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ARTICLES

JUDICIAL INDEPENDENCE AND THE SCOPE OF ARTICLE III—A VIEW FROM *THE FEDERALIST*

Michael G. Collins *

I. INTRODUCTION

In *The Federalist No. 78*, Alexander Hamilton provided the Ratification era's best-known defense of Article III's provisions for judicial independence and for tenure during good behavior to secure it.¹ His main argument, grounded in separation of powers concerns, asserted that independence in office was needed for the judiciary to be a reliable check on the legislature by holding unconstitutional laws to be void in cases that come before them.² By contrast, a judiciary with less protection might show "improper complaisance" with the political branches that appointed them and/or that had an easy power of removal.³ Hamilton noted that while judicial independence might not always be necessary for judicial review, it would otherwise take "an uncommon portion of

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1. See *THE FEDERALIST NO. 78* (Alexander Hamilton) (Jacob E. Cooke ed., 1961). I do not address whether Hamilton's underlying assumptions about legislative dependence of the judiciary were accurate, much less whether the Constitution's provisions for life tenure (or the limits on it) achieved their supposed aim. See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 *YALE L. & POL'Y REV.* 301, 306 & n.28 (2003) (discussing skeptical modern commentary regarding the insulation of the judiciary from the political process).

2. See *THE FEDERALIST NO. 78*, *supra* note 1, at 522–23 (Alexander Hamilton).

3. *Id.* at 529.

fortitude” to resist legislative encroachments.⁴ Drawing from history, Hamilton suggested that “in republics,” independent judiciaries had historically formed an “excellent barrier [against] the encroachments and oppressions of the representative body”;⁵ by checking such usurpations, the judiciary could thereby serve “as the bulwark[] of a limited constitution”⁶ and a defender of liberty.⁷

Nevertheless, judicial independence from the political branches had its potential downside as well. The federal judiciary could itself engage in acts of constitutional usurpation that might be difficult to remedy.⁸ Hamilton, however, supposed that other structural limitations on the judicial branch made that possibility less of a threat than political branch encroachments.⁹ And it was not as if the political branches lacked all means of ensuring accountability,¹⁰ including impeachment if federal judges engaged in “a series of deliberate usurpations on the authority of the legislature.”¹¹ In addition, by discarding schemes in which the life-

4. *Id.* at 528.

5. *Id.* at 522.

6. *Id.* at 526.

7. *Id.* at 523–24. Hamilton believed liberty was in danger when the judicial branch was not distinct from the political branches. *Id.*; see also THE FEDERALIST NO. 48, at 335–37 (James Madison) (Jacob E. Cooke ed., 1961) (criticizing intermingling of legislative and judicial functions at the state level).

8. Anti-Federalists were especially concerned about expansive equitable constructions of the scope of federal judicial power. See William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1042 (2001) (describing Anti-Federalist fears that state courts would be eclipsed by such constructions, and along with them, the trial by jury in civil cases).

9. Hamilton famously stated that the judiciary lacked control over “the sword or the purse,” and exercised “neither Force nor Will, but merely judgment.” THE FEDERALIST NO. 78, *supra* note 1, at 523 (Alexander Hamilton). The judiciary therefore had to depend on the aid of the executive to see its judgments enforced. See *id.* Anti-Federalist essayists were less sanguine. See, e.g., *Essays of Brutus No. XV (Mar. 20, 1788)*, in 2 THE COMPLETE ANTI-FEDERALIST 437, 438 (Herbert J. Storing ed., 1981) (referring to federal judges as “independent of . . . every power under heaven”).

10. For a discussion of external controls, ranging from the budgetary, to jurisdictional regulation, to impeachment, see John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 976–94 (2002); see also Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 157 (2003) (explaining why “some incursions on judicial autonomy are deemed acceptable and others are not”).

11. THE FEDERALIST NO. 81, at 545–46 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that occasional “misconstructions” presented no similar problem); see also THE FEDERALIST NO. 48, *supra* note 7, at 334 (James Madison) (indicating that because the federal judicial power was well-delineated “projects of usurpation [by the judiciary] would immediately betray and defeat themselves”).

tenured judiciary would have a role in lawmaking, the Constitution ensured that judges would not be predisposed toward the validity of laws that they may have played a part in approving,¹² while simultaneously ensuring that the legislature would be free from judicial interference at the lawmaking stage.¹³

Although focused on separation of powers, the judicial independence argument in *The Federalist No. 78* contains an important, if less explicit and less discussed, federalism dimension as well. The same separation of powers problem that Hamilton saw Article III as avoiding at the federal level—the dependence of the judiciary on the political branches—was present at the state level, where certain state judiciaries were beholden to legislatures for their retention and where the political branches sometimes had a role in judicial decisionmaking.¹⁴ While the Constitution is not directly concerned with questions of separation of powers at the state level,¹⁵ for Hamilton it was the absence of protections for judicial independence in some of the states that played a major role in shaping the extent of federal judicial power.¹⁶ That role was reflected not only in Article III's extension of judicial power over cases implicating federal law and the Constitution, but in its party-based grants as well.¹⁷ At the same time, there were other concerns less related to issues of state judicial independence that also played an important part in Hamilton's defense of Article III's scope.

My purpose in this essay is to assess the extent to which *The Federalist* relies on arguments about judicial independence to

12. See *THE FEDERALIST NO. 73*, at 499 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *THE FEDERALIST NO. 81*, *supra* note 11, at 544 (Alexander Hamilton) (doubting that “men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach, in the character of judges”).

13. Although he recognized the risk of judicial usurpations, Hamilton supposed that the greater danger was that the judiciary, on account of its “natural feebleness,” would be “overpowered, awed or influenced” by the political branches. See *THE FEDERALIST NO. 78*, *supra* note 1, at 523 (Alexander Hamilton).

14. See *infra* note 27 (describing state judicial arrangements in 1787).

15. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386–87 (1821) (stating that “[t]he constitution of the United States furnishes no security against the universal adoption of this principle [of judicial dependence on legislative will]”); see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 226 n.81 (1985) (connecting the lack of federal constitutional standards for state courts with the structure and scope of Article III).

16. See discussion *infra* Part II.

17. See discussion *infra* Parts III.B., V.

help justify the extent of federal judicial power—particularly as it related to various party-based grants of jurisdiction. Most scholarship on judicial independence focuses on the role it plays in judicial review of the constitutionality of federal action, as well as the constitutionality of state action and its conformity to federal law. Although judicial independence has played a part in modern discussions of party-based grants such as diversity of citizenship jurisdiction, its linkage to such grants is less clear. Hamilton linked the two by proceeding from the relatively uncontroversial argument in favor of judicial tenure in office, as a way to minimize dependence on the appointing power,¹⁸ to the more controversial argument for the scope of federal judicial power in these areas.¹⁹ For Hamilton, an important function of the federal courts was to make up for the separation of powers provisions that were lacking in some of the states' judiciaries, at least for certain categories of cases in which the risk of appointing-power deference was thought to present a national concern.²⁰

II. STATE COURTS AS MODELS FOR FEDERAL COURTS

The argument for judicial independence in *The Federalist No. 78* is phrased in general terms, but is ostensibly directed to the role of the federal courts vis-à-vis the political branches of the federal government. Although this aspect of *The Federalist No. 78* has been the one most emphasized by scholars, individual state governmental arrangements were very much a part of that argument.²¹ Hamilton borrowed a number of positive examples from the state courts to argue for judicial independence at the federal level and to minimize the novelty of Article III's provisions for good behavior. For example, Hamilton suggested that Article III was designed to be "conformable to the most approved of the state constitutions" which already had provisions regarding tenure

18. See THE FEDERALIST NO. 78, *supra* note 1, at 529–30 (Alexander Hamilton).

19. For arguments about the scope of judicial power, see *Essays by a Farmer VI* (Apr. 1, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 53–54; *Essays of Brutus XIV* (Mar. 6, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 436; *Letters from The Federal Farmer XVIII* (Jan. 25, 1788), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 343–44.

