

The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction

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Why did the Framers give the federal courts diversity jurisdiction? This Article brings to light a crucial but forgotten source of inspiration for diversity jurisdiction, showing that previous explanations ignore the Framers' experience judging prize case appeals during the Revolutionary War. Scholars have largely rejected the view that the Framers anticipated state bias in diversity litigation, arguing, for example, that diversity jurisdiction was designed to provide a high-quality venue for commercial disputes. Yet placing the Framers' decision in the context of their lived experience as judges in contentious "Prize Cases" during the Revolutionary War rehabilitates the geographic bias theory. During the War, the Continental Congress relied heavily on privateers—private citizens, who, with the financial support of individual states or Congress, were authorized to capture British ships. At George Washington's urging, the Continental Congress set up an adjudicatory committee within Congress itself, the Committee on Appeals, to resolve appeals from prize cases in the state courts. The Framers' taste of judicial work exposed them to contentious interstate disputes—a preview of what diversity litigation would look like in the new country. We argue that this experience, almost entirely ignored by contemporary

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scholars, directly inspired the otherwise perplexing decision to include diversity jurisdiction in Article III.

INTRODUCTION

One hundred years after the Constitution was ratified, James Bradley Thayer posed a difficult question: why diversity jurisdiction?¹ “Why is it,” Thayer asked, “that a United States court is given this duty of administering the law of another jurisdiction? Why did the States allow it? Why was it important that the United States should have it?”² These questions have been so enduring because the Framers themselves failed to answer them. Henry Friendly, whose influential 1928 article sought to answer Thayer’s questions, pointed out that the “letters and papers of the men who were to frame the Constitution” did not indicate that the Framers had “given any large amount of thought to the construction of a federal judiciary.”³

Nor were the records of the Constitutional Convention “fruitful to a student of the [D]iversity [C]ause.”⁴ “Certain it is,” he concluded, that diversity jurisdiction “had not bulked large in their eyes.”⁵ Turning to colonial court records for insight, Friendly found no evidence of prejudice against citizens of other colonies to support the standard view that fear of geographic bias prompted diversity jurisdiction.⁶ From this, Friendly concluded that diversity “was not a product of difficulties that had been acutely felt under the

1. Diversity jurisdiction is located in Article III of the Constitution. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to . . . Controversies between . . . citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof and foreign States, Citizens, or Subjects.”).

2. James Bradley Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311, 316 (1891).

3. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928).

4. *Id.*

5. *Id.*

6. *See id.* at 492-93.

Confederation.”⁷ Instead, he proposed that diversity jurisdiction arose out of “a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts.”⁸

In an article published later that year, Felix Frankfurter, Friendly’s mentor, agreed that diversity jurisdiction did not spring from any actual experience of geographic bias.⁹ “Plainly enough, this phase of the ‘judicial power of the United States’ did not grow out of any serious defects of the Confederacy nor did it anticipate glaring evils,” he wrote.¹⁰ “The available records disclose no particular grievance against state tribunals for discrimination against litigants from without.”¹¹ John Frank similarly concluded that diversity was based on “a gloomy anticipation” of prejudice against out-of-state commercial parties “rather than an experienced evil.”¹²

But what *was* the actual experience of the Framers? Conspicuously absent or sidelined from these accounts of the origins of diversity jurisdiction is the Framers’ direct experience serving as judges in the Revolutionary War “Prize Cases.”¹³ Beginning in 1776, the Second Continental

7. *Id.*

8. *Id.* at 498.

9. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520 (1928).

10. *Id.*

11. *Id.*; Julius Goebel made this same point about Article III as a whole, concluding that “[t]he judiciary was subjected to much less critical working over than the other departments of government [I]t is difficult to divest oneself of the impression that . . . provision for a national judiciary was a matter of theoretical compulsion rather than of practical necessity.” JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 205-06 (1971).

12. John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 9 (1963). More specifically, Frank argued that Congress predicted commercial activity and trade “on an unknown but vast scale If the Founding Fathers could anticipate the industrial and commercial revolution, already beginning, they could anticipate some of the obstacles to the success of the concomitant business enterprise.” John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 27 (1948) [hereinafter Frank, *Historical Bases*].

13. The Revolutionary War Prize Cases—the focus of this Article—are not to be confused with the more famous Civil War Prize Cases, in which the U.S.

Congress determined disputes involving privateers, private individuals or ships authorized¹⁴ by the government to attack and capture enemy ships in exchange for a share of the bounty.¹⁵ Usually seeking out merchant ships, privateers tirelessly attacked the British during the Revolutionary War, motivated by a powerful cocktail of greed and patriotism. Because it was not always clear whether a captured ship was British, American, or neutral, and because more than one privateer sometimes participated in a capture, disputes over the spoils arose early and often.

During the Revolutionary War, state admiralty courts adjudicated these disputes in the first instance, but Congress sought to oversee their work. Similar to its English equivalent,¹⁶ the initial appeals “court” was actually a committee within Congress, known as the “Committee on Appeals.”¹⁷ Over thirty-seven members of Congress, including John Adams, Edmund Randolph, and, most importantly, the key architects of the future federal judiciary—James Wilson and Oliver Ellsworth¹⁸—served as

Supreme Court upheld the constitutionality of President Lincoln’s pre-war blockade of Southern ports. *See* *The Prize Cases*, 67 U.S. (2 Black) 635, 698-99 (1863).

14. The document that gave a privateer his commission was called a “letter of marque.” *See* EDGAR STANTON MACLAY, *A HISTORY OF AMERICAN PRIVATEERS* 7 (1899).

15. Black’s Law Dictionary defines a privateer as a “vessel owned, equipped, and armed by one or more private individuals, and duly commissioned by a belligerent power to go on cruises and make war upon the enemy, usually by preying on his commerce.” BLACK’S LAW DICTIONARY 1195 (6th ed. 1990). For a background on privateering in Britain and the early United States, see Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221-26 (2009).

16. In Britain, the Lords Commissioners for Prize Appeals were located within the Privy Council, though in the eighteenth century common law judges often participated in the hearing of the appeals. HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT* 18 (1977); *see also* GOEBEL, *supra* note 11, at 151 (“Incongruous though it may seem, the resemblance between the earnest republicans who made up the Standing Committee and the grandees commissioned as Lords Commissioners of Appeal is very striking. Both bodies were similarly constituted; both performed similar tasks and faced similar difficulties.”).

17. BOURGUIGNON, *supra* note 16, at 40.

18. *Id.* at 330.

judges on the Committee, deciding appeals from the state courts. Others, including Alexander Hamilton,¹⁹ practiced as lawyers in prize disputes; James Madison²⁰ worked behind the scenes to improve the functioning of the appellate process. Ultimately, Congress handed its jurisdiction over to a new, freestanding court, the Court of Appeals in Cases of Capture—our first federal court.²¹

Few articles engage meaningfully with the Prize Cases or their influence on the shape of the federal judiciary.²² The few that have done so generally only attribute their influence to the decision to entrust admiralty jurisdiction to the federal courts, and the power to issue “letters of marque”²³ to Congress.²⁴ Several scholars, particularly in the late

19. *Id.* at 337.

20. *Id.* at 127.

21. The Prize Cases were not, however, the only judicial experience the Continental Congress had. Congress also decided territorial disputes between states, which surely also informed its view of litigation between states. But, as Robert Steamer has noted, “the arrangements provided [for land disputes] were temporary and haphazard.” Robert J. Steamer, *The Legal and Political Genesis of the Supreme Court*, 77 POL. SCI. Q. 546, 562 (1962).

22. For example, two recent articles exploring the sources of Article III barely mention the Prize Cases at all. See, e.g., Robert L. Jones, *Finishing A Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1001 (2007) (mentioning the Court of Appeals in Cases of Capture as the “only national court” prior to the ratification of the Constitution); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1634 (2011) (mentioning the Court of Appeals in Cases of Capture only once in passing, despite the article’s close attention to James Wilson, one of the most active participants in the Prize Cases).

23. “The Congress shall have Power . . . [t]o declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water . . .” U.S. CONST. art. I, § 8; see also *id.* § 10 (“No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal . . .”).

24. See Frank, *Historical Bases*, *supra* note 12, at 9 (“The experience of the Confederation convinced virtually every conscientious patriot of the 1780s that the admiralty jurisdiction ought to be totally, effectively, and completely in the hands of the national government, and an extended search has not revealed a criticism from any contemporary source of the clause of the constitution granting federal admiralty jurisdiction.”). Wythe Holt, who extensively detailed local bias in the Prize Cases, also discusses them in the framework of admiralty. Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1427-30 (1989) [hereinafter Holt, *The Invention of the Federal Courts*] (explaining that the men involved in the federal

nineteenth and early twentieth centuries, have acknowledged the importance of the Court of Appeals in influencing other aspects of Article III, contending that the Prize Cases helped spark a shared understanding of the need for a national judiciary,²⁵ contributed to the separation of the legislative and judicial branches of government,²⁶ influenced the breadth of congressional war powers,²⁷ and played a significant role in the designation of a single Supreme Court.²⁸ This Article seeks to highlight another legacy of the

admiralty court “presumably understood the problems of localism that the national experience with admiralty had presented during the Confederation and shared the general attitude of 1789 that admiralty jurisdiction should be an exclusively national matter.”).

25. See, e.g., Steamer, *supra* note 21, at 560 (“There is no doubt that this action by a national authority to standardize admiralty procedure is a clear antecedent for a national judiciary.”).

26. See, e.g., 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, 757 (1984) [hereinafter Clinton, *Guided Quest*]. Interestingly, the Articles of Confederation, promulgated after the Committee on Appeals had been operating for several years, specifically stated that “no member of Congress” could be appointed to the Court of Appeals in Cases of Capture. See ARTICLES OF CONFEDERATION of 1777, art. IX.

27. See Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1720 (2009).

28. J. Franklin Jameson, *The Predecessor of the Supreme Court*, in *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1775-1789*, 1, 5 (J. Franklin Jameson ed., 1889); J.C. Bancroft Davis, *Federal Courts Prior to the Adoption of the Constitution*, 131 U.S. app. xix, xxxiv (1889); Frank, *Historical Bases*, *supra* note 12, at 28; William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 WM. & MARY L. REV. 503, 519 (1976); Sidney Teiser, *The Genesis of the Supreme Court*, 25 VA. L. REV. 398, 400 (1938). More recently, Robert Clinton acknowledged the vast significance of the Prize Cases. See Clinton, *Guided Quest*, *supra* note 26, at 757 (“[The Prize Case] experience demonstrated, however, the value of a court, like the Court of Appeals, separate from the national legislature. The experience highlighted, among other things, the need to avoid the ponderous delay and inconvenience created by the ad hoc establishment of hearing tribunals, the importance of the national disposition of certain judicial cases to orderly diplomatic relations and to the domestic harmony of the states, the need for judges who could decide such questions independent of any obligations owed to the states that appointed them, and the extreme difficulty of enforcing national judgments affecting important state interest.”). Clinton, however, does not address the Prize Cases at length, noting that “[t]he judicial experience of the confederation is detailed elsewhere.” *Id.*

Prize Cases: diversity jurisdiction.²⁹

Modern accounts of the sources of diversity jurisdiction gloss over this judicial experience, focusing instead on the economic motives of the Framers. These theories of diversity jurisdiction look, for example, to the failure of the states to open their courts to British merchants as the Treaty of Paris required,³⁰ the Framers' desire to counteract state anti-creditor legislation,³¹ and the need for strong commercial courts. Moreover, in an intriguing recent article, Robert Jones contends that the Diversity Clause was actually motivated by the Framers' concern over the quality of federal

29. To our knowledge, this Article is the first to explore the relationship between diversity jurisdiction and the Prize Cases in any depth, but it is not the first to note it. Although this Article focuses on the Prize Cases' influence on the creation of a single Supreme Court, Sidney Teiser mentioned the relationship between diversity jurisdiction and the Prize Cases in his 1938 article, *The Genesis of The Supreme Court*. See Teiser, *supra* note 28, at 415 (noting that the members of the Constitutional Convention "were fully acquainted with the desirability of establishing a court having jurisdiction over disputes arising between different states, and between citizens of different states—at least in respect to captures."). Henry Bourguignon, who wrote the definitive history of the Prize Cases, also briefly mentioned the Prize Cases' influence on a number of different aspects of federal jurisdiction, including diversity. See BOURGUIGNON, *supra* note 16, at 332 ("The years of limping along with the congressional appellate prize court had shown that many problems arose if state courts could determine finally cases of captures, cases involving foreign or out-of-state litigants, or cases in which national peace and harmony were at stake.").

30. See, e.g., Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY UNIV. L. REV. 547, 552 (1989) [hereinafter Holt, *The Origins of Alienage Jurisdiction*] (explaining that "[t]he Convention was worried about refusal by state courts to uphold a previously ratified treaty or treaties"); see also Charles Anthony Smith, *Credible Commitments and the Early American Supreme Court*, 42 LAW & SOC'Y REV. 75, 77 (2008) (arguing "that a significant rationale for the jurisdiction and design of the [Supreme] Court was to establish a credible commitment to uphold trade agreements and resolve trade disputes with other nations.").

31. See, e.g., 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, 98 (1993) (noting that "[t]he prevailing perception appears to have been that diversity courts were to have some freedom to apply laws independent of state laws, particularly with regard to anticreditor legislation.").

jurors; federal courts would have the power to select a “superior class of individuals” to serve on federal juries.³²

This Article does not intend to supplant the work of other scholars in this area entirely. These scholars have provided significant evidence that the Framers were motivated in part by a desire to help creditors and merchants. We wish, however, to reveal a key oversight in previous accounts, which have largely examined the sources of diversity jurisdiction without considering the lived judicial experience of the Framers themselves.³³ More generally, we seek to reacquaint legal scholars with the Prize Cases, a rich source of material for the historical legacy of diversity jurisdiction and Article III as a whole.

Viewing diversity jurisdiction through the lens of the Prize Cases teaches us three key lessons. First, previous scholars have been wrong to claim that the Framers³⁴ had little actual experience that suggested a need to give diversity jurisdiction to the federal courts. From their Prize Case experience, the Framers had ample reason to worry

32. Jones, *supra* note 22, at 1086. For more on Jones’s argument, see *infra* notes 202-06 and accompanying text.

33. Legal historians have long struggled with the difficulties of interpreting the Framers’ intent. As Wythe Holt has said, “[w]e tend to think differently, to think in terms of a separate, neutral legal realm of constitutionally prescribed federal court jurisdiction, a realm where structural dictates are everything and contingent political pressures are meaningless. It is a mode of thinking which the generation of Framers did not use in any systematic fashion.” Holt, *The Origins of Alienage Jurisdiction*, *supra* note 30, at 548. See also Clinton, *Guided Quest*, *supra* note 26, at 747 n.1 (“In searching for such original understanding, the legal historian must also always remember that she is looking at the primary historical data through lenses that have been clouded by contemporary issues and by the perspective of intervening legal, social, and political history. Thus, in this sense the legal historian’s quest for original understanding may never truly replicate the framers’ understanding.”).

34. By “Framers,” we mean the men who attended the Constitutional Convention. Because not all the members of the Constitutional Convention were members of the Continental Congress, the men who witnessed the Prize Case experience were not precisely the same ones who structured the Constitution. However, four-fifths of the men at the Convention were also in Congress. See Teiser, *supra* note 28, at 415. This is not, however, to imply that everyone involved in the Prize Cases supported diversity jurisdiction, or even the Constitution, though most did. See BOURGUIGNON, *supra* note 16, at 330 n.23 (listing as examples of opponents Samuel Chase, Luther Martin, and William Paca).

that state courts would be biased against parties from other states.

Second, the Prize Cases suggested to the Framers how federal courts could remedy this geographic bias, inspiring the Framers to give the Supreme Court broad appellate jurisdiction. But the Prize Cases also taught the Framers that appellate jurisdiction over interstate disputes would not suffice to combat the problem of interstate bias. Throughout the War, colonial legislatures and courts disregarded Congress's jurisdiction, either restricting the right of appeal to the congressional court, or, as exemplified in a few famous cases, refusing to enforce Congress's decisions at all. The Judiciary Act of 1789 responded to these problems by creating the inferior courts contemplated in the Constitution, vesting original jurisdiction over diversity cases in those courts, and providing for federal marshals to enforce the decisions of those courts.³⁵

Third, the Prize Case experience shows why diversity litigation was considered essential by so many of the Framers. Providing a national forum for these classes of disputes could function as a means of avoiding national conflicts with parties both foreign and domestic.

The evidence that the Prize Cases inspired diversity jurisdiction (and other aspects of Article III) is powerful. True, the Framers rarely mentioned the Cases specifically in their debates. Yet the Framers most involved in drafting and supporting Article III and the Judiciary Act—James Wilson, Oliver Ellsworth, and James Madison—were among those most deeply involved in arguing, deciding, and enforcing the decisions of the Committee and the Court of Appeals. Even those members of Congress who did not serve in the judicial role debated and voted on key resolutions regarding the Committee, and, later, the Court of Appeals.

