

In some cases, it appears that judges on salary were expected to pay the expenses of their office from their own resources, rather than being compensated by the government for their travel. One can see that assumption reflected in a variety of sources, if not expressly spelled out in terms. For example, James Madison recommended to the Continental Congress that it furnish an additional sum of money for the judges of the Court of Appeals in Cases of Prize and Capture to cover the cost of their travel and purchase of books.<sup>61</sup> In contrast to salaried officers who paid their own traveling expenses, court officials compensated by fees were often permitted to include a charge for the cost of their travel. In representative provisions adopted in New York, sheriffs and marshals received fees for the service of process and the expense of traveling to perfect such service.<sup>62</sup>

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which the judges were paid a per diem allowance and travel expenses for their attendance. *See id.* at 123–24. These fees and expenses were payable from the Treasury, not from the litigants.

59. Congress commissioned a study of state fees in connection with its assessment of the fees payable to federal judicial officers under provisions that incorporated state fees by reference. *See* C.A. RODNEY, FEES OF OFFICERS OF STATE COURTS, in 16 ANNALS OF CONG. app. at 1147–1246 (1807). The study reveals that state law authorized fee payments to superior court judges in Vermont, New York, New Jersey, and Delaware. *See id.* at 1160, 1166, 1178, 1179–80, 1183, 1190.

60. *See* Parillo, *supra* note 34, at 40–42 (describing fees paid to justices of the peace in New York).

61. *See* 19 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 374–75 (Gaillard Hunt ed., Gov't Printing Office 1912) (1781) (proposing the payment of an additional \$5,000 “or the real equivalent” to cover the “expences of such extensive duty in travelling, books and other matters”). Madison proposed to link this salary to a provision that barred the judges from receiving any “perquisites of office whatever.” *Id.* at 375.

62. Under the New York statute that governed fees for judicial proceedings after the Revolution, the sheriff or marshal would receive “one shilling” for “[c]onveying a prisoner to gaol” within “one mile” and would receive six pence “for every mile more.” *See* Act of Feb. 18, 1879, ch. 25, § 1, reprinted in 2 LAWS OF THE STATE OF NEW YORK 255 (Thomas Greenleaf ed., 1792). In admiralty, the fee for service by the marshal of the original process in the proceeding (*capias*, attachment, or summons) was twelve shillings plus an additional one shilling for “[t]ravelling each mile, going only.” *Id.* at 256. Under the terms of the same statute, judges were to receive fees as follows: for affixing the seal to process, four shillings, and to exemplifications, ten shillings; for every sentence, thirty shillings; for taking an affidavit, one shilling, and a stipulation, four shillings; for swearing a witness, two shillings; and for taxing a bill of costs, ten shillings. *Id.* at 255; *see also* Priest, *supra* note 8, at 2423 (describing fee bills in colonial Massachusetts as including fees for clerks, judges, constables, and witnesses).

Similar compensation systems were adopted for federal court officers. Under the Act of March 3, 1791, clerks of the district and circuit courts were paid five dollars a day to attend sessions of the courts and ten cents a mile to travel to them. Act of March 3, 1791, ch. 22, 1 Stat. 216. These fees were paid by the government, rather than by litigants. When Congress first established salaries for federal offices under the new Constitution, members of the House and Senate received from the

Heading into the Philadelphia Convention, then, the framers had lived through fundamental changes in the way judges were compensated. As colonists, they had criticized the Crown's control over both the judges' tenure in office and the judges' salary.<sup>63</sup> They had also criticized payment systems that relied on fees from litigants, particularly when those fees were payable (as they were in the vice-admiralty courts) on terms that gave the judge a financial interest in the outcome.<sup>64</sup> Many state constitutions reflected these concerns, shifting from fee-based payments to salaries for judges, especially superior court judges. Although the shift to salaries was not universal, and did not alter the fact that some inferior judges were compensated with fees, the trend toward salary-based compensation appears to have informed the drafting of Article III of the federal Constitution, as the next Part explains.

## II. FRAMING ARTICLE III'S COMPENSATION PROVISION

Sometimes, significant constitutional provisions hide in plain sight, largely unexplored or perhaps taken for granted. Article III's provision for the payment of compensation to federal judges may be one such provision. Sparely worded, the provision declares that federal judges shall receive for their services "at stated Times . . . a Compensation, which shall not be diminished during their Continuance in Office."<sup>65</sup> Scholars and courts increasingly focus on the no-diminution provision, viewing it as linked to both Article III's provision for tenure during good behavior and the founding generation's desire to secure judicial independence.<sup>66</sup> But Article III's compensation provision does more than simply rule out pay cuts for federal judges. The provision requires Congress to pay federal judges compensation "at stated Times."<sup>67</sup> The no-diminution and "stated Times" provisions assume that judges were to be paid salaries and may, implicitly, rule out fee-based compensation for federal judges.<sup>68</sup>

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Treasury both per diem fees for attendance at the session and travel expenses from their homes, calibrated by the mile. *Id.* By contrast, judicial salaries were fixed on an annual basis, and no provision was made for the payment of travel expenses. *See infra* text accompanying note 99.

63. *See* Barbara Aronstein Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 LAW & HIST. REV. 101 (1985); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976).

64. For example, Edmund Randolph's report to Congress, suggesting changes to the Judiciary Act of 1789, refused to link the compensation of clerks and marshals to fines and forfeitures because that would rest the remuneration "of public servants upon the delinquencies of its citizens." REPORT OF THE ATTORNEY-GENERAL TO THE HOUSE OF REPRESENTATIVES (1790) [hereinafter RANDOLPH'S REPORT], in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 127, 165 (Maeva Marcus ed., 1992) [hereinafter 4 DHSC].

65. U.S. CONST., art. III, § 1.

66. *See, e.g.*, Rosenn, *supra* note 4; Geyh & Van Tassel, *supra* note 21.

67. U.S. CONST., art. III, § 1.

68. An intriguing linguistic similarity connects the rhythm of the Compensation Clause to the language of the compensation provisions that appeared in the British Royal letters patent. *See* 2 FREDERICK CLIFFORD, A HISTORY OF PRIVATE BILL LEGISLATION 717 (London, Butterworths 1887) ("In the Royal letters patent [for the office of clerk of the Parliament] the salary was ten pounds of

At a minimum, the terms of Article III do not fit particularly well with a fee-based compensation scheme. Fees were payable at various times throughout the course of the litigation, with particular amounts specified for the various chores that a judge might perform. Thus, in New York admiralty proceedings, judges were paid when they placed the court's seal on process, administered an oath to witnesses, accepted affidavits and stipulations, and entered a judgment or sentence.<sup>69</sup> Obviously, a judge's fee-based compensation would arrive irregularly, depending on how litigation progressed on the court's docket. Moreover, fee-based compensation would vary with the caseload; a reduction in case filings would reduce the judges' fee income. Judicial compensation based on the payment of fees was thus in tension with both the "stated Times" and the no-diminution provisions of Article III.<sup>70</sup>

Of course, one might argue that Article III simply requires Congress to pay a salary to federal judges, but does not bar the judges from receiving fees as additional compensation. On this view, the mandatory "shall receive" and "stated Times" language of Article III regulates the time and manner of paying salaries but does not exclude other forms of compensation. One might bolster such an argument by noting that the language of the Act of Settlement, providing for judicial salaries in England to be "ascertained and established," was not read as ruling out supplemental fee income.<sup>71</sup> One might also observe that, unlike the state constitutions of Pennsylvania and Maryland, Article III stops short of saying anything that would expressly foreclose fee payments to federal judges.<sup>72</sup> In support of a fee-based system, the rate of fee-based compensation might be fixed by statute, so as to satisfy the no-diminution requirement, and the time for the payment of fees might be keyed to events in litigation—the date of filing or the date of entry of judgment—so as to satisfy the "stated Times" requirement. Finally, one might contend that fees payable by litigants do not come directly from the fisc and thus do not implicate Article III's regulation of the payment of public money to federal judges.

These arguments for the possibility of fee-based compensation are not particularly forceful. As a textual matter, Article III speaks of the

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lawful money of Great Britain, payable half-yearly at the Exchequer, 'together with all other rewards, dues, rights, profits, commodities, advantages and endowments whatsoever to the said office.'"). The Compensation Clause tracks the patent in referring to payment at a specified time, but fails to provide for any other "rewards [and] advantages." *Id.*; see also U.S. CONST., art. III, § 1.

69. See *supra* note 62.

70. It was not uncommon among early American systems of compensation to use the proceeds of forfeitures to provide a fund from which salaries and fees were paid. For example, in creating the Court of Appeals for Prize Cases, the Continental Congress provided that a share of any amounts forfeited to the Continental government was to be available to defray the cost of the court, including judicial salaries. See BOURGUIGNON, *supra* note 54, at 115. The "stated Times" provision of Article III may have suggested that salaries were to be paid from general revenues, rather than from the funds secured through forfeitures; salaries dependent on forfeitures might arrive sporadically and might, more importantly, give the judge a stake in the disposition.

71. See Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.).

72. See MD. CONST. of 1776, *supra* note 48; PA. CONST. of 1776, *supra* note 50.

“compensation” that judges must receive, not the “rate” of compensation. In prohibiting reductions in compensation, Article III seems to focus on the amount of judicial compensation, rather than the rate of fees judges may earn. For this reason, the fluctuations inherent in a fee-based compensation scheme seem inconsistent with the no-diminution rule.<sup>73</sup>

As a historical matter, the Act of Settlement may not offer much useful guidance on the availability of fees under Article III. Judges of England’s superior courts had long received both salaries and fees as perquisites of their offices. The Act of Settlement did not mean to alter those perquisites.<sup>74</sup> Indeed, the Act of Settlement speaks only to the issue of judicial “salaries,” requiring that they be “ascertained and established”; it says nothing about the treatment of fee-based compensation, instead leaving it to vary in accordance with the docket.<sup>75</sup> By contrast, Article III regulates the “compensation” of federal judges, a term broad enough to encompass all forms of payment, and thus raises doubts about the variability of compensation that would result from fee-based payments.<sup>76</sup> In the end, experience in England under the Act of Settlement may not provide the best interpretive context in which to evaluate Article III’s compensation provision, which was adopted nearly a century later, after decades of pointed colonial criticism of fee-based payment systems.<sup>77</sup>

One finds additional support for a no-fees interpretation in the drafting history of Article III.<sup>78</sup> The drafting history begins with the ninth resolution of the Virginia plan, which provided that the judges of the federal courts were to hold their offices during good behavior and were 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

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73. To be sure, one might contend that any reduction in fee-based compensation that resulted from a diminishing caseload would result from external market forces rather than a legislative attack on the federal judiciary and should not implicate Article III’s concern with preserving judicial independence. But a Congress determined to cut judicial pay could do so by enacting legislation that preserved fee rates at the same time it steered cases to an alternative forum. Judges might contend that restrictions on their jurisdiction operated as *de facto* salary reductions in violation of Article III.

74. Professor Klerman reports that English judges earned substantial fee income throughout the eighteenth century, but that it was curtailed by statute beginning in 1799. *See* Klerman 2007, *supra* note 8, at 1180, 1187–89.

75. 12 & 13 Will. 3, c. 2, § 3 (Eng.).

76. I am indebted to Nicholas Parrillo for this observation.

77. *See* URDAHL, *supra* note 9, at 98 n.4 (“For the sake of acquiring fees as governor or proprietor he . . . disputed the best of titles, and vexed the fairest traders.” (quoting 2 HUGH WILLIAMSON, *THE HISTORY OF NORTH CAROLINA* 14 (Phila., Thomas Dobson 1812))); *id.* at 99–100 n.3 (noting that Governor Andros of New York received fifty pounds to confirm land patents issued under an earlier charter).

78. Of course, one should note that fees might come either from litigants or from government sources. To the extent fees were paid by litigants and varied with the impact of external market forces on federal dockets, one might argue that official compensation had not suffered a diminution within the meaning of Article III. By reason of its impersonal nature, the fluctuation might be seen as leaving the rate of compensation unchanged and as failing to implicate a diminution rule that was viewed as targeting politically motivated salary reductions. Thanks to Nick Parrillo for this observation.



office at the time of such increase or diminution.”<sup>79</sup> Delegates to the Convention viewed the provision as contemplating the payment of salaries out of the treasury, rather than the payment of fees by litigants. Thus, Robert Yates reported in his journal that, in approving the ninth resolution on June 13, the convention had provided that the “judiciary be paid out of the national treasury.”<sup>80</sup> The evidence suggests, then, that the decision to drop the reference to fixed compensation was not meant to allow fee-based compensation, but instead to reflect the framers’ decision to allow salary increases.<sup>81</sup>

Debates over the contours of the compensation provision appear to confirm that only salary-based compensation was under consideration. The only serious debate on the provision took place on July 18, 1787, when Gouverneur Morris moved successfully to amend the language to permit an increase in judicial compensation.<sup>82</sup> Morris argued that inflation might erode the purchasing power of the judges’ compensation and necessitate a pay increase. Madison notably disagreed with Morris on this point. Although he acknowledged inflation as a risk, he worried that allowing Congress to raise judicial compensation would produce a judicial dependence on Congress. He proposed instead that the compensation be calibrated in terms of wheat, or some other commodity, so that judicial pay would adjust to the cost of living. (Virginia, for example, often calibrated value in terms of tobacco.)<sup>83</sup> He also noted that any increase in business could be handled by hiring more judges.

Morris’s response to Madison reveals that both men were thinking of judicial pay in terms of salary, rather than fees. Morris first noted that the price of wheat might vary, thus making it a poor benchmark for inflation. Next, he disputed Madison’s claim that an increase in business could be addressed by hiring more judges. For the Supreme Court, at least, “[a]ll the business of a certain description whether more or less must be done in that

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79. Resolutions proposed by Mr. Randolph in Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21–22 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

80. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 79, at 238. Of course, Congress might establish a fee-based payment system that was payable out of the fisc. Under the new Constitution, both members of Congress and the United States attorneys for the several federal districts were to be paid fees for their services from the Treasury. See *infra* note 105.

81. The resolution adopted on June 13 did not contemplate fees; it called for the judges “to receive punctually, at stated times, a fixed compensation for their services,” 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 79, at 226, and thus seemingly ruled out fee payments. Later, the framers dropped the term “fixed” when it became clear that Congress could authorize salary increases but not reductions. See Records of the Committee of Detail, in 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 79, at 132 (showing that the resolution as submitted to the Committee of Detail somewhat illogically includes a requirement of “fixed” compensation but also allows increases in compensation); *id.* at 186 (omitting in the Committee of Detail draft any reference to “fixed” compensation).

82. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 79, at 44–45.

83. Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason and Politics in the New Republic*, 47 AM. J. LEG. HIST. 35, 76–78 (2005) (describing Virginia’s failed experiment with fixing the salary of public officials by reference to the price of tobacco).

single tribunal—Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.”<sup>84</sup> Note the assumption that underlies this comment: the judges were to receive only their salaries, and their compensation was not to be augmented by fees. Fee-based income, after all, would tend to increase with the workload of the court, thus compensating the Justices for the additional demands of the job. In debating adjustments to compensation, both Madison and Morris apparently assumed that fee-based compensation was foreclosed, and no one took issue with them on this point.

As sent to the Committee of Detail, therefore, the compensation provision called for “fixed” compensation and forbade any diminution during a judge’s continuance in office. The Committee chose to drop the word “fixed,” perhaps because the Committee viewed the possibility of increases in salary, which was contemplated by the adoption of the Morris motion, as inconsistent with the requirement of a fixed compensation.<sup>85</sup> Madison tried again to secure a prohibition against any increase in judicial compensation, but his attempt failed.<sup>86</sup> Those discussing the motion again assumed that judges were to be compensated with salaries. Thus, Charles Pinckney opposed the motion, urging the importance of increasing the “salaries” of federal judges to attract lawyers of the “first talents”;<sup>87</sup> no one spoke of possible payment of compensation through litigant fees.

Like those who drafted Article III, those who discussed the provision during and after its ratification assumed that it contemplated the payment of salaries to federal judges.<sup>88</sup> Alexander Hamilton urged that view in discussing the possibility of adding a new corps of inferior judicial officers to the staff of the federal courts in the late 1790s. In a letter to the Speaker of the House supporting amendments to the judicial department, Hamilton proposed authorizing the appointment of additional lower court judges as well as “Conservators or Justices of the Peace with only Ministerial functions.”<sup>89</sup> Hamilton proposed compensating the judges with a “moderate salary” and justices of the peace with “fees for the services they shall perform.”<sup>90</sup> He distinguished the two on constitutional grounds, noting that the “[C]onstitution requires that Judges shall have fixed salaries[,] but [that] this

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84. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 79, at 45.

85. *See id.* at 186.

86. *Id.* at 429–30.

87. *Id.* at 429 (remarks of Charles Pinckney).

88. Oliver Ellsworth, the leading drafter of the Judiciary Act of 1789, apparently assumed that Article III required fixed salaries. In commenting on a suggestion that Congress rely on state judiciaries, Ellsworth explained that the state judges would become federal judges, and would continue as such “during good behavior & on fixed salaries [sic].” Letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789), *in* 4 DHSC, *supra* note 64, at 495.

89. Letter from Alexander Hamilton to Jonathan Dayton (Oct.–Nov. 1799), *in* 4 DHSC, *supra* note 64, at 614.

90. *Id.*

does not apply to mere Justices of the peace without Judicial powers.”<sup>91</sup> Hamilton’s comment provides the clearest expression of the view that Article III, by foreclosing downward adjustments in judicial compensation, also rules out the payment of fee-based compensation. As the next Part demonstrates, Congress apparently took the same view in its early implementation of Article III.

### III. JUDICIAL COMPENSATION IN THE FEDERALIST ERA

On September 24, 1789, the Judiciary Act of 1789 became law, establishing a new federal judiciary under Article III with thirteen federal district courts, three federal circuit courts, and one Supreme Court.<sup>92</sup> Two other important federal statutes took effect in late September of that year. The first, enacted on September 23, specified the salaries for the nineteen judges who were to make up the federal judiciary.<sup>93</sup> The second, enacted on September 29, regulated the process of the federal courts and specified the fees that clerks, marshals, and officers of the court were to receive.<sup>94</sup> Read together with one another, and with other statutes dealing with official compensation, the three statutes reflect a decision by Congress to specify fixed (“certain”) salaries for federal judges and to deny the judges any kind of fee-based compensation for their services. The statutes also show that Congress meant to include in those salaries the funds necessary to defray any expenses associated with performing their official duties, including their considerable travel expenses.

#### A. *Travel Expenses and Judicial Salaries*

This Section first examines the treatment of judicial travel expenses and then considers the case for viewing Congress as having precluded fee-based compensation. While the Judiciary Act provided three tiers of courts, it supplied only two kinds of judicial officers: Supreme Court Justices and district court judges.<sup>95</sup> In staffing the federal circuit courts (which

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91. *Id.*

92. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73. For background on the Judiciary Act of 1789, see HART & WECHSLER, *supra* note 20, at 28–33.

93. *See* Compensation Act of 1789, ch. 18, 1 Stat. 72.

94. *See* Process Act of 1789, ch. 21, 1 Stat. 93.

95. The federal judiciary included three tiers of courts: thirteen federal district courts, one for each of the eleven ratifying states (and two more for the districts that were to become Maine and Kentucky) with jurisdiction over admiralty and maritime causes, revenue matters, and minor criminal offenses; three circuit courts with original jurisdiction in diversity matters, alienage matters, and more serious federal crimes, and appellate jurisdiction over many matters in the district courts; and one Supreme Court, staffed with one Chief and five Associate Justices, with a primarily appellate docket. For useful summaries of the debates in the First Congress over the structure of the judiciary, see JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 458–508 (1971); Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV 1515 (2005); and Wythe Holt, “*To Establish Justice*”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

lacked any judges of their own), the Judiciary Act called for two Supreme Court Justices and one district court judge to sit together to form a court. To hold these circuit courts, both the Supreme Court Justices and district judges were required to travel.<sup>96</sup> The Judiciary Act generally established circuit courts in two major cities in each state. Justices would sit in the nation's capital for terms of the Supreme Court in February and August and would then ride their circuits in the spring and fall. District judges would join the circuit-riding Justices in the appointed city on specified days to hold circuit courts. Clerks and marshals for the district courts also served as officers of the circuit courts.<sup>97</sup>

Under the Compensation Act of 1789, the Chief Justice and Associate Justices were “allowed” a “yearly compensation” of \$4,000 and \$3,500, respectively, to be paid on a quarterly basis at the Treasury.<sup>98</sup> District judges were paid specified annual sums, from a low of \$800 for the judge in Delaware, a mid-level salary of \$1,000 for the judges of the district courts of Kentucky, Maine, and New Hampshire, to upper-level salaries of \$1,500 and \$1,600 for the judges in Georgia and Pennsylvania, and \$1,800 for the judges of the Districts of Virginia and South Carolina.<sup>99</sup> In the debate over fixing judicial salaries in the House, representatives asserted that it was necessary to set a figure that would attract judges of the “first abilities,” would immunize them from “every possible inducement to an undue bias and influence”<sup>100</sup> and would “shield[] [them] from all possible assaults of temptation.”<sup>101</sup> Critics of generous salaries argued that the figures exceeded the sums paid to state judges and were more than sufficient to attract the best talent.<sup>102</sup>

No provision was made in the Act to reimburse judicial travel expenses. In this respect, the judicial salary provisions differed from those that governed the payment of compensation to members of Congress. The first compensation act for members of Congress provided six dollars for each day a member attended a session and an additional payment of six dollars for every twenty miles that the member was required to travel in order to

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96. See DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 41–44 (1971).

97. Judiciary Act of 1789 § 7.

98. Compensation Act of 1789 § 1 (fixing salaries for federal judges).

99. *Id.* James Madison initially suggested that district judges receive a uniform salary of \$1,000, but that figure was rejected in favor of salaries that varied by district. See PETER GRAHAM FISH, FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1789–1835, at 23 (2002).

100. 1 ANNALS OF CONG. 936 (Joseph Gales ed., 1790) (remarks of Rep. James Jackson).

101. *Id.* at 937 (remarks of Rep. James Madison).

102. See *id.* at 934 (remarks of Rep. Benjamin Goodhue); *id.* at 936 (remarks of Rep. Elbridge Gerry); see also Letter from Benjamin Goodhue to Samuel Phillips, Jr. (Sept. 13, 1789), in 17 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1529–30 (Charlotte Bangs Bickford et al. eds., 2004) [hereinafter 17 DHFFC] (noting that Virginia judges were paid \$1,000, and arguing that Supreme Court Justices should receive no more than double that sum); Letter from James Sullivan to Elbridge Gerry (Oct. 11, 1789), in 17 DHFFC, *supra*, at 1682 (“[N]ot ten men in the United States . . . have income from [their] Estates equal to what is given the Judges.”).

attend.<sup>103</sup> The absence of any travel stipend in the judges' compensation act suggests that judicial travel expenses were to come from salary.

A variety of other evidence supports the conclusion that judges were to pay their own travel expenses out of their salaries.<sup>104</sup> One historian familiar with the papers of Chief Justice Marshall reports that he has seen no indication that Marshall ever requested travel reimbursement.<sup>105</sup> In deliberations over judicial salaries several years later, it is clear that Congress assumed that salaries included travel expenses.<sup>106</sup> District judge salaries varied in accordance with the travel obligations of the judges' office,<sup>107</sup> and they were not made uniform until 1891,<sup>108</sup> a date that corresponds to the establishment of circuit judgeships and end of circuit riding for both Supreme Court Justices and district judges.<sup>109</sup> Moreover, the willingness of the Justices to remit a portion of their salaries in exchange for relief from the burdens of the circuits certainly suggests that they viewed circuit-riding expenses as payable from their own pockets.<sup>110</sup> Finally, the prohibition against the receipt of judicial fees in the Process Act of 1789 suggests that Congress did not anticipate payment of fees to compensate for judicial travel expenses.<sup>111</sup>

The cost of travel may help solve the scholarly puzzle over the variation in district court salaries. Scholars have attributed the difference in pay to such factors as state population, territorial size, and cost of living.<sup>112</sup> But

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103. See Act of Sept. 22, 1789, ch. 17, 1 Stat. 70 (specifying six dollars per diem and travel reimbursement at a rate of six dollars per twenty miles as the compensation for members of the House and Senate).

104. See Letter from James Iredell to Hannah Iredell (Apr. 11, 1791), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 157–58 (Maeva Marcus ed., 1992) [hereinafter 2 DHSC] (proposing to address shortage of personal funds by drawing on his salary, rather than by seeking a travel reimbursement from the Treasury); Letter from David Sewall to George Thatcher (Nov. 25, 1792), in 2 DHSC, *supra*, at 334 (recognizing that if Congress were to end circuit riding for the Justices and impose circuit duties on the district judges, the “expences of the former, will be greatly diminishd [sic] and that of the latter increased”).

105. See email from Charles Hobson to author (on file with author) (Dec. 4, 2006, 10:46 EST).

106. See 25 ANNALS OF CONG. 150 (1812). In arguing for a judicial salary increase, one representative explained that the “expences of travelling the circuit of the districts consumed near the whole emolument of some of the judges.” *Id.*

107. See *infra* Appendix.

108. See Rosenn, *supra* note 4, at 343 tbl. 1 n.; see also *infra* Appendix.

109. See Evarts Act, ch. 517, 26 Stat. 826 (1891) (creating stand-alone circuit courts and staffing them with circuit judges). See generally FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 107 (1928) (discussing Evarts Act).

110. See *infra* note 117 and accompanying text.

111. See *infra* text accompanying note 123.

112. See FISH, *supra* note 99, at 23 (“The House . . . scaled down the salary schedule previously approved by the Senate [which] established salaries roughly proportional to projected caseloads.”); HENDERSON, *supra* note 96, at 51 (“The salaries of the district judges . . . depend[ed] in part upon the territorial extent and population of the state and in part upon the estimated volume of business . . .”). For the claim that salary variation in the early republic reflected differences in the cost of living, see Elliot A. Spoon, Comment, *Compensation of the Federal Judiciary: A Reexamination*, 8 U. MICH. J.L. REFORM 594, 612 (1975). For the claim that salary variation in the early republic did *not* reflect differences in cost of living, but instead reflected differences in the lengths

even though the states' population and territory may have influenced views of the expected docket and the burden of travel, those factors do not explain why the judge in Georgia received nearly twice the salary (\$1,500) as the judge in Delaware (\$800). Indeed, New York was comparable to Pennsylvania in size and population and vastly more populous than Georgia, but the New York district judge received considerably less in salary than did the judges of those two states.

Expected travel expense helps account for salary variation among district judges.<sup>113</sup> As recounted in the Appendix, the district judge in Kentucky was to hold court in a single city, Harrodsburg, whereas the judge in Maine held court in two cities, Portland and Pownalborough. Neither judge was called upon to ride circuit; in both regions, the district courts were assigned the powers of district and circuit courts. Meanwhile, the New York district judge sat throughout the year in New York City for both district and circuit court sessions; judicial duty required only a single trip to Albany in October to hold the circuit court there. Contrast the modest travel required of district judges in Kentucky, Maine, and New York with that of their more highly paid colleague in Virginia, where district courts were held in two cities (Richmond and Williamsburg) and circuit courts were held in two cities (Charlottesville and Williamsburg). The Virginia district judge made at least four round trips a year to hold district and circuit courts in the state, traveling 450 miles at a minimum. Similarly, the Pennsylvania judge rode some 750 miles from Philadelphia to Yorktown and the intrepid Georgia judge was required to log some 830 miles a year on the roads between Savannah and Augusta.<sup>114</sup> All of these traveling judges were paid higher salaries than were their more stationary colleagues.

Projected travel expenses must have also informed the calculation of the Supreme Court Justices' salaries, although the amount of the travel allowance remains unknown. Some evidence suggests, however, that the cost of circuit riding may have approached \$500 per year, or roughly one-seventh of the Justices' salaries. Justice Iredell of North Carolina, who joined the Court in April 1790, traveled around 1800 or 1900 miles on the Southern circuit in 1790 and an additional 1800 miles to get to and from Philadelphia.<sup>115</sup> If one were to have compensated Iredell at the travel rate set for members of Congress, the 1800 miles would have entitled him to an additional \$540,

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of coastlines (and so number of admiralty cases) in each district, see RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 34 (1996).

113. The Appendix sets forth the salary of each district judge, the relative size and population of the state or district in which the judge served, and the approximate mileage required to attend sittings of the district and circuit courts in that district. See *infra* Appendix.

114. Perhaps the clearest counterexample is that of South Carolina. Neither the state's population, nor its size, nor the travel obligations imposed on its district judge appear to justify the salary specified. Anticipated docket pressure, both from admiralty proceedings and Southern debt claims, may explain the South Carolina salary and help support Professor Fish's expected caseload account. See FISH, *supra* note 99.

