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BOOK REVIEW — Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises and Using New Evidence

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BOOK REVIEW

Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence. By Wilfred J. Ritz. Edited by Wythe Holt and L.H. LaRue. Norman, Oklahoma, and London, England: University of Oklahoma Press, 1990. 264 pages.

Reviewed by ROGER J. MINER*

INTRODUCTION

The 102nd Congress of the United States is in its second session as this book review is written. The problems it faces, difficult as they are, pale into insignificance when compared with the tasks that confronted the first Congress when it convened in 1789 under the newly-ratified Constitution. Although the Constitution contained the broad outlines of a new national government, the members of the first Congress were constrained to draw a more detailed blueprint for governance. That they were able to do so in one session is a tribute to their sweeping visions of the future as well as to their political abilities. Their consensus-forging skills are worthy of study by modern-day lawmakers, who often seem incapable of compromise.¹ There is much else to be learned from an examination of the work of the first Congress, which set the stage for a new government of the United States by fleshing out the Constitution in the course of adopting twenty-seven separate Acts and four Resolutions.²

One of the most enduring of the twenty-seven Acts adopted by the first Congress was the one entitled "An Act to Establish the Judicial Courts of the United States."³ Frequently referred to

as the Judiciary Act of 1789, or the First Judiciary Act, this item of legislation established a three-level system of national courts that has continued, with various jurisdictional and functional alterations at each level, to the present day.⁴ Exercising the power granted to it under the Constitution to establish courts "inferior" to the Supreme Court, the first Congress in the First Judiciary Act established both District and Circuit Courts.⁵ No judges were authorized for the Circuit Courts, which were to be composed of two Supreme Court Justices "riding Circuit" plus a District Judge.⁶ For district court purposes, the nation was divided into thirteen districts, with at least one district in each state.⁷ One judge was provided for each district court.⁸ For circuit court purposes, three circuits were established, each consisting of two or more districts.⁹

Under the Judiciary Act of 1789, both the district and circuit courts were courts of original jurisdiction, and the circuit courts had certain appellate jurisdiction as well. Conferred upon the district courts was (1) exclusive jurisdiction over maritime and admiralty causes, including seizures on the high seas (saving to suitors available common law remedies); (2) exclusive jurisdiction over all seizures on land and of all suits for penalties and forfeitures incurred under the laws of the United States; (3) jurisdiction, concurrent with the courts of the several states and the circuit courts, "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States;" (4) jurisdiction concurrent

with the state and circuit courts in suits at common law brought by the United States "and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars;" and (5) exclusive jurisdiction of suits against consuls or vice-consuls, except for criminal offenses triable in the circuit courts.¹⁰

The district courts were given exclusive criminal jurisdiction respecting "crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted."¹¹ The circuit courts were given concurrent jurisdiction of the same crimes and offenses and exclusive jurisdiction over all others.¹² On the civil side, the Act accorded to the circuit courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State."¹³

The Act provided for removal of cases from state courts to the circuit courts in private civil litigation where the amount in dispute exceeded \$500 and the petition for removal was filed

by a defendant who was an alien; a defendant sued in a state different from his state of citizenship by a plaintiff who was a citizen of the state where suit was brought; and by either party to a dispute over a land title where one party claimed title under a grant from the state where the action was brought, the other party claimed title under a grant from another state, and the matter in dispute exceeded \$500.¹⁴ The circuit courts had appellate jurisdiction over final decrees of the district court in admiralty and maritime cases where the amount in dispute exceeded three hundred dollars, and over final judgments of the district court where the amount in dispute exceeded fifty dollars.¹⁵ No right of appeal from any criminal conviction was afforded in the federal court system until 1889, when the right of direct review by the Supreme Court was provided for capital cases.¹⁶ The First Judiciary Act also failed to confer general federal question jurisdiction upon the lower courts, a deficiency that was not finally remedied until 1875.¹⁷

Conferred upon the Supreme Court, in language tracking the Constitution, was exclusive jurisdiction over civil controversies where a state was a party, except between a state and its citizens; original jurisdiction in suits against ambassadors or other public ministers, consistent with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers.¹⁸ Original but not exclusive jurisdiction was provided in actions between a state and citizens of other states or aliens.¹⁹ Manifesting the

importance of jury trials to the American citizenry, the Act provided that "the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."²⁰ Final judgments and decrees of the circuit courts in civil cases were appealable to the Supreme Court on writs of error if the matter in dispute exceeded \$2,000 in value.²¹ Review of a final judgment of the highest court of a state was allowed where the question involved the validity of a treaty or of a statute of the United States or of an authority exercised under the United States.²²