The Article proceeds as follows. Part I provides a general overview of the Prize Cases, the congressional Committee on Appeals, and the Committee's successor, the Court of Appeals in Cases of Capture. Part II shows how the Prize

35. The first Congress imposed a five hundred dollar "amount in controversy" for diversity suits, likely responding to complaints that litigants with small claims would be dragged from their homes to answer in federal courts. See JUDICIARY ACT of 1789, § 11, 1 Stat. 78 (1789).

Cases provide strong support for the “geographic bias” theory of the Constitution’s grant of diversity jurisdiction, refuting Friendly’s claim that geographic bias was not a significant influence on Article III.

In Part III, we delve more specifically into how the Prize Cases taught federal courts how to remedy these prejudices. This Part extends the analysis to the Judiciary Act’s grant of original jurisdiction over diversity cases to the inferior federal courts, focusing attention on how federal trial courts provided a remedy for the kinds of enforcement problems encountered by the first federal tribunals in the Prize Cases. In Part IV, we explain why the influence of the Prize Cases is not limited to admiralty alone. And finally, in Part V, we demonstrate how the Prize Cases showed the Framers the need for diversity jurisdiction not only as a safeguard for the nation’s economic future, but also as a means of avoiding real crisis in the new nation.

I. BACKGROUND ON THE PRIZE CASES

A. *Adjudicating the Prize Cases*

When George Washington wrote a letter to Congress in 1775 about his troubles with the privateers, he likely did not suspect he was pouring the foundation for the new country’s federal judiciary.³⁶ Washington was harassed by complaints from the American privateers, private citizens who had taken to the sea to capture British ships. The practice of privateering was not new; the British had long used privateers when they needed to supplement their standing military force.³⁷

36. Letters from George Washington to the President of Congress (Nov. 11, 1775), *reprinted in* 2 WRITINGS OF GEORGE WASHINGTON: BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE 155 (Jared Sparks ed., 1834) [*hereinafter* Letters from George Washington]. For more general background of what led to the letters, see BOURGUIGNON, *supra* note 16, at 43-45.

37. See Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 332 (1996) (explaining that the “arming of private vessels was an absolutely vital means of increasing the size of a

Privateering was essential to the success of the Revolutionary War; privateers captured or destroyed three times as many vessels as the tiny Continental Navy.³⁸ Writing to the Marine Committee, Congressman Silas Deane boasted that privateering “effectually alarmed England, prevented the great fair at Chester, occasioned insurance to rise, and even deterred the English merchants from shipping goods in English vessels at any rate of insurance.”³⁹ An Englishman wrote from Jamaica in 1777 that “from sixty vessels that departed from Ireland not above twenty-five arrived in this and neighboring islands, the others, it is thought, being all taken by American privateers. God knows, if this American war continues much longer we shall all die with hunger.”⁴⁰

American privateers hunted down ships on the other side of the Atlantic too. English Whig politician Horace Walpole wrote that, “American privateers infest our coasts; they keep

country’s naval forces in an era when maintenance of a large standing military force was not possible.”).

38. See MACLAY, *supra* note 14, at viii (pointing out that the navy captured 196 vessels, while privateers captured about 600). The number of captured American ships may even have been higher than this. As Maclay also reports, an alderman testified at the House of Lords that “the number of ships lost by capture or destroyed by American privateers since the beginning of the [W]ar was seven hundred and thirty-three, whose cargoes were computed to be worth over ten million dollars.” *Id.* at xiii.

39. *Id.* at xii. Other examples abound. John Adams, for example, complained that the success of the privateers was not sufficiently reported in the press. He wrote in 1777:

One of the most [s]killful, determined, persevering, and successful [e]ngagements that have ever happened upon the [s]eas, have been performed by American [p]rivateers against the [p]rivateers from New York. They have happened upon the [c]oasts and seas of America, which are now very well swept of New York privateers, and have seldom been properly described and published even there, and much more seldomer ever inserted in any of the [g]azettes of Europe, whether it is because the actions of single and small [v]essels and these [p]rivateers are not thought worth publishing, or whether it has been for [w]ant of some [p]erson to procure it to be done.

Letter from John Adams to Edmé Jacques Genet, *The Adams Papers Digital Editions*, MASS. HISTORICAL SOC’Y (May 3, 1780), available at <https://www.masshist.org/publications/apde/portia.php?id=PJA09d168>.

40. MACLAY, *supra* note 14, at xi-xiii.

Scotland in alarms, and even the harbor of Dublin has been newly strengthened with cannon.”⁴¹ Over the course of the War, 1697 privateer ships manned by 58,400 men roamed the seas.⁴²

Privateering men grew wealthy.⁴³ Most American privateers “devoted themselves mainly to commerce destroying,” capturing merchant ships bearing rich cargo.⁴⁴ As just one example, American privateers captured a ship from Africa carrying “four hundred and fifty negroes, some thousand weight of gold dust, and a great many elephant teeth . . . worth [an estimated] twenty thousand pounds.”⁴⁵ And this at a time when the average wage in America was eight pounds a year.⁴⁶ It soon became difficult to attract men to the army from the sea.⁴⁷

41. Letter from Horace Walpole to Horace Mann (July 17, 1777), *reprinted in* 24 THE YALE EDITION OF HORACE WALPOLE'S CORRESPONDENCE, 315-316 (W.S. Lewis, ed. 1937-1983), *available at* <http://images.library.yale.edu/hwcorrespondence/page.asp?vol=24&seq=331&type=b>; *see also* Letter from John Adams to James Warren, *The Adams Papers Digital Editions*, MASS. HISTORICAL SOC'Y (Mar. 31, 1777), *available at* <http://www.masshist.org/publications/apde/portia.php?id=PJA05d079> (“[A]ll the Ports of France and Spain, and Italy, and all the Ports in the Mediterranean, excepting Portugal, are open to our Privateers and Merchant Ships.”).

42. Randolph B. Campbell, *The Case of the “Three Friends”: An Incident in Maritime Regulation During the Revolutionary War*, 74 VA. MAG. HIST. & BIO. 190, 193 (1966). The Northern states—Massachusetts, Pennsylvania, Maryland and Connecticut—account for the vast majority of these commissions. North Carolina apparently issued none. *Id.*

43. John Adams spoke of dining with a Mr. Bleakly after the War, whom he said “made a very large fortune during the War by privateering, and since the Peace, came to Europe to enjoy it.” Diary of John Quincy Adams, *The Adams Papers Digital Editions*, MASS. HISTORICAL SOC'Y (Mar. 5, 1785), *available at* <http://www.masshist.org/publications/apde/portia.php?id=DQA01d713>.

44. EVARTS BOUTELL GREENE, THE FOUNDATIONS OF AMERICAN NATIONALITY 467 (1922). Note, however, that many privateers later joined the navy. *See* MACLAY, *supra* note 14, at 79 (noting that “some sixty of our most formidable privateers were commanded by men who were, or soon afterward became, captains in the navy.”).

45. MACLAY, *supra* note 14, at xiii.

46. M. RUTH KELLY, THE OLMSTEAD CASE: PRIVATEERS, PROPERTY, AND POLITICS IN PENNSYLVANIA 151 n.39 (2005).

47. *See* GREENE, *supra* note 44, at 467.

But as with most profitable ventures, the privateers' success came with bitter disputes. A captured ship was ordinarily taken to a port, then registered with the local admiralty court.⁴⁸ The profits from the sale of the ship and cargo were ultimately distributed between the privateer and the state or the Continental Congress—whichever government had given the ship its commission.⁴⁹ But capturing a ship was often only the beginning of a long legal battle. The ship's owners might deny that the ship was an enemy vessel and seek to recover the Prize. In addition, privateers from different states sometimes claimed to have captured the same ship, forcing litigation over the relative shares of the Prize money.⁵⁰

The issues these disputes raised were decided under international law.⁵¹ In England, privateering disputes had been heard in the Vice-Admiralty courts since the fourteenth-century.⁵² In the colonies, similar Vice-Admiralty courts were eventually established, and these courts heard privateering disputes arising from eighteenth-century British wars.⁵³ But once the Revolution broke out, the colonial Vice-Admiralty courts—which had been particularly hated by the

48. When privateers first brought a ship into port, “the judge of the admiralty or vice-admiralty [court] was to complete the preparatory examination of the key members of the crew of the captured ship and he was to issue monition or public notice to all parties concerned in the trial of this vessel.” BOURGUIGNON, *supra* note 16, at 139. Privateers in America and Jamaica then filed a “libel,” a “highly stylized bill” that functioned as a complaint. *Id.* at 141. Evidence was then taken, with interrogatories often prepared by the captors for the crew of the captured ship. *Id.* at 139, 143.

49. *See id.* at 47.

50. Teiser, *supra* note 28, at 400 (explaining that “[i]t often occurred that ships owned by inhabitants of the different colonies, and sometimes also by the Colonies and the Congress, all contributed to a capture. Under such circumstances, disputes over prize moneys arose, which were not satisfactorily settled by the courts of the state wherein . . . the prize was brought.”).

51. For an overview of substantive prize law during the Revolution, see BOURGUIGNON, *supra* note 16, at 238-96.

52. *See id.* at 4.

53. *See id.* at 22-26.

colonists⁵⁴—could not be counted upon to resolve the inevitable and contentious disputes that privateering produced.⁵⁵

At the start of the Revolutionary War, Prize disputes were in General Washington's hands alone. Having other things to do, Washington wrote to the Continental Congress asking to be relieved of the burden of adjudicating these cases. Might Congress set up a court to resolve them? "Whatever the mode is which [Congress is] pleased to adopt, there is an absolute necessity of its being speedily determined on; for I cannot spare [t]ime from [m]ilitary [a]ffairs, to give proper attention to these matters."⁵⁶

B. *The Committee on Appeals*

But instead of establishing a special trial court, as Washington had suggested, Congress directed the states to set up their own courts to decide Prize disputes. Unusually, Congress resolved that Prize Cases be decided by jury, a significant deviation from English practice in admiralty cases.⁵⁷ But Congress followed English precedent in another

54. See Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1720 (2009) (explaining that the "[Vice-Admiralty] courts—which lacked juries—were also responsible for enforcing the trade laws against the colonists, rendering them extremely unpopular."); see also David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America 1764–1776*, 16 WM. & MARY Q. 459, 461 (1959). Because of the previous animosity, the Continental Congress "studiously avoided" the name "Courts of Admiralty." Jameson, *supra* note 28, at 6.

55. For more, see Jameson, *supra* note 28, at 5 ("Where the governor had acted as judge, he was now in flight. The admiralty judges, as dependents of the governor, would most likely flee also; and the more so because their courts had of late years become highly unpopular, since a recent act had placed many infractions of the revenue laws under their jurisdiction, so that they were tried without a jury.").

56. Letters from George Washington, *supra* note 36.

57. BOURGUIGNON, *supra* note 16, at 46. Note that some states disregarded congressional command to use juries in prize disputes. Delaware never allowed juries to decide Prize Cases, and Pennsylvania did not after 1780. *Id.* at 192. Maryland, North Carolina, and Massachusetts did not always use juries in Prize suits. *Id.* (explaining that "[t]hough not universally used, juries were definitely the rule and not the exception in prize litigation.").

respect, by reserving appellate jurisdiction to itself in all Prize Cases.⁵⁸ Congress sometimes acted legislatively, and sometimes played the role of an executive body. Now, Congress also took on a judicial role.⁵⁹

Washington's response to Congress's actions was lukewarm. Perhaps anticipating the difficulties that would later arise, he wrote back to Congress that "[t]he resolves relative to captures made by Continental armed vessels only want a court established for trial to make them complete."⁶⁰

And, in fact, Congress's plan to oversee Prize disputes by hearing appeals from the state courts did not go smoothly. Although the states generally applied the law according to the resolutions of Congress and the law of nations,⁶¹ they jealously guarded their jurisdiction over their cases. Each state believed it had the power to establish its own courts and to define their jurisdiction—including the scope of the right of appeal to Congress in Prize Cases.⁶² Consequently, nearly every state limited appeals to the Committee and, later, to the Court of Appeals. Massachusetts and New Hampshire,

58. *See id.* at 45-46.

59. Congress also took on a semi-judicial role deciding boundary disputes in "ad hoc" tribunals. Swindler, *supra* note 28, at 514. But the court was, as Jameson points out, "called into existence only a very few times (three apparently), and actually convened and pronounced judgment in one case"—a dispute between Pennsylvania and Connecticut over Wyoming. Jameson, *supra* note 28, at 3. Notably, James Wilson was the lawyer for Pennsylvania, which prevailed in the dispute. William Ewald, *James Wilson and The Drafting of the Constitution*, 10 U. PA. J. CON. L. 901, 910 (2008).

60. Letters from George Washington, *reprinted in* 3 THE WRITINGS OF GEORGE WASHINGTON: BEING HIS CORRESPONDENCE, ADDRESSES, MESSAGES, AND OTHER PAPERS, OFFICIAL AND PRIVATE 196-97 (Jared Sparks ed., 1837).

61. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS (Dec. 4, 1781), at 1158 (Washington Chauncey Ford ed., rev. ed. 1904-1937) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS] ("The rules of decision in the several courts shall be the resolutions and ordinances of the United States in Congress assembled, public treaties when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe. Public treaties shall have the pre-eminence in all trials.").

62. Swindler, *supra* note 28, at 513-14 ("The language of state legislation often explicitly limited appeals to a higher court within the state jurisdiction or was sufficiently ambiguous to enable states to determine the legality of an appeal to the national court.").

for example, only allowed appeals in disputes involving ships outfitted by Congress.⁶³ Rhode Island and Connecticut allowed a broader appellate jurisdiction, but excluded several kinds of cases from appellate review by Congress.⁶⁴ Georgia allowed appeals only after a second trial by a special jury.⁶⁵ Pennsylvania only permitted appeals on questions of law.⁶⁶ Only New Jersey, Delaware, and South Carolina allowed Congress its full appellate jurisdiction.⁶⁷ Most states thus disregarded congressional authority in some way, despite the fact that the draft of the Articles of Confederation in July 1776 gave Congress the exclusive power to decide Prize Case appeals.⁶⁸

On July 4, 1776, the first Prize appeal—regarding a ship named the *Thistle*—was presented to Congress.⁶⁹ Naturally enough, Congress was engrossed in other tasks, and did not get to the appeal for several months.⁷⁰ In the case of the *Thistle*, and the six appeals that followed it, members of Congress rotated through the Committee, with John Adams, James Wilson, Oliver Ellsworth, Edmund Randolph, and many others serving as appellate judges.⁷¹ The shifting membership of the Committee had at least one beneficial side

63. BOURGUIGNON, *supra* note 16, at 74.

64. *Id.*

65. *Id.*

66. *Id.* at 75.

67. *Id.*

68. GOEBEL, *supra* note 11, at 163 (“All of these assertions of state sovereignty fell just short of overt hostility to central management of common concerns. What lent these statutes a peculiarly aggressive quality was the fact that in the first draft of the Articles of Confederation (July 1776) Congress had been given power to establish rules of prize as well as courts to receive and finally determine appeals in all cases of captures.”).

69. BOURGUIGNON, *supra* note 16, at 81. This was not, however, the first case that had been presented to Congress. There was some confusion initially about the Court’s jurisdiction; the first two applications made to Congress were for exercise of “original jurisdiction,” which it declined. *See* Davis, *supra* note 28, at xxii.

70. BOURGUIGNON, *supra* note 16, at 81.

71. *Id.* at 329 n.22.

effect: it exposed dozens of members of Congress both to prize cases and to the judicial process more generally.⁷²

But a crack in the system appeared early on: inconsistency. Although Congress and the states were, in theory, following the “law of nations” and the English Prize system, there was little knowledge of Prize law in Congress, and little access to relevant books.⁷³ And the inconsistency in the Committee’s membership led to inconsistency in the law; the law announced in one case was not necessarily followed in another. Nor was the membership of the Committee always clear, even in an individual case; in the case of the *Phoenix*, for example, Congress heard three appeals before the case was decided, in part because the case had initially been heard by the wrong members of Congress.⁷⁴

In January of 1777, based on the experience of eight appeals, Congress passed a series of resolutions that composed a “standing [C]ommittee” of five members to decide the cases, appointing ad hoc members during the inevitable absences.⁷⁵ The Committee began functioning even more like an appellate court.

Still, others campaigned for an even more permanent situation for the Committee. In 1779, a group of merchants in Philadelphia—which included James Wilson—wrote to Congress imploring it to revamp the appellate system. Noting that “[c]ertainty in the [l]aws is the great [s]ource of the people’s [s]ecurity,” the Philadelphians wrote that “[i]n a [c]ourt where there is this [c]onstant change and succession

72. *Id.* at 90-91 (noting that over the forty-two appeals heard when the Committee was active, “thirty-seven members of Congress were at one time or another appointed to sit on the Committee of Appeals.”).

