PROCESS IS POWER: THE COMPETING INTERESTS OF DEBTORS AND CREDITORS, THE MODES OF PROCESS IN THE FEDERAL DISTRICT COURTS FROM 1789–1828, AND THE RESULTING CRISIS OF APPLICATION OF FINAL PROCESS DURING THE PANIC OF 1819

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EXECUTIO EST FINIS ET FRUCTUS LEGIS.[1]

I. INTRODUCTION

The competing interests of debtors and creditors provide a remarkable lens through which to view American history.[2] Anxiety over the payment, collection, and enforcement of debt contracts has pervaded the American experience since its inception.[3] My focus here is not on all of American

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[1] *Execution is the end and fruit of the law*. A maxim attributed to Sir Edward Coke in his *Commentary upon Littleton. See* AN ABRIDGEMENT OF THE LORD COKE'S COMMENTARY ON LITTLETON 318 (London: printed for Lee, Pakeman and Bedell 1651); 1 THOMAS BRANCH & JOHN RICHARDSON, PRINCIPIA LEGIS ET AEQUITATIS: BEING AN ALPHABETICAL COLLECTION OF MAXIMS, PRINCIPLES OR RULES, DEFINITIONS, AND MEMORABLE SAYING, IN LAW AND EQUITY 51 (5th ed. 1824); *see also* Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51, 64 (1825) ("An execution is the fruit and end of the suit, and is very aptly called the life of the law."); HENRY M. HERMAN, TREATISE ON THE LAW OF EXECUTIONS 1 (1876) ("Execution signifieth in law the obtaining of actual possession of anything acquired by judgment of law, or by a fine executory levied, whether it be by the sheriff or by the entry of the party, *and is called the life of the law*, and therefore is in all cases to be favored.") (emphasis added).

[2] This idea is not original to me, of course. For the masterwork on this subject, see BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002).

[3] Claire Priest et al., *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1387 (2001) ("[I]n times of currency scarcity, more debt contracts ended in litigation because debtors became unable to raise funds to pay their debts."); Jonathan M. Chu, *Debt Litigation and Shays' Rebellion*, *in* IN DEBT TO SHAYS, THE

history, however. Rather, my focus is a specific time period, 1789–1828, and the efforts employed by American political elites through control of judicial final process—that is the process of execution—to protect the rights of creditors in the newly established federal courts. The story begins with the end of the American Revolution and continues through the economic downturn of the 1780s, Shays' Rebellion, the Judiciary Act of 1789, and the first Process Acts, which controlled process and procedure in the federal courts from 1789 to 1828.[4] The Process Acts vested complete control over final process—the method of enforcing judgments through execution—in the federal judiciary.[5] This was intentional as the federal courts were in part designed as a haven for creditors and a bulwark against pro-debtor policies in the states.[6] The system as to final process set up in 1789 worked, more or less, until the Panic of 1819, at which point the federal courts refused to apply pro-debtor legislation as to executions enacted in the states and the system broke down. Political pressure led to the enactment of a new Process Act in 1828, and the establishment of a new procedural regime in the federal courts.

Shays' Rebellion and the Panic of 1819 are bookends of a sort, bracketing a period of deep anxiety among elites about pro-debtor policies and protection for creditors. In effect, Shays' Rebellion was a debtor revolt against the operation of the courts and the legal process of execution by subsistence farmers angry at the seizure of their property and possible imprisonment for nonpayment of debts.[7] Shays' Rebellion prompted a series of convulsions in the relationship between the federal government and the states—including the enactment of the U.S. Constitution, the Judiciary Act of 1789, and the first Process Acts. The federal-state relationship was put to the test in the Panic of 1819—a severe economic downturn and depression—when the federal courts began to refuse to apply pro-debtor legislation controlling process enacted by the states, thus

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BICENTENNIAL OF AN AGRARIAN REBELLION 82, 92 (Robert A. Gross ed., 1993) (describing creditor anxiety in the 1785 Massachusetts recession).

[4] *See* Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 426–27, 435 (1930).

[5] *Id.*

[6] Wythe Holt, *To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1458 (1989).

[7] Chu, *supra* note 3, at 81.

creating a crisis in the application of final process and setting the stage for a new Process Act in 1828.[8]

The drafters of the first Process Acts recognized that in enforcing the rights of creditors *vis a vis* debtors, process was power. How? Process is the power of enforcement, the power to compel, and the power to control. So, in the guise of supposedly balancing state and federal interests, the Process Acts vested complete control over process, issued from the federal courts to the federal courts themselves.[9] This gave the federal courts complete power over the enforcement of their own judgments without any reference to state interests. Why this mattered is embodied in the nature of practice and procedure in the federal district courts prior to the enactment of the Federal Rules of Civil Procedure in 1938.[10]

Prior to the enactment of the Federal Rules of Civil Procedure in 1939, federal district courts followed rules of process and procedure that were supposedly based on the state in which the federal court sat.[11] The state-by-state fragmentation resulted from a series of federal statutory enactments or "Process Acts" that attempted to mold, beginning in 1789, the practice in the federal courts to the practice in the state courts in the states in which the federal courts sat.[12] In other words, the federal courts were to theoretically follow state court rules, *but this was not actually the case*. There were some matters on which the state courts were not to be trusted. The most important being the rights of debtors *vis a vis* creditors, especially British creditors. Indeed, the state governments of the 1780s and 1790s were hostile to British creditors and at least one of the reasons given during the debates on the Judiciary Act of 1789 for the creation of inferior federal courts was to provide a safe haven and protection for creditors.[13] So, among the rules that federal courts were *not* required to follow in the years after 1789 were rules related to process, in particular to final process or the process of execution; that is, the method of enforcement a successful

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[8] *See, e.g.*, United States v. Wilson, 21 U.S. (8 Wheat.) 253 (1823) (refusing to release debtor from prison even though debtor had obtained a certificate of discharge under New York law that abolished imprisonment for debt).

[9] *See* Warren, *supra* note 4, at 427–28.