The Judiciary Act of 1789 is more than just an object of historical interest. It is an important point of reference for those who are concerned with the present-day operation of the federal court system and care about its future. At a time when structural reform of the system is under serious consideration,²³ the institutional antecedents of the existing structure are worthy of examination. Also of interest to those who would prepare for the future of the federal courts is the original treatment of subject matter jurisdiction, including diversity jurisdiction.²⁴ It should be remembered that the Judiciary Act of 1789 did not vest in the federal courts the full judicial power provided by the Constitution, probably because the Federalists in control of Congress sought to appease the Anti-Federalists.²⁵ Indeed, Congress never has conferred upon the courts the full constitutional judicial power it has been authorized to confer.²⁶ Should it do so now, in response to

popular demand? Or should it cut back? Should the status quo be maintained? The answers to these questions, and others, can be informed by a study of the original Judiciary Act. One thing is certain: the ever-expanding menu provided in the lower federal courts, a consequence of the "underdeveloped capacity [of Congress] for self-restraint,"²⁷ is beginning to create a caseload crisis of major proportions.²⁸

Twentieth century scholars, lawyers and judges have had occasion to refer to section 34 of the original Judiciary Act and, apparently, will have reason to do so again. In section 34, Congress went beyond the structural, jurisdictional and procedural aspects of the newly created judicial system and ventured into the area of the law to be applied by the federal courts. Section 34, which has survived in the statutes essentially in its original form, provided:

That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.²⁹

It has been said that "[p]robably no statute regarding the federal courts has led to such difficulty" as this one.³⁰

According to present conventional wisdom, section 34 requires that state law, whether statutory or common, must be applied except in matters governed by the federal constitution, Acts of Congress or treaties duly ratified. This notion of course gained currency when Swift v. Tyson, interpreting laws in the section 34 context as statutory only,³¹ was overruled by Erie

R.R. v. Tompkins, in which Justice Brandeis wrote: "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."³² The Brandeis opinion was based in part on what the Justice referred to as "recent research of a competent scholar."³³ The scholar was Professor Charles Warren, who had found in the attic of the Senate what appeared to be the original manuscript draft of the Judiciary Act of 1789. In the draft that Professor Warren found, there was a provision establishing as rules of decision at common law in courts of the United States, except where the federal constitution, federal statutes or treaties applied, "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise."³⁴ Warren thought that the final version of section 34 was intended to say the same thing as the newly discovered draft. He believed that section 34 was grounded in federalism concerns.

In their fascinating examination of the First Judiciary Act, the authors of Rewriting the History of the Judiciary Act of 1789 put an entirely new spin on section 34. They say that it is not about federalism at all, admonishing the reader that "one ought not to read Section 34 as doing what to moderns it seems perfectly obvious that it does and should do, that is, to instruct national judges to look at state statutes and state decisions and follow their lead."³⁵ The authors note that at the

time the Judiciary Act was adopted there were no common law decisions in print and the state statutes were not generally collected and printed. It therefore would make no sense for section 34 to refer to these as sources of law. Moreover, a persuasive argument is made that the manuscript discovered by Professor Warren was not the same version of the bill used by the Senate during its deliberations. The Warren view is said to be flawed by reliance on the manuscript.

Through scholarly deduction, examination of ancient documents, legal reasoning, attention to the language then in use and an astute understanding of the tenor of the times, the distinguished legal historians who wrote this book have posited two alternative conclusions about section 34: that it was intended as a direction to the new courts to apply American rather than British law in all common law civil and criminal proceedings; or "most probably [that it] was intended as a temporary measure to provide an applicable American law for national criminal prosecutions, should national criminal prosecutions be brought in the national courts, pending the time that Congress would provide by statute for the definition and punishment of national crimes."³⁶ They are certain that section 34 was not intended to apply to diversity cases and that "on its historical basis, Erie is dead wrong."³⁷

Rewriting the History makes a forceful argument for the proposition that section 34 was designed to allow the national courts to apply American, rather than British, criminal common

law until a national criminal code could be adopted. The first session of the First Congress failed to pass a criminal bill, although it did define two crimes with punishment, both contained in the Collection Act and relating to the collection of duties,³⁸ and one crime with no specified penalty relating to the registering of ships and contained in the Coasting Act.³⁹ The Crimes Act of 1790, adopted at the second session of the First Congress, was the earliest criminal code. It defined crimes and provided penalties for four categories of prohibited activities within the exclusive criminal jurisdiction of the United States: felonies committed on the high seas, offenses directly affecting the operations of government, crimes committed within federal enclaves, and interference with the functioning of the federal courts.⁴⁰ The offenses sanctioned in the Crimes Act were either mentioned specifically in the Constitution or established under the authority of the Necessary and Proper Clause.⁴¹