73. *Id.* at 189 (explaining that without a more comprehensive book available on Prize law, “American lawyers and judges who took the trouble to read what was then available could only find a hazy picture of [P]rize procedures which must have closely resembled the [P]rize practice they could see in their own vice-admiralty courts.”); see also GOEBEL, *supra* note 11, at 154 (indicating that “[t]here were no available admiralty reports, for the jurisprudence as practiced and applied in the High Court was a memory jurisprudence of the most arcane variety.”).

74. BOURGUIGNON, *supra* note 16, at 87.

75. See Davis, *supra* note 28, at xxiii.

of [j]udges, it is impossible that fixed principles can be established, or the doctrine of precedents ever take place.”⁷⁶ This uncertainty, the letter continued, created obstacles to justice that caused unreasonable delay particularly harsh on the privateers. “In the privateering trade in particular, the very life of which consists in the adventurers receiving the rewards of their Success and Bravery as soon as the Cruize is over, the least delay is uncommonly destructive.”⁷⁷

C. *The First Federal Court*

Spurred in part by the Philadelphia merchants’ letter, and in part by the irritation and time demands of handling Prize appeals,⁷⁸ Congress began paving the way for a permanent court, appointing committees to devise the framework for how the Court would work. Four years after Washington’s request, the Court of Appeals in Cases of Capture—the first federal court—was finally established.

Congress selected three judges—George Wythe, William Paca, and Titus Hosmer⁷⁹—and in 1780, all appeals were transferred from the Committee to the new Court.⁸⁰ The Court operated much like the Committee, using similar procedures to admit and take evidence, and continuing to re-examine facts after a jury verdict, including reviewing new depositions.⁸¹ And like the Committee on Appeals, the Court of Appeals depended on the states for the enforcement of its decisions.

76. Jameson, *supra* note 28, at 24-25.

77. *Id.* at 25-26. Further, the merchants complained that the Court only ever sat where Congress resided, so “parties who attend it are perhaps under the necessity of coming to Congress from the most distant parts of the United States” at great expense and time. *Id.* at 25.

78. Unquestionably, the Committee demanded a great deal of time from the otherwise busy Congressmen and became a headache. *See infra* notes 354-67 and accompanying text 367 (discussing the Committee being delayed by the Pennsylvania legislature and the U.S. Supreme Court).

79. BOURGUIGNON, *supra* note 16, at 116.

80. *Id.* at 119.

81. GOEBEL, *supra* note 11, at 177.

Despite their short life span,⁸² the Committee on Appeals, and later, the Court of Appeals in Cases of Capture, became the testing ground—a “graduate seminar”⁸³—for the national judiciary. The Court decided nearly 120 cases, upholding state judgments in thirty-nine appeals, and reversing them in forty-nine, before its closure in 1787.⁸⁴ An active break from English practice, the freestanding Court of Appeals was not only the first federal court, but also the predecessor of a single Supreme Court. The new Supreme Court’s docket included many cases that began life in the Court of Appeals in Cases of Capture; the Supreme Court was quick to affirm the Capture Court’s jurisdiction and demand enforcement of its decisions.⁸⁵ But the experience would also play a less obvious role in shaping the national judiciary, and diversity jurisdiction in particular.

82. John C. Hogan, *The Court of Appeals in Cases of Capture*, 33 OREG. L. REV. 95, 103–04 (1953). The end of the court was less dramatic than its beginnings. In 1784, no new appeals were being filed, and two of the judges wrote to Congress explaining that the docket was cleared. *Id.* at 103. Congress then swiftly resolved that the Court would continue, but that the salaries of the judges should “henceforth cease.” *Id.* The judges were upset about losing their salaries. *Id.* Congress then explained that it was

impressed with a sense of the ability, fidelity, and attention of the Judges of the Court of Appeals . . . but that, as the [W]ar was at an end, and the business of that court in a great measure done away, an attention to the interests of their constituents made it necessary that the salaries of the said judges should cease.

Id. The Court did have further business with rehearings, and the judges continued to sit at an allowance of ten dollars a day, until the closing of the court in 1787. *Id.* J. Franklin Jameson pointed out that “Hamilton, it is interesting to find, during his brief term of service in Congress, made a characteristic attempt to prolong the life of this federal institution, feeling doubtless that any such institution was, for ‘continental’ reasons, too valuable to be allowed to expire.” Jameson, *supra* note 28, at 35.

83. BOURGUIGNON, *supra* note 16, at 319.

84. *See id.* at 217, 319.

85. *See, e.g.*, *United States v. Peters*, 5 Cranch 115, 140 (U.S. 1809) (“By the highest judicial authority of the nation, it has been long since decided, that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several states, in prize causes.”); *Jennings v. Carson*, 4 Cranch 2, 21–22 (U.S. 1807) (holding that the Continental Congress had authority to establish appellate tribunals over Prize Cases); *Penhallow v. Doane*, 3 Dal. 54, 113 (U.S. 1795) (same).

II. BOLSTERING THE GEOGRAPHIC BIAS THEORY OF DIVERSITY JURISDICTION

A. *Traditional View of Diversity Jurisdiction*

As described above, the traditional view of diversity jurisdiction—that it arose from geographic bias against citizens from out-of-state—has largely been discarded by scholars of Article III’s origins. This Section rehabilitates the traditional view of diversity, and refutes Friendly’s challenge to it, through a close examination of geographic bias in the Prize Cases.

Despite its current unpopularity, the traditional view has always had strong evidence on its side. Judging from the few contemporaneous statements the Framers actually made about diversity jurisdiction, their stated motive for its inclusion was clear: federal jurisdiction over disputes between citizens of different states, and between Americans and foreigners, was intended to mitigate bias against outsiders, particularly in matters of debt collection.

Though it was unchallenged at the Continental Congress,⁸⁶ diversity jurisdiction was controversial during the ratification debates. Madison argued in Virginia that diversity jurisdiction was necessary because

[i]t may happen that a strong prejudice may arise, in some states against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events might think himself injured.⁸⁷

86. Friendly, *supra* note 3, at 486-87 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 168, 169-70 (Max Farrand ed., rev. ed. 1937) [hereinafter Farrand, Records]) (“Mr. Baldwin of Georgia told Ezra Stiles in December that the delegates had been ‘unanimous also in the Expedy & Necessy of a supreme judicial Tribunal of universal Jurisdiction—in Controversies of a legal Nature between States—Revenue—& appellate Causes between subjects of foreign or different states.’”).

87. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed. 1901) [hereinafter Elliot’s Debates].

Hamilton echoed these concerns in *The Federalist Papers*. The principle that “[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias[,]” weighed heavily “in designating the federal courts as proper tribunals for the determination of controversies between different states and their citizens.”⁸⁸ Therefore, these cases must “be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.”⁸⁹

Even more striking are the statements of James Wilson and Oliver Ellsworth, the two Framers with perhaps the most influence on the national judiciary. James Wilson, one of the most active Framers in arguing and deciding Prize Cases, was, as Friendly noted, “the most enthusiastic defender of [the Diversity] [C]lause of the new Constitution.”⁹⁰ Wilson asked “[h]ow a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel who has his debts at the mercy of tender laws in other states?”⁹¹ Similarly, Oliver Ellsworth, who drafted the Judiciary Act,⁹² is reported to have said that “our Juries” were “generally prejudiced” against “foreigners” and that

[t]he Laws of nations & Treaties were too much disregarded in the several States—Juries were too apt to be biased against them, in favor of their own citizens & acquaintances; it was therefore

88. Hamilton went further than diversity with this justification, adding “[a]nd it ought to have the same operation in regard to some cases between citizens of the same State.” THE FEDERALIST NO. 80, at 498 (Alexander Hamilton) (Henry Cabot Lodge ed., 1889).

89. *Id.* at 497.

90. Friendly, *supra* note 3, at 486.

91. 2 Elliot’s Debates, *supra* note 87, 491-92.

92. The first draft of the act is in Ellsworth’s hand. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 50 (1923).

necessary to have general Courts for causes in which foreigners were parties or citizens of different States[.]⁹³

From these statements of the Framers, the traditional view, as articulated by Charles Warren, is that “[t]he chief and only real reason” for diversity was “to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens.”⁹⁴ Warren added, for emphasis: “[t]here is not a trace of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction.”⁹⁵ Robert Brown agreed, writing in 1929 that

[t]here seems to be no disagreement as to the primary purpose of this provision for federal jurisdiction based upon diversity of citizenship. It was to provide, so far as possible, against injury to nonresident suitors because of local and sectional prejudice, which would be extremely unlikely to have an important effect in state courts.⁹⁶

Courts, too, have largely adopted the idea that geographic bias, or at least, avoiding the appearance of bias,⁹⁷ motivated diversity jurisdiction.

93. Commentary from William Loughton Smith to Edward Rutledge (Aug. 9-10, 1789), *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: ORGANIZING THE FEDERAL JUDICIARY: LEGISLATION AND COMMENTARIES 496, 497-99 (Maeva Marcus ed., 1992).

94. Warren, *supra* note 92, at 83.

95. *Id.*

96. Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 181 (1929).

97. *See, e.g.,* Dodge v. Woolsey, 59 U.S. 331, 354 (1855) (“The foundation of the right of citizens of different States to sue each other in the courts of the United States, is not an unworthy jealousy of the impartiality of the state tribunals. It has a higher aim and purpose. It is to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit.”); Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (“However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this

B. *Friendly's Rejection of the Traditional View*

But in 1928, Henry Friendly upset this standard view.⁹⁸ In *The Historical Basis of Diversity Jurisdiction*, Friendly proposed an alternative theory for the source of the Diversity Clause.⁹⁹ First, Friendly dismissed the Framers' statements about state prejudice, calling their defense of diversity jurisdiction "apath[etic]."¹⁰⁰ As an example, Friendly pointed to Madison's less than rousing defense at the state ratification debates: "As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts."¹⁰¹

And although Madison also said that "[i]t may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them[,]"¹⁰² Friendly did not take that claim seriously. "Madison does not point out any specific examples of prejudice, does not allege that any exist; Madison even gives the innuendo that none do exist."¹⁰³ And, Friendly added, "if there had been no injustice under the chaos and state jealousy of the Confederation, why was there cause for apprehension as to

subject, . . . that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.").

98. Friendly was only eight months out of law school at the time. Louis H. Pollak, *In Praise of Friendly*, 133 U. PA. L. REV. 39, 40 (1984) (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483 (1928) (noting that "[t]he paper must have been conceived when the author was still in student status, for he was at pains to acknowledge his substantial indebtedness 'to Professor Felix Frankfurter . . . both for suggesting the subject of this paper and for constant help in its preparation.'")).

99. This view might perhaps be better called the Frankfurter-Friendly view, given Frankfurter's input into the article. *See id.*

100. Friendly, *supra* note 3, at 486.

101. *Id.* at 487 (quoting 3 Elliot's Debates, *supra* note 87, at 533). Friendly does, however, leave out the next section of Madison's quote, in which he adds "[b]ut I sincerely believe this provision will be rather salutary than otherwise." 3 Elliot's Debates, *supra* note 87, at 533.

102. Friendly, *supra* note 3, at 492 (quoting 3 Elliot's Debates, *supra* note 87, at 533).

103. *Id.* at 493.

prejudice under the new regime of the Constitution?”¹⁰⁴ Similarly, Friendly explained that “[e]ven the statesman who was to be most closely identified with the creation of a powerful federal judiciary”—future Chief Justice John Marshall—“admitted in regard to diversity jurisdiction: ‘[w]ere I to contend, that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment.’”¹⁰⁵

Instead of relying on the Framers’ statements, Friendly searched for actual evidence of bias in the state courts before the drafting of the Constitution, and found the record of prejudice lacking.¹⁰⁶ He reviewed the results of litigation between diverse parties in state law reports.¹⁰⁷ Although he acknowledged that the state reports only gave a “fraction” of the cases, “such information as we are able to gather from the reporters entirely fails to show the existence of prejudice on the part of the state judges.”¹⁰⁸ In the nine diversity of citizenship cases he found in Connecticut, for example, he concluded that “the record of the court is highly creditable. In only two of them was the domestic party victorious, and these cases could not well have gone the other way.”¹⁰⁹ Friendly found little evidence of state bias in other state reports, and “none have been found which indicate undue prejudice on the part of the local tribunal.”¹¹⁰ From this evidence, Friendly concluded, “there was little cause to fear that the state tribunals would be hostile to litigants from other states.”¹¹¹

But what motivated diversity, if not fear of interstate prejudice? Friendly’s answer was straightforward: “the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity

104. *Id.*

105. *Id.* at 487-88 (quoting 3 Elliot’s Debates, *supra* note 87, at 556).

106. *Id.* at 493.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 494.

111. *Id.* at 497.

jurisdiction”¹¹² State courts and state legislatures could not be trusted with commercial litigation.¹¹³ Friendly explained how in New Hampshire, for example, “the legislature was equally occupied with tasks that are commonly thought to be exclusively the business of the courts.”¹¹⁴ For example, the New Hampshire legislature vacated judgments and annulled deeds, and even allowed “certain litigants to secure review of judgments, though the time for taking such action had passed.”¹¹⁵ “Not unnaturally,” Friendly wrote, “the commercial interests of the country were reluctant to expose themselves to the hazards of litigation before such courts as these.”¹¹⁶ Friendly could not, however, pin down exactly why the Framers thought federal courts would provide a better forum for commercial cases than state courts.¹¹⁷ Although he briefly discussed the superior method of appointment, the tenure of judges, and the “practical workings of the system,”¹¹⁸ ultimately he believed the Framers had no more than “a vague feeling that the new courts would be strong courts, creditors’ courts, business men’s courts.”¹¹⁹

Modern scholars have been quick to adopt Friendly’s view that geographic bias against citizens from different states was not the true source of diversity jurisdiction. Felix Frankfurter—Henry Friendly’s mentor—agreed that “[s]uch distrust as there was of local courts derived, not from any fear of their partiality to resident litigants, but of their general inadequacy for the interests of the business community.”¹²⁰ John P. Frank echoed that diversity stemmed from a belief that “the federal courts would be more sympathetic to

112. *Id.* at 496-97.

113. *Id.* at 498.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 497.

119. *Id.* at 498.

120. Frankfurter, *supra* note 9, at 520.

business interests than the state courts.”¹²¹ More recently, Patrick J. Borchers has argued that instead of geographic bias, “diversity was intended at least in part as a protection against aberrational state laws, particularly those regarding commercial transactions.”¹²² And invoking in part Friendly’s argument, Judge Posner has agreed that “[b]ias played a smaller role in the creation of the diversity jurisdiction than is generally believed”¹²³

In short, as Debra Lyn Bassett concluded, “today’s major argument for retaining diversity jurisdiction—the protection of out-of-state litigants from local bias—is not supported by the original constitutional documents. There is no reason to believe that local bias was *a* reason, much less *the* reason, behind the creation of diversity jurisdiction.”¹²⁴

Compelling arguments. Thus, despite the stated intent of the Framers, Friendly’s dismissal of geographic bias as the central concern of the Framers in favor of a more economic rationale is now considered “authoritative.”¹²⁵

C. *Friendly’s View Reconsidered in Light of the Prize Cases*

Friendly’s dismissal of the geographic bias theory is arguably problematic even on its own terms. Hessel E. Yntema and George H. Jaffin, for example, have provided ample reason to doubt Friendly’s claims that the Framers cared little about diversity jurisdiction.¹²⁶ The idea that

121. Frank, *Historical Bases*, *supra* note 12, at 27.

122. Borchers, *supra* note 31, at 81.

123. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 212 (1999).

124. Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 130 (2003).

125. Pollak, *supra* note 98, at 41 (“Friendly’s article was and remains the authoritative study of the genesis and early days of diversity jurisdiction.”); *see also* Borchers, *supra* note 31, at 81 (“[D]iversity was intended at least in part as a protection against aberrational state laws, particularly those regarding commercial transactions.”); Frank, *Historical Bases*, *supra* note 12, at 27 (echoing that diversity stemming from “the federal courts would be more sympathetic to business interests than the state courts.”); Frankfurter, *supra* note 9, at 250.

126. *See generally* Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931).

“staunch federalists, such as Madison and Marshall, gave ‘tepid’ support to the federal diverse-citizenship jurisdiction, probably should be taken *cum grano salis*”¹²⁷ If the Framers’ statements in defense of diversity jurisdiction sometimes seem tepid, Yntema and Jaffin argued that it was only because the Constitution’s supporters had to be circumspect in the face of substantial opposition.¹²⁸ “The attitude of the federalists during the controversy succeeding the Constitutional Convention was necessarily conciliatory, as they desired primarily to assure the ratification of the Constitution.”¹²⁹ Yntema and Jaffin also rejected Friendly’s claim that state bias did not exist in the state courts, pointing out there was “[n]o contemporary denial of the existence of local prejudice” and that the records of the time were “full enough of evidence of local feelings.”¹³⁰

But these critiques of Friendly are, perhaps, beside the point; when considering the Framers’ motives, whether bias actually existed in interstate litigation does not matter as much as whether the Framers *believed* that bias existed. Friendly’s claim hinges on the argument that actual bias “had only a speculative existence in 1789”¹³¹ and that “the provision with which we are to be concerned in this study was not a product of difficulties that had been acutely felt under the Confederation.”¹³² We do not know whether the Framers

127. *Id.* at 875 n.12.