[10] *See, e.g.*, Valarino v. Thompson, 28 F. Cas. 866 (S.D.N.Y. 1857) (No. 16810A).

[11] *See id.* at 866.

[12] *Id.* ("[P]ractice on the law side of the federal courts is not established by any specific enactment of the legislature, or code of rules, or special usages of the courts themselves. It is [instead] compounded in part of provisions in acts of congress.").

[13] Holt, *supra* note 5, at 1458.

creditor could deploy against a losing debtor following a lawsuit. With regard to final process, the federal courts could apply the state rules if they wished or fashion a remedy independent of the state rule.[14] Thus, in favoring creditors the federal courts could ignore state rules as to final process and apply their own often harsher rules, even when state law was far more forgiving.[15] As noted above, this would eventually lead to a crisis in application of the rules regarding final process during the Panic of 1819, which would in turn spark a change in how the federal courts were directed to use state rules of process in 1828.

The pre-1938 system of procedure in the federal courts was defined by three distinct phases, where the rules to be followed by the federal district courts were defined in different ways by pieces of federal legislation known as Process Acts.[16] There were no uniform rules.[17] Prior to 1872, the state procedure the federal courts supposedly followed was, pursuant to the relevant Process Act, of an unchanging date certain in the past.[18] Depending on when the state was admitted to the United States, the date certain used was in 1789, 1828, or on some other date in another year.[19] So, if the federal courts followed state rules at all, they looked to *past* state practice—even if decades old and since changed—for the rules to apply in contemporary cases.[20] That means federal courts often "adhere[d] to state laws governing process that had been superseded locally [at the state level] as a result of changed attitudes and conditions."[21] For example, if a state

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[14] *See* Warren, *supra* note 4, at 434–36.

[15] *See, e.g.*, United States v. Wilson, 21 U.S. (8 Wheat.) 253 (1823).

[16] *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1036 (1982).

[17] *See id.*

[18] *See id.* at 1037.

[19] *See* Warren, *supra* note 4, at 435–36, 445..

[20] *See* Burbank, *supra* note 16, at 1037.

[21] *Id.* at 1036. This meant that the procedure that many of the federal courts were following for actions at law—whether by choice or by adherence to state court practice—was based on the antiquated English system of common law pleading and practice. This near ancient system relied on the pleadings to define the cause of action, and the pleading rules themselves were highly technical and precise. *See* Wm. H. Lloyd, *Pleading*, 71 U. PA. L. REV. 26, 26 (1922). If the required precision was not employed—if incorrect language or an improper legal formulation was used—the action could be dismissed regardless of the merits. *See id.* at 27. Because of the reliance on the pleadings, there was only limited provision for discovery. *See id.* at 29. The modern system of liberal discovery was unknown

changed its rules regarding final process to better accommodate debtors in 1821, the federal court would not be required to follow the new rules, as they were not in effect on September 29, 1789.[22] This "date certain" aspect of conformity to state procedure would change in 1872 to a more dynamic formulation where contemporary state procedure was followed, but nevertheless the inconsistency and confusion in the system would remain,[23] as would the ability of federal courts to ignore those state rules that they did not like.

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prior to 1938. *See* Burbank, *supra* note 16, at 1036, Also unknown in the common law system was the efficiency supplied by the free joinder of claims and parties, both of which are provided for in the modern federal rules. Although the common law system was not without its proponents, there was widespread sentiment, perhaps articulated most persuasively by Roscoe Pound in 1906, that the system was in dire need of reform. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445 (1906). Unified reform in the federal system was not feasible, though, with conditions as they were; that is, with law and equity separate and with 48 different states influencing practice in actions at law in the federal district courts. Reform would have to await the Rules Enabling Act of 1934, the unification of law and equity, and the ratification of the Federal Rules of Civil Procedure in 1938.

[22] *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

[23] The fragmented system in place prior to 1938 was further complicated by the separation of law and equity. Traditionally, the "law" referred to the written rules and principles that governed conduct and interactions within a particular jurisdiction while "equity" meant "recourse to principles of justice to correct or supplement the law as applied to particular circumstances." *Equity*, BLACK'S LAW DICTIONARY 680 (11th ed. 2019). In other words, equitable principles were applied when the law was deemed inadequate. Law and equity were therefore seen as incompatible; two separate systems serving different purposes. The separation of the two was a relic of medieval English practice where equitable principles were applied by the Court of Chancery and common law principles were applied by the common law courts. *See* Andrew Burrows, *We Do This at Common Law, But That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 3 (2002). The courts, principles, and causes of action simply did not mix. This translated to the American system not with separate courts, but with separate "doors" into the same court and same judge. Thus, if a particular set of facts involved application of both legal and equitable principles, it would be heard as two separate cases—one in law, one in equity—in front of the same judge. And, as another symptom of separation, different rules would apply as well. Unlike for actions at law, the Supreme Court had been drafting uniform rules for actions at equity since the 19th century. The most complete realization of this was the Federal Equity Rules of 1912, which would ultimately serve, at least in part, as the basis for the Federal Rules of Civil Procedure.

This Note is the first of three that will tell the story of federal civil practice in the federal district courts from 1789–1938. This first Note will cover the period between 1789–1828. The second, 1828–1872. And the third, 1872–1938. Each time period is defined by the federal Process Act that established the procedural regime for the federal courts to follow. The Notes will focus on the legislation that ushered in the relevant time period and highlight the various aspects of the procedural setup that ultimately led to the legislation's demise and eventual replacement. This ground has been somewhat trod before. Notably, by Charles Clark[24] and Charles Warren[25] in the years just before and after the enactment of the Federal Rules of Civil Procedure in 1938. Clark's mission was the selling of the new Federal Rules of Civil Procedure and, thus, his work in this area revolved around the improvements the new federal rules would enact.[26] Over the course of two articles, Warren wrote a more comprehensive history of the pre-1938 period and although he discussed the application of final process, his work is more of a survey with less depth and clarity than this Note deploys.[27] In any event, Warren's articles are now ninety-four years old and in need of updating as to research and conclusions. Notably, both Clark and Warren came to a conclusion about the Process Acts—that they were in part designed to prevent federal court encroachment on state sovereignty—that I consider to be erroneous.[28] Certainly, the Process Acts said that the federal courts should follow state rules, but that edict was nothing more than a feint in the direction of the preservation of state

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[24] *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 399–401 (1935).