115. See HENDERSON, *supra* note 96, at 42; Letter from James Iredell to Thomas Johnson (Mar. 15, 1792), in 2 DHSC, *supra* note 104, at 246, 247; see also Holt, *supra* note 21, at 309–10 (quoting Iredell complaining about nearly being drowned on one of his circuit rides).

while the travel reimbursement for the entire 3700 miles would have amounted to some \$1,110. Other evidence suggests that the cost to a Justice of riding the Southern Circuit could be fairly reckoned at about \$500. At one point, Justice Iredell persuaded his colleagues to consider a deal with Congress in which they would each sacrifice \$500 in salary in exchange for relief from circuit riding duty.<sup>116</sup> At another stage, the Justices agreed each to contribute \$100 (for a total of \$500) to compensate the unfortunate rider of the Southern Circuit.<sup>117</sup>

Assumptions about the availability of outside income may have also influenced the decision to pay the Justices so much more than the district court judges. District judges were free to practice law in the state courts until 1812, and they may well have had more time to pursue such outside sources of income than Supreme Court Justices did.<sup>118</sup> In opposing the adoption of this limitation, one member of Congress objected that the judges were so poorly paid that they had to supplement their salaries.<sup>119</sup>

The decision to build anticipated travel expenses into the Justices' (and judges') salaries represents an extremely interesting decision on the part of Congress. Travel took time, obviously, and it cost money both to hire the conveyance and to pay for meals and lodging on the road. Judges traveling on their circuits would obviously enjoy a range of options, and could stay with friends to economize on their expenses or could lodge at taverns and public inns.<sup>120</sup> Judges would face questions about how dignified, and expensive, a

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116. See Letter from James Iredell to Thomas Johnson, *supra* note 115. Iredell speculated that Justice Cushing's reluctance to accept the proposal reflected the fact that Cushing found "travelling in the midst of his NE. Friends much cheaper than any of the rest of us do." *Id.* at 247. While Justices Wilson, Blair, Johnson, and Jay agreed with the proposal, Justice Cushing agreed only after pointing out that eliminating circuit duty would require the appointment of new judges and new salaries, "which could not be compensated out of the 500 [dollars]." Letter from William Cushing to James Iredell (Mar. 26, 1792), in 2 DHSC, *supra* note 104, at 250; see also Holt, *supra* note 21, at 329. Scholars have found no evidence that Iredell's proposal was presented to Congress. Holt, *supra* note 21, at 329.

117. See Letter from James Iredell to James Wilson (Nov. 24, 1794) in 2 DHSC, *supra* note 104, at 497, 498 & n.4. The agreement may have dated from the February 1794 term of the Supreme Court. See *infra* note 156. In any case, the practice of paying one's fellow Justices to cover one's circuits was apparently well established by the time of Oliver Ellsworth's tenure as Chief Justice from 1795–1802. Ellsworth accepted a position as envoy to France during his tenure as Chief Justice, just as Chief Justice Jay had done to England during his own tenure. In later seeking additional compensation after the completion of his service, Ellsworth noted that he "made an arrangement with one of my Brethren to perform on my acct [sic] such Circuit duty as should fall to my lot during my absence." Letter from Oliver Ellsworth, Chief Justice, U.S. Supreme Court, to Mr. Gideon Granger, U.S. Postmaster General (Mar. 17, 1802) (on file with General Manuscript Collection, Princeton University Library). In context, it seems clear that Ellsworth was seeking reimbursement for his payment to a colleague to perform Ellsworth's circuit duty. Part IV will examine in greater detail the political interactions between the Court and Congress over the issue of circuit riding.

118. For the law prohibiting private law practice, see Act of Dec. 18, 1812, ch. 5, 2 Stat. 788 (declaring it a "high misdemeanor" and threatening with impeachment any judge who purported "to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law").

119. See 25 ANNALS OF CONG. 200 (1812) (comment of Rep. Richard Stanford).

120. Of course, the public inns and taverns did not necessarily offer five-star accommodations. Justice Iredell complained of the surroundings at a "very rascally house," where several

form of travel they wished to undertake, and whether they wished to stay over from one court session to the next or return home.<sup>121</sup> By providing the judges with travel compensation in their salaries, Congress not only eliminated the red tape associated with requests for travel reimbursement but also forced each judge to strike a personal balance between luxury and economy. Such an approach largely eliminated the risk of self-dealing for judges who might incline toward luxurious travel under a program of direct reimbursement.

### B. Congressional Preclusion of Fee-Based Judicial Compensation

The Compensation and Process Acts of 1789 indicate that Congress intended to provide salary-based rather than fee-based compensation for federal judges. The Compensation Act allows federal judges a specified compensation to be paid out of the treasury on a quarterly basis; it makes no provision for fees or expenses.<sup>122</sup> The Process Act generally adopted the “modes of process” of the state courts to govern practice in the federal district and circuit courts.<sup>123</sup> In addition, the Act included a provision that authorized court personnel, including clerks and marshals, to receive the same fees in cases at common law as their counterparts in the supreme courts of the states in which they served.<sup>124</sup> But the Process Act seemingly confirmed the absence of fee-based compensation for federal judges: in the provision that incorporated state fees for federal court personnel, Congress pointedly inserted the language “except fees to judges.”<sup>125</sup>

Despite the apparent desire to foreclose fee-based payments to federal judges, the Process Act was ambiguous in one respect. A second provision incorporated the fees of the state courts for cases in equity and in admiralty and maritime jurisdiction; this provision did not contain the language

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“worthless young Fellows” stayed up all night, “drinking gaming & cursing & swearing.” Letter from James Iredell to Hannah Iredell (Sept. 19, 1791), in 2 DHSC, *supra* note 104, at 210. In part to avoid such rascally surroundings, the Justices introduced their colleagues on the bench to friends on the circuit with whom they could lodge. *See, e.g.*, Letter from James Iredell to Richard Bennehan (Aug. 15, 1794), in 2 DHSC, *supra* note 104, at 480 (introducing Justice James Wilson to a North Carolina planter).

121. Following the English tradition, the movement of the Justices on circuit often provided the occasion for local parades, welcomes, and send-offs. For example, the procession that accompanied the opening of the circuit in Boston included “Eight constables, with staves,” Deputy-Marshals Bradford and Thomas, Marshal Jackson, Chief Judge Jay, Judges Cushing and Lowell, the United States Attorney, the Attorney-General of Massachusetts, and various other officials, attorneys, religious leaders, and prominent citizens. HENDERSON, *supra* note 96, at 35. Justices were obviously expected to display a dignity appropriate to their position; keeping up appearances would doubtless entail some personal expense.

122. Compensation Act of 1789, ch. 18, 1 Stat. 72.

123. Process Act of 1789, ch. 21, 1 Stat. 93. § 2.

124. *Id.*

125. *Id.*



(which had been added late in the legislative process)<sup>126</sup> excluding judges from the receipt of such fees.<sup>127</sup> Accordingly, at least one federal judge, Thomas Bee, the district court judge for the District of South Carolina, included judicial fees among the taxable costs that litigants were required to pay in admiralty proceedings.

Research so far does not reveal the amount of the fees taxed in the South Carolina District Court, but some evidence suggests they may have been quite substantial, such that the merchants of Charleston submitted a petition to Congress in October 1792 requesting relief.<sup>128</sup> The petition first noted that the Act of Congress had incorporated the fee schedule of state supreme courts,

whereby your petitioners are subjected to the same enormous fees and obnoxious mode of proceedings in the Court of Admiralty of the United States, in this State, as were practis'd and receiv'd in a Court of similar jurisdiction before the revolution; The Legislature of this State having never made any regulations or alterations therein . . . .<sup>129</sup>

The petition further noted that “respectable” members of the Charleston Bar were refusing to appear in “a Court [that had] become obnoxious to all reasonable men.”<sup>130</sup> The petition enclosed a representative bill of costs, as taxed by the admiralty judge, and contended that the bill would speak for itself in demonstrating the excessive nature of the costs.<sup>131</sup> The petition suggests that the merchants objected to two features of prerevolutionary admiralty practice, the payment of “enormous fees” and the “obnoxious mode of proceedings.”<sup>132</sup> The “obnoxious” proceedings in question may have been the British vice-admiralty courts’ practice of ordering the payment of fees only in cases in which assets were forfeited. Payment of fees to judges only where they ordered forfeiture would have been quite controversial.

Congress responded with alacrity, passing legislation in 1793 that regulated fee payments in admiralty proceedings and rather pointedly made no provision for any fee payments to judges.<sup>133</sup> Judge Bee acknowledged that

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126. On the late addition of the provision excluding judicial fees, see An Act to regulate Processes in the Courts of the United States, Sept. 29, 1789, in 4 DHSC, *supra* note 64, at 114, 120 n.2 (revealing that the language was added during the House’s consideration of the bill).

127. Process Act of 1789 § 2 (“[T]he rates of fees [in equity and admiralty proceedings] were [those] last allowed by the states respectively in the court exercising supreme jurisdiction in such causes.”).

128. See Petition from the Merchants of Charleston, S.C. to U.S. Senate (Oct. 8, 1792) (on file with author and National Archives).

129. *Id.*

130. *Id.*

131. See *id.* Unfortunately, the archivist reports that the attached bill of costs does not appear with the petition in the Archives. Email from Jessica Kratz, Archivist, Nat’l Archives and Records Admin., to author (Apr. 29, 2008, 11:16 EDT) (on file with author).

132. Petition from the Merchants of Charleston, S.C. to U.S. Senate, *supra* note 128.

133. See Act of Mar. 1, 1793, ch. 20, 1 Stat. 332 (prohibiting the taxation of any fees in admiralty proceedings, except as expressly allowed in the Act itself, and making no provision for the payment of fees to admiralty judges, but allowing fees to clerks and marshals).

the new legislation ended his collection of fee income. Commenting ruefully on this alteration in a letter several years later, Bee noted that judicial fees under the old system would have frequently produced judicial income that would have exceeded his annual \$1,800 salary.<sup>134</sup>

Bee's other comments raise a variety of interesting questions about founding era conceptions of judicial compensation. Bee's letter begins by noting that federal district judges have been seeking an "increase of salary, on account of the increase of business chiefly in the admiralty jurisdiction."<sup>135</sup> After expressing support for the proposed salary increase, Bee notes that "[a]t the first establishment of the Court the judges were allowed fees in admiralty Proceedings, which if continued would have been equal, if not exceeded the fixed salaries, in several years."<sup>136</sup> Bee goes on to note:

Frequent Petitions are presented for summary hearings respecting Penalties & Forfeitures under the Revenue & Excise Laws, & Statements of Facts thereon add much to the increase of business to the judges, in matters too, not strictly within the line of their Judicial functions, as they in such cases only act ministerially.<sup>137</sup>

He concludes by commenting that admiralty proceedings "occasion two times more duty to the Judge in this District, than all the business in the Circuit & District Courts added together."<sup>138</sup>

In this highly revealing document, Bee seems to have assumed that all admiralty judges were taking fees under the terms of the Process Act of 1789. Yet my research into archival district court records in New York casts doubt on that assumption.<sup>139</sup> The evidence suggests that the New York federal district judge, James Duane, refrained from taking fees in admiralty proceedings from 1789 to 1792. I examined four representative decrees in which Duane awarded costs in admiralty proceedings.<sup>140</sup> While the awards in

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134. See Letter from Thomas Bee to U.S. Senators from South Carolina (Feb. 3, 1800) (on file with author); *infra* Appendix (providing salary information). Thanks to Bill Casto for providing me with a copy of Bee's letter.

135. *Id.*

136. *Id.*

137. *Id.* For more on these ministerial functions, see *infra* note 199.

138. Letter from Thomas Bee to U.S. Senators from South Carolina, *supra* note 134.

139. I chose the archives of the New York District Court as the subject of further research because its state law provided for the payment of fees in admiralty both to officers of the court (clerks and marshals) and to the judges themselves. See *supra* note 62.

140. The first two decrees award fees from the proceeds of an auction of items forfeited due to a violation of the customs laws. In *United States v. Four Cheeses*, the auction returned a sum of \$43.73 from which Duane ordered costs as follows: U.S. Attorney for the District of New York, \$13.25; marshal for the District of New York, \$4.30; clerk of the district court, \$4.86; the cryer of the court, \$0.49; and the printer's bill for advertising the auction, \$9.37. (Total costs came to \$32.27, or roughly three-fourths of the sum forfeited.) After payment of costs, Duane ordered payment of the "residue" as follows: one-half to the United States treasury and one-half in equal shares to three port officials (the collector, the naval officer, and the surveyor). *United States v. Four Cheeses* (D.N.Y. Aug. 1790) (on file with National Archives, Records of the Federal District Court of New York, Document No. M886, Minutes at p. 28). In *United States v. Eleven Yards of Flannel*, the auction returned the sum \$364.70 from which Duane ordered costs as follows: U.S. Attorney for the

these four decrees reflect the influence of the New York statutory cost structure, the decrees notably omit to order the payment of any fees to the judge himself. In contrast to Judge Bee, perhaps Judge Duane did not view himself as entitled to such payments.

More principally, if it were widely understood (as Bee assumed) that federal admiralty judges were entitled to fees under the Process Act of 1789, one wonders why the decision of Congress to eliminate such fee payments in 1793 did not excite a judicial outcry against the resulting diminution in their compensation. Bee commented on the change, but did not cast the issue in constitutional terms nor did the admittedly sketchy newspaper accounts of the legislation indicate that members of Congress raised any constitutional doubts about the elimination of judicial fees.<sup>141</sup>

If, as Bee assumed, district judges routinely accepted fees in admiralty at the time Congress intervened, and if judges nonetheless remained silent when Congress acted to curtail their fees, perhaps judges regarded the fees as lying outside the scope of Article III's prohibition of diminished compensation. One possible basis for such a conclusion may have been that the fees were coming from private litigants, not from the Treasury. But if litigant fees, payable to federal judges, do not implicate the no-diminution rule of Article III, Congress could readily sidestep the constitutional prohibition against politically charged reductions in judicial compensation. Congress might attempt to secure a more compliant judiciary by adjusting, or threatening to adjust, the level of fee payments.