128. *Id.*

129. *Id.*

130. *Id.* at 876-77 n.13. Wythe Holt has offered a similar critique:

[I]t would not be accurate to conclude from such a sparse record, as Friendly concluded about diversity jurisdiction, that federal courts were “not a product of difficulties that had been acutely felt under the Confederation” or that “fears of local hostilities . . . had only a speculative existence in 1789” [D]ebtors suffered “acutely” during the Confederation period, thereby creating “difficulties” for creditors that the Constitution was designed to solve.

Holt, *The Invention of Federal Courts*, *supra* note 24, at 1425 (quoting Friendly, *supra* note 3, at 484, 510). Unlike Friendly, Holt found in his own search of records evidence of bias in the state courts. *See id.* at 1455-56.

131. Friendly, *supra* note 3, at 510.

132. *Id.* at 484.

were actually aware of interstate bias in the state courts in commercial cases. We *do* know, however, what the Framers saw firsthand adjudicating disputes between diverse parties in the Prize Cases. Taking this experience into account upsets Friendly's claim that the Framers' stated justifications for diversity were somehow insincere.

The Prize Cases, which frequently involved disputes between interstate or international claimants, were riddled with the very local bias that Friendly denied existed in the colonial courts. After reviewing the Prize Case records closely, Henry Bourguignon, who wrote the definitive history of the Prize Cases, concluded that in most cases state courts generally decided Prize disputes in favor of privateers from their state, "even in the face of direct evidence of neutrality or American ownership of a prize."¹³³ "Out-of-state or foreign litigants could be denied justice by state admiralty courts," he explained, "and their pleas to Congress called forth reassuring promises that justice would be done, but little effective relief."¹³⁴

And, although the records do not always reveal whether a court's decision was only the product of geographic bias, several cases show its obvious influence. A Massachusetts jury, for example, awarded the entirety of a Prize to a Massachusetts privateer, "despite the latter's clear agreement with a Rhode Island privateer to share all prizes, and the decree was affirmed by the Massachusetts superior court."¹³⁵ In Connecticut, privateers regularly targeted ships belonging to New York citizens, even though there was no proof of British ownership, and the Connecticut courts regularly upheld those seizures.¹³⁶

133. Gerard W. Gawalt, *Henry J. Bourguignon, The First Federal Court. The Federal Appellate Prize Court of the American Revolution 1775-1787*, 22 AM. J. LEGAL HIST. 271, 272 (1978) (reviewing BOURGUIGNON, *supra* note 16).

134. *Id.*

135. Holt, *The Invention of the Federal Courts*, *supra* note 24, at 1429.

136. *Id.* In another example, a New Jersey court awarded the *Mermaid*, a British transport ship, to a New Jersey boat crew and owner, rather than to out-of-state privateers; it is unclear whether it was because the *Mermaid* reached the prize first, or because "the boat crew were local residents, while the privateers were from other states." BOURGUIGNON, *supra* note 16, at 271.

Bias was also a factor in one of the most famous Cases of the era, the case of the *Lusanna*.¹³⁷ In short,¹³⁸ the *Lusanna* was sailing from Boston to London and back—its cargo full of hundreds of casks of valuable spermaceti oil and “head matter”¹³⁹—when it was forced by a storm to stop in Canada.¹⁴⁰ Having taken a British registry to leave Canada, Shearjashub Bourne, the son-in-law of the ship’s owner, posed as a loyalist once the ship reached London to make the ship’s departure back to Canada easier.¹⁴¹ Once in Canada, he and the crew would be able to throw off their loyalist “cover” and return to Boston. Unfortunately, a New Hampshire privateer ship, the *McClary*, captured the *Lusanna* before it made it back to Canada, and libeled it in a New Hampshire court. This put Bourne, and his father-in-law, Elisha Doane, in the difficult position of explaining that the ship had only been *posing* as loyalist.¹⁴²

Doane and Bourne, both Massachusetts-based, hired John Adams to represent them in New Hampshire.¹⁴³ But things did not look to be in Doane’s favor. The day before the

137. See *Penhallow v. Doane’s Adm’rs*, 3 U.S. 54 (1795).

138. The facts of many of the Prize Cases are byzantine, and even more so in the case of the *Lusanna*. The details of the *Lusanna* are laid out in all of their complex glory here. See *Editorial Note, The Adams Papers Digital Editions*, MASS. HISTORICAL SOC’Y 357-62 [hereinafter *Editorial Note*], available at <http://www.masshist.org/publications/apde/portia.php?id=LJA02d082#LJA02d082n77>.

139. “Head-matter” was the “waxy head-matter encased in the skull of the Sperm” whale, used for making candles. Dauril Auden, *Yankee Sperm Whalers in Brazilian Waters, and the Decline of the Portuguese Whale Fishery (1773-1801)*, 20 THE AMERICAS 267, 275 (1964).

140. See *Editorial Note, supra* note 138, at 358.

141. *Id.* at 358-59.

142. See *id.* at 362-65. Posing as a loyalist was a common way of doing business during the Revolutionary War. See BOURGUIGNON, *supra* note 16, at 242 (explaining that “[b]ecause of the difficulties of commerce immediately before and during the [W]ar, an American merchant often found his property liable to capture by both the British and the Americans. The merchant resorted to many ruses such as double papers to protect their property and therefore, when discovered engaging in suspicious activities, at times were forced to give complicated and implausible explanations of their conduct.”).

143. See *Editorial Note, supra* note 138, at 362-63.

trial, Adams wrote to his wife, Abigail, that the case of the *Lusanna*

[C]omes on Tomorrow, before my old Friend Dr. Joshua Brackett, as Judge of Admiralty. How it will go I know not. The Captors are a numerous Company, and are said to be very tenacious, and have many Connections; so that We have Prejudice, and Influence to fear: Justice, Policy and Law, are, I am very sure, on our Side.¹⁴⁴

Despite “Justice, Policy and Law,” Doane lost the case in the New Hampshire court.¹⁴⁵ On appeal to the New Hampshire Superior Court, he lost again.¹⁴⁶ New Hampshire did not then allow appeals to Congress unless the ship had been outfitted by the “United Colonies.”¹⁴⁷

But Doane petitioned Congress to hear his case anyway.¹⁴⁸ The Committee on Appeals ruled that it had jurisdiction, and the case was soon transferred to the new Court of Appeals.¹⁴⁹ There, with James Wilson as his lawyer,¹⁵⁰ Doane complained that the jury was biased against him in favor of privateers from their home states.¹⁵¹ Even if the Court of Appeals ruled in his favor, he believed that the New Hampshire courts would not heed the Court’s decision.¹⁵² And indeed, when the new Court of Appeals reversed the New Hampshire decision, the New Hampshire court refused to enforce the Court of Appeals’ decision,

144. *Id.* at 364. Just because Judge Brackett was a “friend” of Adams, didn’t mean he was unbiased. As C. James Taylor points out, “Brackett may have been JA’s old friend, but he was undoubtedly a current acquaintance of at least 10 of the McClary owners, who, with him, were members of [minister] Ezra Stiles’ congregation.” *Id.* at n.52.

145. *Id.* at 365-68. Interestingly, the *Lusanna* marked the end of John Adams’s legal career; according to his autobiography, he was in court for the case when he learned that he had been appointed to go to France. *See id.* at 368.

146. GOEBEL, *supra* note 11, at 179.

147. *Id.*

148. BOURGUIGNON, *supra* note 16, at 244.

149. *Id.* at 179-80.

150. *Id.* at 251 (describing Wilson’s arguments on appeal).

151. *See Editorial Note, supra* note 138, at 369.

152. *Id.* at 372-73.

arguing again that the Court lacked jurisdiction.¹⁵³ Only after the passing of the Judiciary Act—eighteen years after the initial trial—was the decision enforced in New Hampshire, at the instance of the U.S. Supreme Court.¹⁵⁴

In another case, both Ellsworth *and* Wilson defended a client from an obvious case of geographic bias. The *Hope*, full of “[h]ogshead and tierces of rum, sugar and limes, a ‘kegg of tamarines,’ barrels of yams, India chintz, ‘black sattin’ and women’s gloves,”¹⁵⁵ was seized by Connecticut privateers. The ship’s owner, Aaron Lopez, a Jewish merchant¹⁵⁶ from Massachusetts, had a business transporting goods from Jamaica.¹⁵⁷ Though Lopez claimed he was “and ever ha[d] been a true and faithful Subject of the United States of America,”¹⁵⁸ the privateers claimed the *Hope* was an enemy ship.¹⁵⁹ At the trial in Hartford, the judge refused to accept two jury verdicts, which, though unreported, were presumably in Lopez’s favor.¹⁶⁰ He sent the jury back to deliberate a third time, after which they could not agree. The judge then impaneled a second jury, which, as one account of the case concluded, “promptly . . . reported a verdict in favor of the local boys”¹⁶¹ The judge accepted this verdict.¹⁶² “[O]pen and base partiality I discovered in some of the

153. *Id.* at 372-73.

154. *Id.* at 373-75. Doane had died by this time. *Id.* at 372.

155. Lee M. Friedman, *Aaron Lopez’ Long Deferred “Hope,”* 37 PUBL’NS. AM. JEWISH HIST. SOC’Y, 103, 108 (1947). With such wealth taken from the ship, it is no surprise that he wrote to Ellsworth, asking his advice on securing a court date and when, as “[he] propose[d] to attend it in person.” *Id.* at 103.

156. Lopez was also a notorious slave trader. See Virginia Bever Platt, “*And Don’t Forget the Guinea Voyage: The Slave Trade of Aaron Lopez of Newport,*” 32 WM. & MARY. Q. 601, 602 (1975).

157. Friedman, *supra* note 155, at 103-04.

158. *Id.* at 105.

159. *Id.*

160. *See id.* at 110.

161. *Id.*

162. *Id.*

Hon'ble bench[.]” Lopez wrote in a letter to a friend and rabbi.¹⁶³

Ellsworth had represented Lopez in the state courts,¹⁶⁴ and Wilson and William Lewis were his counsel on appeal.¹⁶⁵ The Committee on Appeals reversed the decision, restoring the ship and its contents to Lopez.¹⁶⁶ Yet, like Doane, Lopez struggled to have the Committee's decision enforced. He filed a suit against the marshal in the Connecticut court, which was dismissed, and then appealed to the Hartford Superior Court.¹⁶⁷ Finally, the Connecticut courts issued an order giving effect to the Committee's decision in 1782, though it was not actually enforced until September of 1783.¹⁶⁸

This evidence of bias in the Prize Cases is unsurprising considering that prejudice against those from other states was rampant during the Revolutionary period. Unneighborly disputes over trade led to interstate jealousies as states imposed high protective tariffs on their goods.¹⁶⁹ Frustrations over the imbalance of war debt added to the grievances, as did the bitter disputes with regard to paper money, the value of which was always fluctuating. The Georgia legislature, for example, refused to accept any currency other than its own for confiscated property, a decision that a correspondent of Governor Caswell said was done “to humble the pride of the

163. *Id.* at 103. Of course, it is difficult to untangle the bias Lopez experienced as an out-of-stater from the anti-Semitic bias he also likely suffered. But the record does not differentiate between the two biases; likely, it was a combination of both, though neither bias seemed to influence the jury the first two times they deliberated.

164. *See id.*

165. *Id.* at 110.

166. *Id.* at 111.

167. *Id.*

168. *Id.* at 113. Indeed, bias against non-local parties did not just come from juries; it often came in a delay or outright refusal to enforce decisions. For more, see the discussion of *Olmstead*, *infra* Part III.C.

169. *See* ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION* 555-68 (1969).

North Carolinians, who refuse to take [Georgia's] money, but at an under rate."¹⁷⁰

Unsurprisingly, then, Washington then found his soldiers prejudiced against each other. North Carolinians were accused of being lazy, and the New Englanders complained of being called "damned Yankees."¹⁷¹ (Washington wasn't immune to these prejudices, writing that he found the New Englanders he was camped with "exceedingly dirty and nasty people."¹⁷²) John Adams complained that rumors circulated of New Englanders "running away perpetually, and the Southern troops as standing bravely."¹⁷³ As historian Allan Nevins reports, a Brigadier-General in the Continental Army wrote that "'the Pennsylvania and New England troops would as soon fight each other' as the British," a claim Nevins concludes was "no great exaggeration."¹⁷⁴

In this context, many of the Framers, reviewing case after case in which prejudice was alleged, must have appreciated that state courts could be geographically biased, or at least that litigants claimed them to be.¹⁷⁵ The nature of the Prize Cases perhaps even exaggerated these biases, inflating the levels of interstate prejudice in the eyes of the

170. *Id.* at 570.

171. *Id.* at 548.

172. *Id.* at 549. Adams complained that Washington "often mention[ed] things to the disadvantage of some part of New England" and that all of his aides came from the South, and showed no respect for New England. *Id.* at 551.

173. *Id.*

174. *Id.* Interestingly, Nevins reports, the troops helped changed Washington's mind. In 1777, in a speech to the troops, Washington said,

[w]ho, that was not a witness, . . . could imagine, that the most violent local prejudices would cease so soon; and that men, who came from different parts of the continent, strongly disposed by the habits of education to despise and quarrel with one another, would instantly become but one patriotic band of brothers?

Id. at 554.

175. See Holt, *Invention of Federal Courts*, *supra* note 24, at 1429 (discussing, in the context of admiralty, how examples of bias, such as the ones in the Lopez case, "demonstrate why local bias against nonlocal citizens, both American and foreign, was obvious to many in the prize litigation emanating from the Revolution.").

Framers; privateering carried risk and enormous reward for both the privateer and the colony that had outfitted it,¹⁷⁶ heightening the incentives for a jury to lean in favor of a local figure. It was not always clear who was the enemy—a loyalist—and who was a faithful American. Further, the law of nations was so little understood, even by the judges of the state courts,¹⁷⁷ that jurors likely struggled with the standards they were asked to apply, making it easier to fall back on local prejudices.¹⁷⁸ In this way, the nature of privateering disputes aggravated local feelings against outsiders that might have been present anyway. Diversity begins to seem “a product of difficulties that had been acutely felt under the Confederation.”¹⁷⁹

By stressing that the Framers had good reason to fear geographic bias in the state courts, we do not mean to argue that the grant of diversity jurisdiction was not *also* inspired by “economic, social, and political”¹⁸⁰ divides in the new nation. Critics of the traditional view have succeeded in showing that the Framers were motivated in part by a desire to create courts favorable to commercial concerns. But in many instances, it is difficult to disentangle different kinds of bias; prejudice against outsiders often overlaps with prejudice against commercial parties. Geographic bias systematically favors one set of interests: preferring a neighbor to a stranger meant keeping money in the community. And in cases where an out-of-state merchant was accused of being British—such as Elisha Doane’s *Lusanna* or

176. Privateering carried great rewards for lawyers as well. John Adams wrote in his diary in 1777 that “[y]oung [g]entlemen who had been [c]lerks in my [o]ffice and others whom I had left in that [c]haracter in other [o]ffices were growing rich, for the Prize Causes, and other [c]ontroversies had made the profession of a [b]arrister more lucrative than it ever had been before.” 4 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 1 (L.H. Butterfield ed., 1961).

177. See BOURGUIGNON, *supra* note 16, at 71, 95.

178. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 177 (2001) [hereinafter Harrington, *Economic Origins*] (“[S]tate court juries, lacking the expertise in the law of prize held by the vice-admiralty judges, often ignored well-established principles of the laws of nations and adjudged ships taken by local captains and crews to be lawful prize.”).

179. Friendly, *supra* note 3, at 484.

180. See Jones, *supra* note 22, at 1008.

Aaron Lopez's *Hope*—local bias may well have been intensified by a bias against, or at least a misunderstanding of, commercial dealings.

The Framers likely saw the federal courts as a way to mitigate both the geographic and commercial biases in the state courts. The Committee on Appeals and later the Court of Appeals were, in some respects, commercial courts that dealt kindly with merchants—almost always returning property to American merchants whom state courts had claimed to be British.¹⁸¹ As Bourguignon has put it, “the judges showed an appreciation of the difficulties in which American merchants had found themselves during the [W]ar. The judges tended to accept the arguments of the interested parties to explain away the incriminating evidence present at the time of the capture of their property.”¹⁸² The judges on the Court of Appeals were already setting a precedent for a court system that was sensitive to the problems faced by merchants—domestic and foreign.¹⁸³ This attention to the needs of merchants, however, does not suggest that geographic bias was not also an independent motivation for diversity jurisdiction, particularly when so many of the merchants were themselves out-of-staters.