20. See THE FEDERALIST NO. 81, *supra* note 11, at 547 (Alexander Hamilton).

21. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 319 (1999) (noting that "[e]xperience under state arrangements had a profound effect on" the Constitution's Framers and Ratifiers).

during good behavior.²² And he called the development of the good behavior standard “one of the most valuable of the modern improvements in the practice of government.”²³ In addition, Hamilton drew on the practice of certain state judiciaries to support his argument that an independent judiciary best secured the impartial administration of laws, quite apart from its role in securing fearless assessment of their constitutionality.²⁴ He concluded by noting that “there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of their judicial offices.”²⁵

Flattery was a part of Hamilton’s argument about the federal judiciary’s imitation of state courts, but it was not on that account insincere.²⁶ By 1787, a majority of the states provided for tenure during good behavior.²⁷ Although earlier arrangements had reflected greater state legislative control of their courts—itsself a reaction to an era of royal dominance²⁸—the movement toward greater judicial independence in the states had made considerable strides by the time Hamilton wrote.²⁹ Of course, in some states, the removal of judges appointed during good behavior

22. THE FEDERALIST NO. 78, *supra* note 1, at 522 (Alexander Hamilton).

23. *Id.*

24. *See id.* at 528–30.

25. *Id.* at 530.

26. Some might disagree. *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1660 (2001) (noting that “it is most unlikely that the Founders would have taken the structural arrangements of any particular state or set of states to be an appropriate model for federal judicial power”).

27. Of the original thirteen states, a majority seem to have provided for tenure during good behavior, while others provided for a term of years or made continued tenure subject to legislative will. *See* EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 105–134 (1944) (indicating that Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia provided for tenure during good behavior). Nevertheless, separation of powers concerns may have still been present in the “good behavior” states of Delaware and New York. Delaware, for example, made the elected Governor the “president” of the state high court. *Id.* at 106. New York operated under a scheme that mixed legislative and judicial functions. *See* SIMEON E. BALDWIN, *THE AMERICAN JUDICIARY* 30–31 (1905); *see also id.* at 19 (noting that Rhode Island and Connecticut did not separate legislative from judicial functions).

28. *See* THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (stating that the King of Great Britain had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries”).

29. Gordon S. Wood concluded that legislative control of state judiciaries was a response to earlier royal control, but that it had begun to fall out of favor prior to the framing of the Constitution. *See* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 451–63 (1969).

might be accomplished by procedures that were arguably less cumbersome than impeachment under the proposed Constitution.³⁰ But Hamilton's express reference to state courts as models for federal courts seems well-founded, and the existence of such models formed an important part of his argument in selling Article III.

While some state courts were deserving of imitation, others were not, and even those that were imitable could be improved at the federal level. Hamilton noted that some state courts lacked provisions for life tenure, and even those that had such protection did not have salary guarantees quite like those in Article III.³¹ Invoking "human nature," Hamilton stated in *The Federalist No. 79* that "a power over a man's subsistence amounts to a power over his will."³² By adopting the combination of salary guarantees along with life tenure, Article III improved upon state court models by "afford[ing] a better prospect of . . . independence than is discoverable in the constitutions of any of the states, in regard to their own judges."³³ In this respect, Article III was indeed novel. Yet despite that novelty and despite the prevalence of other arrangements in the states, tenure during good behavior plus salary protections for the federal judiciary seemed to draw little complaint.³⁴

30. See Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 142, 147 (noting that the constitutions of Maryland, South Carolina, and Massachusetts provided for gubernatorial removal of judges upon address of both state houses, with Maryland requiring a two-thirds vote in each house). The scope of impeachable offenses, moreover, might be articulated differently than in the proposed Constitution. See *id.* at 142 (noting that North Carolina's constitution provided for impeachment for a judge's violation of the state constitution, maladministration, or corruption).

31. THE FEDERALIST NO. 79, at 532 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

32. *Id.* at 531 (emphasis omitted).

33. *Id.* at 532; see also THE FEDERALIST NO. 48, *supra* note 7, at 335-36 (James Madison) (criticizing the dependence of certain state judiciaries on their legislatures for subsistence).

34. Anti-Federalists, while apparently content with the concept of good behavior, still preferred more active political oversight. See Dimino, *supra* note 1, at 308 (quoting various Anti-Federalist essayists). Another author of *The Federalist*, James Madison, feared judicial independence would be compromised by Article III's failure to prevent legislative enhancement of judicial salaries. He preferred to fix the salary "by taking for a standard wheat or some other thing of permanent value." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44-45 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS].

In addition, in a few states, legislatures acted as high courts of appeal, along the lines of the House of Lords in England.³⁵ Such arrangements could be seen either as subjecting judicial decisionmaking to ultimate legislative control, or as ensuring that high court “judges”—legislators—were subject to popular control. Hamilton indicated that such a mechanism of appointment and removal would cause “too great a disposition to consult popularity.”³⁶ Here too, according to *The Federalist No. 78*, the federal judiciary would be modeled on the greater number of states that kept legislative and judicial branches distinct.³⁷ Far from being “novel and unprecedented,” Article III in this respect was “but a copy of the constitutions” of the majority of states.³⁸

III. STATE JUDICIAL INDEPENDENCE AND THE ENFORCEMENT OF FEDERAL LAW

A. *Uniformity*

When it came to addressing the scope of Article III in other installments of *The Federalist*, concerns for state judicial dependence on political decisionmakers played an important, but not exclusive, role. Article III’s inclusion of federal question jurisdiction provides a representative illustration.³⁹ Hamilton saw two functions being served by this particular grant of jurisdiction as it relates to state courts—ensuring uniformity in the interpretation of federal law and ensuring that state courts not undermine federal supremacy.⁴⁰

35. See *THE FEDERALIST NO. 81*, *supra* note 11, at 542–45 (Alexander Hamilton). Hamilton lists nine states that departed from the English model; the three he does not list are Connecticut, Rhode Island, and New York. *Id.* at 544–45.

36. *THE FEDERALIST NO. 78*, *supra* note 1, at 529 (Alexander Hamilton); see also *THE FEDERALIST NO. 49*, at 341 (James Madison) (Jacob E. Cooke ed., 1961) (observing that the judiciary “by the mode of their appointment, as well as, by the nature and permanency of it, are too far removed from the people to share much in their prepossessions”).

37. See *THE FEDERALIST NO. 81*, *supra* note 11, at 544–45 (noting that “the preference which has been given to these models is highly to be commended”).

38. *Id.*

39. See U.S. CONST. art. III, § 2.

40. *THE FEDERALIST NO. 22*, at 143–44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 831–32 (1984) (referring to these functions as “the now classic dual justifications for the estab-

Judicial independence, however, is probably not the most significant factor in securing the uniform interpretation of federal law and the Constitution. The argument that a federal court should be available to promote such uniformity is addressed to the fact that, as Hamilton explained, there might be multiple state courts of last resort rendering "contradictory decisions" on federal law.⁴¹ "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."⁴² Thus, no matter what the provisions for judicial independence in the state courts, uniformity concerns necessarily require that a single decisionmaker have the last word to resolve any such contradictions.⁴³ For example, uniformity concerns would exist respecting the decisions of multiple lower federal courts, if Congress created them, even though their judges would all have the judicial independence safeguards of Article III.⁴⁴

Nevertheless, independence concerns were not entirely irrelevant to the question of uniformity, although they appear to be secondary. Hamilton stated that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."⁴⁵ Presumably, Hamilton supposed that such constraints would result in greater exercise of "judgment" and less exercise of "will."⁴⁶ Yet Hamilton stated that knowledge of such rules and precedents was achievable only by "long and laborious study," and their proper application required "unit[ing] the requisite integrity with the requisite knowledge."⁴⁷

lishment of a federal judiciary," but noting that "Hamilton was one of the few to assert the necessity of assuring uniformity of federal law").

41. THE FEDERALIST NO. 22, *supra* note 40, at 143 (Alexander Hamilton).

42. THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

43. THE FEDERALIST NO. 22, *supra* note 40, at 143-44 (Alexander Hamilton) (noting the necessity of having one "paramount" court "to settle and declare in the last resort, an uniform rule" and to resolve "endless diversities in the opinions of men").