At least between the first and second sessions of the First Congress, then, there was no criminal code in effect. Even the Crimes Act of 1790 can hardly be characterized as a comprehensive criminal code. What criminal law was to apply? It generally was assumed that some law of crimes was to be applied, else why grant to the lower federal courts such complete criminal jurisdiction? Even the Anti-Federalists arguing for a Bill of Rights that included guarantees relating to the criminal process "premised their argument on the assumption that the national courts under the Constitution did have a comprehensive criminal

jurisdiction."⁴² Another historical curiosity supporting the contention of the authors is that the first federal judges, in giving their grand jury charges, seem to have accepted the extension of criminal jurisdiction to non-statutory crimes.⁴³ Curious also is the position of section 34 in the First Judiciary Act. It is the next to last section, just before the provision for U.S. Attorneys in each district and for an Attorney General of the United States. Does the position signify a catch-all provision? And what about the power conferred upon the United States Attorneys to "prosecute in such district all delinquents for crimes and offences?"⁴⁴ In light of all this, it is passing strange that the Supreme Court in 1812 held that there was no common law of crimes.⁴⁵

The book sheds much new light on many old notions. Its success lies in compelling the reader to forebear from reading the First Judiciary Act through the eyes of "moderns." The reader is thus constrained to avoid the ruinous vision of conventional wisdom. For example, it generally has been assumed that the national judicial system was modeled on then-existing hierarchical systems of state judiciaries. This was not so, as the authors of the book clearly demonstrate. They show that the state systems were subsequently modeled on the one established by the Judiciary Act of 1789. At the time the Act was adopted, there was in most cases no distinction between trial and appellate judges in the several states. What then existed was a corps of judges who presided over trials in the field and at

times assembled in the state capitals to hear appeals. The same group of judges sat in different courts.⁴⁶ Often, there was no real distinction between trials and appeals, and review often meant a retrial by a court having more judges than the original "inferior" court.

Apparently, there were those who feared that the Article III provision for "appellate jurisdiction, both as to law and fact" in the Supreme Court would require litigants to travel to the nation's capital for retrials. As the authors put it: "The opponents of the Constitution, and even some of its friends, were alarmed by this provision, since they read it in the context of the then-existing state courts."⁴⁷ Also frightening to some was the fact that the language of the Constitution seemed to dispense with juries on retrial in the Supreme Court. It was to address those concerns that the new three-tier system was established for the national courts. A jury was provided where the Supreme Court exercised its original jurisdiction in cases brought against citizens of the United States. The appeals process was designed to work in a different way from that extant at the time, since writs of error were provided to bring up cases on appeal. The Supreme Court would be limited to questions of law where a lower court was to be reviewed, and questions of fact could not be retried in those cases. Policy reasons, rather than tradition, informed the new hierarchical system and the procedures prescribed for the national courts.

This book, as promised, exposes myths, challenges premises

and uses new evidence in its examination of the Judiciary Act of 1789. It does so in an exciting way, and the interest of the reader is held from start to finish. The background of the First Judiciary Act is presented in a most informative manner. There are eight chapters in the book, each of which stands alone as a matter of separate interest. The chapter headings are descriptive of the material included in each: Introduction; Chronology and Description; The "Judicial Systems" of the Several States in 1789; Organization of National Courts Under the Judiciary Act of 1789; Word Usage in the Constitution and in the Judiciary Act of 1789; Criminal Jurisdiction of the National Courts; Section 34; and Epilogue: An Outline of the History and Interpretation of Section 34. There are three appendices: Charles Warren and the Judiciary Act of 1789; The Sources for a History of the Judiciary Act of 1789; and Letters to and from Caleb Strong During May 1789. The appendices are most valuable, as are the Notes, Table of Short-Form Citations and Index.

This is a book for those who have an interest in the federal judiciary -- in its past, in its present, and in its future.

FOOTNOTES

* Judge, United States Court of Appeals for the Second Circuit. Adjunct Professor of Law, New York Law School.

1. The National Legal Center for the Public Interest blames "the increased politicization of the legislative process" for the inaction of the 101st and 102nd Congresses, noting that legislation bearing on "[n]early every major issue--from campaign reform to unemployment insurance to employment discrimination to abortion to resale price maintenance to crime--found its way into a veto showdown that slowed and, in some cases, eliminated its prospects." National Legal Center for the Public Interest, Judicial Legislative Watch Report, Vol. XIII, No. 2 at 2 (Mar. 6, 1992).

2. Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence 13 (1990) [hereinafter "Ritz, Rewriting the History"].

3. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) [hereinafter "Judiciary Act of 1789"].

4. See Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 30-49 (3d ed. 1988) (tracing evolution of federal court system) [hereinafter "Hart & Wechsler's"]; Charles A. Wright, The Law of Federal Courts 1-8 (4th ed. 1983) (highlighting major events in evolution of federal judiciary) [hereinafter "Wright, Federal Courts"]; Roger J. Miner, Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, 65 St. Johns L. Rev. 673, 674-76 (1991) (discussing creation of modern circuit courts of appeals) [hereinafter "Miner, Planning for the Second Century"].

5. Judiciary Act of 1789, supra note 3, at §§ 3, 4, 1 Stat. at 73-75.

6. Id. at § 4, 1 Stat. at 74-75.

7. Id. at § 2, 1 Stat. at 73.

8. Id. at § 3, 1 Stat. at 73-74.

9. Id. at § 4, 1 Stat. at 74-75.

10. Id. at § 9, 1 Stat. at 76-77.

11. Id.

12. Id. at § 11, 1 Stat. at 79.
13. Id. at § 11, 1 Stat. at 78.
14. Id. at § 12, 1 Stat. at 79-80.
15. Id. at §§ 21, 22, 1 Stat. at 83-84.
16. See Evitts v. Lucey, 469 U.S. 387, 409 (1985) (Rehnquist, J., dissenting) ("In 1891 Congress extended this right to include 'otherwise infamous' crimes.") (citation omitted).
17. Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.
18. Compare Judiciary Act of 1789, supra note 3, at § 13, 1 Stat. at 80-81 with U.S. Const. art. III, § 2.
19. Judiciary Act of 1789, supra note 3, at § 13, 1 Stat. at 80-81.
20. Id. at § 13, 1 Stat. at 81. Trial by jury of factual issues was provided for in the district and circuit courts in all except admiralty, maritime, and equity cases. Id. at §§ 9(d), 12, 1 Stat. at 77, 79-80.
21. Id. at § 22, 1 Stat. at 84.
22. Id. at § 25, 1 Stat. at 85-86.
23. Report of the Federal Courts Study Committee 4 (Apr. 2, 1990) (offering comprehensive review of state of Judiciary and proposals to "prevent the system from being overwhelmed by a rapidly growing and already enormous caseload") [hereinafter "Study Committee Report"]. See generally Miner, Planning for the Second Century, supra note 4 (reviewing Study Committee Report, evaluating recommendations, and describing techniques used in Second Circuit for handling problems identified by Report, as well as offering further suggestions); Roger J. Miner, The Tensions of a Dual Court System and Some Prescriptions for Relief, 51 Alb. L. Rev. 151 (1987) (commenting on difficulty of having parallel judicial systems with sometimes overlapping jurisdiction and suggesting methods for alleviating friction).
24. Judiciary Act of 1789, supra note 3, at § 11, 1 Stat. at 78. Much has been written about the potential abolition of diversity jurisdiction. See, e.g., Flango & Boersema, Changes in the Federal Diversity Jurisdiction: Effects on State Court Caseloads, 15 U. Dayton L. Rev. 405 (1990) (detailed study of effect of elimination or restriction of diversity jurisdiction on state courts); M.C. Butler & J. Frank, Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come? (National Legal Center

for Public Interest 1983); Martin H. Redish, *Federal Courts* 566-69 (2d ed. 1989). See also Study Committee Report, supra note 23, at 38-42 (recommending abolition of diversity jurisdiction, or in the alternative limiting its availability, and thereby easing federal caseload).

25. Ritz, *Rewriting the History*, supra note 2, at 5.

26. See Wright, *Federal Courts*, supra note 4, at 4, 26-27; Hart & Wechsler's, supra note 4, at 37.

27. Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

28. See generally Miner, *Planning for the Second Century*, supra note 4, at 676-724 (noting burgeoning federal caseload as reported by Federal Courts Study Committee and discussing possible solutions); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 Harv. J.L. & Pub. Pol'y 117 (1987) (positing "federalization" of criminal law as cause of overburdened federal courts). See also generally Jeffrey B. Morris, *Federal Justice in the Second Circuit* (1987) (discussing historical landmarks in expansion of federal jurisdiction).

29. Judiciary Act of 1789, supra note 3, at § 34. The comparable provision today reads:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

30. Wright, *Federal Courts*, supra note 4, at 5.

31. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

32. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

33. Id. at 72. See also Martin H. Redish, *Federal Jurisdiction: Tension in the Allocation of Judicial Power* 211 n.4 (2d ed. 1990).