III. HOW FEDERAL COURTS MITIGATE GEOGRAPHIC BIAS

Identifying geographic bias as a source of diversity jurisdiction raises the question: how could a national judiciary fix problems of geographic bias in diversity suits? Again, the Prize Case experience offers a fresh perspective on this question. First, the Prize Cases directly inspired the Framers' initial decision to vest the Supreme Court with jurisdiction over “Law and Fact,”¹⁸⁴ giving the Court the ability to overrule biased jury decisions. Second, the Framers learned that resting diversity jurisdiction in inferior courts could help mitigate bias in decision-making. Finally, the Prize Case experience taught that the state courts and marshals could not always be trusted to enforce federal

181. See BOURGUIGNON, *supra* note 16, at 251.

182. *Id.*

183. *Id.*

184. U.S. CONST. art. III, § 2.

decisions in cases where geographic bias was a factor. Without real enforcement powers of the kind provided by the Judiciary Act, federal appellate power would be toothless.

A. *Appellate Jurisdiction as to Both “Law and Fact”*

The first lesson the Prize Case experience taught the Framers is that, at the very least, they would need to create a federal appellate court that could overrule biased jury decisions in diversity litigation. Article III of the Constitution provides that the Supreme Court shall have original jurisdiction over cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”¹⁸⁵ In all other cases, however, the Constitution provides that “the [S]upreme Court shall have appellate Jurisdiction, *both as to Law and Fact*, with such Exceptions, and under such Regulations as the Congress shall make.”¹⁸⁶ James Wilson explained the breadth of the clause at the Convention, explaining that it meant that the Supreme Court’s jurisdiction extended to “fact as well as law—and to cases of Common law as well as Civil Law.”¹⁸⁷ No comments about this phrase were made after this statement, and the provision passed with ease.¹⁸⁸ Thus, although Congress could curtail the Supreme Court’s power to review issues of fact, the drafters of Article III provided for a default rule that would allow the Court to overrule a state court jury’s decision.¹⁸⁹

185. *Id.*

186. *Id.* (emphasis added).

187. 2 Farrand, Records, *supra* note 86, at 431.

188. See Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 393 (1983).

189. See THE FEDERALIST NO. 81, at 552 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (explaining that “the Supreme Court shall possess appellate jurisdiction, both as to law and fact, and that jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe.”) (emphasis omitted); see also 3 Elliot’s Debates, *supra* note 87, at 572 (statement of Edmund Randolph) (noting that Congress “may except generally both as to law and fact, or they may except as to the law only, or fact only.”).

A Supreme Court with the power to overturn jury decisions, though surprising today, would have been familiar to Framers with close connections to the Prize Cases. The Committee on Appeals and the Court of Appeals regularly decided factual issues.¹⁹⁰ Unrestricted by the record below, the Committee and the Court reviewed factual issues in contested cases *de novo*, allowing new depositions to be taken and commissioning state officers to take depositions from those too distant to travel to Philadelphia.¹⁹¹ Congress repeatedly affirmed both the Committee's and the Court's ability to examine "decisions on facts as decisions on the law."¹⁹² Although the Framers envisioned that Congress would curb the Supreme Court's review in many civil cases,¹⁹³ the Prize Case experience perhaps explains why the Framers did not balk at this broad grant of jurisdiction that was so divisive in the state conventions.

Indeed, the Framers explicitly invoked the Prize Case practices when justifying their grant of appellate jurisdiction over factual matters to the Supreme Court. At the Constitutional Convention, Wilson argued that "[t]he jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary."¹⁹⁴ Wilson continued:

Those gentlemen who during the late war had their vessels retaken, know well what a poor chance they would have had, when those vessels were taken into other states and tried by juries, and in what a situation they would have been, if the court of appeals had not

190. BOURGUIGNON, *supra* note 16, at 211-12.

191. *Id.*; see also GOEBEL, *supra* note 11, at 159-60.

192. 13 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 281, 283 (Worthington Chauncey Ford ed., 1909).

193. See, e.g., Letter from John Adams to Thomas Brand-Hollis, FOUNDERS ONLINE (Jan. 4, 1788), available at <http://founders.archives.gov/documents/Adams/99-02-02-0305> (writing that "[o]ur new constitution does not expressly say that juries shall not extend to civil causes.—Nor, I presume, is it intended, to take away the trial by jury in any case, in which you, sir, yourself would wish to preserve it.").

194. Remarks of James Wilson at the Pennsylvania Convention (Dec. 7, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 520 (Merrill Jensen ed., 1976).

been possessed of authority to reconsider and set aside the verdict of those juries.¹⁹⁵

Hamilton also invoked the Prize Cases to support the Supreme Court's appellate jurisdiction over factual questions, explaining in *The Federalist Papers* that "the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace."¹⁹⁶

Ultimately, the Constitution's critics successfully argued that the provision would allow judges to usurp the power of the jury trial; the Seventh Amendment conceded the point, limiting the Supreme Court's power to review juries' factual determinations in "Suits at common law."¹⁹⁷ Nevertheless, inspired by the Prize Cases, the Framers envisioned that the Supreme Court could have some power to neutralize jury biases, even in the absence of inferior federal courts.

B. *Replacing State Court Decisionmakers*

But appellate jurisdiction alone would only go so far; by providing the option for federal inferior courts in the Constitution,¹⁹⁸ the Framers recognized that controlling the decision-making at the trial level would be an even more effective means of mitigating bias. Without lower courts, Madison had argued, "appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in

195. *Id.* at 514, 520-21.

196. THE FEDERALIST NO. 81, *supra* note 189, at 551.

197. U.S. CONST. amend. VII.; Harrington, *Economic Origins*, *supra* note 178, at 147-48 (explaining that the "Seventh Amendment was really the climax of the long struggle over the right of the jury to find both law and fact in civil cases, and was designed to achieve a compromise between those who believed that the jury should have unfettered power to decide law and fact and those who sought to allow judges to impose some limits on the jury's power to decide the whole of a case.").

198. The Randolph proposal had provided for lower courts, but some delegates, believing that the state courts would better function as lower courts, brought a motion to eliminate federal inferior courts. The motion passed. Madison and Wilson then moved to provide the new Congress with the *option* of establishing lower courts, which was "enough to double the vote for lower courts." See Frank, *Historical Bases*, *supra* note 12, at 10.

many cases be a remedy.”¹⁹⁹ “What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury?” he asked.²⁰⁰ “To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court.”²⁰¹ Inferior courts could resolve these issues of bias at the local level.

Admittedly, late eighteenth-century juries exercised far more power than juries do today; they even decided questions of law. Given that federal jurors would still hail from a particular locality, how would decision-makers in the inferior courts differ from their state counterparts? One answer is that federal judges would facilitate a different selection of eligible jurors. According to Robert Jones, “the key to understanding the origins of diversity jurisdiction is to recognize the dramatic ways in which federal juries were intended to differ from their state counterparts.”²⁰² Most states “provided local sheriffs with virtually unlimited discretion to impanel jurors of their own choosing.”²⁰³ By circumventing state sheriffs, federal marshals would have a “plenary power to dictate the compositions of federal juries.”²⁰⁴ This power would allow those marshals to “pervasively control the political, economic, and social composition of the federal juries.”²⁰⁵ Jones makes Friendly’s “vague” idea that federal courts would be better more specific: “the Framers believed that the tight control maintained by federal officials over the selection of juries in federal courts would transform the federal courts into a superior forum, i.e., one that was more aligned with the

199. See 5 Elliot’s Debates, *supra* note 87, at 159.

200. *Id.*

201. *Id.*

202. Jones, *supra* note 22, at 1003.

203. *Id.* at 1004.

204. *Id.*

205. *Id.*

values and perspectives of the Framers than the state courts.”²⁰⁶

Jones’s view is consistent with the difficulties the Framers faced reviewing verdicts by juries in prominent Prize Cases. Yet Jones’s account perhaps overly diminishes the role of the judge in the inferior courts. Judges, too, had to be chosen carefully. The judges of the colonial era were generally not learned men of the law. Early America simply lacked well-trained lawyers, and there was little difference between juries and the judges who oversaw them.²⁰⁷ It was, as Anton-Hermann Chroust has said, “necessary and, in some places, considered even advisable, to resort to judges not familiar with the law.”²⁰⁸ This was “especially true in the lower courts;” but even state supreme courts “also had their share of incompetent and often ill-tempered laymen.”²⁰⁹ Although juries did have more power than they do today, they were not self-directed. Prize Case litigants like Aaron Lopez—who suffered a judge sending a jury back three times before receiving the answer the judge wanted—knew that even unbiased juries could be thwarted at the hands of a biased judge.²¹⁰

The Framers therefore would have seen the power to appoint learned judges on a federal salary and with life tenure on the bench as another way to mitigate geographic bias. Congress had already shown its willingness to appoint serious lawyers to the Court of Appeals in Cases of Capture.²¹¹ One judge, William Paca, had practiced law in the

206. *Id.* at 1005.

207. See BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 71 (1987) (“In background, experiences, and outlook,” Mann has argued, “[juries] were much like the litigants whose disputes they determined, and not very different from the judges who oversaw them.”).

208. Anton-Hermann Chroust, *The Legal Profession in Colonial America*, 33 *NOTRE DAME L. REV.* 51, 57 (1957).

209. *Id.*

210. See *supra* notes 160-63 and accompanying text.

211. Congress had initially appointed George Wythe, arguably the first law professor, and Titus Hosmer, a prominent lawyer who had gone to Yale, to the Court, but Wythe declined and Hosmer died before he could take office. See BOURGUIGNON, *supra* note 16, at 116-17.

Inner Temple in London before entering the Maryland bar, and had been the chief judge of the Maryland General Court.²¹² Cyrus Griffin had studied at Edinburgh and the Middle Temple.²¹³ George Read had a longstanding legal practice in Philadelphia, sometimes acting as a lawyer in Prize Cases.²¹⁴ John Lowell had been to Harvard and studied law in a leading office in Massachusetts.²¹⁵ Appellate or otherwise, judges like these—staffing a federal court and paid by the United States—would presumably be more disciplined to the law and less accountable to local biases.

C. *Enforcing Federal Court Decisions*

Well-trained judges loyal to federal interests would, too, be more likely to actually enforce an appellate decision—a courtesy the state judges did not always afford to the Committee or Court of Appeals. The Prize Case experience taught that even if the Supreme Court could overrule biased jury decisions in diversity suits, that power would be hollow without the ability to execute its decisions. Winning an appeal is one thing; getting cash (or ship and cargo) in hand is another. The Committee on Appeals, and later the Court of Appeals, were dependent on the officials of state admiralty courts—the very courts whose judgments they were overturning—to carry out their judgments.²¹⁶ Although states frequently implemented appellate rulings with no

212. *Id.* at 117.

213. *Id.*

214. *Id.* at 120.

215. *Id.* at 121.

216. GREENE, *supra* note 44, at 563 (“The absence of a federal judiciary made Congress dependent on the state courts for the enforcement of its will on individual citizens, and this illustrates the fundamental weakness of the Confederation. So far as the individual was concerned, his primary allegiance was to the state in which he lived and the federal government could not reach him directly. Congress could make a treaty, but its enforcement depended on the efficiency and good will of state governments.”); *see also* BOURGUIGNON, *supra* note 16, at 317-18 (explaining that “the political realities repeatedly frustrated congressional efforts to execute the decrees of its court of prize appeals. If a state government or state court stuck to its determination to negate the effectiveness of these appellate decrees, Congress had no weapons in its scanty arsenal of powers to compel compliance.”).

objection,²¹⁷ they flagrantly refused to enforce several of the most controversial Prize Case decisions.

James Wilson, a lawyer in at least six cases before the Committee or the Court,²¹⁸ was perhaps more aware of the difficulties of enforcing the Prize Case appeals than any other Framer. Recall that Wilson was one of the appellate lawyers in the case of the *Lusanna*,²¹⁹ in which New Hampshire refused to enforce the Court of Appeals' decision a dozen years after the appellate court had handed down its decision.²²⁰ Similarly, Wilson was Aaron Lopez's lawyer in his longstanding battle to have his decision enforced in Connecticut.²²¹ Wilson had surmised, after Lopez prevailed on appeal, that the merchant might face difficulties enforcing a favorable decision, warning Lopez that "some efforts might be taken in Connecticut to prevent him from obtaining the full effect of the decree of the Court of Appeals."²²² This was an understatement; it took Lopez nearly three years and two more court cases in Connecticut to have his judgment enforced.²²³

But no case better illustrates Wilson's firsthand experience of enforcement difficulties than the *Olmstead* case, in which another state—this time, Pennsylvania—refused to give effect to a Committee on Appeals judgment.²²⁴

217. Holt, *Invention of the Federal Courts*, *supra* note 24, at 1427 n.13 (criticizing Bourguignon for his "failure to indicate the degree and promptness of enforcement by state courts of most decrees of the federal admiralty appeals courts, . . ."). Nevertheless, in the cases that would have been known to most Congressmen, such as the *Olmstead* case, enforcement difficulties were pronounced.

218. BOURGUIGNON, *supra* note 16, at 329.

219. *See supra* text accompanying notes 136-68.

220. *See* Penhallow v. Doane's Adm'rs, 3 U.S. 54, 80-82, 85 (1795) (holding that the decisions of the Court of Appeals were binding on the states).

221. BOURGUIGNON, *supra* note 16, at 226.

222. *Id.* While Bourguignon frames this as evidence that the admiralty courts executed decrees of the appellate court "as a matter of course," Wilson's letter, which describes Wilson's desire to know if there are any difficulties so that "he could let Congress know," seems to indicate otherwise. *Id.*

223. Friedman, *supra* note 155, at 113.

224. *Olmstead* is a case which, one historian has said, "displays all the inherent qualities of a romance, and its scenes are crowded with the most distinguished

In 1778, Gideon Olmstead, a Connecticut fisherman, was taken prisoner along with his crew by a British ship, the *Active*.²²⁵ The *Active* was sailing to New York with arms and supplies for the British army, and Olmstead was forced to assist in the navigation.²²⁶ Remarkably, Olmstead and his crew, though outnumbered three to one, overcame their British captors in a fierce battle and took the ship as their own.²²⁷ Olmstead set sail for New Jersey with what he now believed was his prize.²²⁸

As the newly-captured *Active* neared the shore, an American privateer ship—the *Convention*—seized the *Active* after a chase and a fight.²²⁹ The *Convention* was owned and outfitted by the state of Pennsylvania, and was assisted in the capture by another privateering ship it was sailing with, the *Le Gerard*; together, all three ships then sailed for Philadelphia.²³⁰ The privateers of the *Convention*, with those of the *Le Gerard*, now claimed the *Active* as their own prize.²³¹

personages, who are arrayed against each other in situations which are highly dramatic.” Hampton Carson, *The Case of the Sloop ‘Active,’* 15 PENN. MAG. HIST. & BIO. 385, 386 (1892).

225. *Id.* For additional details of the facts, see KELLY, *supra* note 46; William O. Douglas, *Interposition and the Peters Case 1778-1809*, 9 STAN. L. REV. 3 (1956); Kenneth W. Treacy, *The Olmstead Case, 1778-1809*, 10 W. POL. Q. 675 (1957).

226. Carson, *supra* note 224, at 386.

227. *Id.* The facts of Olmstead’s takeover are even more gripping than his contentious court battle. Olmstead and his outnumbered crew managed to rise and take over the ship, locking the crew of the *Active* in the “hatches.” Not giving up easily, the British melted spoons into bullets and forced them up the hatches. Ultimately, Olmstead, regained control, but the British captain “cut a hole through the stern and wedged the rudder so as to prevent Olmstead from steering” only giving up when forced by hunger and thirst. *Id.* at 387.

228. Although Olmstead wasn’t commissioned as a privateer, this does not seem to have raised a problem in the courts. Bourguignon surmises that he may have based his claim on a congressional resolve that allowed non-commissioned ships to capture British ships where the capture was made “near the shores of any of these colonies, by the people of the country.” BOURGUIGNON, *supra* note 16, at 103.

229. Treacy, *supra* note 225, at 675.

230. *Id.* at 675-76.

231. KELLY, *supra* note 46, at 36.

And it was quite a prize: the ship and its cargo were worth hundreds of thousands of pounds.²³²

Although Connecticut resident Olmstead had already captured the ship before the *Convention* and the *Le Gerard* had arrived, the Pennsylvania jury²³³ gave just one-fourth of the prize to the outsider Olmstead and his companions. They awarded the remainder of the prize to the captain and crews of the *Convention* and the *Le Gerard*, who would share their awards with the jury's home state of Pennsylvania.²³⁴ With Benedict Arnold²³⁵—himself a Connecticut native, providing the security for his appeal—Olmstead appealed to the Committee on Appeals, with James Wilson as his counsel.²³⁶ The Committee, whose membership included Oliver Ellsworth,²³⁷ reversed the lower court's ruling and awarded the full prize to Olmstead.²³⁸

232. *Id.* at 41, 151 n.39 (describing currency approximations).

233. See Carson, *supra* note 224, at 388 (explaining that the judge “found himself unable to overcome the local prejudices of the jury in favor of the mariners of their own State, . . .”). This case could be biased against Olmstead in more ways than one; Gary Rowe pointed out that “the Pennsylvania Packet, a leading Philadelphia newspaper, ran a long story before the trial describing the capture and based entirely on the disgruntled Captain Underwood’s version of events.” Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 413 (2005).