[25] *See* Warren, *supra* note 4, at 435–36, 445.

[26] *See* Clark & Moore, *supra* note 24, at 387.

[27] More recently Stephen Burbank wrote a monumental article that briefly discussed some of history of this time period, but his focus was mainly on the debates on and process of enacting the Rules Enabling Act. *See* Burbank, *supra* note 16.

[28] According to Clark and Warren, the Federal Process Acts of 1789 and 1792 sought to assuage any fears that the newly sovereign states may have had regarding the newly formed federal government; consequently, any proposed reforms to create a uniform federal procedure may have seemed like encroachments upon state sovereignty. *See* Warren, *supra* note 25, at 421. Under this reading, the implementation of the federal court system was, itself, a compromise between those who saw the nascent country as one, unified nation and those who saw it as "a generally loose federation of independent states," and federal procedure in actions at law was similarly a series of compromises. Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 145 (1948).

power. In reality, by virtue of the Process Acts, the federal courts retained near complete control over the modes of final process[29]—the methods by which creditors' rights were enforced as to debtors—and that was how Congress wanted it.

The first Process Act—enacted on September 29, 1789, five days after the Judiciary Act of 1789—was seemingly an *ad hoc* temporary measure that surrendered to convenience at the close of the first session of the First Congress.[30] Despite being *ad hoc* and temporary, the first Process Act, in supposedly requiring the federal courts to follow state rules, still permitted federal courts to use the writ of *capias ad satisfaciendum*—the harshest form of execution—*in the first instance*, even when other writs were permitted to be used in succession.[31] The issuance of this writ would imprison the debtor "until a tender of the debt and costs in gold and silver shall be made."[32] That gold and silver were required—rather than notes—to satisfy the debt made this writ particularly severe given the limited availability of specie. The "permanent" Process Act of 1792 then enshrined the provisions of the temporary act, with two exceptions. The first exception was the express permission granted to the federal courts in the permanent act to deviate from state rules if they saw fit.[33] This permitted the federal courts to fashion their own rules relating to the application of final process and therefore by extension benefit creditors at the expense of

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[29] 35 years after the enactment of the first Process Acts, Chief Justice Marshall would hold, in *Wayman v. Southard*, that Congress and the federal courts *always* possessed the power to control and issue process, including final process and the process of execution, pursuant to the Necessary and Proper Clause and sections 14, 17, and 18 of the Judiciary Act of 1789. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22–23 (1825).

[30] Warren, *supra* note 25, at 427.

[31] Although widely used, imprisonment for indebtedness drew much condemnation.

> As debt is not a crime, the debtor, considered merely as a debtor, is not a criminal, and therefore government has not a right to punish him by imprisonment. And as they cannot grant to another a right which they do not possess, they have no right to pass a law empowering any one to imprison another for debt.

THOMAS HERTTELL, REMARKS ON THE LAW OF IMPRISONMENT FOR DEBT; SHOWING ITS UNCONSTITUTIONALITY, AND ITS DEMORALIZING INFLUENCE ON THE COMMUNITY 10 (1823).

[32] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (1789).

[33] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

debtors, even when state rules would do the opposite.[34] The second exception was the removal of the requirement that a debt must be satisfied with gold or silver in order to free an imprisoned debtor.[35] This rare enactment in favor of debtors' interests was the subject of extensive debate in Congress.[36] The resulting system of process and procedure, based on the first Process Acts, would hold firm for over 30 years, until 1828.[37]

The United States' economy collapsed in late 1818 following deflationary measures instituted by the Second Bank of the United States.[38] The resulting depression was dubbed the Panic of 1819.[39] Following the onset of the Panic of 1819, many states enacted new rules to provide relief to debtors who were suffering as a result of the abysmal economic climate.[40] Many federal courts refused to follow these rules and instead persisted in their protection of creditors.[41] The resulting clash between the interests of debtors and creditors—between state interests and federal—led to the demise of the original system put in place in 1789 and 1792, and to the enactment of the deeply flawed Process Act of 1828, which ushered in the second major phase in 19th century federal civil practice. The flaws in the 1828 act would eventually lead to the Conformity Act of 1872 and the third phase of 19th century federal civil practice. The Conformity Act would remain in force until the enactment of the Federal Rules of Civil Procedure in 1938.[42] Each of these three time periods of federal court practice will be the subject of a separate article.

This Note begins with a brief discussion of the economic situation in the 1780s, where hostility to British creditors and Shays' Rebellion would lead, at least in part, to the creation of supposedly pro-creditor inferior federal courts and then to the Process Acts that permitted federal control

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[34] *See* Warren, *supra* note 4, at 434.

[35] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[36] *See* Warren, *supra* note 25, at 440–41, 443.

[37] *See id.* at 445.

[38] ANDREW H. BROWNING, THE PANIC OF 1819: THE FIRST GREAT DEPRESSION 157 (2019).

[39] Clyde A. Haulman, *The Panic of 1819: America's First Great Depression*, MUSEUM AM. FIN. 20, 21 (2010), https://www.moaf.org/exhibits/checks_balances/andrew-jackson/materials/Panic_of_1819.pdf [https://perma.cc/SD8F-UQKG].

[40] *See* Patrick Bolton & Howard Rosenthal, *Political Intervention in Debt Contracts*, 110 J. POL. ECON. 1103, 1106 (2002) ("[M]any states intervened in private debt contracts as a result of the severe downturn known as the Panic of 1819.").

[41] *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49–50 (1825).