The affair of fees in admiralty certainly deserves further exploration. For now, we can say that Bee's practice of accepting fees in admiralty was not universally followed by other federal judges, was controversial in Charleston, and was quickly overturned by Congress.<sup>142</sup> Perhaps Judge Bee's exceptional,

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District of New York, \$15.49; marshal for the District of New York, \$13.00; clerk of the district court, \$5.93; cryer of the court, \$0.49; and the printer's bill, \$9.37. *United States v. Eleven Yards of Flannel* (D.N.Y. Nov. 22, 1790) (National Archives, Records of the Federal District Court of New York, Document No. M886, Minutes at p. 51). The second two decrees were entered in connection with a remission of fines and penalties by the secretary of the Treasury, Alexander Hamilton, following the submission of a petition and summary proceedings before the district court in keeping with the process described below. In *Petition of Cornelius Schermerhorn*, Duane ordered the successful petitioner, as a condition of securing the remission of penalties, to pay costs as follows: U.S. Attorney, \$4.67; clerk of the court, \$8.00; cryer of the court, \$0.50. *Petition of Cornelius Schermerhorn* (D.N.Y. Sept. 1792) (National Archives, Records of the Federal District Court of New York, Document No. M886, Minutes at p. 127). In *Petition of Marshal Jenkins*, the remission was conditioned on the payment of the following costs: U.S. attorney, \$4.67; clerk of the court, \$8.31; and cryer, \$0.50. *Petition of Marshal Jenkins* (D.N.Y. Sept. 1792) (National Archives, Records of the Federal District Court of New York, Document No. M886, Minutes at p. 130. (The decree does not explain why the cryer received a one-cent raise.) *See id.*

141. Newspaper accounts were quite matter of fact, simply recording the receipt of the petition of the Charleston merchants and the action of Congress in enacting a schedule of approved fees in admiralty. *See* E. HERALD (Portland, Me.), Dec. 3, 1792, at 2; DUNLAP'S AM. DAILY ADVERTISER, (Phila., Pa.), Nov. 9, 1792, Supp., at 2 (recording receipt of the petition); *id.*, Dec. 29, 1792, at 5 (reporting that debate occurred in Committee of the Whole).

142. Of course, other court officers relied extensively on fees as their primary source of compensation. The clerk of the Supreme Court was allowed "double the fees" of the clerk of the supreme court of the state in which the Supreme Court sat. *See* Act of May 8, 1792, ch. 36, § 3, 1 Stat. 275, 277.

and short-lived, acceptance of fees proves the rule that fees were generally forbidden.

#### IV. SALARIES, TRAVEL EXPENSES, AND EXTRAJUDICIAL DUTIES

Several well-known events have helped to shape scholarly perceptions of the early work of the federal judiciary. For much of the 1790s, the Justices conducted a well-known campaign to secure congressional relief from the burdens of circuit riding. Their efforts produced only intermittent, and somewhat short-lived, relief. Circuit riding was to continue throughout the antebellum period and well into the Gilded Age.<sup>143</sup> Also during the 1790s, the Justices confronted a series of questions about the proper boundaries of the judicial power. In 1792, while serving as circuit justices, they refused to process the claims of disabled war veterans; later decisions confirm the Justices' view that circuit courts could not hear such claims. A short time later they refused the Washington Administration's request that they issue advisory opinions in connection with the neutrality crisis of 1793.<sup>144</sup> In both instances, the Justices took the view that the matters in question lay outside the judicial power. But in contrast to these nice perceptions of a judiciary with limited power, the Justices frequently took on extrajudicial assignments that seem to modern eyes perhaps equally inconsistent with the judicial function. For example, Chief Justice John Jay accepted a position as envoy extraordinaire to Great Britain in 1794, a position that required him to travel to England and prevented him from discharging his judicial office until his return in 1795, when he promptly resigned as Chief Justice. This Part examines how the financial motivations of the Justices may have influenced their approach to these much-studied events.

##### A. *Circuit Duty and Rotation*

We have already seen that the Justices were obliged to pay their own expenses while riding their circuits. This, combined with the fact that Associate Justices all earned the same salary, proved especially painful for Justice James Iredell, a citizen of North Carolina, who (along with Justice Rutledge of South Carolina) missed the Court's first session in February 1790. At that session, the other four Justices agreed that the circuits would be assigned on the basis of residence. (Although the Judiciary Act specified that district judges were to reside in their districts, it said nothing about the residence of the Justices who were to ride the circuits. Justices were not legislatively assigned to specific circuits until 1802.) Iredell, who had not yet

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143. Circuit riding finally ended with the 1891 adoption of the Evarts Act, which transformed the circuit courts into appellate tribunals and created a corps of circuit judges to staff the courts. At the same time, Congress began to pay the (now stationary) district judges the same salary nationwide. See *supra* note 109 and accompanying text.

144. See STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 144 (1997); William R. Casto, *Foreign Affairs Crises and the Constitution's Case or Controversy Limitation: Notes from the Founding Era*, 46 AM. J. LEG. HIST. 237, 238 (2004).

been appointed to the Court and could not attend the fateful session, thus found himself permanently assigned to the most arduous and expensive Southern Circuit. He understandably protested the assignment, and requested that the Justices reconsider their decision.<sup>145</sup> But a majority refused to adopt a rotation of circuit assignments, offering a series of more or less cogent explanations.<sup>146</sup>

Financial considerations no doubt played an important, if unstated, role in the Justices' consideration of this question. Justice Iredell had decided to move his family to the nation's capital, seeking a central location that would enable him more readily to attend the Court's sessions. From Iredell's perspective as a resident of New York and later Philadelphia, service on the Southern Circuit was nearly as expensive for him as it would have been for others on the Court. But for the Justices who had first adopted the home circuit rule, the prospect of riding the difficult and expensive Southern Circuit must have been most unappealing. Not only were the roads and taverns of uneven quality, the mileage would cost the Justices dearly in travel expenses.<sup>147</sup> The Justices from New England and the mid-Atlantic would have viewed travel through their own residential circuits as less daunting and expensive than travel through the Southern Circuit. They knew the routes of travel, and could stay with friends when the need arose.

Indeed, so attached were the Justices in the majority (Cushing, Jay, and Wilson) to the comforts and relative ease of their home circuits that it took an act of Congress to alter the system. Iredell tried persuasion, joining with his fellow southerner in arguing for rotation of circuit-riding duties.<sup>148</sup> But led by the Chief Justice, the majority refused to budge. Jay took the position that any change in the system must come from Congress. He and his colleagues may have viewed circuit riding as a temporary expedient, something that Congress had imposed in establishing an initial federal judicial presence at minimal expense.<sup>149</sup> He may have taken the job on the assumption that the Justices' circuit duties would end as soon as the dockets of the Supreme

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145. See Letter from James Iredell to John Jay, William Cushing, and James Wilson (Feb. 11, 1791), in 2 DHSC, *supra* note 104, at 131, 132 (explaining the hardships of the Southern Circuit and requesting that the Justices consider "some more equitable rule in the allotment of Circuits so unequal in point of duty").

146. Thus, Chief Justice Jay explained that continuity of service might be important in case difficult issues of law were taken under advisement by the two Justices for future decision. See Letter from John Jay to James Iredell (Feb. 12, 1791), in 2 DHSC, *supra* note 104, at 135. He also believed that resident Justices would better know the attorneys seeking admission to the bar and the content of local law. *Id.*

147. Indeed, at one point Iredell took an advance on his salary to provide his wife with needed liquidity. See Letter from James Iredell to Hannah Iredell, *supra* note 104, at 157–58.

148. See Letter from James Iredell to John Jay, William Cushing, and James Wilson, *supra* note 145.

149. In draft legislation prepared at the request of Congress, Attorney General Edmund Randolph recommended a transfer of circuit riding duties from Supreme Court Justices to district judges. See RANDOLPH'S REPORT, *supra* note 64. Randolph may have consulted with the Justices in preparing this report. Holt, *supra* note 21, at 316 & n.57. In any case, Jay supported the proposed legislation. Cf. Letter from John Jay to Rufus King (Dec. 19, 1793), in 2 DHSC, *supra* note 104, at 434; Letter from John Jay to Rufus King (Dec. 22, 1793), in 2 DHSC, *supra* note 104, at 434.

Court and circuit courts began to grow. Whatever the case, he obviously preferred to maintain the status quo pending congressional intervention, and financial considerations may have played a part. Jay reportedly deferred his decision about which post to take in the new Washington Administration until Congress fixed the salary of the Chief Justice (\$4,000) at a figure above that of the competing position, Secretary of State (\$3,500).<sup>150</sup> The expense of circuit riding (if reckoned at \$500 per year) may have threatened to erode much of the pecuniary advantage of the judicial position.

In retrospect, it seems odd that the Justices would have chosen to maintain an allocation of judicial duties that bore so unevenly on the newest members of the Court.<sup>151</sup> Circuit riding was, after all, part of the job description that they had all accepted along with their salaries and commissions as Justices. Moreover, the fact that the Associate Justices were paid the same salary suggests that they were expected to perform official duties of roughly comparable burden and expense. No one seems to have doubted that the cost of riding the Southern Circuit exceeded that of riding the shorter Eastern and Middle Circuits.<sup>152</sup> But the appeal to equity failed. Perhaps the Justices who rejected Iredell's proposal wished to stay in close contact with their political base in their home states.<sup>153</sup> Perhaps financial self-interest played a role. In any event, Congress quickly agreed with Iredell's position and imposed a system of rotation by statute.<sup>154</sup> The legislation provided that, in the absence of consent, no one who had once ridden a particular circuit would be required to do so again until every other Justice had done so.<sup>155</sup> Iredell had achieved rotation, but it seems remarkable that the other Justices remained obdurate to the point of requiring Congress to intervene.

The consent provision in the rotation statute suggests the possibility of a side-deal among the Justices to compensate the rider of the Southern Circuit. Sure enough, sometime after Congress imposed rotation on the Court,

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150. Wexler, *supra* note 29, at 1378 & n.19.

151. See Letter from Charles Johnson to James Iredell (Feb. 1791), in 2 DHSC, *supra* note 104, at 138, 138–39 (“[Iredell’s fellow Justices] prefer[] their own ease and convenience to every generous feeling, principle of justice, or regard to public duty . . . [T]heir conduct appears . . . little, unjust, ungenerous, and unpatriotic.”).

152. Iredell explained that his circuit through the South, at a distance of 1800 miles, was “at least 1000 miles more than the utmost [route] of the others.” Letter from James Iredell to Thomas Johnson, *supra* note 115. The expense and burden quickly became well known. When Thomas Johnson was considering a position on the Court, he explicitly bargained with President Washington for relief from the Southern Circuit and resigned his commission after a short time, citing the burdens of circuit duty. For an account, see 2 DHSC, *supra* note 104, at 122–23; Letter from Thomas Johnson to George Washington (Jan. 16, 1793), in 2 DHSC, *supra* note 104, at 344 (citing the burdens of circuit riding in his letter of resignation).

153. Indeed, Chief Justice Jay allowed his name to be placed in nomination for the governorship of New York while he remained on the bench and he eventually resigned his commission to accept that post in 1795. See Stahr, *supra* note 214, at 339–40. John Rutledge left the Court in 1791 to accept a position as the Chief Judge of South Carolina. See 2 DHSC, *supra* note 104, at 17.

154. For an account, see Holt, *supra* note 21, at 330.

155. Act of Apr. 13, 1792, ch. 21, § 3, 1 Stat. 252, 253 (“[N]o judge, unless by his own consent, shall have assigned to him any circuit which he hath already attended, until the same hath been afterwards attended by every other of the said judges.”).

the Justices agreed among themselves that they would each contribute \$100 to help defray the expenses of the individual who rode the Southern Circuit.<sup>156</sup> This agreement allowed the Justices to retain their residential circuits so long as one Justice was willing to take the Southern Circuit at the price specified. By monetizing the burden and inconvenience, the Justices' agreement both clarifies the real cost of travel through the South and underscores the underlying financial logic of the Justices' disagreement over the issue of rotation. With the agreement in place, the Justices could balance their desire for preserving their political and familial connections to their home states with the financial hardship of the Southern Circuit. Notably, Iredell rode the Southern Circuit for the fifth time in spring 1794, before either Jay or Wilson had done so a single time.<sup>157</sup>

### B. Circuit Duty: Eliminating Circuit Riding

Although the Justices sparred among themselves over the issue of rotation, their larger goal was to secure relief from circuit riding duty altogether. That, of course, would require an act of Congress, and the Justices agreed in August 1790 to pursue such legislation.<sup>158</sup> The result, a letter prepared in draft by Chief Justice Jay (but perhaps never sent), argues that circuit riding duties were in effect an unconstitutional expansion of the Court's original jurisdiction.<sup>159</sup> The premise of the letter was that the Court's original jurisdiction was confined to two cases,<sup>160</sup> the same argument that later informed Marshall's opinion for the Court in *Marbury v. Madison*.<sup>161</sup> As the letter ex-

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156. See Letter from James Iredell to James Wilson, *supra* note 117, at 497–98 & n.4. Iredell's letter notes the existence of the agreement, dating it from February 1794, and indicates that he immediately agreed to ride the Southern Circuit again. *Id.* Such an agreement appears to have been anticipated in the rotation bill, which allowed successive service with the "consent" of the Justice in question, and thus seems to contemplate bargaining among the Justices over how to compensate the Southern Circuit rider and so equalize the burdens of office. Other side bargains over circuit duty may have become common. For example, Ellsworth reports paying a colleague to ride his circuit while he was away as the ambassador to France. See *supra* note 113 and accompanying text. Conceivably, Jay did the same during his tenure as envoy to Great Britain, although I have found no record of it.

157. See HENDERSON, *supra* note 96, at 43. The chart on page 43 displays the attendance of the various Justices on circuit from 1790 to 1800. *Id.* Wilson eventually rode the Southern Circuit for the first time in the fall of 1794. *Id.* Jay, though consistently and conspicuously present on the Eastern Circuit (in which the New York District was located) between 1790 and 1792, rode the Southern Circuit. *Id.* Perhaps Iredell's willingness to accept side payments suggests that his objections to the system of permanent circuit justices were as much personal as institutional.

158. See Letter from John Blair to John Jay (Aug. 5, 1790), in 2 DHSC, *supra* note 104, at 83, 83–84 (describing a meeting during the August term at which the Justices agreed to a "joint representation" setting forth their objections to the "judiciary system").

159. See Draft Letter from the Justices of the Supreme Court to George Washington (Sept. 13, 1790), in 2 DHSC, *supra* note 104, at 89, 89–91. Although Chief Justice Jay circulated the draft to his colleagues, scholars have not yet established that the letter was actually sent to the president. See *id.* at 92 n.1.

160. *Id.* at 89.