34. Ritz, *Rewriting the History*, supra note 2, at 132.

35. Id. at 10-11.

36. Ritz, *Rewriting the History*, supra note 2, at 148.

37. Id.

38. Id. at 114-15.
39. Id. at 115.
40. Crimes Act of 1790, ch. 9, § 1, 1 Stat. 112, 112.
41. U.S. Const. art. I, § 8.
42. Ritz, *Rewriting the History*, supra note 2, at 110.
43. Id. at 118-20.
44. Judiciary Act of 1789, supra note 3, at § 35, 1 Stat. at 92.
45. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812).
46. Ritz, *Rewriting the History*, supra note 2, at 5-6.
47. Id. at 6.

NEW YORK LAW SCHOOL LAW REVIEW



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2. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 13 (Wythe Holt & L.H. LaRue eds., 1990).

3. Ch. 20, 1 Stat. 73 (1789) [hereinafter Judiciary Act of 1789].

and functional alterations at each level, to the present day.⁴ Exercising the power granted to it under the Constitution to establish courts "inferior" to the Supreme Court, the first Congress, in the First Judiciary Act, established both district and circuit courts.⁵ No judges were authorized for the circuit courts, which were to be composed of two Supreme Court Justices "riding circuit" plus a district judge.⁶ For district court purposes, the nation was divided into thirteen districts, with at least one district in each state.⁷ One judge was provided for each district court.⁸ For circuit court purposes, three circuits were established, each consisting of two or more districts.⁹

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The district courts were given exclusive criminal jurisdiction respecting

crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts,

4. See generally PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 30-49 (3d ed. 1988) (tracing the evolution of the federal court system); CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 1-8 (4th ed. 1983) (highlighting major events in the evolution of the federal judiciary); Roger J. Miner, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, 65 ST. JOHN'S L. REV. 673, 674-76 (1991) (discussing the creation of modern circuit courts of appeals).

5. See Judiciary Act of 1789, §§ 3-4, 1 Stat. at 73-75.

6. See *id.* § 4, 1 Stat. at 74-75.

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9. See *id.* § 4, 1 Stat. at 74-75.

10. *Id.* § 9, 1 Stat. at 76-77.

or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.¹¹

The circuit courts were given concurrent jurisdiction of the same crimes and offenses, and exclusive jurisdiction over all others.¹² On the civil side, the Act accorded to the circuit courts

original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.¹³

The Act provided for removal of cases from state courts to the circuit courts in private civil litigation when the amount in dispute exceeded five hundred dollars and the petition for removal was filed by (1) a defendant who was an alien; (2) a defendant sued in a state different from his state of citizenship by a plaintiff who was a citizen of the state in which the suit was brought; or (3) by a party claiming a grant of land title from a state other than the forum state when the adverse party claimed title under a grant from the forum state and both parties were citizens of the forum state.¹⁴ The circuit courts had appellate jurisdiction over final decrees of the district courts in admiralty and maritime cases in which the amount in dispute exceeded three hundred dollars, and over final judgments of the district courts in civil cases in which the amount in dispute exceeded fifty dollars.¹⁵ There was no right of appeal from any criminal conviction in the federal court system until 1889, when the right of direct review by the Supreme Court was provided for capital cases.¹⁶ The First Judiciary Act

11. *Id.*

12. *See id.* § 11, 1 Stat. at 79.

13. *Id.* § 11, 1 Stat. at 78.

14. *See id.* § 12, 1 Stat. at 79-80.

15. *See id.* §§ 21, 22, 1 Stat. at 83-84.

16. *See* Act of Feb. 6, 1889, ch. 113, 25 Stat. 656; *see also* *Evitts v. Lucey*, 469 U.S. 387, 409 (1985) (Rehnquist, J., dissenting) ("[In 1889] Congress granted a right of direct review in the Supreme Court in capital cases. In 1891 Congress extended this right to include 'otherwise infamous' crimes.") (citations omitted).

also failed to confer general federal question jurisdiction upon the lower courts, a deficiency that was not finally remedied until 1875.¹⁷