[42] *See* Burbank, *supra* note 16, at 1036.

over the process issuing from the federal courts. It continues with an analysis of the debates surrounding and eventual enactment of the Judiciary Act of 1789. This monumental piece of legislation established the federal judiciary but left procedural holes that the first Process Acts tried to fill. The debates on the act also make clear the purpose of using the federal courts to protect the rights of creditors, as state courts were refusing to do so. The Note then moves on in part III to a discussion of the importance of final process or the process of execution in any common law system. Part IV provides a brief outline of the three phases of civil practice in the federal courts prior to 1938—already discussed, I know—but mentioned here again to better frame the remainder of the article.

Part V examines the first Process Acts, the report of Edmund Randolph regarding the federal judiciary, and the Judiciary Act of 1793. The common thread running through this period is the political focus on the uses and effects of final process. The mechanisms for the enforcement of orders and judgments in the federal courts were not some sort of tangential concern; rather, it was central to the fashioning of the federal judiciary. Part VI continues the discussion of final process, but here I analyze the illusion that the Process Acts reflected a balancing of federal and state interests. They did not. The Process Acts were a declaration of federal court power over final process and the process of execution; that is, over the true means of enforcing orders and judgments. Part VII illustrates federal court power over final process with the federal response to the Panic of 1819. There, due to the severe economic downturn, many states—most famously, Kentucky—enacted pro-debtor legislation that mitigated the impact of final process and execution on debtors. Because of their control over final process issuing from their courts, the federal judiciary refused to apply these pro-debtor rules. The resulting public outcry led directly to the demise of the first Process Acts and a new regime controlled by the Process Act of 1828. The Note concludes with a brief look at state courts' reaction to the crisis of process during the Panic of 1819 and some observations on the procedural regime put in place in 1828, which is the subject of the second article in this series.

Our story begins in the 1780s, with the period immediately following the American Revolution. Debt was everywhere, and British creditors—long denied—were hungry.

II. THE ECONOMIC AND POLITICAL SITUATION IN THE 1780S PROVIDES A CRITICAL BACKDROP FOR THE JUDICIARY ACT OF 1789 AND THE FIRST PROCESS ACTS

Taken together, the economic climate and resulting events in the mid 1780s fueled the push to create inferior federal courts with the Judiciary Act of 1789 and then vest control over final process in them with the first Process Acts.[43] There was a genuine fear of pro-debtor policies in the states and anxiety regarding the protection of the rights of both foreign and domestic creditors.[44] First, the postwar period was marred by a deflationary spiral, a recession, and rampant indebtedness.[45] Then, Shays' Rebellion—in essence a revolt by indebted rural farmers in Western Massachusetts against the final process imposed on them by their creditors—woke profound trepidation among elites regarding the debtor class.[46] Second, the Treaty of Paris expressly protected the rights of British creditors, and it was thought that the cooperation of those creditors, and by extension the British government, was necessary for the prosperity and success of the new nation.[47]

A. The Recession of the mid-1780s and Shays' Rebellion

> In order to judge rightly of the causes which led to the insurrections in Massachusetts in the year 1786, and the unfortunate rebellion which ensued, it will be necessary to

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[43] *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1018–19 (2007).

[44] *See id.* ("[D]ebtor-friendly state laws . . . represented shortsighted public policy. The mistreatment of foreign and domestic creditors, it was feared, would dry up sources of credit for the young nation and imperil the growth of the country's fledgling economy and commerce.").

[45] *Id.* at 1011–12.

[46] *See* Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1832–33 (2019).

[47] Michael D. Ramsey, *Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 420 (1999) (describing the Treaty of Paris's protection of British creditors against American debtors through the 1790s).

> take a view of the situation of that Commonwealth at the close of the war.[48]

The situation in the Commonwealth of Massachusetts and throughout the United States at the close of the war was one of debt.[49] Overwhelming debt. Excessive borrowing, an overextension and use of credit,[50] and tough post-war British trade policies led to a cascade of debt that rippled from the coastal cities and towns inland to rural subsistence farmers.[51] Then, the rapid devaluation of paper currency in the mid-1780s led to a recession and the inability of individuals and state and national governments to pay their debts as they came due.[52] Private debts were particularly outsized as the essential suspension of lawsuits to collect on debts during the war led to a surfeit of litigation at the war's conclusion.[53] Rural farmers found themselves especially heavy in debt with their farms heavily mortgaged.[54]

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[48] GEORGE RICHARDS MINOT, THE HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS IN THE YEAR SEVENTEEN HUNDRED AND EIGHTY-SIX, AND THE REBELLION CONSEQUENT THEREON 5 (2d ed. 1810).

[49] *See* Jones, *supra* note 43, at 1011–12.

[50] > The usual consequences of war, were conspicuous on the habits of the people of Massachusetts. Those of the maritime towns relapsed into the voluptuousness which arises from the precarious wealth of naval adventurers. An emulation prevailed among men of fortune, to exceed each other in the full display of their riches.

See MINOT, *supra* note 48. at 6.

[51] *See* DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 19 (1980) ("Some coastal wholesalers, seeking an extension of English credit for continued business activity, passed the demand for hard money to their own clients—the retail shopkeepers in the inland regions. Also struggling for financial survival, country store owners in turn tried to collect loans made to farmers. Accustomed to the payment in crops of debts owed to shopkeepers, some farmers quickly felt the effects of the mercantile intrusion upon their traditional world.").

[52] As we shall see, this would happen again, with familiar consequences, during the Panic of 1819. *See infra* Section VIII.A.

[53] *See* MINOT, *supra* note 48, at 28 ("The long restraints which the confusion of war had laid upon the administration of justice in private cases, occasioned a very rapid increase of civil actions, when those restraints were removed.").

[54] *See* Jones, *supra* note 43, at 1012–13 (describing the economic hardships of rural farmers in the mid-1780s).