161. 5 U.S. (1 Cranch) 137 (1803). Although it has been widely criticized in the literature, Marshall's conclusion may have been relatively well grounded in the structure and history of Article

plained, the Judiciary Act assigned the circuit courts original jurisdiction “in the Cases from which the Supreme Court is excluded.”<sup>162</sup> Jay’s letter expressed doubt that the Constitution could “exclude the Court, but yet admit the Judges of the Court.”<sup>163</sup> Indeed, the draft viewed the Constitution as “plainly opposed to the Appointment of the same Persons to both [supreme and circuit judge] Offices” and did not have “any Doubts of their legal Incompatibility.”<sup>164</sup> The letter also contended that circuit assignments violated the Appointment Clause, by filling the separate office of circuit judge through legislative decree instead of by presidential appointment.<sup>165</sup>

Viewed objectively, the letter made an effective, if not overwhelming, legal argument.<sup>166</sup> But the presentation left much to be desired as a matter of practical politics. Members of Congress might well have shared the Justices’ constitutional doubts, but circuit riding was part of the office of Justice that the incumbents had accepted when they accepted their commissions. Indeed, members of Congress might have understandably taken the view that the Justices had been compensated for the burdens of circuit riding with travel stipends in their salaries (just as additional salary compensated the district judges for their travel burdens). It may have seemed a bit too clever for the Justices now to argue that part of the job that they had accepted and for which they were already being paid was unconstitutional.

The practical difficulties with the Justices’ position were worsened by the unavoidable fact of constitutional life that Article III foreclosed any reduction in the Justices’ salary. The no-diminution rule meant that Congress could not respond to the Justices’ complaints by offering to reduce their pay in exchange for the elimination of circuit-riding duty. Had they sent the letter, the Justices would have put themselves in the difficult position of arguing that the Constitution not only required a reduction in the burdens of their offices but also foreclosed any commensurate reduction in their pay. Apparently recognizing the delicacy of their position, the Justices considered a proposal under which they would accept a \$500 per year reduction in their salary in exchange for the elimination of their circuit duty.<sup>167</sup> Justice Cushing, who was then riding the Eastern Circuit, apparently had doubts

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III. For an assessment, see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Power*, 101 COLUM. L. REV. 1515 (2001).

162. Draft Letter from the Justices of the Supreme Court to George Washington, *supra* note 159, at 90.

163. *Id.*

164. *Id.* at 91.

165. *Id.* (“[T]he Appointment of [judges of the circuit courts], by an Act of the Legislature, is a Departure from the Constitution, and an Exercise of Powers, which, constitutionally and exclusively belong to the President and Senate.”).

166. Justices of the Supreme Court would sit in review of the decisions of the circuit courts, decisions in which they had sometimes participated as the judges of a lower court. Even though the Justices invariably recused themselves in matters that involved their own dispositions below, a judicial structure that required one court to review the previous work of its own Justices created the appearance of bias or interest and could undermine confidence in the institution.

167. See *supra* note 116 and accompanying text.



about the bargain, perhaps because his circuit cost him less than \$500 to ride. But even though the Justices eventually agreed on the plan, it came to nothing. The Justices might have doubted that a private agreement with Congress could control the plain terms of the Constitution. Certainly, the \$3,000 that the six Justices offered to put on the table would not have provided sufficient funds to hire circuit judges to staff the courts in their place.<sup>168</sup>

The Justices accordingly changed strategies. Instead of a constitutional argument, they chose to emphasize the burdens of the office as it was currently structured. In their submission to Congress in 1792, they noted that circuit riding required them to hold twenty-seven circuit courts each year, and that their duties as Justices required two additional sessions “in the two most severe seasons of the year.”<sup>169</sup> The combination of these duties required the Justices “to pass the greater part of their days on the road, and at Inns, and at a distance from their families.”<sup>170</sup> The Justices simply “[did] not enjoy health and strength of body [necessary] to undergo [their] toilsome Journies . . . nor [would] any set of Judges however robust . . . be able to support and punctually execute such severe duties for any length of time.”<sup>171</sup> Here was an argument based squarely on pragmatic considerations, and on the subtle message that the burdens of circuit riding had proven greater than anticipated. Congress could provide relief without feeling that it was giving the Justices an unwarranted financial windfall.

This strategy may have borne some fruit. In March 1793, Congress adopted a modification to the judicial system that permitted the circuit courts to operate with two judges: a single Justice of the Supreme Court and a district judge.<sup>172</sup> As a practical matter, this meant that the six Justices were required to ride the three federal circuits only once a year, rather than twice

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168. Congress could have presumably created a single circuit judge for each circuit, joining that judge with district court judges to form a two-judge panel. But the salary required would have presumably exceeded \$1,000 per judge, the salary specified for the lowest-paid district court judges. Moreover, the shift away from using Supreme Court Justices as circuit riders may have persuaded Congress to broaden the Court’s appellate review of the circuit courts. Congress might have economized further on the cost of federal justice by paring down the size of the Supreme Court as Justices resigned or died. That approach to reducing the size of the Court had been on the table in 1796, *see* HENDERSON, *supra* note 96, at 44, and it resurfaced controversially in the Judiciary Act of 1801. *See* Judiciary Act of 1801, ch. 4, 2 Stat. 89 (reflecting the decision of Congress to reduce the size of the Court from six to five when the next vacancy occurred, which would deny President Jefferson his first appointment). Alternatively, Congress could have filled the place of the circuit justices by requiring the district judges to ride circuit. Edmund Randolph had made such a suggestion in his report to Congress in December 1790. *See* RANDOLPH’S REPORT, *supra* note 64, at 134–36.

169. Letter from the Justices of the Supreme Court to the Congress of the United States (Aug. 9, 1792), *in* 2 DHSC, *supra* note 104, at 289, 289–90. The Justices enclosed this submission in a letter to Washington, asking Washington to lay it before the Congress. Letter from the Justices of the Supreme Court to George Washington (Aug. 9, 1792), *in* 2 DHSC, *supra* note 104, at 288, 288–89.

170. Letter from the Justices of the Supreme Court to the Congress of the United States, *supra* note 169, at 290.

171. *Id.*

172. *See* Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333–34.

a year.<sup>173</sup> This neatly reduced by half the burden and expense of circuit riding and thus provided the Justices with what they may have justly regarded as a pay increase. The measure had its greatest impact on the proceedings of the Southern Circuit. While two Justices occasionally attended sessions of the Eastern and Middle Circuits after the law took effect, making a circuit panel of three, the Southern Circuit had but a single Justice in attendance throughout the remainder of the decade.<sup>174</sup>

This process of interbranch dialog continued through the 1790s, producing as much in the way of judicial discomfort as it did in the way of actual relief. Discomfort was clearly on display in February 1794, when the Justices wrote to Congress to point out problems that they foresaw in connection with the rotation system.<sup>175</sup> The Justices observed somewhat ruefully that their request for relief from circuit duty was “capable of being ascribed to personal Considerations.”<sup>176</sup> Further relief came later in the 1790s, when Congress struck certain of the provincial capitals from the list of cities in which the circuit courts were required to meet. Thus, Congress dropped Albany, New York, Hartford, Connecticut, and Exeter, New Hampshire from the Eastern Circuit; and Yorktown, Pennsylvania and Charlottesville and Williamsburg, Virginia from the Middle Circuit.<sup>177</sup> Elimination of these circuit stops simplified life for both the district judges and Supreme Court Justices, and reduced their official travel obligations and expenses.

### C. Extrajudicial Duties: Pensions, Advisory Opinions, and Plural Officeholding

In two well-known episodes of the Federalist era, the Justices refused to take on certain extrajudicial chores: the initial adjudication of the pension claims of disabled war veterans and the provision of advisory opinions to the president. At the same time, however, Chief Justice Jay agreed to serve as envoy extraordinaire to Great Britain, leaving his judicial duties behind to travel to England for a full year without resigning his commission as Chief Justice. Scholars have often remarked on these episodes, both because they reveal much about the Justices’ conception of the boundaries imposed by the separation of powers, and because they reveal a certain inconsistency. If

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173. Cf. GOEBEL, *supra* note 95, at 567 (describing the reform as “but a half loaf and a meagre one at that”).

174. See HENDERSON, *supra* note 96, at 43.

175. See Letter from the Justices of the Supreme Court to the Congress of the United States (Feb. 18, 1794), in 2 DHSC, *supra* note 104, at 443, 443–44 (noting that the rotation of Justices could result in disagreements over matters from term to term of the circuit courts and that such matters might never reach the Supreme Court under the then-applicable \$2,000 limit on appeals from the circuits).

176. *Id.* The Justices’ reference to personal considerations might be seen as reflecting a concern with “personal comfort,” Geyh & Van Tassel, *supra* note 21, at 66–67, but it may well have had more to do with the fact that riding the circuits entailed personal financial issues for the Justices.

177. The legislation took effect on a piecemeal basis. See Act of May 12, 1796, ch. 25, 1 Stat. 463; Act of Mar. 2, 1793, ch. 23, 1 Stat. 335, 335–36; Act of Aug. 13, 1792, ch. 21, § 2, 1 Stat. 252, 252–53.

Chief Justice Jay viewed circuit riding duty, the provision of formal judicial advice, and the adjudication of pension claims as fundamentally inconsistent with the judicial office, how could he accept a position as ambassador to negotiate a treaty that could come before the Court in an adjudicated dispute? Moreover, when one evaluates the pension dispute against the backdrop of the Justices' well-known desire to secure relief from circuit riding, one gains a new appreciation for the complexity of the Justices' decision to refuse to accept their new chores.

The pension imbroglio that eventually led to *Hayburn's Case*<sup>178</sup> began in April 1792, when judges of the Eastern Circuit announced that the court could not take evidence in support of disability claims as the statute required.<sup>179</sup> Other circuit-riding Justices followed suit. The courts explained their refusal in letters to President Washington that pointed to now well-known separation-of-powers concerns: the statute subjected the decisions of the circuit courts to review both by the Secretary at War and by Congress itself. Such "revision and control," the circuit court judges in the Pennsylvania District explained, was "radically inconsistent" with the judiciary's independence and with the separation of powers.<sup>180</sup> While the circuit courts agreed that the Pension Act posed constitutional problems, they disagreed about the cure. Both the Eastern and Southern Circuits concluded that the act should be construed as appointing the judges of the circuit courts as "commissioners" and directing them to act extrajudicially in passing on the pension claims. The Middle Circuit did not adopt that approach; it simply refused to process the claims.<sup>181</sup>

Scholars conventionally view the matter as an early instance in which the Justices denied effect to an act of Congress on constitutional grounds.<sup>182</sup> Under the standard account of *Hayburn's Case*, which began as an application for mandamus to compel the Middle Circuit to process pension claims, the Court held the matter in abeyance to give Congress an opportunity to adopt further legislation. Eventually, Congress cured the constitutional problems. While some in and out of Congress questioned the Justices' decision, and some talked of impeaching the Justices for refusing to perform the du-

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178. 2 U.S. (2 Dall.) 409 (1792).

179. *Id.* For good accounts of this oft-told tale, see Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561; Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn's Case*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 196 (Maeva Marcus ed., 1992).

180. JAMES WILSON ET AL., *OPINION OF THE CIRCUIT JUDGES FOR THE PENNSYLVANIA DISTRICT, RELATIVE TO CERTAIN DUTIES ASSIGNED TO THEM BY ACT OF CONGRESS (Apr. 21, 1792)* in 1 *AMERICAN STATE PAPERS: MISCELLANEOUS* 50, 50–51 (Walter Lowrie & Walter S. Franklin eds., 1834).

181. Neal Kumar Katyal, *Judges As Advicegivers*, 50 *STAN. L. REV.* 1709, 1731–33 (1998).

182. See, e.g., Max Farrand, *The First Hayburn Case, 1792*, 13 *AM. HIST. REV.* 281, 285 (1908).

ties Congress had assigned to them, cooler heads prevailed.<sup>183</sup> Later, in *United States v. Yale Todd*, the Court concluded that the pension decisions of circuit justices who acted as “commissioners” in the Eastern and Southern Circuits had failed to create legally binding obligations.<sup>184</sup> While the precise rationale of *Yale Todd* remains a mystery, and may reflect both statutory and constitutional concerns with the turn to “commissioners,”<sup>185</sup> scholars treat the decisions in *Hayburn’s Case* and *Yale Todd* as the triumph of the constitutional principle of judicial finality.<sup>186</sup>

Principle no doubt played a role in the evolution of the pension system, but the ongoing struggle over the nature and extent of the Justices’ circuit riding duties may have played a role as well. The Justices had sought relief from circuit-riding duty only to find that Congress had saddled them with a substantial addition to their circuit dockets.<sup>187</sup> Not only were pension claims relatively numerous, but the statute also required the circuit judges to remain in attendance for at least five days to provide the claimants ample opportunity to appear and present their claims.<sup>188</sup> This five-day provision would have lengthened their stay at many of the cities and towns in their circuits, as circuit courts normally met for only so long as was necessary to conduct

183. For an account of impeachment threats, which came from the Federalists, see 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 73–75 (rev. ed. 1937).

184. Congress directed the attorney general to secure an adjudication of the legality of pension decisions of circuit justices “styling themselves [as] commissioners.” Act of Feb. 28, 1793, § 3, 1 Stat. 324, 325. The attorney general did so in the case of *United States v. Yale Todd* in 1794. *United States v. Yale Todd* (1794), reproduced in Wilfred J. Ritz, *United States v. Yale Todd* (U.S. 1794), 15 WASH. & LEE L. REV. 220, 227–31 (1958). The Court ruled for the government, concluding that the pension decisions did not create legal obligations. *Yale Todd* was later noted by Justice Taney in an appendix to his opinion for the Court in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52–53 (1852) (Taney, C.J.) (briefly discussing the *Yale Todd* case). See generally Ritz, *supra* (providing background and reproducing the record of the *Yale Todd* case).

185. The statute quite clearly assigned the task of passing on the claims to the “circuit courts” and not to the judges of those courts. See Act of Mar. 23, 1792, ch. 10, § 2, 1 Stat. 243, 244 (“[Qualifying applicants] shall . . . be allowed such farther sum . . . as the circuit court of the district, in which they respectively reside, may think just.”). Conceivably, the *Yale Todd* Court may have concluded that the language was too clear to permit the judges to act as commissioners. Alternatively, the Court may have found that the Constitution forbade such extrajudicial assignments.

186. See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 699–704 (2004) (describing and assessing the finality account of *Hayburn’s Case*).