234. BURTON ALVA KONKLE, GEORGE BRYAN AND THE CONSTITUTION OF PENNSYLVANIA 1731-1791, at 160 (William C. Campbell ed., 1922), available at <https://archive.org/stream/georgebryanconst00konkuoft#page/n7/mode/2up>.

235. Arnold, then military commander of Philadelphia, was not yet suspected of treason. M. Ruth Kelly gives a vivid description of Arnold’s involvement in the case, where he was already showing signs of trickery. When he was accused of advocating for Olmstead because he had a pecuniary interest, he responded in the newspaper, *The Pennsylvania Packet*, that he was interested in Olmstead’s case only because Olmstead and his men were “countrymen and neighbours” and were “in distress.” KELLY, *supra* note 46, at 46. But his investment was not a good one; the long case and lawyers cost a substantial amount of money, and he had to borrow money from the French consul, even trying to entice him to invest in the case. *Id.* Indeed, the case of the *Active* is blamed in part for driving Arnold to the “desperate measures” of treason. *Id.*

236. This Committee included William Henry Drayton, of South Carolina; John Henry, Jr., of Maryland; William Ellery, of Rhode Island; and Oliver Ellsworth, of Connecticut. Carson, *supra* note 224, at 388.

237. *Id.*

238. *Id.* at 388-89.

Yet Olmstead's victory meant little without the means to enforce it. The ship was now in the custody of the Pennsylvania courts, and they alone had the power to execute the Committee's decision. But according to Pennsylvania law, the Committee on Appeals could hear only questions of law; it could not review questions of fact.²³⁹ The Pennsylvania court wrote that it took "into consideration the decree of the court of appeals," but after "mature consideration[,]” determined that that the jury's finding of the facts stood and could not be reversed on appeal.²⁴⁰ Judge Ross²⁴¹ of the Pennsylvania court then issued an order and warrant to his marshal to sell the cargo of the *Active*—the British ship—and bring the money into the court, in preparation for enforcing the jury's verdict.²⁴²

That same day, Olmstead appeared before the Committee on Appeals and pleaded with the Committee to issue an injunction directing the state marshal not to follow the order.²⁴³ The Committee issued the injunction, but the Pennsylvania marshal disregarded it, paying all of the money into the Pennsylvania court in staunch defiance of the Committee's order.²⁴⁴ The marshal then cheekily sent the receipt from the Pennsylvania court to the Committee on Appeals.²⁴⁵

239. 9 THE STATUTES AT LARGE OF PA. FROM 1682-1801, at 279 (WM. Stanley Ray ed., 1903). As the Chief Justice of Pennsylvania explained it,

The genius and spirit of the common law of England, which is law in Pennsylvania, will not suffer a sentence or judgment of the lowest Court, founded on a general verdict, to be controlled or reversed by the highest jurisdiction; unless for error in matter of law, apparent upon the face of the record.

Ross v. Rittenhouse, 2 Dall. 160, 163 (Pa. 1792).

240. United States v. Peters, 9 U.S. (5 Cranch) 115, 120 (1809).

241. Judge Ross was one of the signers of the Declaration of Independence. Carson, *supra* note 224, at 387-88.

242. Treacy, *supra* note 225, at 678.

243. *Id.*

244. *Id.*

245. Carson, *supra* note 224, at 389-90.

The Committee was enraged, but powerless. On January 19, 1779, the Committee issued an order declaring that the “marshal of the court of admiralty of the state of Pennsylvania had absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them was bound to pay obedience.”²⁴⁶ The Committee (referring to itself as “the court”) was thus “unwilling to enter upon any proceedings for contempt, lest consequences might ensue at this juncture dangerous to the public peace of the United States”²⁴⁷ The Committee refused to proceed further, or hear any appeals “until the authority of this court be so settled as to give full efficacy to their decrees and process.”²⁴⁸ The subtext was plain: any further action by the Committee might lead to civil war.

Two months later, Congress purported to reassert the Committee’s jurisdiction to review factual questions as well as questions of law, stating that no finding of a jury or court could oust Congress of its appellate jurisdiction.²⁴⁹ The power of executing the law of nations fell within the rights of a sovereign, and the power to hear appeals was necessary to apply that law uniformly.²⁵⁰ Even though *Olmstead* was a domestic matter, Congress used it as an occasion to assert that failure to enforce its decisions would prevent Congress from satisfying the claims of foreign countries.²⁵¹

But without Pennsylvania’s cooperation, the resolutions lacked bite. On two occasions, Congress appointed committees to meet with a committee of the Pennsylvania legislature, but to little avail. Wilson and Lewis—along with several other members of Congress—suggested that

246. *United States v. Peters*, 9 U.S. (5 Cranch) 115, 122-23 (1809).

247. *Id.* at 123.

248. *Id.*

249. *BOURGUIGNON*, *supra* note 16, at 107.

250. See 21 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 61, at 509. Interestingly, it appears that this was “the only occasion on which a claim of ‘sovereignty’ was officially made on behalf of the Continental Congress” Treacy, *supra* note 225, at 680.

251. Treacy, *supra* note 225, at 679.

Congress itself pay what was owed to Olmstead and charge it to Pennsylvania, but this proposal was sidelined.²⁵² In the end, Pennsylvania and Congress could not agree.²⁵³ It was not until thirty years later that Olmstead got relief, this time in the Supreme Court.²⁵⁴

Inspired in part by the *Olmstead* matter,²⁵⁵ in August of 1779, a committee began planning for the freestanding Court of Appeals.²⁵⁶ The initial committee report called for dividing the United States into four districts, with a different Court of Appeals for each district.²⁵⁷ That proposal would have given each court more enforcement powers, including a marshal, and “all the powers of courts of record for fining and imprisoning for contempt and disobedience.”²⁵⁸ Further, the committee recommended that juries be abolished in Prize Cases.²⁵⁹ Interestingly, the committee plan would have deprived the appellate courts of jurisdiction in cases where the appellant was from the same state where the trial was held—the “converse” of diversity jurisdiction.²⁶⁰ Tweaked by motions and amendments, the bill eventually came up for a vote and failed in an even split.²⁶¹

After the failure of the initial plan for a Court of Appeals, Congress appointed a new committee—which included Oliver

252. See 16 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 273-74 (Gaillard Hunt ed., 1780); see also 15 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1195-96 (Worthington Chauncey Ford. ed., 1780). As Wilson had represented Olmstead on appeal, it is difficult not to see this as a conflict of interest.

253. Treacy, *supra* note 225, at 680-82.

254. See *United States v. Peters*, 9 U.S. (5 Cranch) 115, 141 (1809).

255. Other factors, such as complaints from merchants, also likely inspired the Court. See *supra* notes 75-77 and accompanying text.

256. GOEBEL, *supra* note 11, at 169.

257. *Id.*

258. BOURGUIGNON, *supra* note 16, at 114.

259. *Id.* at 116. Pennsylvania and South Carolina did pass a new law disposing of juries in admiralty cases, but the remainder of the states who used juries continued to do so. *Id.*

260. See 15 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 252, at 1221.

261. GOEBEL, *supra* note 11, at 170.

Ellsworth—that proposed the more modest plan Congress ultimately adopted.²⁶² Although the new plan also abolished juries, it failed to give the Court its own marshal or any powers of contempt.²⁶³ Instead, Congress only advised states to pass laws “directing the admiralty courts to carry into full and speedy execution the final decrees of the Court of Appeals.”²⁶⁴

Why would Congress—still embroiled in the difficulties of enforcing the *Olmstead* case—fail to give its new Court the power to remedy one of the Committee’s most obvious shortcomings? Although the Articles of Confederation, approved by Congress in 1777, had provided Congress the power to establish courts for determining appeals in cases of capture, the Articles were not ratified until 1781—after the Court of Appeals in Cases of Capture had already been established.²⁶⁵ Congress, well aware of the fragile state of the Confederacy, likely felt that it did not have a “clear constitutional mandate” to establish the court, and was therefore hesitant to consolidate its power.²⁶⁶

In 1781, however, Madison raised the issue again, seeking to give the new prize court the ability to enforce its decisions. Madison proposed resolutions recommending that that “the states be called upon to order their respective marshals to carry into immediate execution of the decrees of judgment of the said Court under the penalty of dismission . . . and action for damages in the Courts of common law at the suit of the party injured.”²⁶⁷ He cast about for anything that might make the judges appear more authoritative; one of his proposed resolutions required that the judges be “complimented with a black robe by the United States as proper to appear in during the sitting of the

262. *Id.* at 170-71.

263. *Id.*

264. BOURGUIGNON, *supra* note 16, at 115. For more background on the founding of the Court of Appeals, see *supra* notes 78-79 and accompanying text.

265. BOURGUIGNON, *supra* note 16, at 115.

266. *Id.*

267. 19 JOURNALS OF THE CONSTITUTIONAL CONGRESS 1774-1789, at 374-75 (Gaillard Hunt ed., 1781).

Courts.”²⁶⁸ A committee studying Madison’s proposals would have extended the Court’s jurisdiction even further, giving the Court the power of contempt and to appoint marshals.²⁶⁹ But Congress again declined to adopt resolutions granting the Court more authority, ultimately granting the Court no more authority than it already had.²⁷⁰

Yet many of Madison’s ideas for the Court of Appeals were later recycled in the Constitution and the Judiciary Act. For example, the Judiciary Act created the office of the federal marshal, granting the marshal the power to “execute throughout the District, all lawful precepts directed to him, and issued under the authority of the United States.”²⁷¹ These concerns about the lack of federal marshals loyal to the national judiciary were underscored by the Prize Case experience. As the *Olmstead* case illustrated, state marshals naturally felt more allegiance to the state court than to a congressional appellate body; in the face of conflicting rulings, the marshal would obey the government who paid his salary.²⁷² Unsurprisingly, the appointment of federal marshals was another means of ensuring that the federal courts made up for the shortcomings of the Court of Appeals.

In addition, the allowance for inferior courts in the Constitution helped mitigate the enforcement difficulties the Framers had faced in the Prize Cases. The competing option for inferior courts at the Convention had been proposals to keep the state courts as the “inferior courts” of the Supreme Court, an idea that carried until Madison proposed giving Congress the power to decide.²⁷³ But with inferior *federal*

268. *Id.* at 375.

269. BOURGUIGNON, *supra* note 16, at 129.

270. *Id.*

271. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

272. See GOEBEL, *supra* note 11, at 159 (noting that “[t]here is no evidence that Congress undertook in any appeal to enlist the marshals of the state courts to execute its orders.”).

273. The Paterson plan presented at the Constitutional Convention, for example, left litigation at the trial level to the state courts. 1 Farrand, Records, *supra* note 86, at 20-21; see also Frank, *Historical Bases*, *supra* note 12, at 10 (explaining that “there was strong sentiment in the Convention to leave all litigation at the trial stage to the state courts”).

courts, the Framers would not have to rely on state courts to execute their decisions; the lower courts, buttressed by federal marshals, could act without the states needing to be involved at all. In addition to allowing federal control over both judges and juries, inferior federal courts offered the opportunity for the federal government to have complete control over the enforcement of its decisions—a key requirement for making diversity jurisdiction work.

This emphasis on control and enforcement helps resolve at least one puzzle of diversity jurisdiction: if diversity jurisdiction was intended to alleviate geographic bias, why did the first Congress allow a plaintiff in a diversity suit to file in federal court in his home state?²⁷⁴ Presumably, a plaintiff would get a fair hearing—or better—in his own state courts. The enforcement difficulties Congress grappled with during the Prize Cases provide one clue. In the absence of inferior federal courts, a plaintiff may trust his home state courts to decide the disputes, and indeed prefer his home state court against an out-of-state or foreign litigant. But if he wins in his home court, he may still need to execute the decision against his opponent in *the opponent's* home state. Offering that plaintiff the option of a federal forum in his own home state erases these difficulties; an interstate community of federal marshals assists in the enforcement of a decision outside his state if he prevails.

Arguably, the Constitution's Full Faith and Credit Clause should have remedied any enforcement concerns, by requiring the states to routinely enforce each other's

274. Robert Jones lays out the puzzle: “[t]he logic of the ‘impartiality’ justification is that out-of-state parties would suffer from state court bias in favor of in-state parties.” Jones, *supra* note 22, at 1006. Therefore, it makes sense that an out-of-state party can remove to federal court to protect against bias from the home jury. “Conversely,” Jones suggests, “one would not expect the in-state party—who would likely benefit from the purported bias—to be able to invoke diversity jurisdiction.” *Id.* “In-state parties—the supposed beneficiaries of ‘local prejudice’ in the state courts—were thus allowed to invoke federal jurisdiction when suing or defending against an out-of-state party.” *Id.* The question is: why? Judge Posner, among others, offered the reason that geographic bias must have played a lesser role in the minds of the Framers. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 141 (1985). We argue, however, that permitting in-state parties to invoke federal jurisdiction is consistent with the geographic bias theory.

judgments.²⁷⁵ But although the modern understanding of the Clause is that—as the Supreme Court has said—a judgment in a state court “gains nationwide force[.]”²⁷⁶ this was not likely the understanding of the clause at the Founding.

Recall that the Full Faith and Credit Clause in Article IV, § 1 has two parts. The first part provides that “[F]aith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.”²⁷⁷ This first, self-executing sentence of the Clause, Stephen Sachs has argued, “was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have.”²⁷⁸ In other words, states were merely required to admit the judgment into evidence, not enforce it as they would their own decisions. This view is consistent with the understanding of the Full Faith and Credit Clause in the Articles of Confederation, which again, did not “contemplate[] anything like interstate res judicata.”²⁷⁹

The second part of the Full Faith and Credit Clause allows Congress to “prescribe the Manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”²⁸⁰ But this too does not suggest that the Framers had more sweeping intentions for the Full Faith and Credit Clause. Sachs argues that even when the First Congress passed a statute under this clause, “there is substantial evidence that the Act’s central purpose was to declare the mode of authentication”—or, in other words, the way the

275. U.S. CONST. art IV, § 1.

276. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

277. U.S. CONST. art IV, § 1.

278. Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009); see also David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1588 (2009) (noting that “almost no one in the Founding generation had opined [that ‘full faith and credit’] could mean anything more than evidentiary sufficiency . . .”).

279. Engdahl, *supra* note 278, at 1610 (2009). The Articles of Confederation provided that “[f]ull faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.” ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3.

280. U.S. CONST. art. IV, § 1.

documents should be presented to the court.²⁸¹ Not everyone agrees with this narrow view of what the initial clause meant,²⁸² but the lack of clarity gives reason to doubt that the Framers foresaw that states would henceforth automatically enforce each other's judgments. Placing diversity jurisdiction in the inferior courts, and accompanying those courts with a national network of federal marshals, was a far more reliable means than the Full Faith and Credit Clause of enforcing judgments in interstate litigation.

In short, the Prize Cases taught the Framers important lessons about how federal courts with diversity jurisdiction could mitigate the geographic bias they encountered in the Prize Cases, lessons whose influence went beyond the Constitution to the Judiciary Act. By granting the Supreme Court broad jurisdiction over issues of fact, ensuring control over federal judges and juries, and providing that the federal courts had the power to enforce its decisions, the Framers used their own judicial experience to devise a formula for a federal jurisdiction that would avoid the mistakes of the past.

IV. WHY THE INFLUENCE OF THE PRIZE CASES EXTENDS BEYOND ADMIRALTY

Did the Prize Cases—a seemingly obscure genre of litigation—actually exercise this level of influence over the Framers? Scholars who have shown awareness of bias in the Prize Cases have generally thought not. Friendly, for example,²⁸³ claimed that the influence of the Cases was limited to inspiring federal court jurisdiction over admiralty cases.²⁸⁴ Like Friendly, scholars of the sources of diversity

281. Sachs, *supra* note 278, at 1233.

282. See Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 485 (2013) (arguing that “the command given to the states in the Full Faith and Credit Clause was originally understood to be robust and meaningful.”).

283. Friendly, *supra* note 3, at 484 n.6, 500.

284. As Holt summarizes, contemporaries “presumably understood the problems of localism that the national experience with admiralty had presented during the Confederation and shared the general attitude of 1789 that admiralty jurisdiction should be an exclusively national matter.” Holt, *The Invention of the Federal Courts*, *supra* note 24, at 1430.

jurisdiction have assumed that the problems faced in the Prize Cases arose solely from the unusual nature of admiralty litigation.²⁸⁵

But why limit the analysis to admiralty alone? First of all, the Framers—surely to their annoyance—were intimately aware of the problems of bias the Prize Cases raised. Ellsworth, the drafter of the Judiciary Act and future Supreme Court Justice, was one of the Framers' most involved members in the Prize Cases. Ellsworth had adjudicated nine cases²⁸⁶ and actively helped establish the Court of Appeals;²⁸⁷ he also presented a report to Congress condemning Pennsylvania in the *Olmstead* case. Wilson, also a Supreme Court Justice, was the acknowledged leader of the Committee of Detail at the Convention, which revised the Constitution; the “ten days of the [the Committee of Detail’s] deliberations are . . . in certain respects perhaps the most important episode of the entire Convention.”²⁸⁸ Therefore, the same man who re-drafted the Constitution acted as a lawyer in six Prize Cases, and as a judge in at least ten;²⁸⁹ the Court

285. Indeed, at least one of the Framers did think that the Prize Cases were anomalies. During the debates on the Judiciary Act, Samuel Livermore sought to limit federal court jurisdiction to admiralty, arguing that

we have supported the Union for thirteen or fourteen years without such courts, from which I infer that they are not necessary, or we should have discovered the inconvenience of being without them; yet I believe Congress have always had ample justice done in all their claim; at least as I said before, I never heard any complaint, except the case of an appeal on a capture.

Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1534 (1986). Even this opponent of broad jurisdiction recognized the defects in the Prize Cases.

286. BOURGUIGNON, *supra* note 16, at 329.

287. See William Garrott Brown, *A Continental Congressman: Oliver Ellsworth 1777-1783*, 10 AM. HIST. REV. 751, 761 (1905) (“By his share in creating [the Court of Appeals in Cases of Capture] Ellsworth—no doubt unwittingly—had been training his hand for the noblest task it ever found to do; and in his membership of the committee which preceded it he had an experience which must have proved of value in the highest office he was ever to hold.”).

288. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 931 (2008).

289. BOURGUIGNON, *supra* note 16, at 329.

of Appeals in Cases of Capture was partly his idea. Edmund Randolph, whose proposal for the judiciary was the only to specify that the federal judiciary should have jurisdiction over suits between citizens of different states, had also been involved in a number of appeals. Although Madison did not adjudicate any prize appeals, he did initiate attempts to reinforce the jurisdiction of the Court of Appeals when state courts refused to give effect to its decisions.²⁹⁰

And indeed, every member of Congress must, at some point, have been aware of the Prize Cases and the issues they raised. Over the course of the forty-two appeals heard when the Committee was active, thirty-seven members of Congress sat on the Committee of Appeals.²⁹¹ And the entire Congress would have been aware of problems in the Prize Cases, even if not directly involved with the Committee. For example, Congress debated a resolution bolstering the jurisdiction of the Court of Appeals for two days.²⁹² And while not every member of the Constitutional Convention was on the Continental Congress, at least forty out of the fifty-five men—and likely more—would have been at least made aware of the Court’s problems.²⁹³

It therefore seems unlikely that Congress cabined its Prize Case experience to admiralty. Many of the same concerns that justified federal admiralty jurisdiction also applied to diversity cases. At the Convention, James Wilson said that “admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, [and] to a scene in which controversies with foreigners would be most likely to

290. See *supra* notes 267-70 and accompanying text.

291. BOURGUIGNON, *supra* note 16, at 90.

292. See Brown, *supra* note 287, at 760.

293. See Teiser, *supra* note 28, at 415 (“It is reasonable to suppose, therefore, that forty of the delegates participating in the framing of the Constitution, or about four-fifths of them, were more or less intimately familiar with the functioning of the Committee on Appeals of Congress and with its successor the Court of Appeals in Cases of Capture.”).

happen.”²⁹⁴ The need to regulate disputes involving foreigners, and between citizens of different states, counseled in favor of placing both admiralty *and* diversity in the federal courts.

Moreover, proposals similar to diversity jurisdiction first arose in discussions over the Prize Cases. Recall that when Congress first set up the Court of Appeals in Cases of Capture, it was initially proposed that the Court would not have jurisdiction if a “[p]arty who prays an appeal be a subject or inhabitant of the State where the trial was had in the Court of Admiralty.”²⁹⁵ Similarly, when the report was debated in Congress, a new proposal was made to oust appellate jurisdiction “in any case where all the parties concerned are citizens of one and the same State, unless allowed by the legislature of the said State.”²⁹⁶ Members of Congress were already thinking about diversity jurisdiction, albeit in the converse; rather than *granting* jurisdiction over cases between citizens of different states and foreigners, they considered exempting appeals from those whose trial took place in their home state, or cases where both parties were from the same state. These proposals failed to pass,²⁹⁷ but they show that the Congressmen were thinking about geography as an element in determining federal jurisdiction long before the drafting of the Constitution.

Furthermore, to the extent the Framers were concerned about the viability of commercial litigation, the Prize Cases offered the best available evidence of what interstate commercial litigation might look like in the new United States. Before the War, there was, as John Frank has pointed out, “too little significant interstate business litigation to give room for serious actual abrasion.”²⁹⁸ But the Prize Cases were, in many ways, similar to ordinary commercial litigation between diverse parties: both commercial litigation

294. DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, 69th Cong., H.R. DOC. NO. 398, 158 (1927).

295. 15 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 252, at 1221.

296. 16 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 252, at 29.

297. *Id.* at 29-30; *see also* 15 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 252, at 1221.

298. Frank, *Historical Bases*, *supra* note 12, at 24.

and the Prize Cases involved substantial sums of money. The Prize Cases dangled thousands of pounds before privateers at a time when Americans—and the colonies that stood to gain from the capture—were particularly cash-strapped. Whether or not the potential for interstate or international hostility was glaring in ordinary commercial litigation, it was obvious in the Prize Cases.

The Prize Cases looked closer to commercial litigation than our admiralty cases of today in another key respect: the involvement of juries.²⁹⁹ Although admiralty cases are generally not decided by juries today,³⁰⁰ at the start of the Committee on Appeals, Congress was insistent on a right to a jury trial in a prize case. One of the key crimes of the British in the eyes of Americans before the War was that the British Vice-Admiralty courts did not use juries when adjudicating disputes over the hated trade regulations.³⁰¹ For their part, the British did not believe that American juries could decide trade or taxation cases fairly. Before the Revolution, the colonial governor of Massachusetts, Francis Bernard, said that juries “in these causes were not to be trusted” and that no one “will take upon him to declare, that at this time an *American* jury is impartial and indifferent enough, to determine equally upon frauds of trade.”³⁰² Acts granting admiralty courts increased powers “gave a larger jurisdiction to admiralty courts in America than had ever been given to

299. Lovejoy, *supra* note 54, at 465 (“Americans were distinguished from their cousins in England and were subject to a different judicial system—one that deprived them, they said, of trial by jury. But Americans escaped any serious difficulty over admiralty jurisdiction until after the French and Indian War when Parliament levied taxes on the colonists and used admiralty courts to see that they were paid.”).

300. The Seventh Amendment jury trial right only applies to “[s]uits at common law,” which does not include most admiralty jurisdiction. See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 187 (2000).

301. Lovejoy, *supra* note 54, at 462.

302. *Id.* at 468 (quoting Letter from Francis Bernard (Nov. 10, 1764), in SELECT LETTERS ON THE TRADE AND GOVERNMENT OF AMERICA 13, 16-17 (London, 1774)).

the same courts in England,” thus depriving Americans of jury trials in more cases than their British counterparts.³⁰³

Presumably to remedy this flaw, the Continental Congress had initially required states to use juries in admiralty cases—making the cases look procedurally more like commercial cases than today’s admiralty cases.³⁰⁴ But although the juries in Prize Cases—as Matthew Harrington has said—“certainly neutralized much of the invective hurled against the old vice-admiralty courts,” Congress encountered a “whole new set of problems” when state court juries abandoned the principles of the law of nations in favor of bias.³⁰⁵

So, there is ample circumstantial evidence that the Prize Cases motivated diversity jurisdiction. But why didn’t the Framers reveal the Cases’ influence in the debates? As described earlier, Wilson did use the Prize Cases to justify the grant of jurisdiction over law and fact in the Continental Congress.³⁰⁶ Yet there was so little debate on diversity at the Convention that not much was said about the justifications for diversity at all. And, arguably, the need for diversity was so obvious among those who had witnessed the federal-state struggles in the Prize Cases that it went without saying. When Madison said, “[w]e well know, sir, that foreigners can not get justice done them in these [state] courts,” perhaps “we well know” referred, at least in part, to a shared understanding of the difficulties in the Prize Cases.³⁰⁷

303. *Id.* at 462.

304. Later, they regretted this decision. *See supra* notes 255-64 and accompanying text.

305. Harrington, *Economic Origins*, *supra* note 178, at 177.

306. *See supra* Part III.A.

307. 3 Elliot’s Debates, *supra* note 87, at 583. Robert Clinton has made this broader point with regard to the Prize Cases and the establishment of a national judiciary. *See* Clinton, *Guided Quest*, *supra* note 26, at 757 (“[T]he experience under these national adjudicatory procedures during the confederation period undoubtedly shaped the attitudes of the delegates who attended the Constitutional Convention in Philadelphia during the summer of 1787 and serves to explain the relative consensus surrounding the need for the establishment of a constitutionally created, standing, independent, national judiciary.”).

Diversity jurisdiction *was* contentious, however, during the ratification debates, where the Federalists defended diversity as a means of mitigating geographic bias. The Prize Cases were mentioned at least once in this context to highlight jury bias. In the South Carolina ratification debates, General Charles Coatsworth Pinckney responded to concerns about the Constitution's lack of an explicit right to a civil jury trial by referring to the Prize Cases. He explained that Congress had "passed an ordinance requiring all causes of capture to be decided by juries: this was contrary to the practice of all nations, and we knew it; but still an attachment to a trial by jury induced the experiment."³⁰⁸ The experiment was a disaster. Pinckney noted that

[t]he property of our friends was, at times, condemned indiscriminately with the property of our enemies, and the property of our citizens of one state by the juries of another. Some of our citizens have severely felt these inconveniences. Citizens of other states and other powers experienced similar misfortunes from this mode of trial.³⁰⁹

Therefore, he continued, Congress put juries aside in cases of capture, a decision it was only able to make because the right to jury trial was a resolution of Congress, and not a right guaranteed by the Articles of Confederation.³¹⁰ Pinckney used this example to show that it was unwise to give a sweeping right to a civil jury in every case in the Constitution, when "representatives of the people" would be better placed to decide the scope of the right.³¹¹

Finally, the Prize Cases may not have been invoked more often because the Framers had to present their views to a broader audience. Though vitally important to the Revolution, the Prize Cases involved an obscure body of the law that "touched the lives of few people."³¹² The Court's decisions were unpopular with the states whose judgments

308. 4 Elliot's Debates, *supra* note 87, at 307.

309. *Id.*

310. *Id.* at 307-08.

311. *Id.* at 308.

312. BOURGUIGNON, *supra* note 16, at 337.

were overruled,³¹³ and the subject matter was “too arcane to catch the popular imagination.”³¹⁴ Justifying the Diversity Clause with more abstract references to bias may have been more effective than invoking Congress’s judicial experience, an experience few knew about, and others hated. As Robert Jones has pointed out, the Framers were, after all, “skilled propagandists.”³¹⁵

V. DIVERSITY JURISDICTION AS A CRISIS-AVOIDING MEASURE

The Prize Cases also taught that mitigating geographic bias through diversity jurisdiction, might, in fact, be essential to the nation’s survival. The Framers frequently faced situations where state court decisions evidencing bias against foreign countries could lead to crisis, and even war. For example, several Prize Cases threatened the fragile allegiances between the new Nation and France and Spain, countries the United States desperately needed as allies. From this experience, we conclude that the Framers learned that alienage jurisdiction—jurisdiction over “controversies . . . between . . . Citizens . . . and foreign States, Citizens or Subject,” which is often included under the broader umbrella of “diversity”—could avoid serious foreign confrontations. But they also learned that jurisdiction over disputes between citizens of different states could help avoid domestic crises that were consistently threatened in the new Republic.

A. *Avoiding Foreign Wars*

Throughout the Revolutionary War, the Framers found themselves repeatedly entangled in Prize disputes with international dimensions.³¹⁶ Juries were not just biased

313. See *Jennings v. Carson*, 8 U.S. 2, 9 (1807) (noting argument of appellant counsel that “[t]he federal court of appeals was unpopular in those states who were attached to the trial by jury, and its jurisdiction was opposed with great warmth.”).

314. Swindler, *supra* note 28, at 514.

315. Jones, *supra* note 22, at 1009.

316. Although this Article primarily focuses on privateering along the American coast, privateering also took place in Europe, with distribution of prizes happening in European courts. This privateering made alliances with European

against citizens of other states; foreigners lost out in state admiralty courts, too. Resolving international disputes on appeal became one of Congress's primary roles in its judicial capacity on the Committee on Appeals, a role that was tinged with diplomacy. Consequently, when framing diversity jurisdiction, the members of the Convention were already well acquainted with the need for a federal forum not just for citizens of different states, but for aliens as well.

The Framers knew that international conflicts could arise from unfairly adjudicated legal disputes. Poorly handled state court Prize decisions posed particular difficulties during the War, when Congress desperately needed allies. Early in the War, foreign nations complained about American privateers attacking neutral ships. Benjamin Franklin and the other American Commissioners in Paris sent out a circular to the states, warning that "[c]omplaint having been made of violences done by American armed vessels to neutral nations," states must "respect the rights of neutrality . . . and treat all neutral ships with the utmost kindness and friendship for the honor of your country and of yourselves."³¹⁷

Yet American privateers continued to attack neutral ships. Massachusetts was a repeat offender,³¹⁸ embroiling Congress in numerous battles over the seizure of foreign ships. Because Massachusetts law initially precluded appeals to Congress, the Committee on Appeals was powerless in these cases. In 1779, for example, two Spanish ships were captured by Massachusetts privateers,³¹⁹ although

countries particularly helpful. The alliance with France was especially crucial for the privateering effort, as Greene says, because "[t]he commerce-destroying operations of the American navy and American privateers could now be carried on freely from French ports, unhampered by neutrality regulations." GREENE, *supra* note 44, at 491.

317. Letter from Benjamin Franklin, Silas Deane & Arthur Lee to Captains of American Armed Vessels (Nov. 21, 1777), in 2 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 425, 425 (Francis Warton ed., 1889).

318. To be fair to Massachusetts, it adjudicated the bulk of Prize Cases during the War, which is perhaps one reason why it ran into so many disputes with foreign citizens.

319. Bias might have been particularly prevalent against the Spanish, who had angered the Americans by allowing the British to resupply their troops in New

the Massachusetts court adjudicated one of the ships as neutral, it condemned the cargos of both ships as British property.³²⁰ The Spanish minister, through the French minister, Conrad Alexandre Gerard, conveyed to Congress that he sought “to obtain all the satisfaction due to the honor of the flag of his Catholic majesty, his master,” in enforcing the treaty of alliance and commerce between Spain and America.³²¹ (He also requested that judges be “punished who have unjustly condemned and sentenced as a lawful prize the said cargo”³²²)

In response to the Spanish complaint, a congressional committee noted that “it is very difficult for injured Foreigners to obtain redress in [s]uch cases as the present by a due court of law,” and suggested that Congress “take the most effectual measures” to have the privateers repay the owners of the captured ships.³²³ Congress also responded to the French minister, reassuring him that the United States would follow the law of nations, but at the same time explaining that it could not interfere with the court process.³²⁴ Tellingly, Congress also deleted several paragraphs from its first draft of the letter explaining the difficulties the newly federal appeals system was having.³²⁵ At Congress’s encouragement, Massachusetts did pass an act allowing

York using the Mississippi River, which was under Spanish control. See BOURGUIGNON, *supra* note 16, at 231.

320. *Id.* at 305.

321. Don Juan Miralles, Memorial Respecting Two Spanish Vessels (Apr. 21, 1779), in 3 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, *supra* note 317, at 135.

322. *Id.* John Jay responded that “[t]he Importance of the Subject, as well as the Respect due to the Applications of their good & great Ally, will, I am persuaded, induce Congress to place it among the first Objects of their Attention.” Letter of John Jay to Conrad Alexandre Gerard (Apr. 25, 1779), in 12 LETTERS OF DELEGATES TO CONGRESS 381, 381 (Paul H. Smith ed., 1985).

323. William Henry Drayton’s Draft Committee Report (July 10, 1779), in 13 LETTERS OF DELEGATES TO CONGRESS 183, 183 (Paul H. Smith ed., 1986).

324. BOURGUIGNON, *supra* note 16, at 306.

325. *Id.*

appeals to Congress where the owners of the captured ship claimed it was from a friendly nation.³²⁶

But that was not the end of the international conflicts. In 1781, a Massachusetts privateering ship, the *Sally*, captured a Portuguese ship, *Nostra Seigniora da Solidade e St. Miguel e Almas*.³²⁷ Ultimately, a jury awarded the ship to the Portuguese, but the cargo to the Americans.³²⁸ The Court of Appeals ruled that the ship and cargo both belonged to the Portuguese, yet the Portuguese were still unable to get their ship back.³²⁹

The next year, another Massachusetts privateer captured a Spanish ship below New Orleans, the *St. Antonio*, even though it was flying neutral flags.³³⁰ The Massachusetts privateers brought the ship from New Orleans to Boston,³³¹ violating the general rule that ships should be libeled at a convenient port,³³² likely aware of the favorable treatment they would receive in their home state of Massachusetts. In Boston, where the ship was libeled, the state court upheld the capture,³³³ the Court of Appeals reversed.³³⁴ The privateers

326. *Id.* at 307.

327. *Id.* at 230.