At the same time, the courts "increasingly supported the sanctity of contract and provided a means for the regular collection of debts and loans."[55] Creditors haled farmers into court for nonpayment of debt and threatened them with loss of property or imprisonment.[56] The concerns of the indebted farmers, therefore, centered on the operations of the courts and the effect of final process, that is the process of execution, on themselves and their families. "Seizures of property infuriated the farmers. Living in a community-oriented society, they were indignant at the plight of friends and relatives."[57]

> Many had already "fared hard," had been haled to the hated Court of Common Pleas for nonpayment of debt, had judgment found against them with the court costs added to the original sum; had watched helplessly while the constable sold their property at a "vendue,"[58] and since nothing in hard times fetched more than a fraction of its worth, had the humiliation of losing their oxen without the satisfaction of settling the debt.[59]

Given the general distress, conventions of indebted farmers met, and a list of grievances was sent to the state legislature with a request that the legislature convene so that the grievances could be addressed.[60] Politics, however, moves slowly, and there was fear that the courts would move faster.

> Talk about Northampton court had been going on for a long time. All well and proper to petition, the farmers were telling each other, but General Court couldn't act on the

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[55] SZATMARY, *supra* note 51 at 13.

[56] MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789, at 240 (1966) ("[M]any a farmer who saw little hard money . . . was subject to court action, the loss of property, and even a debtor's prison, not only for his taxes but for his private debts as well.").

[57] *Id.* at 33.

[58] A public auction. *Vendue*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/vendue (Last visited Oct. 18, 2024).

[59] MARION L. STARKEY, A LITTLE REBELLION 14 (1955). "Everyone knew good men whom creditors had forced into debtors' prison. Everyone was faced with the specter of losing not only his livestock but the land itself, and with his land his standing as a freeman." *Id.*

[60] *See* MINOT, *supra* note 48, at 35.

> petitions until it met, and unfortunately the Court of Common Pleas was meeting first. For those on whom it passed judgment, the relief anticipated from General Court would come too late. Judgment would be passed, execution ordered, oxen seized, even fields lost just as they were ripe for harvest.[61]

When the state legislature adjourned without addressing their grievances in late August 1786, the frustration among the citizenry in rural Massachusetts at the impact of final process to their detriment simply boiled over. Approximately 1500 insurgents surrounded and closed the court of common pleas at Northampton and another 300 did the same in Worcester a week later.[62] A week after that, farmers and militants closed courts in Concord, Taunton, and Great Barrington.[63] Similar protests in other states were less successful.[64] The press of the time knew exactly what was going on—that this was a protest by debtors against the operation of the courts—and readily took up the pro-law and order position of the merchant-creditor class.

> In four counties [the courts] have been opposed, by armed bodies of men, and compelled to relinquish the seat of justice to a vile mob. … [A]n armed opposition to the sitting of the judicial courts, legally appointed, and to their administration of justice, is rebellion against the commonwealth; and, in its consequences, a total overthrow and subversion of the present government. The judicial courts being prevented from administering law and justice in the western counties, the inhabitants within those districts are completely deprived of all the benefits of law and government.[65]

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[61] *See* STARKEY, *supra* note 59, at 20.

[62] *See* MINOT, *supra* note 48, at 37–38.

[63] *See* SZATMARY, *supra* note 51, at 59.

[64] *See* THE MASSACHUSETTS CENTINEL (Bos.), Nov. 18, 1786, at 3 ("And further, that an attempt was lately made to prevent the due administration of law and justice in the State of Vermont—but that the rebellion was nipt in the bud, and that the desperadoes were immediately taken up and admitted to prison.").

[65] *To the Publick*, MASS. GAZETTE (Bos.), Oct 10, 1786, at 2. *See also Political Paragraphs, Massachusetts*, CONN. COURANT, WKLY. INTELLIGENCER (Hartford), Nov. 27,

The protests against the operations of the courts and the issuance of final process spread and grew into what appeared to be a full-blown violent insurrection, ostensibly led by Revolutionary War veteran Daniel Shays, [66] who was actively recruiting volunteers.[67] In response, the Governor of Massachusetts, James Bowdoin, proposed on January 4, 1787, the creation of a private militia led by former Continental Army General Benjamin

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1786, at 3 ("Conventions and Mobs! What is their object? Why to remove the legislature from Boston—to diminish the Governor's salary and all fees—to annihilate a certain court—and to declare the people a body of knaves by preventing the payment of public and private debts."). Few, it seemed were sympathetic to the plight of the farmers. As Abigail Adams noted in a letter to Thomas Jefferson:

> With regard to the Tumults in my Native state which you inquire about, I wish I could say that report had exagerated them. It is too true Sir that they have been carried to so allarming a Height as to stop the Courts of Justice in several Counties. Ignorant, wrestless desperadoes, without conscience or principals, have led a deluded multitude to follow their standard, under pretence of grievences which have no existance but in their immaginations. Some of them were crying out for a paper currency, some for an equal distribution of property, some were for annihilating all debts, others complaning that the Senate was a useless Branch of Government, that the Court of common Pleas was unnecessary, and that the Sitting of the General Court in Boston was a grieveince. By this list you will see, the materials which compose this Rebellion, and the necessity there is of the wisest and most vigorous measures to quell and suppress it.

Letter from Abigail Adams to Thomas Jefferson (Jan. 29, 1787), *in* 7 ADAMS FAMILY CORRESPONDENCE, *avilable at* https://www.masshist.org/publications/adams-papers/index.php/view/ADMS-04-07-02-0181 [https://perma.cc/94N7-P4HG].

[66] Although he would ultimately give his name to the rebellion, Shays insisted ever after that he was never its leader. Ablavsky, *supra* note 46, at 1833 ("This movement ultimately became known as Shays's Rebellion—the label affixed to it by its opponents, who used the name of one of its reluctant leaders. But the movement's participants used different terms, referring to themselves as the Regulators or sometimes 'a body of people.'").

[67] *See Rebellion in Massachusetts, Copy of a Letter from a number of Officers and Others, Convened at Pelham*, N.Y. J. WKLY. REG., Feb. 8, 1787, at 2 (reprinting letter signed by Shays dated January 15, 1787, that requested volunteers "well armed and equipped, with ten days provision.").