187. For a sense of how many claims were involved, see JOSEPH HOWELL, ACCOUNTANT, DEP’T OF WAR, INVALID PENSION CLAIMS (Mar. 2, 1795), in 1 AMERICAN STATE PAPERS: CLAIMS 165 (Walter Lowrie & Walter S. Franklin eds., 1834). The document reveals that during a two-month period from January to March 1795, district judges transmitted pension claims to the War Department on behalf of some thirty-seven claimants from the following districts: Connecticut (thirteen), Georgia (six), Kentucky (one), Maryland (one), New Jersey (four), New York (one), North Carolina (three), Pennsylvania (five), and Vermont (three). *Id.* at 166–71. The document also reveals that a number of additional claims were rejected or deferred due to problems of proof. *Id.* at 172. Legislation adopted in 1796 added several hundred individuals to the pension rolls. See Act of Apr. 20, 1796, ch. 15, 1 Stat. 454.

188. See Act of Mar. 23, 1792, ch. 11, § 3, 1 Stat. 243, 244. (“[I]t shall be the duty of the judges of the circuit courts respectively, during the term of two years from the passing of this act, to remain at the places where the said courts shall be holden, five days at the least from the time of opening the sessions thereof . . .”).

judicial business—often for only a day or two.<sup>189</sup> Congress was demanding more of the Justices, both in terms of their docket and in terms of the cost of attending their circuit courts, and had offered to provide little by way of additional compensation. The reaction of the Justices to the pension claims may have reflected a desire to limit the nature of the additional chores that Congress could assign to the circuit courts and the judges who staffed those courts.

One can glimpse the burdensome quality of circuit duty in the letters that the judges wrote, questioning the assignment. Thus, the letter from the Eastern Circuit highlighted the willingness of the judges to sit for the full five-day period, if only in their capacity as commissioners: “That as the Legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed.”<sup>190</sup> Similarly, the letter from the Southern Circuit also referred to the five-day term, and then explained the judges’ willingness to sit for that extended period in the following terms: “[I]t is . . . our indispensable duty to keep open any court of which we have the honor to be judges, as long as Congress shall direct.”<sup>191</sup> Beneath the surface of this expressed willingness to accept a new duty, one may discern both a confirmation that the judges regarded the five-day term as burdensome and a subtle protest against the imposition of that burden.<sup>192</sup>

Several features of the statute that Congress adopted to cure the problems with the pension system tend to support the claim that the burden of circuit duties helped to focus the Justices’ attention on the principle of finality.<sup>193</sup> First, and perhaps most importantly, the new statute did not radically alter the pension system, but simply reassigned the chores from the circuit “courts” to the district “judge.” The district judges were required to collect, on oath or affirmation, all of the evidence relating to pension claims<sup>194</sup> and forward it to the Secretary at War for comparison to the muster rolls and

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189. See, e.g., Letter from James Iredell to Hannah Iredell (May 15, 1792), in 2 DHSC, *supra* note 104, at 278 (recounting the completion of the Circuit Court for the District of South Carolina in a single day); Memorandum from the Circuit Court for the District of Maryland (Nov. 7, 1794), in 2 DHSC, *supra* note 104, at 491 (describing a one-day session in November 1794 for the Circuit Court for the District of Maryland); Memorandum from the Circuit Court for the District of New York (Sept. 5, 1792), in 2 DHSC, *supra* note 104, at 293 (describing a two-day session of the Circuit Court for the District of New York in September 1792); Memorandum from the Circuit Court for the District of Pennsylvania (Oct. 11, 1792), in 2 DHSC, *supra* note 104, at 306 (describing a two-day session of the Circuit Court for the District of Pennsylvania in October 1792).

190. Hayburn’s Case, 2 U.S. (2 Dall.) 409, 410 n. (1792).

191. *Id.* at 413 n.

192. For a similar translation of the subtleties of early Republican correspondence, see JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 141–45 (2000) (reading between the lines of an exchange between Washington and Jefferson).

193. See Act of Feb. 28, 1793, ch. 17, § 1, 1 Stat. 324 (authorizing district judge to appoint three commissioners to hear pension claims).

194. The new statute provided that “[a]ll evidence relative to Invalids shall be taken upon oath or affirmation, before the judge of the district, in which such invalids reside, or before any three persons specially authorized by commission from the said judge.” *Id.*

then on to Congress for its ultimate decision about whether to fund the pension.<sup>195</sup> Like the constitutionally suspect 1792 statute, then, the 1793 amendments provided for the federal judiciary to play a preliminary or ministerial role in the processing of pension claims, with ultimate control vested in the Secretary at War and Congress. The apparent acceptability of this solution (the literature does not reveal that anyone raised constitutional doubts about the lack of judicial finality accorded the work of the district courts)<sup>196</sup> suggests that Congress may have set out to address other concerns.

If the new statute did little to eliminate the preliminary judicial role, it did address a set of problems that may have arisen from the decision of the judges of the Eastern and Southern Circuits to hear pension claims in the capacity of “commissioners.” As we have seen, the Court ultimately invalidated the decisions of these putative commissioners and may have done so for at least three separate reasons. First, the 1792 statute quite clearly assigned the task of assessing the claims to the “circuit courts” and not to the judges of those courts.<sup>197</sup> Second, the Justices may have questioned their ability to perform an official function (passing on pension claims) in the capacity of “commissioners” that they could not constitutionally perform as judges of the circuit court. Recall that in Jay’s draft letter to Washington in 1790, the Justices had denied that Congress could separate the judge from the court (by assigning tasks to them as circuit judges that they could not perform as Justices of the Supreme Court). Reliance on the office of “commissioner” to hear pension claims appeared to contemplate a similar separation of judge from court. Third, as Jay’s draft letter had also noted, the Appointment Clause does not allow Congress to make appointments by statutory enactment. If the office of commissioner were truly separate from that of circuit judge, then statutory appointment of the circuit justices to that office could present a problem.

The amended 1793 statute can be seen as responding to these problems in part. For one thing, the Act vests the responsibility for action in the district “judge,” rather than in the district court. It thus may have helped to clear the way for the judges to act out of court in their individual or ministerial capacity. In addition, the Act provides for the district judge to appoint “commissioners” to take evidence from the claimants and their doctors. This provision might be viewed as addressing problems under the Appointment Clause, which specifically authorizes Congress to vest the appointment of

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195. See *id.* § 2 (providing for the Secretary at War to make such comments on the evidence as would enable Congress “to take such order thereon, as they may judge proper”).

196. Indeed, the literature largely ignores the terms of the 1793 amendments. One scholar who did consider the statute simply remarked that the provision for district judge control of the appointment of commissioners appeared to have solved any problems with the pension system. See HENDERSON, *supra* note 96, at 50.

197. See Act of Mar. 23, 1792, § 2, 1 Stat. 243, 244 (“[Qualifying applicants] shall also be allowed such farther sum . . . as the circuit court of the district, in which they respectively reside, may think just.”). Justice Iredell based his initial doubts about the commissioner approach on the statute’s assignment of the work to the courts and not the judges, but he ultimately devised an intricate way around the problem. See Tushnet, *supra* note 179, at 204–05 (explaining Iredell’s interpretive move).

inferior officers in the “courts of law.”<sup>198</sup> Rather than appointing commissioners itself, the Act creates an appointment mechanism that roughly conforms to the text of the Constitution. Perhaps the district judges viewed themselves primarily as appointing officers, selecting the commissioners and transmitting their work to the nation’s capital. If so, then perhaps the judges viewed the Act less as a threat to the finality of their judicial decisions than as an invitation to play a ministerial role in the collection of evidence. It was a role that the district courts had already accepted in connection with the administration of the revenue laws.<sup>199</sup>

To be sure, the 1793 Act also took steps to address the finality issue, but one might question the significance of the cure. Rather than restricting the oversight role of the War Secretary and Congress, the Act broadened the control of the political branches and eliminated any provision for the district judge to make an initial decision about the proper amount of the pension. The district judge served a purely ministerial function, collecting and transmitting evidence to the nation’s capital for use in fixing the proper pension figure. One might fairly ask, in light of the principle of finality underlying *Hayburn’s Case*, whether such ministerial action comports with the judicial function of finally resolving concrete cases and controversies, free from the oversight and control of the political branches. While the new system eliminated the threat of a direct reversal, in short, it did so by denying the district judge any power finally, or even preliminarily, to resolve the controversy.

One final puzzle arises from the initial willingness of some Justices to sit as “commissioners” to hear pension claims. During the Federalist era, Congress would authorize the appointment of commissioners to perform functions that ranged from negotiating treaties with the Native Americans<sup>200</sup> to overseeing the operation of the loan office.<sup>201</sup> Congress also authorized the appointment of commissioners to assist the district courts by taking evidence in admiralty cases<sup>202</sup> and taking bail in criminal proceedings.<sup>203</sup>

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198. U.S. CONST., art. II (empowering Congress to vest the appointment of inferior officers in the courts of law).

199. For the role of the district courts in amassing evidence that the Secretary of the Treasury would then use in passing on requests for a remission of penalties under the customs laws, see Act of May 26, 1790, ch. 12, 1 Stat. 122. The Act calls for individuals to submit a petition to the district judge, setting forth the basis for the remission of a “fine, penalty, or forfeiture” imposed to enforce the revenue laws. *Id.* The judge was to conduct a summary inquiry, with notice to the U.S. attorney, into the circumstances and annex the facts to the petition for transmission to the Secretary of the Treasury. *Id.* at 123. Ultimate “power” to “mitigate or remit” the fines and penalties was vested in the secretary, along with the power to terminate any prosecution on such terms as the secretary deems “reasonable and just.” *Id.* For an account of the significance of the district court’s ministerial role, see Charlotte Crane, *Asserting and Separating Power: The Remission of Taxes in the Early Republic* (unpublished manuscript, on file with the author). Judge Bee referred to the growth of this ministerial function in his account of the expansion of the admiralty docket. See Letter from Thomas Bee to U.S. Senators from South Carolina, *supra* note 134.

200. Act of Mar. 2, 1793, ch. 21, 1 Stat. 333.

201. See Act of June 5, 1794, ch. 47, 1 Stat. 376.

202. Act of June 9, 1794, ch. 64, § 1, 1 Stat. 395.

203. See Act of Mar. 2, 1793 § 4, 1 Stat. at 334 (authorizing the appointment of “discreet persons learned in the law” to take bail in criminal matters). These “discreet persons” later evolved

Commissioners, by nature, were appointed to offices for a limited term and were typically compensated through the payment of per diem fees and expenses.<sup>204</sup> These judicial commissioners were compensated with fees for 170 years before Congress put them on salary as magistrate judges in 1968.<sup>205</sup> Eventually, as we have seen, Congress authorized district judges to appoint commissioners to help gather evidence from pension claimants.

Congress's decision to rely on commissioners appointed by the district judges may have helped to avoid a question that might have otherwise arisen had the circuit judges accepted the separate office of pension commissioners. If other laws provide a model, Congress may have expected to pay fees to any commissioners appointed by the district judges. Would it have been permissible for Congress to offer the circuit judges additional compensation to serve as pension commissioners? Was their expressed willingness to act as commissioners viewed in some circles as a subtle request for the additional compensation that such officials were normally paid? As we saw earlier, Hamilton acknowledged that the federal judiciary could employ fee-paid justices of the peace, but he clearly believed that Article III required a fixed salary for federal judges.<sup>206</sup> Finally, among other reasons, the Court may have ultimately rejected the improvisational-commissioner approach to pension claims on the ground that federal judges could not take on ministerial work if such work were to lead to the receipt of fee income in addition to their salaries as judges.<sup>207</sup>

If doubts as to the propriety of accepting a separate office helped to persuade the Justices to refrain from taking on the pension claims,<sup>208</sup> the same

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into the commissioners, and magistrates, of the federal courts. Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 AM. J. LEGAL HIST. 1, 5–6 (1970).

204. See Act of June 9, 1794 § 1 (authorizing district courts to appoint “commissioners” to take sworn statements as to the value of property brought before the court in admiralty proceedings); Act of June 5, 1794 § 1 (appropriating funds to pay certain additional expenses of the “commissioners” of the loan office); Act of Mar. 2, 1793 (appropriating funds to pay “commissioners” who were to conduct negotiations with the Native Americans and authorizing payment of expenses and a fee of eight dollars per day).

205. As Linquist explains, “[u]nder the act of 1896, commissioners were allowed \$5 per day for holding one or more preliminary examinations, \$1 per search warrant issued, and 75¢ per arrest warrant or bail presentment.” Lindquist, *supra* note 203, at 14. This fee system produced problems that one might have predicted based on a review of the colonial experience. Congressional investigations in the late nineteenth century revealed that commissioners held multiple offices and tended to multiply tasks and pursue trifling cases, all in pursuit of greater fee income. *Id.* at 9. Further investigations occurred over the decades, but it was not until 1968 that Congress substituted a salaried corps of magistrates for fee-paid commissioners. *Id.* at 15–16. Today, payment of commissioners for the issuance of warrants (but not their denial) would violate due process. See *supra* note 44 and accompanying text.

206. See *supra* notes 89–91 and accompanying text.

207. Cf. *Mistretta v. United States*, 488 U.S. 361, 402–03 (1989) (concluding from *Hayburn’s Case* that federal judges can accept a second office under the federal government so long as it does not impede their ability to perform their judicial duties and the judge accepts the new position voluntarily); Tushnet, *supra* note 185 (portraying *Hayburn’s Case* as approving the use of judges in ministerial positions).

208. Such dual-office holding by the federal judiciary would appear to pose serious constitutional problems, especially when the Constitution was seen as preventing the judges from handling pension claims in their capacity as judges. But district court judges did perform the equivalent of



calculus may have underlain the Justices' response to Jefferson's request for an advisory opinion. The request came during the heat of the neutrality crisis, when the Washington Administration was working to avoid any entanglement in the war between Great Britain and France. France insisted on its rights under its treaty with the United States, raising a host of difficult questions. Jefferson propounded a series of these questions to the Court, prefacing the inquiry with an acknowledgement that the judicial role might not extend to the provision of advice to the executive branch.<sup>209</sup>

Scholars conventionally read the Justices' response in the *Correspondence of the Justices* as a resounding rejection of any advisory role based on concerns with the separation of powers.<sup>210</sup> And so it is—but workload and compensation concerns may have strengthened the Justices' resolve. As Jefferson's letter reveals, complex legal problems can give rise to a host of hypothetical questions. The Justices may have worried that, viewing their legal advice as a free good, the executive branch would consume it too freely. The resulting burden on the Court could have been substantial and could have interfered with its ability to handle its primary adjudicative functions. With circuits to ride, the Justices may have simply viewed the advice-giving function as lying outside their job description. Indeed, part of the Justices' message to the President was to observe that the executive branch had ample power to hire its own lawyers to provide legal advice and need not rely on the Justices to perform that function.<sup>211</sup>

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ministerial work in connection with the administration of the tax-collection system. The impost system required that evidence be collected in the ports and submitted to the Treasury Department for review and final determination. Such judicial decisions were, like the pension decisions, subject to a degree of revision and control by the executive branch. District Judge Thomas Bee alluded to the problem when he described a portion of his admiralty work as "ministerial." *See supra* note 199.