Congress conferred upon the Supreme Court, in language tracking the Constitution,¹⁸ (1) exclusive jurisdiction over civil controversies in which a state was a party, except suits between a state and its citizens; (2) original and exclusive jurisdiction in suits against ambassadors or other public ministers, consistent with the law of nations; and (3) original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers.¹⁹ Original but not exclusive jurisdiction was provided in actions between a state and citizens of other states or aliens.²⁰ Manifesting the importance of jury trials to the American citizenry, the Act provided that "the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."²¹ Final judgments and decrees of the circuit courts in civil cases were appealable to the Supreme Court on writs of error when the matter in dispute exceeded two thousand dollars in value.²² Review of a final judgment of the highest court of a state was allowed when the question involved the validity of a treaty, a statute of the United States or an authority exercised under the United States.²³

The Judiciary Act of 1789 is more than just an object of historical interest. It is an important point of reference for those who are concerned with the present-day operation of the federal court system and who care about its future. At a time when structural reform of the system is under serious consideration,²⁴ the institutional antecedents of the existing

17. Federal question jurisdiction was conferred upon the district courts by the Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470.

18. Compare Judiciary Act of 1789, § 13, 1 Stat. at 80-81 with U.S. CONST. art. III, § 2.

19. See Judiciary Act of 1789, § 13, 1 Stat. at 80-81.

20. See *id.* § 13, 1 Stat. at 80.

21. *Id.* § 13, 1 Stat. at 81. Trial by jury of factual issues was provided for in the district and circuit courts in all except admiralty, maritime, and equity cases. See *id.* §§ 9(d), 12, 1 Stat. at 77, 80.

22. See *id.* § 22, 1 Stat. at 84.

23. See *id.* § 25, 1 Stat. at 85-86.

24. See generally FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 4 (1990) (offering a comprehensive review of state of the Judiciary and proposals to "prevent the system from being overwhelmed by a rapidly growing and already enormous caseload"); Miner, *supra* note 4 (reviewing the Study Committee Report, evaluating its recommendations, describing how the Second Circuit currently handles the problems identified in the report, and offering further suggestions); Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151 (1987) (discussing the difficulty of having parallel state and federal

structure are worthy of examination. Also of interest to those who would prepare for the future of the federal courts is the original treatment of subject matter jurisdiction, including diversity jurisdiction.²⁵ It should be remembered that the Judiciary Act of 1789 did not vest in the federal courts the full judicial power provided by the Constitution, probably because the Federalists in control of Congress sought to appease the Anti-Federalists.²⁶ Indeed, Congress never has conferred upon the courts the full constitutional judicial power it has been authorized to confer.²⁷ Should it do so now, in response to popular demand? Or should it cut back? Should the status quo be maintained? The answers to these questions, and others, can be gathered by studying the original Judiciary Act. One thing is certain: the ever-expanding menu provided in the lower federal courts,²⁸ a consequence of the "underdeveloped capacity [of Congress] for self-restraint"²⁹ is beginning to create a caseload crisis of major proportions.³⁰

Twentieth-century scholars, lawyers, and judges have had occasion to refer to section 34 of the original Judiciary Act and, apparently, will have reason to do so again. In section 34, Congress went beyond the structural, jurisdictional, and procedural aspects of the newly created judicial system

judicial systems with sometimes overlapping jurisdiction and suggesting methods for alleviating friction between the two systems).

25. See Judiciary Act of 1789, § 11, 1 Stat. at 78. Much has been written about the potential abolition of diversity jurisdiction. See, e.g., M. CALDWELL BUTLER & JOHN P. FRANK, *ABOLITION OF DIVERSITY JURISDICTION: AN IDEA WHOSE TIME HAS COME?* (Nat'l Legal Ctr. for the Pub. Interest Judicial Series, 1983) (presenting arguments both in support of and against alteration of diversity jurisdiction); FEDERAL COURTS STUDY COMM., *supra* note 24, at 38-42 (recommending either abolishing diversity jurisdiction or limiting its availability, to ease the federal caseload); MARTIN H. REDISH, *FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS* 566-69 (2d ed. 1989) (noting various reasons for federal diversity jurisdiction and discussing alternatives thereto); Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990) (discussing the effect on state courts of elimination or restriction of federal diversity jurisdiction).

26. RITZ, *supra* note 2, at 5.

27. BATOR ET AL., *supra* note 4, at 37; WRIGHT, *supra* note 4, at 4.

28. See generally JEFFREY B. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT* 167 (1987) (discussing historical landmarks in the expansion of federal jurisdiction).

29. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

30. See generally Miner, *supra* note 4, at 676-724 (noting the burgeoning federal caseload and discussing possible solutions); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987) (suggesting that the "federalization" of criminal law has contributed to the overburdening of federal courts).

and ventured into the area of the law to be applied by the federal courts. Section 34, which has survived in the statutes essentially in its original form, provided "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."³¹ It has been said that "[p]robably no statute regarding the federal courts has led to such difficulty" as this one.³²

According to present conventional wisdom, section 34 requires that state law, whether statutory or common, must be applied except in matters governed by the Federal Constitution, acts of Congress or treaties duly ratified. This notion of course gained currency when *Swift v. Tyson*,³³ interpreting "laws" in the context of section 34 as statutory only,³⁴ was overruled by *Erie Railroad v. Tompkins*.³⁵ On behalf of the *Erie* majority, Justice Brandeis wrote that "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."³⁶ The Brandeis opinion was based in part on what the Justice referred to as "recent research of a competent scholar."³⁷ The scholar was Professor Charles Warren, who had found in the attic of the Senate what appeared to be the original manuscript draft of the Judiciary Act of 1789. In the draft that Professor Warren found, there was a provision that would have established as rules of decision at common law in courts of the United States, "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise" except when the Federal Constitution, federal statutes or treaties applied.³⁸ Professor Warren thought that the final version of section 34 was intended to say the

31. Judiciary Act of 1789, § 34, 1 Stat. at 92. The comparable provision today reads: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1988).

32. WRIGHT, *supra* note 4, at 5.

33. 41 U.S. (16 Pet.) 1 (1842).

34. *See id.* at 17-18.

35. 304 U.S. 64 (1938).

36. *Id.* at 78.

37. *Id.* at 72. *But cf.* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 211 n.4 (2d ed. 1990) (stating that Justice Brandeis did not exclusively rely on Professor Warren's work).

38. RITZ, *supra* note 2, at 132 (quoting Judiciary Act of 1789, § 34 (original manuscript draft)).

same thing as the newly discovered draft.³⁹ He believed that section 34 was grounded in federalism concerns.⁴⁰

In their fascinating examination of the First Judiciary Act, the author and editors of *Rewriting the History of the Judiciary Act of 1789* put an entirely new spin on section 34. They say that it is not about federalism at all, admonishing the reader that "one ought not read Section 34 as doing what to moderns it seems perfectly obvious that it does and should do, that is, to instruct national judges to look at state statutes and state decisions and follow their lead."⁴¹ They note that at the time the Judiciary Act was adopted there were no common law decisions in print and the state statutes generally were not collected and printed.⁴² It therefore would make no sense for section 34 to refer to these as sources of law.⁴³ Moreover, they make a persuasive argument that the manuscript discovered by Professor Warren was not the same version of the bill that the Senate used during its deliberations.⁴⁴ The Warren view is said to be flawed by reliance on the manuscript.⁴⁵

Through scholarly deduction, examination of ancient documents, legal reasoning, attention to the language then in use, and an astute understanding of the tenor of the times, the distinguished legal historians who wrote this book have posited two alternative conclusions about section 34: that it was intended as a direction to the new courts to apply American rather than British law in all common law civil and criminal proceedings;⁴⁶ or "most probably [that it] was intended as a temporary measure to provide an applicable American law for national criminal prosecutions, should national criminal prosecutions be brought in the national courts, pending the time that Congress would provide by statute for the definition and punishment of national crimes."⁴⁷ They are certain that section 34 was *not* intended to apply to diversity cases and that "on its historical basis, *Erie* is dead wrong."⁴⁸

Rewriting the History makes a forceful argument for the proposition that section 34 was designed to allow the national courts to apply American, rather than British, criminal common law until a national

39. *Id.*

40. *Id.* at 25.

41. *Id.* at 10-11.

42. *See id.* at 10.

43. *Id.*

44. *See id.* at 126-40.

45. *See id.* at 137.

46. *See id.*

47. *Id.* at 148.

48. *Id.*

criminal code could be adopted.⁴⁹ In its first session, the first Congress failed to pass a criminal bill, although it did define two crimes with punishment, both contained in the Collection Act and relating to the collection of duties, and one crime with no specified penalty contained in the Coasting Act and relating to the registering of ships.⁵⁰ The Crimes Act of 1790,⁵¹ adopted in the second session of the first Congress, was the earliest criminal code. It defined crimes and provided penalties for four categories of prohibited activities within the exclusive criminal jurisdiction of the United States: felonies committed on the high seas, offenses directly affecting the operations of government, crimes committed within federal enclaves, and interference with the functioning of federal courts.⁵² The offenses sanctioned in the Crimes Act were either mentioned specifically in the Constitution or established under the authority of the Necessary and Proper Clause.⁵³