44. Disuniformity might also adversely impact the confidence of other governments. *See id.* at 144.

45. *See* THE FEDERALIST NO. 78, *supra* note 1, at 529 (Alexander Hamilton).

46. *See supra* note 9. Mark Tushnet points out that while Hamilton satisfactorily explained why there may be little to fear from an independent judiciary's own transgressions of legislative authority, he did not explain satisfactorily why a politically insulated judge is more likely to exercise "judgment," rather than "will." Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669, 1687 (1988).

47. THE FEDERALIST NO. 78, *supra* note 1, at 529-30 (Alexander Hamilton); *see also* THE FEDERALIST NO. 81, *supra* note 11, at 544 (Alexander Hamilton) (noting different

Life tenure, he argued, enables the federal judiciary to attract and retain those few “fit characters” with the requisite learning, integrity, and professional habits of mind that distinguish judicial from legislative decisionmakers.⁴⁸

These observations about the judicial function suggest that Hamilton supposed that decisions from courts with Article III-style protections might prove somewhat more stable on matters of federal law than decisions of courts lacking such protections.⁴⁹ His observation might also suggest that Hamilton perceived that the Supreme Court itself would be more inclined to conform to its own settled precedents and fixed constitutional meanings than a court that lacked such protections.⁵⁰ As Mark Tushnet has remarked, these observations indicate that *The Federalist* seemed to contemplate a “restrictive theory” of constitutional interpretation in which law’s meaning was not radically indeterminate.⁵¹ But, because even independent judges could be expected to disagree in their exercise of judgment, what was critical for uniformity purposes was that final decisionmaking authority be able to be lodged in a single judicial body.⁵²

“qualifications which fit” the legislative, as opposed to the judicial character, and fearing that “the pestilential breath of faction” might overcome a less permanent judiciary).

48. THE FEDERALIST NO. 78, *supra* note 1, at 530 (Alexander Hamilton).

49. See THE FEDERALIST NO. 22, *supra* note 40, at 143–44 (Alexander Hamilton). Hamilton argued that, when ultimate judicial power remains vested in the states, “[t]he faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.” *Id.* at 144. See also THE FEDERALIST NO. 80, *supra* note 42, at 535–36 (Alexander Hamilton) (discussing the extent of the federal judiciary).

50. Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–29 (2003) (discussing the Founders’ expectations that ambiguities in constitutional meanings would become fixed and settled by early interpretation).

51. See Tushnet, *supra* note 46, at 1689; see also Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 19–27 (2000). Molot notes that for judicial independence to matter within the Founders’ framework “law had to be moderately but not radically indeterminate.” *Id.* at 19. Tushnet concludes, however, that such a theory of interpretation is “severely impaired” in light of modern developments in the philosophy of language and meaning. Tushnet, *supra* note 46, at 1696.

52. See THE FEDERALIST NO. 22, *supra* note 40, at 143 (Alexander Hamilton).

B. *Supremacy*

In other respects, however, provision for a federal judiciary to interpret and administer federal law was heavily influenced by state separation of powers concerns and the relative lack of judicial independence in some of the states. For example, Hamilton stated in *The Federalist No. 22* that “the laws of the whole are in danger of being contravened by the laws of the parts.”⁵³ He argued that if only state courts were relied upon to interpret and enforce federal law, problems would arise “besides the contradictions”—besides the disuniform decisions that would exist without a superintending court.⁵⁴ Here, Hamilton’s concern is not with consistency or uniformity in the interpretation of federal law in the abstract, but the risk of underenforcement of federal law by the states and their courts.⁵⁵

Hamilton explained in this regard that there is “much to fear from the bias of local views and prejudices, and from the interference of local regulations.”⁵⁶ Hamilton argued that state law would be favored over federal law because state and local decisionmakers would tend to favor the law that gave them their power, as “nothing is more natural to men in office, than to look with peculiar deference towards that authority to which they owe their official existence.”⁵⁷ This argument rehearses that of *The Federalist No. 78* where Hamilton makes a similar observation about those toward whom federal judges would feel beholden absent Article III’s protections.⁵⁸ His fear in *The Federalist No. 22* is that, the Supremacy Clause notwithstanding, state judicial decisionmakers “acting under the authority of those Legislatures” might hold unconstitutional state laws constitutional, or enforce state law in preference to conflicting federal law even when federal law was otherwise constitutional.⁵⁹

53. *Id.* at 144.

54. *Id.*

55. See also Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (emphasizing review of cases in which claims of right under federal law in opposition to state law had gone underenforced, as opposed to cases in which federal law was arguably overenforced).

56. THE FEDERALIST NO. 22, *supra* note 40, at 144 (Alexander Hamilton).

57. *Id.*

58. See *supra* notes 45–49 and accompanying text.

59. THE FEDERALIST NO. 22, *supra* note 40, at 144 (Alexander Hamilton).

Hamilton's subsequent argument in *The Federalist No. 80* also reinforces the idea that the dependence of some state courts on their legislatures justifies provision for a national judiciary with power to resolve cases arising under federal law.⁶⁰ Unlike *The Federalist No. 78*, which focuses mainly on judicial enforcement of limits on the national government,⁶¹ *The Federalist No. 80* focuses on Article I's limitations on the states, such as "[t]he imposition of duties on imported articles, and the emission of paper money."⁶² While uniformity issues may be a part of such concerns, they are clearly not the only, or perhaps even the dominant, concern. Hamilton noted that state actors might not "scrupulously" regard the prohibitions, absent some superintending power "to restrain or correct the infractions of them."⁶³

The state actors to whom Hamilton was presumably referring were the political branches of the states, which he saw as poised to ignore constitutional limits on them absent a judicial check. But he also necessarily made a statement about state courts to the extent that he perceived that it might take a federal judiciary to supply that check.⁶⁴ Hamilton looked back to the events of the Constitution's framing and found that there either had to be "a direct negative on the state laws"—for example, by the national legislature, a proposal fought for by James Madison and others—"or an authority in the federal courts."⁶⁵ Hamilton said "[t]here is no third course that I can imagine."⁶⁶ That state separation of powers concerns were central to Article III's provision for federal question jurisdiction is also confirmed in *The Federalist No. 81*,⁶⁷ in which Hamilton defended the Constitution's grant of power to Congress to create inferior federal courts.⁶⁸ There, Hamilton

60. See generally *THE FEDERALIST NO. 80*, *supra* note 42 (Alexander Hamilton).

61. See *infra* Part IV.

62. *THE FEDERALIST NO. 80*, *supra* note 42, at 535 (Alexander Hamilton).

63. *Id.*

64. For a similar assessment of modern state courts in constitutional litigation, see Burt Neuborne, *The Myth of Parity*, 90 *HARV. L. REV.* 1105, 1127 (1977) (noting political insulation of federal courts as one factor helping to secure "sustained enforcement of counter-majoritarian constitutional norms").

65. *THE FEDERALIST NO. 80*, *supra* note 42, at 535 (Alexander Hamilton).

66. *Id.* Despite Hamilton's belief, a third course would have been to rely solely on state courts for the final administration of federal law and the Constitution, but presumably Hamilton supposed that such a course would not have achieved the ends of which he spoke.

67. See generally *THE FEDERALIST NO. 81*, *supra* note 11 (Alexander Hamilton).

68. See *id.* at 546–52.

pointed to the political dependency of those state courts where judges held office “during pleasure, or from year to year” as a chief justification for enabling lower federal courts to hear cases involving the “national laws” and to ensure their “inflexible execution.”⁶⁹

Perhaps Hamilton thought that even state judges with life tenure would hold biases in favor of state law, thus making judicial independence of uncertain relevance to the problem of under-enforcement of federal law. His observation elsewhere that permanence in office would minimize improper judicial deference to the appointing power seems to leave room for the possibility that some residual bias in favor of the government that appointed them might nevertheless remain.⁷⁰ But that same observation suggests that he likely saw much less to fear from life-tenured state judiciaries, even if he were to agree that state courts retained some residual appointing-power bias.⁷¹ In addition, Article III’s focus in this regard had to be on the weakest links among the state courts, not on the “most approved” of them.⁷²

Of course, a similar appointing-power bias might infect federal judicial decisionmakers, resulting in possible overenforcement of federal law at the expense of state law. Some Anti-Federalists expressed fear of a lack of independence of federally approved judges, along with concerns about their possible class biases.⁷³ As Jack Rakove has noted, Anti-Federalists worried that a federal judiciary would act as “an agent of arbitrary power,” especially if

69. *Id.* at 547.