209. JAY, *supra* note 144, at 117–34; Casto, *supra* note 144.

210. *See, e.g.*, Pushaw, *supra* note 29, at 485–87.

211. The Court may not have been entirely consistent in refusing doubtful new business. During the early Republic, the Court agreed to hear "feigned cases"—cases in which the parties contrived to bring a disputed question before the federal courts for resolution. *E.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33 (1804). Both *Pennington* and *Fletcher* were based upon a fictional wager between the parties that was meant to give rise to a personal action for damages. Charlotte Crane, *Pennington v. Coxe: A Glimpse at the Federal Government at the End of the Federalist Era*, 23 VA. TAX REV. 417 (2003); Lindsay G. Roberston, "A Mere Feigned Case": *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249. In *Pennington*, the wager was calibrated at a level that would satisfy the threshold amount for the exercise of appellate jurisdiction by the Supreme Court. *See* Crane, *supra*, at 454 n.102 (noting that none of the taxpayers had a tax liability that would reach the \$2,000 threshold for Supreme Court review). The parties clearly specified the issues for resolution by writing them into the terms of their hypothetical wager. *Id.* at 461. Despite the argument that such feigned or hypothetical questions do not satisfy the justiciability requirements of Article III, the Court resolved the cases on the merits. Perhaps the Court's resolution of these cases suggests a willingness to grasp for new business that would belie the claim that a salary-based compensation system would tend to discourage such behavior.

But one can question whether the example of feigned cases undercuts the claim that salary-based compensation would offer an incentive to preserve jurisdictional limits. For starters, feigned cases were likely to be viewed as one-off events; they were designed to settle a particular question but not likely to bring a steady stream of litigation to the federal courts. (Indeed, feigned cases might obviate the need for later litigation as in the case of *Pennington*.) Accordingly, they threatened a smaller docket impact than, say, advisory opinions or pension claims. Moreover, the Court eventu-

Chief Justice Jay's actions underscore the importance of financial considerations in the calculus of the first federal judges. For one, he cut back on his ex officio work with the agency responsible for funding the federal debt, refusing in March 1792 to travel to Philadelphia to provide legal advice to the Board of Commissioners of the Sinking Fund on which he served by virtue of his office.<sup>212</sup> Although Jay had attended the meetings when the nation's (temporary) capital in New York City made it convenient to do so, he refused to travel from New York to Philadelphia on the ground that it would interfere with his duties as a circuit judge. Likewise, Chief Justice Jay's decision to accept a position as envoy to Great Britain, while no doubt due in part to his sense of patriotism and duty, was perhaps similarly influenced by financial considerations. Envoys traditionally received generous compensation in the form of an annual salary (upwards of \$9,000) and an "outfit" of equal value. (In the parlance of the foreign affairs community, an outfit was a lump sum equal to the annual salary that served to compensate the envoy for the expense of overseas travel. The envoy was not required to "account" for these expenses but simply received the funds free and clear.)<sup>213</sup> Jay's appointment as envoy thus raised both the prospect that he might negotiate a treaty that would come before the Court and the prospect that he might receive two salaries from the federal government concurrently. That perception fueled the criticisms that were aimed at Jay during the Senate debate on his confirmation. Senator John Taylor, the redoubtable Anti-Federalist from Virginia, argued that it was improper for Jay to serve in two lucrative offices at the same time.<sup>214</sup> This critique of plural officeholding, a

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ally came to question the wisdom of agreeing to hear feigned cases, a development that may reflect a growing awareness of the importance of preserving crisp justiciability boundaries. Finally, one can argue that the feigned case presented little real threat to the justiciability values of Article III. In *Pennington*, for example, a concrete dispute between sugar refiners and the government required settlement through litigation. The feigned case that brought the issue to the Court thus resembles a declaratory judgment action in permitting anticipatory resolution of a case of actual controversy. In a friendly or amicable dispute, both parties can agree on the need for a judicial answer to their legal dispute without necessarily lacking the adversity necessary to support the exercise of judicial power. See Collins, *supra* note 18, at 1847 ("[A]dversariness [should] appear on the face of the pleadings in the form of a viable common-law claim [in friendly disputes]."); Crane, *supra*, at 456 n.107 (noting that the parties to a feigned case acted as adversaries on the merits).

212. For accounts of the episode, see JAY, *supra* note 144, at 93–94, and Wheeler, *supra* note 29, at 141–44. Travel at his own expense to attend the meeting, at a time when the Chief Justice was chafing under travel obligations more generally, must have been especially unwelcome. The Chief Justice sent a legal opinion by mail instead. JAY, *supra* 144, at 93, 248 n.60. After this episode, Chief Justice Jay and his successor Chief Justice Ellsworth did not regularly attend meetings of the board. *Id.* at 248 n.61

213. For an overview of ministerial compensation, see OFFICE OF THE ATTORNEY GEN. OF THE U.S., OPINION OF THE ATTORNEY GENERAL (W. WIRT) ON ALLOWANCES OF SALARIES AND OUTFITS TO PUBLIC MINISTERS OF THE UNITED STATES (Oct. 1, 1821), in 5 AMERICAN STATE PAPERS: FOREIGN RELATIONS 755 (Asbury Dickins & James C. Allen eds., 1825). Wirt's opinion reveals that ambassadors to Great Britain and France routinely received both a \$9,000 salary and an outfit of equal amount; somewhat less was paid to ministers to less important countries. See *id.* at 757. Wirt's opinion also reveals that Chief Justice Jay received no salary or outfit, but notes that his expenses were borne. In contrast, when Oliver Ellsworth was appointed envoy to France in 1800, he received a full outfit. *Id.*

214. WALTER STAHR, JOHN JAY: FOUNDING FATHER 316 (2005) ("Senator John Taylor opposed the appointment upon the ground of incompatibility in the office of Chief Justice and Envoy

staple of revolutionary and Anti-Federalist rhetoric, also informed newspaper criticisms of Jay's appointment.<sup>215</sup>

On Jay's return from England, he delivered the Treaty of 1795 (commonly known as Jay's treaty) to President Washington and promptly resigned his commission as Chief Justice to accept the governorship of New York.<sup>216</sup> Some were surprised that Jay had chosen to retain his judicial position while overseas; they thought Jay would deal with the plural officeholding charge by resigning his commission as Chief Justice. But instead, Jay negotiated to retain his salary as Chief Justice, to refuse any salary as envoy, and to seek reimbursement for only the actual expenses that he incurred as envoy.<sup>217</sup> To be sure, those expenses amounted to some \$12,000, quite a considerable figure at the time for a diplomatic mission of less than one year, and did not include the cost of his passage to London, perhaps as much as \$3,000 more.<sup>218</sup> Jay was later attacked for incurring exorbitant expenses during his stay in London, and one might question some of his decisions.<sup>219</sup> But Jay defended himself vigorously against the charges and retired from public life with his honor and reputation intact.<sup>220</sup>

In attempting to reconstruct Jay's calculus in May 1794, we should acknowledge that he was entitled to a salary of \$9,000 as envoy, a figure much

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Extraordinary. In Taylor's view, such an appointment would destroy the independence of the Judiciary by teaching them to look for lucrative employment from and dependent upon the pleasure of the Executive." (internal quotation marks omitted)).

215. Newspaper critics offered a range of arguments, many based on the claim that the executive could subvert judicial independence if he were free to offer lucrative posts to federal judges. In addition, some critics urged that, in making a treaty, Jay would be exercising powers of legislation that were incompatible with the judicial function. *See, e.g., From Correspondents, BACHE'S GEN. ADVERTISER*, Apr. 19, 1794, at 3. One critic opposed the appointment "upon the ground of the incompatibility in the office of Chief Justice and Envoy Extraordinaire." STAHR, *supra* note 214, at 316 (internal quotation marks omitted).

216. STAHR, *supra* note 214, at 339–40.

217. The treasury provided Jay with a bill of exchange valued at \$18,000 on which he was free to draw while in London. *See* Letter from John Jay to Henry Van Schaack (Sept. 23, 1800), in 1 WILLIAM JAY, *THE LIFE OF JOHN JAY* 415 (New York, J. & J. Harper 1833). Note that the \$18,000 figure corresponds to the amount previously paid to ministers who were to receive a salary and outfit of \$9,000. Jay returned the unused balance along with accounts reflecting expenses of \$12,000. *See id.* at 416 (setting forth Jay's accounts on his return from London); OFFICE OF THE ATTORNEY GENERAL OF THE U.S., *supra* note 213, at 756 (noting that Jay received no salary for his service as envoy but that he was paid his actual expenses of \$12,000); Instructions from Edmund Randolph to John Jay (May 6, 1794), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 472, 474 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833) (noting that Jay's expenses were to be paid, together with an allowance of \$1,350 per annum for a secretary, and making no mention of salary).

218. *See* Letter from John Jay to Henry Van Schaack, *supra* note 217, at 415–16 (describing his critics as having valued his passage to London at \$3,700 but noting that he had "no agency" in booking the vessel).

219. *See* STAHR, *supra* note 214, at 333–34 (explaining that Jay concluded his business as envoy in the fall, but remained in London both to avoid a dangerous winter crossing of the Atlantic and to make a dignified exit from the Court of St. James).

220. *See* Letter from John Jay to Henry Van Schaack, *supra* note 217, at 415 (responding to the charge that he had received some \$52,000 in outfit and expenses in the course of negotiating the treaty). In his own defense, Jay explained that he had refused any compensation as envoy but had stipulated that his "stated salary as chief justice must be continued." *Id.* at 416. On Jay's reputation, *see* JAY, *supra* note 144, at 86–91.

higher than the \$4,000 salary he earned as the Chief Justice. But the envoy position might not last a full year, and then Jay would find himself out of work. While he had agreed to leave the Supreme Court if elected governor of New York, he knew that his election to that post in 1795 was not assured. He had allowed the Federalist Party of New York to nominate him for governor back in 1792 and had lost to Governor Clinton.<sup>221</sup> As a good conservative, Jay may have concluded that it was better to retain the life-tenured position as Chief Justice, while he awaited the results of the New York governor's race, than to resign that position to take the envoy's salary for a single year. Indeed, from one point of view, Jay may have seen himself as gaining financially from the temporary switch from Chief Justice to envoy. As we have seen, his salary as Chief Justice assumed that he would ride at least one circuit a year at his own expense. The new appointment enabled him to switch from a position in which he was expected to pay his own travel and subsistence expenses to one that reimbursed those expenses at a relatively lavish level. The charge of plural officeholding thus rang true to a degree, in that Jay was overcompensated (or at least undertraveled) as the Chief Justice while acting as the nation's envoy to Great Britain. The envoy position may not have been as lucrative as Senator Taylor feared, or as critics charged, but it appears to have been lucrative enough to tempt Chief Justice Jay away from his circuit-riding duties.<sup>222</sup>

#### D. Marshall, Circuit Riding, and the Revolution of 1801

Relief from the burdens of circuit riding finally arrived, but it came as part of the ill-fated and short-lived Judiciary Act of 1801. One year later, with the Jeffersonians in charge, Congress repealed the Act and eliminated the circuit judgeships that had made relief from circuit riding possible. Federalists in Congress assumed, or hoped, that the Court would invalidate the Act of 1802, perhaps on the ground that, by eliminating the offices of newly appointed federal judges, Congress had invaded Article III's guarantee of tenure during good behavior. But the Jeffersonians adroitly arranged to suspend the Court's sessions, forcing the Justices to confront the constitutionality of the new legislation as they contemplated riding their (reinstated) circuits in April 1802. If the Justices rode their circuits, they would be acting in the place of the (now displaced) circuit judges and would be unmistakably signaling their acquiescence in the new dispensation.<sup>223</sup>

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221. See Holt, *supra* note 21, at 327–28 & n.104.

222. Note that during the period of Jay's service, 1790–1795, the Court adjudicated only four cases on the merits. See GOEBEL, *supra* note 95, at 812 tbl.13. Thus, for Justices during this period, circuit riding was far and away the most significant feature of their judicial office.

223. Justice Samuel Chase offered the clearest statement of this understanding, and a detailed argument against the constitutionality of the Act of 1802. See Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 THE PAPERS OF JOHN MARSHALL 109 (Charles F. Hobson ed., 1990). Chase's remarkable letter anticipated the analysis in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), noting that the Court was one of limited original jurisdiction and making a considered argument for the exercise of judicial review. Letter from Samuel Chase to John Marshall, *supra*, at 110, 112. He also argued that the new circuit judges, having been commissioned, could not be dis-

This is not the place to rehearse the details of Chief Justice Marshall's response to the challenge of the 1802 repeal.<sup>224</sup> Suffice it to say that the Justices rode their circuits, and when they convened again in February 1803, they formally announced their acceptance of the repeal in *Stuart v. Laird*.<sup>225</sup> At the same time, Marshall engineered an opinion for the Court in *Marbury v. Madison*<sup>226</sup> that simultaneously completed the surrender even as it articulated new limits on Congress's power. Taking a page from the Justices' first considered argument against circuit riding,<sup>227</sup> and from the argument of counsel in *Stuart*,<sup>228</sup> Marshall concluded in *Marbury* that Congress lacked power to expand the Court's original jurisdiction beyond the two categories specified in the Constitution.<sup>229</sup> The combined message of the two opinions was plain to see: Congress could reinstate the Justices' old circuit-riding duties (even though such duties might logically seem in tension with *Marbury*'s announced limits on the expansion of original jurisdiction) but the Court would resist any new impositions.<sup>230</sup>

Knowledge of the Justices' compensation packages adds an interesting wrinkle to the story. The Act of 1801 conferred a substantial real salary increase on the Justices by eliminating their obligation to ride the circuits, something they had done at their own expense. By the same token, the re-

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placed from their offices other than by impeachment and conviction under the Constitution. *Id.* at 111–13. Finally, he urged Marshall to convene the whole Court for deliberations, fearing that any individual judge would “sink” under the “burthen” of having to decline circuit duty on his own. *Id.* at 116. Marshall surveyed his colleagues on the Court and found that a majority viewed the matter, as the Court later explained in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), to have been settled by past practice.