328. *Id.*

329. *Id.* The Portuguese ship did eventually receive some partial enforcement of favorable decisions, but only when it resorted to common law remedies. *See id.* at 228 (“This case . . . does suggest that litigants might turn to the common law courts in a *quasi in rem* proceeding to attempt to have the captured property or its value restored, even after a decree of the judges of appeals had awarded it to them. Such an action at common law would be unnecessary if the decree of the appellate court were fully executed in admiralty.”).

330. *Id.* at 231-32 (“Here was a glaring example justifying the fears that local juries in admiralty cases could involve the United States in serious international incidents.”).

331. *Id.* at 231.

332. *Id.* at 55.

333. *Id.* at 232. Interestingly, the Massachusetts privateer brought the ship from New Orleans to Boston, violating the general rule that ships should be libeled at a convenient port. *See id.* at 55, 231. Likely, the privateers were aware of the favorable treatment they would receive in their home state of Massachusetts.

334. *Id.* at 233. The Committee did, however, affirm the decision in part, because it appeared that some of the cargo was British property.

who had captured the Spanish ship then wrote to Congress, claiming that the appellate decision was prejudiced by letters from the Spanish officials, and requesting a rehearing.³³⁵ Around the same time, Congress learned from the Spanish that Massachusetts was refusing to enforce the Court of Appeals' decision in the *St. Antonio* case.³³⁶ A committee of Congress determined that the privateers' complaint had no merit, but there was little Congress could do.³³⁷ Congress could again only recommend to Massachusetts that it respect the Committee on Appeals' decision.³³⁸ It is unclear whether the owners of the Spanish ships ever had their decision enforced.³³⁹

This kind of bias against foreign parties, exacerbated by the state courts' refusal to enforce federal appellate decisions, was a particular problem throughout the Prize Cases. These cases exposed the Framers to the prospect of international strife resulting from biased state court decisions. In the constitutional debates, the Federalists emphasized that the proposed federal courts would be a safe place for international disputes. Madison said at the Constitutional Convention: “[a]s our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can only be done by giving the federal judiciary exclusive jurisdiction.”³⁴⁰ John Jay argued that, in a federal judiciary, treaties and “laws of nations, will always be expounded in one sense, and executed in the same manner,” unlike the state courts where the decisions of the “thirteen States . . . will not always accord or be consistent;”

335. *Id.*

336. *See id.* at 234.

337. *See id.*

338. *Id.*

339. *Id.* (“Once again Congress, by this recommendation, had to implicitly admit its impotence to assure full justice in prize cases without the free cooperation of the states—and cooperation of the states was never an item in abundance.”).

340. 3 Elliot's Debates, *supra* note 87, at 485.

particularly as they might be affected by “different local laws and interests.”³⁴¹

The Prize Case experience also warned that the shoddy application of international law by undiplomatic state institutions³⁴² could have disastrous consequences. Jurisdiction over alienage cases was essential to maintaining friendly diplomatic relations and avoiding foreign wars. When speaking of alienage jurisdiction, Madison asked, “[c]ould there be a more favorable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the union to drag the whole community into war?”³⁴³ The Framers invoked this fear of war explicitly in the debates. Hamilton wrote in *The Federalist Papers* that federal jurisdiction over “all causes in which the citizens of other countries are concerned” was essential to the “public faith” and “the security of the public tranquility.”³⁴⁴ James Wilson also defended alienage

341. THE FEDERALIST NO. 3, at 15 (John Jay) (Jacob E. Cooke ed., 1961). Pinckney said that the federal judiciary was “the most important and intricate part of the system.” He continued, “[i]t is equally true that, in order to insure the administration of justice, it was necessary to give it all the powers, original as well as appellate, the Constitution has enumerated; without it we could not expect a due observance of treaties.” 4 Elliot’s Debates, *supra* note 87, at 257-58. See also Douglas J. Sylvester, *International Law As Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 27 (1999) (contending that Randolph’s argument that the Articles of Confederation were deficient because “no treaty or treaties among the whole or part of the States, as individual Sovereignities, would be sufficient . . . was widely held and formed a strong conceptual component behind federal jurisdiction”).

342. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 961 (2010) (“The field of foreign affairs was new ground for most of the men in the state governments. Even those with experience in colonial government or overseas trade had rarely dealt with the formalities of foreign policy, which previously had been handled by British imperial agents, almost all of whom remained loyal to the empire.”).

343. 3 Elliot’s Debates, *supra* note 87, at 486.

344. THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Henry Cabot Lodge ed., 1889).

jurisdiction as a way to “preserve peace with foreign nations.”³⁴⁵

This view of alienage jurisdiction as a crisis-avoiding measure is consistent with another justification for alienage: assuaging foreign creditors. Wythe Holt focuses on the colonists’ enormous debts to British creditors in the post-Revolutionary War period as the source of alienage jurisdiction.³⁴⁶ Because of a mixture of British hostility and financial insolvency, Holt points out, “every state legislature during, and several after, the [W]ar passed at least some kind of statute restricting the power of at least some British creditors to collect.”³⁴⁷ State courts followed the legislatures, too, and refused to hear cases from British creditors during the War.³⁴⁸ British merchants were “amazed”³⁴⁹ that the Americans were refusing to abide by Article IV of the Treaty of Paris, which provided that creditors would “meet with no lawful impediment” in claiming their debts.³⁵⁰ Establishing national courts that were free from biased state institutions was the solution.³⁵¹ Following the passage of the Judiciary Act, “British creditors immediately began filing cases in the

345. 2 Elliot’s Debates, *supra* note 87, at 491-93. Similarly, William Davie of North Carolina remarked that, “[i]f our courts of justice did not decide in favor of foreign citizens and subjects when they ought, it might involve the whole Union in a war[.]” But he also added that, “of controversies between the citizens or subjects of foreign states and the citizens of the United States . . . were left to the decision of particular states, it would be in their power, at any time, to involve the continent in a war, usually the greatest of all national calamities.” 4 Elliot’s Debates, *supra* note 87, at 158-59.

346. Holt, *The Origins of Alienage Jurisdiction*, *supra* note 30, at 551, 562-64.

347. *Id.* at 559-60.

348. *Id.* at 561-62.

349. *Id.* at 561.

350. *Id.* at 554-55 (quoting Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 9 stat. 80, 82).

351. *Id.* at 562. The Framers explicitly invoked this rationale in the debates. Wilson, for example, called for an “impartial tribunal” that could “restore either public or private credit” for foreigners. 2 Elliot’s Debates, *supra* note 87, at 491. Madison said that “foreigners cannot get justice done them in these [state] courts, and [that] this has prevented many wealthy gentlemen from trading or residing among us.” 3 Elliot’s Debates, *supra* note 87, at 583.

national courts in what southerners thought was a flood, but which to the merchants was merely a trickle.”³⁵²

The Prize Case experience naturally overlaps with the Framers’ concerns about foreign creditors’ ability to collect their debts. Both in the Prize Cases and in disputes with British creditors over the states’ disregard for Article IV of the Treaty of Paris, the Framers found it difficult to secure compliance with the nation’s international obligations, or treat international disputes uniformly. Seemingly local events with individual foreign citizens could take on an international dimension, just as failure to pay foreign debts might, as Holt warns, “embroil the weak fledgling nation in war.”³⁵³

B. *Domestic War*

But Congress also feared a domestic war arising from Prize disputes. The dramatic end of the *Olmstead* case exemplifies that fear. Although these events admittedly happened after the ratification of the Constitution, they give credence to the concerns of the Framers and their contemporaries that inter-*state* disputes—like international disputes—could spiral into armed conflict.

Though the Committee on Appeals had ruled in *Olmstead*’s favor in 1778 against the Pennsylvania privateers, *Olmstead* still had not received his prize by 1790.³⁵⁴ After David Rittenhouse, the Pennsylvania state treasurer and celebrated astronomer, died, his heirs and executrices held the funds from the *Active* in the form of federal debt; they refused to give it to *Olmstead*.³⁵⁵ *Olmstead* won a default judgment in the Pennsylvania Court of Common Pleas, but the Pennsylvania Supreme Court rejected his claim in 1792, arguing that the lower court lacked jurisdiction to issue a default in an admiralty case.³⁵⁶

352. Holt, *The Origins of Alienage*, *supra* note 30, at 563-64.

353. *Id.* at 562.

354. Douglas, *supra* note 225, at 5-7.

355. *Id.* at 6-9.

356. *Id.* at 7.

In 1803, Olmstead went instead to the new federal district court in Pennsylvania and obtained a decree against the heirs.³⁵⁷ But the Pennsylvania legislature sided with its state courts, rejecting the federal district court's decision and declaring that the jurisdiction of the Committee on Appeals had been illegal and void.³⁵⁸ The legislators ordered the governor to use all means to protect Pennsylvania's rights.³⁵⁹ As Hampton Carson has written, the nominal parties to the controversy were Olmstead and Rittenhouse's heirs—"an old man of eighty-two and two women who had inherited the lawsuit, but the real contestants were the State of Pennsylvania and the United States."³⁶⁰

Still empty-handed, Olmstead next took his case to the new United States Supreme Court, where Chief Justice Marshall upheld the authority of the congressional court.³⁶¹ Chief Justice Marshall granted an order of mandamus, and took the opportunity to reaffirm the dominance of the federal judiciary over the state. "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments," Marshall wrote, "the [C]onstitution itself becomes a solemn mockery."³⁶²

But, standing alone, the Chief Justice's stern words were not enough to secure the primacy of the federal courts. The federal marshal sent to enforce the decision found Pennsylvania state militia under the command of General Bright, appointed by the governor to uphold the legislature's pledge of protection to the Rittenhouse heirs.³⁶³ The marshal

357. *Id.*

358. *Id.* at 8.

359. *Id.*

360. Carson, *supra* note 224, at 394.

361. Douglas, *supra* note 225, at 8-9.

362. *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809). Justice Marshall continued: "[s]o fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves." *Id.*

363. Carson, *supra* note 224, at 395.

read his commission to the armed soldiers surrounding the house of the Rittenhouse women, but to no avail; the marshal's attempts to enter the house were met with "pointed bayonets."³⁶⁴ Eventually the marshal somehow devised a strategy to enter the house from the back door and serve his writ,³⁶⁵ and held the women captive. After a habeas corpus action to win the release of the women failed, the Pennsylvania legislature backed down, calling for a withdrawal of the militia, and the governor ultimately paid out the money for the ransom of the women.³⁶⁶ An uprising against federal authority was narrowly averted.

General Bright and his armed soldiers who had threatened the marshal were put on trial for obstruction of justice³⁶⁷ and found guilty, but President Madison—who had been so closely involved with the *Olmstead* case thirty years before—commuted their sentences because they were acting under a "mistaken sense of duty."³⁶⁸

Thus, the same kinds of disputes that arose between Americans and foreigners also arose between citizens of different states. The threat of Civil War in the early years of the Republic was real. That the colonies would dissolve into civil war, if independent, had been a favorite "Tory argument."³⁶⁹ This was in part because British creditors were not the only ones to suffer in the courts; American debtors did as well. Rhode Island was a particular villain, shutting down its courts to creditors both foreign *and* out-of-state alike, and in turn, its merchants were shut out of other states' courts.³⁷⁰ At the North Carolina ratifying convention,

364. *Id.*

365. JOHN F. WATSON, 3 ANNALS OF PHILADELPHIA, BEING A COLLECTION OF MEMOIRS, ANECDOTES, AND INCIDENTS OF THE CITY AND ITS INHABITANTS 93 (Willis P. Hazard ed., 1884), available at http://archive.org/stream/annalsofphiladel03wats/annalsofphiladel03wats_djvu.txt.

366. Carson, *supra* note 224, at 396-97.

367. *Id.* at 397.

368. Douglas, *supra* note 225, at 11-12.

369. NEVINS, *supra* note 169, at 545.

370. See *id.* at 571 ("Rhode Island creditors were virtually outlawed in the neighboring States, and could no more collect a note at face value than a Boston creditor could collect a note in full in Providence.").

William Davie expressed the need for impartial courts so that “a debt may be recovered from the citizen of one state as soon as from the citizen of another.”³⁷¹ A citizen of Massachusetts, he argued, “might be ruined” before he could recover a debt in Virginia.³⁷²

Even apart from the grievances between the states, the United States lacked any role models for nations that functioned smoothly with a federal court system. In arguing for diversity jurisdiction, Hamilton had to reach back to fifteenth-century Germany for an example of a successful court system that functioned well in a federal nation.³⁷³ Conflicts in the Prize Cases between states, or between the states and Congress, only reinforced this heavy feeling that Americans were not yet a unified nation.

Given the threat of war from inside and out, it is not surprising that the Framers themselves might have seen diversity litigation as a way to maintain “national peace and harmony.” Four out of the five plans for the Constitution provided for alienage jurisdiction, but the Virginia Resolution was the only one that also included jurisdiction over disputes between “citizens of other states.”³⁷⁴ But when the plan became the focus of discussion at the Convention, the specific language was dropped, and replaced with a more general provision that the federal courts’ jurisdiction should extend to “all cases arising under the national laws and to such other questions as may involve the national peace and harmony.”³⁷⁵ The Committee of Detail—made up of

371. 4 Elliot’s Debates, *supra* note 87, at 159.

372. *Id.*

373. Hamilton compared the situation the United States might face in the absence of diversity jurisdiction to the “private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us at the same time of the vast influence of that institution in appeasing the disorders and establishing the tranquility of the empire.” THE FEDERALIST NO. 80, at 536-37 (Alexander Hamilton) (Henry Cabot Lodge ed., 1889).

374. James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 1-3 (1964).

375. *Id.* at 3 (quoting MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 119 (1913)).

Ellsworth and Wilson—again made the grant of jurisdiction more specific, replacing jurisdiction over issues involving the “national peace and harmony” with “controversies . . . between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects.”³⁷⁶ “Thus,” Moore and Weckstein conclude, “it seems a fair inference that diversity as well as alienage jurisdiction were thought to be included within the general phrase ‘questions as may involve the national peace and harmony.’”³⁷⁷

This relationship between diversity jurisdiction and “national peace and harmony” might also help resolve what John Frank called a “mystery truly dark—why did the Congress of 1789 provide that appellate jurisdiction should be sufficient in federal question cases while there should be trial court jurisdiction in diversity cases?”³⁷⁸ Scholars have offered several theories. One theory is that diversity litigation would be more likely to invoke issues of fact rather than issues of law, and that factual issues would be more difficult to review without the unpopular means of overruling a jury decision.³⁷⁹ Others have compellingly argued that withholding federal question jurisdiction might have been part of a compromise between Federalists and Anti-Federalists, who feared that the federal courts would absorb the state courts’ jurisdiction.³⁸⁰

But the Framers’ desire to provide jurisdiction over cases involving the “national peace and harmony,” inspired in part by the Prize Case experience, might offer another clue as to why diversity was initially included in the inferior courts’ jurisdiction, where federal questions were not. The Prize

376. 2 Farrand, Records, *supra* note 86, at 186; Moore & Weckstein, *supra* note 374, at 3.

377. Moore & Weckstein, *supra* note 374, at 3 (quoting HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 19 (1953)).

378. Frank, *Historical Bases*, *supra* note 12, at 28.

379. James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 641 (1942) (noting that “[a] possible explanation may well lie in the fact that the possibilities of discrimination in diversity cases were most likely to be realized in the fact-finding aspects of the trial, beyond the reach of review.”).

380. Holt, *The Invention of Federal Courts*, *supra* note 24, at 1484-89.

Cases taught that diversity cases *were* functionally federal question cases, and at the time, their placement in federal courts were deemed even more essential to the survival of the new country. Preserving the national peace and harmony—whether threatened by disputes with foreign citizens, or citizens of other states—was an essential part of preserving the Nation itself. The Framers may have been just as concerned with these “federal questions” as they were with the ones we generally include within federal question jurisdiction today.

CONCLUSION

The Framers’ judicial experience in the Prize Cases is noticeably absent from the civil procedure or federal courts literature, and is rarely invoked when discussing the origins of the national judiciary. This Article has sought to correct this oversight, re-acquainting scholars with the influence of the Prize Cases, and focusing more specifically on the Cases’ influence on diversity jurisdiction. Viewing diversity litigation through the actual litigation experience of the Framers reveals why the need for a neutral forum for diversity disputes seemed so obvious at the time of the Convention, and might explain the lack of any debate on what were otherwise controversial propositions. The Prize Case experience also exemplified how a real threat of foreign and domestic war could arise from clumsily handled state court litigation. Above all else, the Prize Case experience rehabilitates the view that geographic bias was a driving force behind the grant of diversity jurisdiction to the federal courts.

Thayer asked the question that sparked this Article, Friendly’s,³⁸¹ and many others: why diversity litigation? Thayer’s article ultimately answered his own question. “It was because,” he wrote, “in controversies between its own citizens and those of other States or countries, it might be expected that the courts of any given State would not be free from bias.”³⁸² Here, as so often, the simplest answer is also the most accurate.

381. Friendly, *supra* note 3.

382. Thayer, *supra* note 2, at 316.