70. *The Federalist No. 78* recognized that deference to the appointing power would be diminished in Article III-style decisionmakers, even if it was not altogether eliminated. See *THE FEDERALIST NO. 78*, *supra* note 1; see also *supra* text accompanying notes 6–7.

71. Hamilton did not discuss the reverse prospect—that because state judges are politically insulated from the federal political branches, they might be relied on as reliable enforcers of federal law and the Constitution against federal legislative or executive branch overreaching. But Congress would presumably be permitted to make that assessment.

72. See *THE FEDERALIST NO. 78*, *supra* note 1, at 522 (Alexander Hamilton).

73. See, e.g., 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 539 (2d ed. 1836) [hereinafter *ELLIOT'S DEBATES*] (remarks of Patrick Henry in the Virginia Ratifying Convention against ratification); *Letters from The Federal Farmer XV*, in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 9, at 315–20; see also Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 *ALA. L. REV.* 397, 422 (1999) (noting that the Seventh Amendment’s civil jury guarantee was viewed as a check on the federal judiciary, including its feared class biases and pro-nationalist outlook).

it acted without civil juries as Article III seemed to suppose it might.⁷⁴ *The Federalist's* response was again to point to the safeguards of Article III, which James Madison indicated “must soon destroy all sense of dependence on the authority conferring them.”⁷⁵ In any event, the uncertain risk of some overenforcement of federal law by life-tenured federal decisionmakers, who may have felt some residual allegiance to the government that appointed them, might have been seen as preferable to the more certain risk of its continued underenforcement, as had occurred under the Articles of Confederation.

IV. STATE JUDICIAL INDEPENDENCE AND THE IMPARTIAL ADMINISTRATION OF LAW

As noted above, enforcing constitutional limits on legislative action, whether federal or state, is not the only justification Hamilton gave in favor of a life-tenured judiciary. “[I]t is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society.”⁷⁶ Hamilton then added that “in any government,” not just in republics, an independent judiciary was the “best expedient” for securing “upright and impartial administration of the laws.”⁷⁷ Here, Hamilton’s focus was on “private rights,” as distinguished from what he called “the rights of the constitution.”⁷⁸ The dual functions of judicial independence as an aid in securing enforcement of the Constitution on the one hand, and the impartial enforcement of ordinary rights on the other, is a frequent theme of *The Federalist No. 78*.⁷⁹ Hamilton’s

74. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 148, 322 (1996).

75. *THE FEDERALIST NO. 51*, at 348 (James Madison) (Jacob E. Cooke ed., 1961). In addition, Madison asserted in *The Federalist No. 39* that “impartiality” will inhere in the decisions of a national tribunal given the “most effectual precautions . . . to secure [it].” *THE FEDERALIST NO. 39*, at 256 (James Madison) (Jacob E. Cooke ed., 1961); see also RAKOVE, *supra* note 74, at 187 (referring to this as “Madison’s bland assertion of the ‘impartiality’ of federal judges”).

76. *THE FEDERALIST NO. 78*, *supra* note 1, at 528 (Alexander Hamilton).

77. *Id.* at 522.

78. *Id.* at 528–29. Despite the contrast, Hamilton does not suggest that the “rights of the constitution” could be enforced other than through the vehicle of cases that raised some claim of denial of a private right. *Id.* at 529. Rather, “private rights” here seems to refer to rights that might not implicate any constitutional questions.

79. See, e.g., *id.* at 528 (referring to “rights of the constitution and of individuals”); *id.*

suggestion was that independent judges would be less likely to play favorites in such private rights cases, and would have the freedom to develop habits of mind that countered arbitrariness in decisionmaking and promoted the rule of law in more ordinary cases.⁸⁰

Such "impartial administration"⁸¹ concerns would seem to be addressed to combating possible influences on judicial decision-making even apart from ones stemming directly from the political branches.⁸² Yet Hamilton believed that this concern for impartial administration was sometimes linked to legislative action as well. After referring to the role of an independent judiciary in connection with the "ill humours" that produce unconstitutional legislation, he noted that judicial independence is also a safeguard against other "ill humours" which "sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws."⁸³

Hamilton's distinction between unconstitutional laws and "unjust and partial laws" is intriguing, to the extent that it suggests he might have supposed that an independent federal judiciary could provide a barrier to bad lawmaking even if it was not unconstitutional lawmaking.⁸⁴ Hamilton was not suggesting that laws, otherwise constitutional, could be overturned simply because they were unjust or partial.⁸⁵ Rather, he indicated that an independent judiciary can "mitigat[e] the severity[] and confin[e] the operation of such laws."⁸⁶ In so doing, he said, an independent judiciary could deter future legislative adventures by putting the

at 522 (referring to the "political rights of the constitution"); *id.* at 528 (speaking of judicial independence "not with a view to infractions of the constitution only," but also "injury of the private rights of particular classes of citizens, by unjust and partial laws").

80. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 728-29 (1995) (referring to this as "unbiased administration of day-to-day justice"); Burbank, *supra* note 21, at 336 (noting Hamilton's dichotomy).

81. THE FEDERALIST NO. 78, *supra* note 1, at 522 (Alexander Hamilton).

82. See Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, app. A (1997) (referring to this as "decisional" independence in contrast to "institutional" independence).

83. THE FEDERALIST NO. 78, *supra* note 1, at 528 (Alexander Hamilton).

84. *Id.*

85. See SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 82-83 (1990).

86. THE FEDERALIST NO. 78, *supra* note 1, at 528 (Alexander Hamilton).

legislature on notice of what was in store for them.⁸⁷ Hamilton then alluded to practices through which “the integrity and moderation” of the courts has “already been felt in more states than one.”⁸⁸ On this score, Hamilton appeared to be endorsing a theory of equitable interpretation of statutes, consistent with late eighteenth century judicial practice.⁸⁹

Although Hamilton did not spell out his examples, he was clearly referring to the actions of some of the more independent state judiciaries in checking their legislatures in this manner.⁹⁰ For Hamilton, life tenure allowed the judiciary to ride out the more temporary winds of faction that might produce either unconstitutional or partial and unjust laws.⁹¹ Arguably, Hamilton offered these state courts as a model for the federal courts in connection with the administration of federal law, although he did not say so explicitly.⁹² In addition, to the extent that federal

87. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 189–90 (1984) (connecting this independent role with advancement of the “public good”).

88. *THE FEDERALIST* NO. 78, *supra* note 1, at 528 (Alexander Hamilton).

89. See Eskridge, *supra* note 8, at 1038–39, 1050–53, 1056–57. John Manning offers a different reading of this “debatable” passage of Hamilton’s. See Manning, *supra* note 26, at 1668 n.92. Manning argues that Hamilton’s statements are consistent with a view that such ameliorative readings of statutes will occur only in cases of statutory ambiguity. *Id.* Perhaps such a reading is possible. But the difficulty with it is that Hamilton refers to judicial narrowing of “unjust and partial laws,” not to ambiguous laws or even to ambiguous “unjust and partial” laws. *THE FEDERALIST* NO. 78, *supra* note 1, at 528 (Alexander Hamilton). Moreover, in both his discussion of unconstitutional laws and unjust or partial laws, Hamilton’s concern is with judicial remedying of legislative “ill humours,” not legislative imprecision. See *id.* at 527; see also *THE FEDERALIST* NO. 81, *supra* note 11, at 543–44 (Alexander Hamilton) (observing, in connection with proposals to have the legislature exercise judicial authority, that “[f]rom a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application”). In addition, Manning suggests that instances of broad equitable interpretation by state courts was somehow linked with nonindependent judiciaries. See Manning, *supra* note 26, at 1662–65. But Hamilton, at least, seems to have made precisely the opposite link by discussing these examples as part of his argument in favor of judicial independence and life tenure. See *THE FEDERALIST* NO. 78, *supra* note 1, at 528 (Alexander Hamilton).