224. Marshall clearly understood the politics of the situation. As he explained, “[t]he consequences of refusing to carry the law into effect may be very serious.” Letter from John Marshall to William Paterson (Apr. 19, 1802), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 223, at 108, 109. Although the Justices would doubtless put aside the consequences and do their duty under the Constitution, Marshall thought “the conviction of duty ought to be very strong before the measure is resolved [sic] on.” *Id.* The fact that the Justices had previously ridden the circuits would, Marshall explained, “detract very much” from the public's likely perception of the Court's “sincerity” in declaring circuit duties unconstitutional. *Id.*

225. 5 U.S. (1 Cranch) 299. The Court's *Stuart* opinion upheld the Judiciary Act of 1802 against a challenge to the legitimacy of the new circuit courts. Critics have rightly questioned the Court's approach, which concluded that the issue of circuit riding had been settled by the contemporaneous exposition of Article III in the assignment of such duties to Supreme Court Justices. In focusing on circuit riding, the Court ignored counsel's argument that the displacement of the circuit judges violated the tenure provisions of Article III. See Alfange, *supra* note 27, at 363.

226. 5 U.S. (1 Cranch) 137. For a detailed reconstruction of the political climate, see Alfange, *supra* note 27, at 349–72. For doubts about certain of Alfange's legal conclusions, see Pfander, *supra* note 161, at 1523–31 (supporting Marshall's interpretation of section 13 and Article III against Alfange and other critics, who argue that section 13 failed to confer freestanding power to issue writs of mandamus).

227. See *supra* notes 159–165 and accompanying text.

228. *Stuart*, 5 U.S. (1 Cranch) at 305–06.

229. *Marbury*, 5 U.S. (1 Cranch) at 138.

230. Justice Chase anticipated this resolution in arguing that Congress could require “additional Judicial duties of any of the Judges” but could not “require of the Judges, duties that are impracticable [or] impose duties on them that are unreasonable, and for the manifest purpose of compelling them to resign their Offices.” Letter from Samuel Chase to John Marshall, *supra* note 223, at 111.

peal of that Act and the restoration of circuit-riding duties represented a significant real salary reduction. In discussing the matter among themselves, the Justices did not frame their constitutional concerns with the restoration of circuit duties in terms of salary reduction, but focused instead on the burdens associated with the “office” of Justice of the Supreme Court. Thus, Marshall explained his view that “the constitution requires distinct appointments & commissions for the Judges of the inferior courts from those of the supreme court.”<sup>231</sup> Marshall also distinguished between the “original case of being appointed to duties markd [sic] out” in the Judiciary Act 1789, and the case of “having the duties of administering justice in new courts imposed [sic] after their appointments,” thus highlighting the addition of new duties as the basis for a possible challenge.<sup>232</sup>

Challenging a real salary reduction as a violation of Article III was tricky, especially when the nominal salary of the Justices had remained unchanged. But Charles Lee, counsel for the appellant, attempted to make that argument as part of his challenge to the new circuit courts. He contended that the revived circuit duties were unconstitutional “because they impose new duties upon the judges of the supreme court, and thereby infringe their independence.”<sup>233</sup> The *Stuart* Court did not address this (or any other argument) directly. Having ridden the circuits and effectively signed the pink slips for circuit judges with a more cogent Article III-based claim, the Justices refrained from contending that the new legislation unconstitutionally reduced their salaries and infringed their independence.

In refraining from making such a challenge to the newly reinstated circuit duties, the Justices may have learned something from the experiences of Virginia state judges a decade earlier.<sup>234</sup> In Virginia, the legislature imposed additional trial duties on the judges of the Virginia appellate court without providing any additional compensation.<sup>235</sup> The judges responded in an order and remonstrance letter that assailed the legislation as establishing a “new office, the labour of which would greatly exceed that of the former.”<sup>236</sup> By doubling the workload “without any increase of salary,” the legislation represented “so evident an attack upon the independency of the judges”—one they felt obliged to resist.<sup>237</sup> The assembly heeded the judges’ protest, promptly adopting legislation disbanding the court on which they sat and restructuring the court system to incorporate the sitting judges into a district

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231. Letter from John Marshall to William Paterson, *supra* note 224, at 108.

232. *Id.* at 109. But Marshall himself received his commission before the 1801 elimination of circuit duty and would have had no basis for mounting such a claim (except on a theory that the right to a downsized circuit-riding obligation had vested as soon as the 1801 legislation took effect).

233. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 305 (1803) (argument of counsel).

234. For accounts of the court reorganization efforts in Virginia in 1788, see Charles F. Hobson, *St. George Tucker's Law Papers*, 47 WM. & MARY L. REV. 1245, 1253–60 (2006); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 513–17 (2005).

235. *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call) 135 (1788).

236. *Id.* at 145.

237. *Id.*

court and circuit court system that required a good deal of travel.<sup>238</sup> While the judges protested again that they could not be deprived of their offices by legislative act, they nonetheless agreed to resign their posts “of their mere free will” so as to facilitate the court reorganization.<sup>239</sup> If resignation were the price of principled opposition to court reorganization, then perhaps one can understand the reluctance of the Justices of the Supreme Court to stand on principle.

#### CONCLUSION

One can draw a number of lessons from the way judicial compensation shaped early attitudes toward the nature of the judicial office. Consider first Madison’s criticism of the one-way ratchet in Article III. Madison worried that the ratchet would make federal judges dependent on Congress by encouraging them to seek salary increases. The evidence supporting this point seems rather mixed. The Justices did not openly lobby for salary increases, but they did devote considerable energy to an effort to procure relief from their circuit-riding duties, duties that imposed significant physical and financial burdens on them. Did the Justices’ desire for circuit relief compromise their independence, leading them to adopt legal positions in early cases that were designed to curry favor with a controlling faction in Congress? We cannot know for certain. But we do know that the Justices’ refusal to handle pension claims was criticized in Federalist Party circles and may have hurt the Justices’ prospects for radical circuit relief (although partial relief came a short time later). We also know that the Court delivered its 1793 decision in *Chisholm v. Georgia*<sup>240</sup> even as it continued to seek relief from circuit duties. One scholar has speculated that the controversial *Chisholm* decision, holding that the states were amenable to suit on the Court’s original docket,<sup>241</sup> may have helped foreclose any real prospect for circuit relief.<sup>242</sup> If that is so, then the Justices’ willingness to reach that unpopular result provides modest evidence that their desire for circuit relief did not lead them to trim their sails.<sup>243</sup>

The early debate over circuit duties reveals a second insight into Madison’s concern with the one-way ratchet in Article III. Madison worried that judges would sacrifice their independence in efforts to secure salary increases, but the real value of any system of judicial compensation depends

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238. For a description of the resulting system of district and circuit courts and burdens associated with traveling, see Hobson, *supra* note 234, at 1257–60.

239. *Cases of the Judges*, 8 Va. (4 Call) at 150.

240. 2 U.S. (2 Dall.) 419 (1793).

241. *Id.* at 425. On the *Chisholm* decision and the role state debts played in the ratification of the Eleventh Amendment, see James E. Pfander, *History and State Stability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

242. See Holt, *supra* note 21, at 339.

243. On the other hand, the Justices may not have anticipated the opposition to the *Chisholm* decision and may have approached the issue as if the text of Article III was decisive and political considerations were of less significance.

on both salary and workload. Even with a one-way ratchet in place, Congress can confer a substantial real salary increase, as it did when it cut back on the scope of circuit duty, without increasing the nominal salary of the federal judiciary.<sup>244</sup> By the same token, Congress can substantially expand the burdens of office—as it did when it added invalid pension claims to the circuit courts’ responsibilities in 1792 and when it restored the Justices’ circuit-riding duties in 1802—without adjusting the judges’ nominal salary. So long as Congress retains control over judicial workload, Madison’s goal of insulating the judiciary from dependence on the political branches cannot be fully attained.

Apart from framing interactions between the branches, the one-way ratchet in Article III may have influenced the choices Congress made in setting the level of judicial compensation and workload. The circuit duty that Congress assigned to the Justices represents in some ways a sensible adaptation to the uncertainties Congress must have faced about the likely workload of the federal judiciary. Congress surely knew that the Supreme Court, as a court of mostly appellate jurisdiction, would not face a sizable docket in the first few years of its existence.<sup>245</sup> Congress must have had difficulty justifying the payment of large salaries to a corps of Justices with little judicial work to perform. While large salaries were thought necessary to attract the “first abilities,” they would have dramatically overcompensated the Justices during their first few years of service. By giving the Justices the additional task of riding the circuits, Congress could justify relatively large salaries that the Court’s own docket would not support. Over time, as the Court’s docket grew, along with the workload of the circuits, Congress could rethink judicial assignments and cut back on the extent of the Justices’ circuit riding duties. The Justices doubtless understood the logic of their hybrid office in this way; their desire for a “radical” alteration of the judicial system probably reflected the view, widely held in Federalist circles, that circuit duty was a temporary expedient necessitated by the initial absence of cases on the Court’s own docket.<sup>246</sup>

Just as the one-way ratchet framed Congress’s decision to impose circuit-riding duties on the Justices, and led to the subsequent debate over relief from those duties, Article III’s apparent choice of salary-based compensation may have shaped the attitudes of the Justices toward the definition of their judicial office. Tenure during good behavior ensured that federal judges would enjoy a life estate in their offices, subject to removal by im-

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244. The Justices of the Supreme Court received their first nominal salary increase in 1819. See Rosenn, *supra* note 4, at 343 tbl.1 (noting a salary increase from \$3,500 to \$4,500 for associate judges in 1819).

245. Sure enough, the Court disposed of only four cases on the merits in its first six years of existence; its early sessions were devoted mostly to ceremonial matters and the admission of lawyers to its bar. See GOEBEL, *supra* note 95, at 812 tbl.13 (reporting that the Court adjudicated four cases on the merits from 1790 to 1795, but none in the first three years, 1790–92).

246. Letter from the Justices of the Supreme Court to the Congress of the United States, *supra* note 169, at 289 (describing a “general and well founded opinion” that the Judiciary Act of 1789 introduced a “temporary expedient, [rather] than a permanent System”).



peachment;<sup>247</sup> salary assurances protected the judges from a diminution in their nominal compensation. But these assurances neither defined the amount of work the judges were to perform, nor clarified the extent to which Congress could add new business (like pension claims) to a judicial office that had been previously defined in less demanding terms. Unlike fee-based compensation systems, which tie judicial pay to workload, the fixed salaries of federal judges would not immediately respond to changes in the judicial docket. Article III's presumptive reliance on salary-based compensation thus establishes a framework in which federal judges would tend to adopt a narrow view of the judicial office and resist new assignments, especially those outside the core function of deciding cases and controversies.<sup>248</sup>

In evaluating the degree to which this framework of fixed salaries influenced the way the Justices defined the role of the judiciary in the early Republic, it seems clear that financial considerations both figured prominently in early thinking about the judicial office and may have prompted the Justices to view burdensome new obligations with distaste. The pattern was set early on, when the majority rejected Iredell's proposal for rotation of circuit duty. The Southern Circuit was the most demanding and expensive; the Justices themselves valued the burden of riding that circuit at \$500 a year soon after Congress forced rotation upon them.<sup>249</sup> In debating the propriety of rotation as a legal matter, it appears that the Justices' disparate views of the merits aligned nicely with their varying financial interests. Financial considerations may also help to explain why Chief Justice Jay refused to take on the expense of traveling (without reimbursement) to perform his duties as an ex officio member of the Sinking Fund Commission but was willing to take on the much more disruptive (but lavishly reimbursed) burden of traveling to serve as an envoy to England.<sup>250</sup>

Finally, we obviously cannot say how much financial considerations influenced the Justices' reluctance to handle pension claims and to issue advisory opinions. But we can say that the principles the Justices cited in refusing to take on pension claims (separation of powers and judicial finality) did not seem to lead them to question the validity of Congress's subsequent reassignment of pension chores to the district judges. This is not to say that financial considerations were paramount in the calculus of the Justices, particularly when they worked so hard to review pension claims in

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247. See James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227 (2007).

248. The judges of the Virginia Court of Appeals (a group that included Judge Blair, later a Justice of the Supreme Court) highlighted the salary issue in their 1788 remonstrance against legislation that would have assigned them the additional job of serving as trial court judges. See *supra* notes 235–239 and accompanying text. Under the state constitution, they argued, the assembly could not make judges into “hewers of wood and drawers of water”; such demeaning assignments could only be meant to drive the judges from office in violation of the spirit of life tenure and judicial independence. *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call) 135, 145–46 (1788). For the same reason, legislation that would expand their judicial duties without providing any additional compensation would encroach on judicial independence. See generally Hobson, *supra* note 234, at 1253–58.

249. See *supra* notes 115–117 and accompanying text.

250. See *supra* note 212 and accompanying text.

their capacity as self-appointed commissioners. But perhaps the Justices' financial incentives helped to confirm their judgment that the additional burden of pension claims lay beyond the scope of the judicial office that they had accepted as Justices of the Supreme Court. And if so, Article III's presumed reliance on a salary-based compensation system may have served to lend concrete institutional support to the somewhat abstract conception of the federal courts as courts of limited jurisdiction.

October 2008]

*Judicial Compensation*

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APPENDIX  
SALARY OF DISTRICT JUDGES IN 1789

DISTRICT	1 SALARY	2 RANK BY SIZE	3 RANK BY POPULATION	4 MILEAGE (RANK)
Virginia	\$1,800	1	1	454 (4)
South Carolina	\$1,800	7	6	236 (8)
Pennsylvania	\$1,600	4	2	750 (2)
Maryland	\$1,500	8	5	476 (3)
Georgia	\$1,500	2	11	828 (1)
Massachusetts	\$1,200	10	3	80 (12)
Maine	\$1,000	6	10	172 (10)
New Hampshire	\$1,000	9	9	96 (11)
Connecticut	\$1,000	12	7	228 (9)
New York	\$1,000	3	4	320 (5)
New Jersey	\$1,000	11	8	272 (6)
Kentucky	\$1,000	5	12	-0- (13)
Delaware	\$800	13	13	252 (7)

Columns 1–3 appear in HENDERSON, *supra* note 96, at 52 tbl. Column 4 (mileage) was compiled from the Judiciary Act of 1789, based on the district court and circuit assignments of the district court judges in the several states. Judiciary Act of 1789, ch. 20, §§ 2–3, 1 Stat. 73; *see also* HENDERSON, *supra* note 96, at 46 (conveniently setting forth the dates and places of the district and circuit courts in each state). Mileage was calculated based upon the assumption that the district judge lived in the first listed court city in the Act, traveled to the second city from his home, and returned to his home before setting out to the next succeeding court city. Trip mileage between cities was based on a search in Google Maps.