Lincoln to quash the nascent "rebellion."[68] Lincoln marched some 4,000 men west in mid-January 1787 to protect the county debtor courts.[69] On January 25, 1787, Shays led 1,200 insurgents in an attempt to capture the "stores" and "barracks" at the state armory at Springfield.[70] Upon being fired on, Shays' men "broke" and "retired in great confusion, leaving four dead and dying."[71] The insurgents retreated to Ludlow and then left the area around Springfield entirely.[72] Lincoln and his army pursued Shays and his men to Amherst, Pelham, and finally Petersham,[73] where on the morning of February 4, 1787, Lincoln launched a surprise attack on Shays' camp causing Shay and his men to scatter.[74] Shays and many men fled to Vermont.[75] Others to New York and beyond.[76] Sporadic Shaysite attacks would continue for several months before finally petering out in June 1787.[77]

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[68] *See* SZATMARY, *supra* note 51, at 85.

[69] *See id.*

[70] *See* Extract of a Letter from a Correspondent in General Sheppard's Army, Dated Jan. 27, at Springfield, N.Y. J. WKLY. REG., Feb. 8, 1787, at 2 (reporting that the objects of the insurgents were the "stores, which they were determined to carry at all hazards [and] the barracks and accommodations . . . for [Shays'] troops" (internal quotation marks omitted)).

[71] *Id.*

[72] *See id.*

[73] Richard D. Brown, *Shays's Rebellion and Its Aftermath: A View from Springfield, Massachusetts, 1787*, 40 WM. & MARY Q. 598, 609 (1983).

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> We came upon [Shays' camp] at nine o'clock in the morning—he never knew of our approach until we were within half a mile of him, and they all fled in parties of 30 and 40. We have taken about 150 of them, a few sleighs, &c. Shays has gone to Athol, a town about 8 miles from this, and it is supposed he will go on to Northfield, and quit the country, if possible—His men fired a few shots at our light-horse, but did no damage.

Extract of a Letter from Petersham, Dated Feb. 4, AM. RECORDER & CHARLESTOWN ADVERTISER (Mass.), Feb. 9, 1787, at 2.

[75] *See* SZATMARY, *supra* note 51, at 107–08.

[76] *See id.*

[77] *See id.* at 108–14.

B. The importance of Shay's Rebellion cannot be gainsaid.

The rebellion struck fear into the hearts of politicians and elites.[78] Not fear of physical harm necessarily, but fear of debtors and the "mob."[79] In part, this fear led to a desire for a stronger central government, which in turn led to the drafting and ratification of the U.S. Constitution in 1787–88.[80] In another part, the fear of debtors and a desire to protect creditors led to the development of inferior federal courts in the Judiciary Act of 1789 and federal control of final process with the temporary and permanent Process Acts of 1789 and 1792.[81] And, the first creditors that the economic and political elites wished to protect were British creditors, who were agitating to collect on debts owed them from before the war.[82]

C. British Creditors and the American Revolution

> Most British merchants packed their belongings carefully, including their account books, and went home full of

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[78] Darrell Miller, *Guns as Smut: Defending the Home-Bound Second Amendment,* 109 COLUM. L. REV. 1278, 1326–27 (2009).

[79] William Kambas, *The Development of the U.S. Banking System: From Colonial Convenience to National Necessity*, 28 RUTGERS L. REC. 4, 4 (2004).

[80] Miller, *supra* note 78, at 1326–27 ("The immediate reaction to Shays's Rebellion was fear, followed by resolution: fear that the new country would be consumed by inter- and intrastate factionalism, and resolution that a stronger national government would be required to preserve the peace . . . The Framers made pointed reference to Shays's Rebellion in their arguments for the Constitution."). So much so was the influence of Shays' Rebellion on the elite that John Quincy Adams believed opposition to the Constitution was tantamount to joining the insurgency.

> In our Government, opposition to the acts of a majority of the people is rebellion to all intents and purposes; and I should view a man who would now endeavour to excite commotions against this plan, as no better than an insurgent who took arms last winter against the Courts of Justice.

Entry in John Quincy Adams's Diary, *Adams Papers Digital Edition, Volume 2*, MASS. HIST., *available at* https://www.masshist.org/publications/adams-papers/index.php/view/ADMS-03-02-02-0003-0002-0007 [https://perma.cc/THY7-GXCQ].

[81] *See* Clark & Moore, *supra* note 24, at 391.

[82] Daniel Hulsebosch, *From Imperial to International Law: Protecting Foreign Expectations in the Early United States*, 65 UCLA L. REV. DISCOURSE 142, 150 (2018) (describing the prioritization of British creditors in the 1780s).

> bitterness and determined to collect the enormous debt once hostilities ended. They had to collect, since they were heavily in debt themselves. They wanted to collect, because, in the world of commerce and profits, contractual obligations are sacred and payment is the blood flow of life. The merchants owned the right to be repaid—with interest, they thought. It was only just.[83]

The American Revolution was rough for British loyalists, and particularly rough for British creditors.[84] Many states confiscated Loyalist property.[85] Others made it more difficult for British creditors to recover on any lawsuit[86] and others still simply closed the doors of their courts to the British.[87] Coupled with the general hostility toward British creditors was an environment in the states generally favorable to debtors. For example, in 1777, Pennsylvania acted to make bills of credit legal tender for payment of debts due to a shortage in specie caused by the war.[88] In 1799, the Maryland legislature responded to the issue of creditors refusing to accept payment of debts in bills by enacting a law that mandated the discharge of debt.[89] This law stipulated that if a debtor appeared at the creditor's dwelling place and, in front of a witness, tendered bills as repayment, the debt would be considered satisfied.[90] When Pennsylvania

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[83] Holt, *supra* note 5, at 1436.

[84] Daniel J. Hulsebosch, *Confiscation Nation: Settler Postcolonialism and the Property Paradox*, 33 YALE J.L. & HUMAN. 227, 231 (2022) (discussing the exclusion of loyalists from membership in the revolutionary society); Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 169–170 (2001) ("The outbreak of war . . . was a catastrophe for British Merchants. Colonial debtors naturally refused to pay their debts, leaving their creditors without any recourse.").