90. William Eskridge suggests that Hamilton’s own law practice had given rise to one such state court example. See Eskridge, *supra* note 8, at 1050 & n.306.

91. See Tushnet, *supra* note 46, at 1680 (seeing a reference to “faction” in Hamilton’s language: “ill humours which the arts of designing men, or the influence of particular conjunctures,” *THE FEDERALIST* NO. 78, *supra* note 1, at 527); see also *THE FEDERALIST* NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961) (noting how temporary legislative majorities can form to deprive minorities and individuals of rights).

92. This, for example, is how Judge Posner reads this passage. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 308–09 n.16 (1996) (viewing Hamilton’s suggestion as “an invitation to judges to set their own sense of justice against that embodied in legislation, and in the guise of interpretation to make legislation more

courts might also be involved in the administration and enforcement of state law under provisions such as diversity jurisdiction, Hamilton may have envisioned a similarly aggressive federal role to mitigate the harshness of unjust and impartial state laws affecting "the private rights of particular classes of citizens."⁹³ I discuss this prospect in the following section.

V. STATE JUDICIAL INDEPENDENCE AND THE ENFORCEMENT OF NON-FEDERAL LAW

Concern over state judicial dependence also features prominently, but not exclusively, in *The Federalist's* defense of the scope of Article III more generally—for example, in areas unrelated to the enforcement of constitutional limits or the administration of federal law. In *The Federalist No. 80*, Hamilton laid out a number of general goals to be served by a federal judiciary, including, for example, the resolution of cases on which "the PEACE of the CONFEDERACY" depended and those in which "state tribunals cannot be supposed to be impartial."⁹⁴ He listed other case categories as well.⁹⁵ Hamilton then proceeded to indicate into which of those various groupings the actual grants of jurisdiction in Article III happen to fall.⁹⁶ Chief among those in which state judicial dependence played a leading role were those categories that Hamilton viewed as based on the possible bias or partiality of state judges.⁹⁷ Independence played an important but somewhat less prominent role in connection with cases that fall under the peace-of-the-confederacy rubric.⁹⁸ Of course, some of the cases and controversies to which the federal judicial power extends partake of more than one of Hamilton's general categories.

civilized in application than it was in intention"). Importantly, Hamilton did not consider this to be an example of judicial usurpation. See THE FEDERALIST NO. 81, *supra* note 11, at 546 (Alexander Hamilton).

93. THE FEDERALIST NO. 78, *supra* note 1, at 528 (Alexander Hamilton); see also *infra* notes 149–54 and accompanying text. Impartiality in the administration of law was also enhanced in independent judiciaries by what was supposed to be their greater tendency to adhere to precedent. See *supra* notes 44–51 and accompanying text.

94. THE FEDERALIST NO. 80, *supra* note 42, at 534 (Alexander Hamilton).

95. These categories include cases arising under federal laws; admiralty and maritime cases; those in which the United States was a party; and those that "concern the execution of the provisions expressly contained in the [Constitution]." *Id.*

96. See *id.* at 538–41.

97. See *id.* at 535–38.

98. See *id.*

A. *Partiality*

Hamilton treated the rationale for enabling the federal judiciary to hear those cases in which “state tribunals cannot be supposed to be impartial” as almost too obvious for explanation.⁹⁹ He connected it with the ancient maxim that no man should be a judge in his own case, suggesting that there were cases in which state courts would identify with the interests of their own state and/or its citizens.¹⁰⁰ Yet the only cases that he placed exclusively into this category were suits between citizens of the same state claiming land based on grants from different states.¹⁰¹ It was also the only group in which Article III “directly contemplates the cognizance of disputes between citizens of the same state.”¹⁰² “The courts of neither of the [interested] states could be expected to be unbiassed,” Hamilton said, because “it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.”¹⁰³ He even went so far as to say that the laws of the respective states might have to be ignored in such cases, since they may have “tied the courts down to decisions in favour of the grants of the state to which they belonged.”¹⁰⁴

Perhaps such a natural bias would exist in state judiciaries without regard to safeguards for judicial independence.¹⁰⁵ As Hamilton elsewhere made clear, however, the “strong predilec-

99. *Id.* at 534, 538 (stating that this category “speaks for itself”).

100. *Id.* at 538.

101. *Id.*

102. *Id.* at 540 (emphasis omitted). As Joseph Story would later point out, the Constitution “indirectly” contemplated jurisdiction over suits between citizens of the same state in a number of areas, such as in cases arising under federal law. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1690 (Hilliard, Gray, and Co. 1833).

103. THE FEDERALIST NO. 80, *supra* note 42, at 538 (Alexander Hamilton); *see also* THE FEDERALIST NO. 22, *supra* note 40, at 144 (Alexander Hamilton) (making a similar statement about appointment-power deference of politically dependent state courts in clashes between state and federal law); THE FEDERALIST NO. 78, *supra* note 1, at 522–23 (Alexander Hamilton) (making a similar statement about appointment-power deference generally).

104. THE FEDERALIST NO. 80, *supra* note 42, at 538 (Alexander Hamilton). Were the unconstitutionality of a state’s laws the expected sticking point in such cases, they might have been accounted for through federal question jurisdiction. But Hamilton’s statement suggests that even constitutional state laws might have to be ignored, or one state’s laws preferred over another’s. Thus, something besides federal question jurisdiction would be needed to accomplish such a result.

105. *Id.*

tion” in favor of one’s own government, like that in favor of the appointing power, was one that was substantially undercut by such protection.¹⁰⁶ And as noted above, Article III had to account for the least common denominator among state courts, not the most exemplary. Besides, a federal court—not having attachment to any state appointing power—might have been thought to lack whatever lingering residue of home-state bias even an independent state judiciary might be supposed to retain, although Hamilton did not mention the possibility. But Hamilton did suggest that an independent and disinterested judge, unlike a possibly interested and dependent one, could more readily ignore an unconstitutional law in the context of suits involving competing states’ land grants, and at least mitigate the severity of harsh or unjust laws.¹⁰⁷

B. *Peace of the Confederacy*

Hamilton’s category of cases that implicate the peace of the confederacy is reminiscent of a similar grouping employed during the framing of the Constitution.¹⁰⁸ There, “the national peace and harmony” was used as a catchall for cases other than those arising under federal law or the Constitution to which federal judicial power might extend.¹⁰⁹ This category was eventually made more specific, and it would include the various party-based grants of jurisdiction, a few of which are discussed below, along with other grants of jurisdiction.

Hamilton saw this category as referring to cases in which judicial decisionmaking by the constituent “parts” of the Union—the states—might risk injury to “the whole.”¹¹⁰ While issues of partiality or bias, along with issues of judicial dependence, are often implicated in peace-of-the-confederacy cases, Hamilton treated peace-of-the-confederacy concerns as potentially independent of

106. *Id.*

107. See THE FEDERALIST NO. 78, *supra* note 1, at 527–28 (Alexander Hamilton). A neutral third state might have filled the bill, provided its judges enjoyed protections such as those in Article III, but at a risk to principles of equality among states by setting one state judiciary over the others. The arguable location(s) of the disputed property might also limit the states in which such suits could have been filed.

108. THE FEDERALIST NO. 80, *supra* note 42, at 534 (Alexander Hamilton).

109. 2 FARRAND’S RECORDS, *supra* note 34, at 133, 147.