At least between the first and second sessions of the first Congress, then, there was no criminal code in effect. Even the Crimes Act of 1790 can hardly be characterized as a comprehensive criminal code. What criminal law was to apply? It generally was assumed that some law of crimes was to be applied, else why grant to the lower federal courts such complete criminal jurisdiction? Even the Anti-Federalists arguing for a Bill of Rights that included guarantees relating to the criminal process "premised their argument on the assumption that the national courts under the Constitution did have a comprehensive criminal jurisdiction."⁵⁴

Another historical curiosity supporting this contention is that the first federal judges, in giving their grand jury charges, seem to have accepted the extension of criminal jurisdiction to nonstatutory crimes.⁵⁵ Curious also is the position of section 34 in the First Judiciary Act. It is the next-to-last section, just before the provision for United States Attorneys in each district and for an Attorney General of the United States. Does this position signify a catch-all provision? And what about the power conferred upon the United States Attorneys to "prosecute in such district all delinquents for crimes and offences"?⁵⁶ In light of all this, it is passing

49. *See id.* at 116.

50. *Id.* at 114-15.

51. Ch. 9, 1 Stat. 112.

52. *See id.*

53. U.S. CONST. art. I, § 8, cl. 18.

54. RITZ, *supra* note 2, at 110.

55. *See id.* at 118-20.

56. Judiciary Act of 1789, § 35, 1 Stat. at 92.

strange that the Supreme Court in 1812 held that there was no common law of crimes.⁵⁷

Rewriting the History sheds much new light on many old notions. Its success lies in compelling the reader to forebear from reading the First Judiciary Act through the eyes of "moderns." The reader is thus constrained to avoid the ruinous vision of conventional wisdom. For example, it generally has been assumed that the national judicial system was modeled on then-existing hierarchical systems of state judiciaries. This was not so, as the author and editors of the book clearly demonstrate. They show that the state systems were subsequently modeled on the one established by the Judiciary Act of 1789.⁵⁸ At the time the Act was adopted, there was in most cases no distinction between trial and appellate judges in the several states. What then existed was a corps of judges who presided over trials in the field and at times assembled in the state capitals to hear appeals.⁵⁹ The same group of judges sat in different courts. Often, there was no real distinction between trials and appeals, and review often meant a retrial by a court having more judges than the original "inferior" court.⁶⁰

Apparently, there were those who feared that the Article III provision for "appellate jurisdiction, both as to law and fact" in the Supreme Court would require litigants to travel to the nation's capital for retrials.⁶¹ As Ritz, Holt, and LaRue put it: "The opponents of the Constitution, and even some of its friends, were alarmed by this provision, since they read it in the context of the then-existing state courts."⁶² Also frightening to some was the fact that the language of the Constitution seemed to dispense with juries on retrial in the Supreme Court. It was to address those concerns that Congress established the new three-tier system for the national courts.⁶³ A jury was provided when the Supreme Court exercised its original jurisdiction in cases brought against citizens of the United States.⁶⁴ The appeals process was designed to work in a different way from that extant at the time, because writs of error were provided to bring up cases on appeal. The Supreme Court was limited to questions of law when a lower court's decision was being reviewed; questions of fact

57. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

58. See RITZ, *supra* note 2, at 5.

59. *Id.* at 5-6.

60. *Id.*

61. *Id.* at 6.

62. *Id.*

63. *Id.* at 7.

64. See Judiciary Act of 1789, § 13, 1 Stat. at 80-81.

could not be retried in those cases.⁶⁵ Policy reasons, rather than tradition, informed the new hierarchical system and the procedures prescribed for the national courts.⁶⁶

This book, as promised, exposes myths, challenges premises, and uses new evidence in its examination of the Judiciary Act of 1789. It does so in an exciting way, holding the reader's interest from start to finish. The background of the First Judiciary Act is presented in a most informative manner. There are eight chapters in the book, each of which stands alone as a matter of separate interest. The chapter headings are descriptive of the material included in each: Introduction; Chronology and Description; The "Judicial Systems" of the Several States in 1789; Organization of National Courts Under the Judiciary Act of 1789; Word Usage in the Constitution and in the Judiciary Act of 1789; Criminal Jurisdiction of the National Courts; Section 34; and Epilogue: An Outline of the History and Interpretation of Section 34. There are three appendices: Charles Warren and the Judiciary Act of 1789; The Sources for a History of the Judiciary Act of 1789; and Letters to and from Caleb Strong During May 1789. The appendices are most valuable, as are the Notes, the Table of Short-Form Citations, and the Index.

This is a book for all those who have an interest in the federal judiciary—in its past, in its present, and in its future.

65. See *id.* § 22, 1 Stat. at 84-85.

66. See RITZ, *supra* note 2, at 5-7.