[85] Andrew Tutt et al., *Treaty Textualism*, 39 YALE J. INT'L L. 283, 327 (2014).

[86] Holt, *supra* note 6, at 1451–52.

[87] *Id.*; Harrington, *supra* note 84, at 179 ("Maryland, Virginia, North Carolina, and New Hampshire closed their courts to British creditors.").

[88] *See An act for making the Continental Bills of Credit, and the Bills of Credit emitted by the Resolves of the late Assemblies, legal tender, and for other purposes therein mentioned*, *reprinted in* DUNLAP'S PA. PACKET (Phila.), Feb. 4, 1777, at 2.

[89] *See A Supplement to the Act, entitled, An act to make the bills of credit issued by Congress and the bills of credit emitted by Acts of Assembly and Resolves of the late Convention, a legal tender in all cases*, *reprinted in* THE ROYAL GAZETTE (N.Y.C.), Jan. 26, 1780, at 2.

[90] *Id.*

repealed its bills of credit law upon specie becoming more plentiful in 1782, it still enacted protections for debtors, including delays in bringing suit on debts incurred prior to January 1, 1777, (six month delay) and prior to January 1, 1776 (two year delay).[91]

The war eventually came to an end, and the Treaty of Paris formally concluded the American Revolution in 1783.[92] The Treaty expressly protected the rights of British creditors. Among its provisions was article four, which provided: "It is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."[93] The article's inclusion was the product of negotiation, of course, but there can be no doubt that the American elite of the time favored making British creditors whole.[94] For example, an expatriate "gentleman of reputation and intelligence," wrote the following to a friend in New York:

> Mr. Jay is just arrived in London---I have not yet seen him, at Paris I had a long conversation with him and Dr. Franklin---they are both very hurt at the violent measures the states in general have adopted respecting the Loyalists; our national character is much lowered in the opinion of Europe, and nothing but a more generous conduct and a strong federal union with funds established for the payment of the interest of our debts will render us respectable.[95]

Please note that even at this early date there was economic elite interest in a "strong federal union" to protect creditor rights.

Elites aside, the general reaction to the Treaty's protection of British creditors at the expense of American debtors was swift and caustic. Upon

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[91] *See* ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA: CAREFULLY COMPARED WITH THE ORIGINALS, §§ 9–10, at 496 (1782).

[92] Definitive Treaty of Peace, Gr. Brit.-U.S., Sept. 3, 1783, 8 Stat. 80.

[93] *Id*.

[94] Hulsebosch**,** *supra* note 82, at 150 ("[T]he peace treaty created an asymmetry between American and British creditors—favoring the latter.").

[95] *NEW YORK, January 1. Extract of a Letter from London, dated October 24, 1783, from a Gentleman of Reputation and Intelligence, Who Lately Left this Country—to His Friend in this City, Dated October 24*, 1783*,* NORWICH PACKET, OR CHRON. FREEDOM (Norwich, Conn.), Jan. 15, 1784, at 3.

learning that a "Tory Lawyer" in September 1783[96] "had commenced suits for BRITISH DEBTS against some of our most active Whigs," an incensed citizen writing under the name *Sic Vos non Vobis*,[97] fulminated:

> If the report be true, it is high time for the Legislature to interfere. … It is not only necessary, that the Whigs should be guarded against an immediate sale of their property, but time should be allowed them to settle their affairs; and no suit should be commenced at this improper time for any British debt contracted before the war. The definitive treaty is not arrived; nor have the British given us possession of New York. How impolitic then in us to suffer BRITISH BLOOD-SUCKERS and TORY LAWYERS to harass and ruin our best Whigs.[98]

In response to opinions like this one, many states did in fact choose to interfere with the enforcement of rights in favor of British creditors.

D. State Resistance to the Treaty of Paris

> The fourth article of the treaty of peace between the United States and Great Britain … stipulated that creditors on either side were to "meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Until the federal circuit court opened in the spring of 1790, this article had been a dead letter as far as British creditors of Virginia citizens were concerned. [99]

The Treaty of Paris said what it said, but the states were in no mood to enforce its provisions as to British creditors, and at the time, state courts

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[96] Given that the Treaty of Paris had only been signed only on September 3, 1783, this evidently struck the letter writer as unseemly haste. *See* Definitive Treaty of Peace, *supra* note 92.

[97] *Sic Vos Non Vobis* translates to "For you, but not yours" in Latin. Vergil famously wrote this phrase on a wall after another poet, Bathyllus, plagiarized his work and claimed credit. Andreas Bieler, *"Sic Vos Non Vobis" (For You, But Not Yours): The Struggle for Public Water in Italy*, 67 MONTHLY REV., Oct. 2015, at 35.

[98] *See* Sic Vos Non Vobis, Letter to the Editor, INDEP. GAZETTEER; OR, CHRON. FREEDOM (Phila., Pa.), Sept. 13, 1783, at 3.

[99] Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176, 176 (1984).

were the only means of enforcement.[100] Virginia, where much of the private indebtedness to British creditors was concentrated,[101] provides an illustrative example. There, the legislature had in 1777 "sequestered" into the control of state-appointed commissioners all British property within the state,[102] permitted the satisfaction of British debts through payment of currency to a state loan office, and stayed all lawsuits in which British subjects were plaintiffs or executions in lawsuits where monies would accrue to a British subject.[103] The prohibition on recovery of British debts extended to those individuals to whom British creditors had assigned their debts in order to circumvent the law.[104] These laws remained on the books following the Treaty of Paris and there was no U.S. Constitution or Supremacy Clause with which to trump them. Moreover, from a political perspective, it was simply not possible for Virginia judges or juries to act impartially when it came to British debts.[105] Even when the laws preventing the recovery of British debts were ostensibly repealed in late 1787, the operation of the repeal was suspended pending return of forts of the United States which were occupied by British troops and the return of slaves owned by Virginians that had been seized by the British.[106] In effect, the state courts of Virginia were closed to British creditors until well into the 1790s.[107]

State recalcitrance on the subject of British creditors greatly vexed the nationalists of the day, who saw a productive relationship with Great

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[100] Harrington, *supra* note 84 at 179 (discussing reluctance of state courts to hear British creditors' claims); Holt, *supra* note 5, at 1458 (describing British creditors' optimism that federal courts, once invented, would provide a neutral forum more likely to hear their claims than the resistant state courts).