110. THE FEDERALIST NO. 80, *supra* note 42, at 535–36 (Alexander Hamilton).

such issues. That is because the risk of affront to another state or a foreign government might be unrelated either to the independence of the state judicial system that rendered the adverse judgment, or to the actual presence of partiality or its risk. The peace-of-the-confederacy rationale also appears to encompass a concern for feelings of confidence among outsiders and their governments, and to that extent also focuses on fears of partiality, whatever their reality.¹¹¹

1. Suits Between States

A state suing or being sued in another state's courts by that other state, for example, could well be suspicious of any judgment rendered against it, without regard to the judicial protections of the judges of the judgment-rendering state. Whether such suspicion was well-founded might be somewhat beside the point if interstate harmony, and the risk of war between states, is the concern. Only a third-party adjudicator could effectively eliminate that fear, or at least neutralize it for the contending states. That is why, under the Articles of Confederation, such disputes were resolved finally by Congress.¹¹² Selection of a neutral third state might have been an option for resolving such cases, but it is not clear how much that would have alleviated possible suspicion that two states were in cahoots against the loser, or that there was something to be gained by the judgment-rendering state.¹¹³

Of course, the potential for actual bias is at work here as well, not just its perception, at least within Hamilton's framework that viewed judicial decisionmakers as tending to favor their own gov-

111. Similar peace-of-the-confederacy concerns might lurk in a state court's decision that slighted a sister state's title in litigation over different states' land grants, notwithstanding the impartiality or independence of its judges. But only the claims of co-citizens are covered by that grant of jurisdiction, thus somewhat minimizing such concerns. Plus, diversity jurisdiction would have been available to pick up similar land-title disputes between citizens of different states. Although Hamilton does not mention peace-of-the-confederacy concerns as a basis for jurisdiction in such land grant disputes, Joseph Story later would by noting that a disinterested court would aid "in quieting the jealousies, and disarming the resentments of the state." 3 STORY, *supra* note 102, § 1690.

112. *See id.* § 1674.

113. Even if the third state's judiciary had independence guarantees like those in Article III, that might not be enough to bury such suspicion. The idea of being judged by a sister state, no matter how neutral or disinterested, might not sit well in a political community in which all states are created equal.

ernments to the degree that they are not independent of their legislatures. Indeed, Hamilton acknowledged that the partiality principle and the idea that no one should be a judge in his own case “has no inconsiderable weight” in the category of suits between states.¹¹⁴ In addition, the perception of partiality in such cases is not always unrelated to the risk of actual partiality. Such a perception would obviously be magnified to the extent that interstate disputes might be left to a state court that was interested in the litigation and lacking in Article III-style protections.

By contrast, a decision by a life-tenured judge without a stake in the outcome might reduce suspicion on the part of the losing state concerning partiality of a judgment in suits between states. Placement of such jurisdiction in the Supreme Court of the United States as an original matter might also have provided an additional measure of confidence among the litigants, whatever other purpose it may have served. In addition, as Hamilton elsewhere suggested, a politically insulated federal decisionmaker might be able to mitigate any potential offense to the loser in shaping the final judgment in an interstate dispute, thus helping to secure the peace of the Union.¹¹⁵ And, if offense were to be taken by the losing state to the Article III court’s judgment, it would at least be directed at the more distant and diffuse central government, not at another state.

Here, of course, Hamilton was simultaneously relying on the federal judiciary’s independence while also assuming some residual identification with the interests of the Union—identification that judicial independence is ordinarily designed to break, unless the state action in question runs afoul of federal law or the Constitution.¹¹⁶ The concession was therefore double-edged and threatened to undermine Hamilton’s recognition elsewhere that government-allegiance issues were significantly present only in nonindependent courts. But perhaps Hamilton simply recognized that some such residual bias would inhere even in independent judiciaries, federal or state, if only to a limited degree, and that sometimes, it could be a good thing.

114. THE FEDERALIST NO. 80, *supra* note 42, at 538 (Alexander Hamilton); *see also id.* at 540 (stating that suits between states belong to the peace-of-the-confederacy category, as do diversity suits and suits between states and citizens of other states, and partake in some measure of the partiality category).

115. *Id.* at 535–36.

116. *See id.*

2. Alienage

According to Hamilton, alienage jurisdiction rests on concerns for the peace of the confederacy exclusively.¹¹⁷ One of Hamilton's justifications for alienage jurisdiction was that judgments against aliens by tribunals other than the national government's might be viewed negatively either by the litigant or by his parent country.¹¹⁸ Here, Hamilton's concern would seem to be over the fear of underenforcement of rights—"the denial or perversion of justice"—associated with an alien's losing effort.¹¹⁹ Just as in the setting of suits between states, suspicion of favoritism on behalf of United States citizens could exist without regard to the protections enjoyed by a state's judges or actual partiality in their decisionmaking.¹²⁰

More importantly, the perceived failure to do ordinary justice to an alien in citizen-alien disputes would be a matter for which the United States would be answerable at the international level.¹²¹ And a disregard or misapplication of the law of nations—law that Hamilton supposed might frequently be implicated in connection with litigation involving aliens—could produce similar consequences.¹²² As Hamilton pointed out, whether alienage cases implicated questions of federal treaties or law of nations, or only questions of municipal law, denial of justice concerns might inhere in any adverse verdict to an alien, and become a source for international reprisal.¹²³ Because the United States would be "answerable" in such cases, "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."¹²⁴ As

117. *See id.* at 535–36, 541.

118. *Id.* at 536.

119. *Id.*

120. A judgment might or might not have been erroneous, and error might not have been the result of impartiality in the judiciary, but it is easy to imagine that an adverse judgment in such a setting would be linked in the mind of the foreign observer to partiality, whether legislative or judicial.

121. *See* THE FEDERALIST NO. 80, *supra* note 42, at 536 (Alexander Hamilton).

122. Whatever their status today, law of nations questions probably would not have been perceived as presenting federal questions, thus making alienage jurisdiction one of the primary vehicles by which federal courts might review such questions. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (discussing the non-federal nature of the law of nations).

123. THE FEDERALIST NO. 83, at 568 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

124. THE FEDERALIST NO. 80, *supra* note 42, at 536 (Alexander Hamilton). *See generally* Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L.

was true of certain other peace-of-the-confederacy cases like interstate disputes, alienage jurisdiction gave the federal government—through its independent judges—the ability to oversee and, as Hamilton described, “mitigate” any harm,¹²⁵ or perhaps even the perception of harm, for which the federal government might be held responsible.¹²⁶ As a consequence, a “part” would be less able to subject “the whole” to a cause for war.¹²⁷

As with other peace-of-the-confederacy categories, perception of partiality was likely not the only problem, or one that was always unrelated to actual partiality or its risk. During the era of Confederation, there had been high profile cases in which aliens fared poorly, and which resulted in judgments that were very likely partial, in addition to being perceived as such.¹²⁸ Although Hamilton does not include alienage jurisdiction as partaking of the state court partiality category, others at the time believed that alienage jurisdiction’s best defense was that it “secur[ed] the United States from the danger of controversies . . . under the partial decisions of those of the individual states.”¹²⁹

649, 658–660 (2002) (discussing Hamilton’s treatment of law of nations and alien related jurisdictional grants in *The Federalist No. 80*).

125. See THE FEDERALIST NO. 78, *supra* note 1, at 528 (Alexander Hamilton).

126. See *id.*

127. Even admiralty jurisdiction was said to partake in some measure of the peace-of-the-confederacy rationale, and to that extent therefore relies only partly on the structural protections afforded state judges. Admiralty cases frequently involve foreigners, and their public law side—prize and capture cases—involve risks of offense to foreign sovereigns which would otherwise be out of the hands of the United States. THE FEDERALIST NO. 80, *supra* note 42, at 538 (Alexander Hamilton).

128. See, e.g., Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (viewing discriminatory non-enforcement of ordinary obligations owed aliens as a chief reason for establishing the federal judiciary); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 24 (1948) (“There can be no doubt, for example, of direct bias in the administration of justice against British creditors.”). Bias could lie in legislative restrictions on alien recovery of debts—as it often did—or in judicial administration.

129. James Monroe, *Some Observations on the Constitution*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 9, at 303–04; see also Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 193, 204 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (focusing on “impartial” forums to avoid states’ “unjust” and “partially unjust” laws).

3. Diversity Jurisdiction

As he did with suits between states, Hamilton pigeonholed diversity into two categories: (1) peace-of-the-confederacy and (2) state court partiality.¹³⁰ As noted above, these categories can implicate both judicial independence¹³¹ and nonindependence-related concerns. Chief among the nonindependence-related concerns would again be the fear, whatever the reality, that a judgment by a state court in favor of its own citizens was not an impartial one.¹³² Such a concern was common to all party-based categories of jurisdiction in which the interests of competing governments were aligned against one another, such as interstate disputes, alienage jurisdiction, and even disputes regarding competing state land grants.

Here, too, suspicion was not the only problem. As another Ratification-era defender of the Constitution observed with respect to diversity, “there may happen a variety of cases, where the distrust and suspicion may not be altogether destitute of a just foundation.”¹³³ Hamilton’s specific justification for diversity jurisdiction focused heavily on the possibility that local prejudice might readily manifest itself against outsiders in a less than fully independent judiciary.¹³⁴ Specifically, he argued that Article III’s diversity provision was designed to implement Article IV’s interstate Privileges and Immunities Clause—a clause that was cre-

130. THE FEDERALIST NO. 80, *supra* note 42, at 540 (Alexander Hamilton). Hamilton stated that diversity partakes of the impartiality rationale only “in some measure.” *Id.* Elsewhere he said that the impartiality rationale carries “no inconsiderable weight” in justifying diversity. *Id.* at 538.

131. See, e.g., Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 481 (1986) (linking diversity rationale to concerns over state court independence).

132. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 278 (1992) (noting that diversity was designed to alleviate such fears).

133. Remarks by Alexander Contee Hanson, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788, at 238 (Paul Leicester Ford ed., 2000) (1888).

134. See *supra* Part V.B.2. Not everyone would agree. See Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 124, 128 (2003) (stating that “[l]ittle historical documentation” supports the prejudice-against-out-of-state-litigants rationale for diversity and referring to Hamilton’s statements as “general and merely suggest[ing] the need for an impartial forum”). I believe that Hamilton’s remarks are very precisely related to the problem of in-state bias against non-resident litigants, both feared and actual, whether arising from state legislatures or state judiciaries.

ated to enforce interstate equality among United States citizens and to insure that no state treated out-of-state citizens differently than in-state citizens with respect to certain rights.¹³⁵ The provision for federal jurisdiction to enforce interstate equality suggests that for Hamilton there was a real question whether state courts could always be counted on to do so.¹³⁶

Henry Friendly derided Hamilton's Article IV rationale for diversity jurisdiction, pointing out that if a state enacted a law hostile to out-of-state citizens, it would present a federal question that could be considered in the exercise of the federal courts' federal question jurisdiction.¹³⁷ Diversity jurisdiction would therefore not be needed to take care of a violation of Article IV. Friendly made the point as part of his argument that, for the Framers, diversity jurisdiction was not really aimed at redressing local prejudice against out-of-state citizens by state judiciaries.¹³⁸ Instead, Friendly claimed that diversity was mainly designed to blunt the force of certain pro-debtor remedial legislation and perhaps anti-creditor bias more generally.¹³⁹ But Hamilton made clear that the problem with state court adjudication of suits that pitted in-state and out-of-state citizens against one another was more than just discriminatory state laws—i.e., the "equality of privileges."¹⁴⁰ He noted that such disputes also present a risk of "evasion and subterfuge" of interstate equality.¹⁴¹ The evasion and subterfuge language suggests that Hamilton may have seen Article IV as addressed to discrimination by the state judiciary (and its juries) in the interpretation or administration of possibly neutral state laws. And he viewed diversity jurisdiction as de-

135. THE FEDERALIST NO. 80, *supra* note 42, at 537–38 (Alexander Hamilton).

136. *Id.*

137. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 n.44 (1928) (referring to it as "[o]ne of the most specious arguments" in favor of diversity jurisdiction). Friendly was largely dismissive of Hamilton's focus on "local prejudice," or even the fear of it, as a rationale for diversity. Friendly believed that "the real fear" that prompted the diversity provision "was not of state courts so much as of state legislatures." *Id.* at 495. As discussed in the text, Friendly was probably right that certain state laws that were otherwise constitutional, were a likely focus of diversity. Hamilton, however, suggested that they were not diversity's exclusive focus. See *supra* text accompanying notes 130–36.

138. Friendly, *supra* note 137, at 492 n.44.

139. *Id.* at 495–97.

140. See THE FEDERALIST NO. 80, *supra* note 42, at 537 (Alexander Hamilton).

141. See *id.*

signed to secure against it.¹⁴² This language also shows that Hamilton was not only focused on problems associated with the perception of partiality among state judiciaries, but on its reality as well.

Friendly was right that state laws which facially discriminate against out-of-state citizens might be easily handled under the rubric of federal question jurisdiction on direct review. To that extent, diversity might be redundant of such jurisdiction. But it is less clear that federal question jurisdiction could have handled the problem of “evasion and subterfuge” in the interpretation and administration of state law. First, it is open to serious doubt whether ad hoc discrimination on the basis of state citizenship by a state court would have presented a federal question at the time Hamilton wrote.¹⁴³ If it did not, only the provision for diversity jurisdiction would have allowed for federal court involvement in policing state courts in their interpretation and administration of state law. And even if it did, it might have been difficult to police such subtle forms of discrimination under the aegis of federal question jurisdiction, especially if lower courts had gone uncreated and review of state court decisionmaking was available in the Supreme Court only after the fact.¹⁴⁴ Diversity, however, provides a prophylactic basis of jurisdiction that does not require proof of actual discrimination in each case, based in part on the assumption that discrimination may occur often enough, and might otherwise be difficult to show.¹⁴⁵

Hamilton made no bones about the potential structural superiority of federal courts to administer state law in such settings, and focused once again on the problem of loyalty to the appoint-

142. *See id.*

143. *See* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 870–71 n.1 (1931) (expressing similar doubt).

144. This would be true even with broad review of fact on appeal—something that Article III would have allowed for and something that terrified the Anti-Federalists who wanted a constitutional provision to insulate jury factfinding. *See* Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 595 n.21 (2001) (discussing Anti-Federalist commentary).

145. If diversity jurisdiction were exercised on direct review, it might have required some ability to second-guess determinations of state law, factfinding, and application of law to fact. In addition, while creation of lower federal courts may not have been constitutionally compelled, diversity jurisdiction exercised by federal trial courts could handle—if one believed, as Hamilton did, in the neutral forum rationale for diversity—the more subtle forms of discrimination that might enter in at the judicial stage by filtering them out *ex ante*.

ing power.¹⁴⁶ Because a federal court will “ow[e] its official existence to the union” it will not likely feel a similar “bias” toward the state of one of the contestant litigants as would an interested state court.¹⁴⁷ Perception of bias problems would presumably be reduced for a similar reason. Here, too, Hamilton focused on the significance of the political branches in the appointment of federal judges, but only to make the point that the federal court would lack any relevant appointing-power deference—i.e., to a government that was involved in the litigation. To be sure, such disinterestedness in the federal courts—“no local attachments”¹⁴⁸—would likely exist without regard to the respective protections for independence of the federal judiciary.¹⁴⁹ But, as Hamilton argued elsewhere, it was the occasional want of such protections at the state level that made local prejudice against out-of-state litigants a more troublesome possibility in the first place.¹⁵⁰

In addition, Hamilton’s recognition in *The Federalist No. 78* that an independent judiciary could better provide “impartial administration of the laws” and redress for “injury of the private rights of particular classes of citizens, [caused] by unjust and partial laws,” might have especial application in the diversity setting.¹⁵¹ For example, state debtor relief laws that disfavored the creditor class could be subject to a Contract Clause challenge if they operated retrospectively.¹⁵² But other laws, such as state installment laws, might not present a problem under the Contract Clause nor facially discriminate against out-of-state citizens.¹⁵³ The harshness of such partial but possibly constitutional laws di-

146. See THE FEDERALIST NO. 80, *supra* note 42, at 537–38 (Alexander Hamilton).

147. *Id.*

148. *Id.* at 537.

149. In the Judiciary Act of 1789, neutral state courts were entrusted with diversity actions, to the exclusion of federal courts, so long as neither party was a citizen of the neutral state. See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (providing for diversity jurisdiction when “the suit is between a citizen of the State where the suit is brought, and a citizen of another State”); *id.* at § 12 (limiting removal to out-of-state defendants sued in the state of which the plaintiff was a citizen).

150. See THE FEDERALIST NO. 83, *supra* note 123, at 571–72 (Alexander Hamilton).

151. THE FEDERALIST NO. 78, *supra* note 1, at 522, 528 (Alexander Hamilton).

152. See U.S. CONST. art. I, § 10, cl. 1.

153. Installment laws might permit a debtor to pay off a debt over a longer term than that contemplated by the original debt instrument. See 4 ELLIOT’S DEBATES, *supra* note 73, at 159–60 (remarking that diversity jurisdiction would permit federal courts to ignore such “iniquitous” installment laws).

rected against the creditor class—and as a matter of disparate impact perhaps, directed against out-of-state citizens and aliens—is precisely what Hamilton seemed to suppose independent judges could and should try to mitigate.¹⁵⁴ These are, moreover, the very same hostile state laws that Friendly saw diversity jurisdiction as somehow designed to get around, although Friendly did not discuss Hamilton's fair administration of justice rationale. But for Friendly, this was diversity's only purpose. For Hamilton—who believed that diversity jurisdiction addressed a host of sins, including state court bias against out-of-state litigants and its risk—it likely was not.

VI. STATE JUDICIAL INDEPENDENCE AND THE LOWER FEDERAL COURTS

All of Hamilton's arguments regarding judicial independence discussed thus far relate to the scope of federal judicial power—power that might have been exercised by a supreme court alone, mostly on appeal. That Court, unlike the lower federal courts, the Constitution itself creates.¹⁵⁵ But Hamilton also relied on the judicial dependence of some state courts to support the Constitution's provision for congressional establishment of lower federal courts.¹⁵⁶ Opening the discussion in *The Federalist No. 81* with a respectful disclaimer that “the fitness and competency of [state] courts should be allowed in the utmost latitude,”¹⁵⁷ he continued by explaining the necessity of such a provision.¹⁵⁸ His main argument focused directly on the absence of judicial independence in

154. Prior to the advent of a Due Process Clause applicable to the states, diversity provided a kind of federal remedy against such class-based discrimination by state political branches, but only on behalf of out-of-state litigants. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 *YALE L.J.* 77, 86 (1997). For additional discussion of diversity as having been designed to avoid certain kinds of state lawmaking, see Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 *TEX. L. REV.* 79 (1993).

155. U.S. CONST. art. III, § 1. This is neatly born out by the language of the first judiciary statute that purports to create various lower federal courts, but does not purport similarly to create a Supreme Court. See Act of Sept. 24, 1789, ch. 20, §§ 3–4, 1 Stat. 73, 73–75.

156. Article I gave Congress the power “[t]o constitute Tribunals inferior to the supreme Court.” U.S. CONST. art. I, § 8, cl. 9. Article III states that the federal judicial power “shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.* art. III, § 1.

157. *THE FEDERALIST NO. 81*, *supra* note 11, at 546 (Alexander Hamilton).

158. *Id.* at 546–47.

certain of the states.¹⁵⁹ Because they “hold[] their offices during pleasure, or from year to year,” Hamilton suggested that those state judges “will be too little independent to be relied upon for an inflexible execution of the national laws.”¹⁶⁰ He also justified the grant of power to Congress as a precautionary measure, noting that “[t]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of [the] national causes” associated with Article III.¹⁶¹ But the concern was not entirely hypothetical or off in the unforeseeable future. Hamilton stated that even then, “courts constituted like those of some of the states, would be improper channels of the judicial authority of the union.”¹⁶²

None of these arguments, however, directly addresses why lower federal courts, as opposed to the Supreme Court on appeal, would be needed to handle such concerns. Perhaps Hamilton saw the possibility of interim mischief arising from state court “execution of the national laws” pending final review in the Supreme Court.¹⁶³ And perhaps he saw the difficulty of addressing on appellate review those cases in which a “local spirit” might have subtly distorted state decisionmaking in Article III cases beyond repair.¹⁶⁴ But he did not say so. The closest Hamilton came to an explanation is a point he made about judicial efficiency: “The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the supreme court, in every case of federal cognizance.”¹⁶⁵ Absent some provision for

159. *See id.* Hamilton’s first explanation is that a provision empowering Congress to constitute inferior tribunals might have been necessary even “if it were only to empower the national legislature to commit to [the *state* courts] the cognizance of causes arising out of the national constitution.” *Id.* This might suggest that Hamilton did not think that state courts could in fact exercise all Article III jurisdiction on their own—outside of the Supreme Court’s original jurisdiction, perhaps—in contrast to the usual reading of *The Federalist*. *See also infra* note 167.

160. THE FEDERALIST NO. 81, *supra* note 11, at 547 (Alexander Hamilton).

161. *Id.*

162. *Id.*

163. *See id.*

164. *See id.*

165. *Id.* at 546. It might be possible to read this and related language in *The Federalist* as arguing for some sort of mandatory vesting of the federal judicial power. *See* THE FEDERALIST NO. 82, at 556 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The evident aim of the plan of the convention is that all the causes of the specified classes, shall for weighty public reasons receive their original or final determination in the courts of the union.”). But it is also possible that Hamilton was only saying that Article III enables this possibility, should Congress wish it.

lower federal courts, the need for appeals to the Supreme Court would increase, and Hamilton believed that unrestrained appeals would be a bad thing both for the Court and for litigants.¹⁶⁶ But Hamilton recognized that the need for appeals from state courts would itself depend on “the grounds of confidence in, or diffidence of” the state courts, thus indicating that he perceived that the appellate problem—to which lower federal courts could provide a solution—arose in large measure because that confidence might be lacking.¹⁶⁷

VII. CONCLUSION

Defending the scope of Article III was a delicate task, and the risk of insult to state courts in any such defense was substantial. Besides, it appears that many state judiciaries were on a firm footing and deserving more of imitation than criticism. Too vigorous an attack on the state judiciaries would have been troubling in a system that appeared to contemplate their substantial involvement in the enforcement of federal law and other judicial business included within Article III. Too moderate a defense might have imperiled the Constitution. Moreover, the ultimate assessment of confidence in the state courts’ ability to handle Article III business—whether in the first instance or perhaps all on their own—would rest largely with Congress.

Hamilton’s arguments show a mix of respect for and skepticism about state courts.¹⁶⁸ Certain of the arguments defending the scope of judicial power developed in *The Federalist* did not impli-

166. THE FEDERALIST NO. 81, *supra* note 11, at 547 (Alexander Hamilton) (“I should consider every thing calculated to give in practice, an *unrestrained course* to appeals as a source of public and private inconvenience.”).

167. *Id.* There is one other possibility as to why there might have had to be some provision for lower federal courts. If certain of the jurisdiction in Article III was exclusively federal by force of the Constitution—for example, those Article III matters over which state courts lacked pre-existing jurisdiction—state courts would not be able to hear such cases on their own and for reasons that might have little to do with the dependence of some state judiciaries on their legislatures. Although most scholars do not believe that such constitutional exclusivity exists, many Federalists thought that it did, and it is not clear that Hamilton did not. See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 63–73 (1995).

168. See Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 115–20 (2002) (noting the love/hate feelings about state courts in *The Federalist*).

cate concerns over the structure of the state judiciaries or the quality of their decisionmaking. But others clearly did, and those arguments tended to implicate state judicial independence from the political branches—an argument that Hamilton primarily developed in connection with the judiciary's role within the federal government. Moreover, while tenure during good behavior for the federal judiciary and the removal of the national legislature from judicial decisionmaking was not a controversial proposition, the scope of Article III was. And Hamilton used the absence of judicial independence in some of the states to help justify many of the more contested aspects of Article III jurisdiction. Hamilton tried to soften the blow of his argument by his repeated suggestion that there were only a few bad apples in the bunch.¹⁶⁹ But Article III could not very readily single out the doubtful state judiciaries from the exemplary ones. Consequently, the Constitution, but perhaps not Congress,¹⁷⁰ was obliged to treat all states alike to remedy the problem of a few.

169. See generally THE FEDERALIST NOS. 80–82, *supra* notes 42, 11, 165 (Alexander Hamilton).

170. Cf. Letter from Edward Carrington to James Madison (Aug. 3, 1789), in 12 THE PAPERS OF JAMES MADISON 323 (Charles F. Hobson & Robert A. Rutland eds., 1979) (expressing Carrington's wish to Representative Madison that Congress might "provide for separate appointment of inferior Courts in States who may not have good establishments for themselves").