[101] *See* Emory G. Evans, *Private Indebtedness and the Revolution in Virginia, 1776–1796*, 28 WM. & MARY Q. 349, 349 (1971).

[102] The legislature formally confiscated the property in 1779. *See* THE REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 486–87 (1819).

[103] *See* 2 WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 377–80 (1823).

[104] *See id.* at 176.

[105] *See* Hobson, *supra* note 99, at 177.

[106] *See* HENING, supra note 103, at 528.

[107] *See* Hobson, *supra* note 99, at 180.

Britain as vital to American peace and prosperity.[108] Particularly vexed was John Adams, the first American ambassador to Great Britain, who was trying to negotiate with the British over some of the finer aspects of the peace. As Adams wrote to his friend Cotton Tufts in 1786:

> The most insuperable Bar, to all their Negotiations here, has been laid by those States which have made Laws against the Treaty. The Massachusetts is one of them. The Law for Suspending Execution for British Debts, however coloured or disguised, I make no Scruple to say to You is a direct Breach of the Treaty. … Are the Merchants afraid, the Tories will get their Commerce? What is this to the Country? Their Capitals will assist Us in Paying our Debts and in opening a Trade every Way. Are our Politicians afraid of their Places?[109]

Please recall that at the time, state courts were the only means for the enforcement of private debt contracts. That fact coupled with frustration with state governments and state political interests, such as that expressed here by Adams regarding payments to British creditors, led to the formation of inferior federal courts with the Judiciary Act of 1789 and federal court control of process with the first Process Acts. Following the Judiciary Act of 1789, there was a system of federal courts where creditors' rights could be enforced, and enforced through application of final process issuing from the federal courts themselves, without any reference to the laws or courts of the states.[110]

III. JUDICIARY ACT OF 1789

On Tuesday, April 7, 1789, Senators Ellsworth, Paterson, MaClay, Strong, Lee, Bassett, Few, and Wingate were appointed to a committee to draft a bill for the organization of the federal judiciary.[111] The committee

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[108] *See* David M. Glove & Daniel 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, 962–63 (2010) (describing Federalists' efforts to combat anti-British legislation).

[109] Letter from John Adams to Cotton Tufts (May 26, 1786), NAT'L ARCHIVES, *avilable at https://founders.archives.gov/?q=Project%3A%22Adams%20Papers%22%20Author%3A%22Adams%2C%20John%22%20british%20debt&s=1511311111&r=44* [https://perma.cc/66JR-MHD3].

[110] *See* Hobson, *supra* note 99, at 181–183.

[111] 1 ANNALS OF CONG. 18 (1789) (Joseph Gales ed., 1834).

reported on the bill on Friday, June 12, 1789.[112] The Senate began its consideration of the bill on Monday, June 22, 1789, and continued daily through Saturday, July 11, 1789.[113] The details of the Senate debate were not recorded.[114] The bill passed the Senate on Friday, July 17, 1789, and was sent to the House of Representatives for consideration.[115] The Senate's bill was viewed with skepticism by some. In a letter to Samuel Johnston dated July 31, 1789, James Madison wrote, "[t]he most that can be said in [the Judiciary Act's] favor is that it is the first essay, and in practice will be surely an experiment."[116] In the same letter, Madison expressed that the bill is "pregnant with difficulties" and contends that, because it is simply an experiment, it will be greatly improved in the House of Representatives.[117]

The debates on the bill in the House of Representatives *were* recorded. The debates began with a statement from Egbert Benson of New York[118]

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[112] *Id.* at 47.

[113] *Id.* at 47–50.

[114] The Senate met behind closed doors until the 2d session of the Third Congress. This explains the sketchiness of the reporting on the Senate proceedings in the first two Congresses. Although the debates on the Judiciary Act of 1789 were not recorded, Charles Warren has analyzed and discussed the initial draft bill, the original amendments to the draft bill, and the bill in the form that it passed the Senate and was sent to the House of Representatives. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

[115] 1 ANNALS OF CONG. 51 (1789) (Joseph Gales ed., 1834).

[116] Letter from James Madison to Samuel Johnston, (July 31,1789), NAT'L ARCHIVES, *avilable at* https://founders.archives.gov/documents/Madison/01-12-02-0204 **[**https://perma.cc/6P3V-9HS8]. [Original source: *The Papers of James Madison*, vol. 12, *2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789*, ed. Charles F. Hobson & Robert A. Rutland. Charlottesville: University Press of Virginia, 1979, pp. 317–318.]

[117] *See id.* In a speech given in the House of Representatives on February 19, 1802, James A. Bayard, the Representative from Delaware, echoed Madison and asserted that the "[former judicial system] could not be more than experiment; it was built upon no experience." 11 ANNALS OF CONG. 622 (1802).

[118] In addition to representing New York in the Continental Congress, Egbert Benson was a member of the U.S. House of Representatives, founded the New York Historical Society, was New York Supreme Court's chief justice, a judge for the United States circuit court for the second circuit, and New York's first Attorney General. Stanton D. Krauss et al., *New Light on the History of Free Exercise Exemptions: The Debates in Two Eighteenth-Century State Legislatures*, 71 CATH. U. L. REV. 763, 769 (2022) (describing Benson's

that neatly illustrated (at least in the House) the expedient and *ad hoc* nature of these proceedings at the close of the first session of the First Congress. Not only for the Process Acts, but also for the Judiciary Act of 1789 itself.

> Mr. BENSON said, the Senate had employed a great deal of time in perfecting this bill, and, he believed, had done it tolerably well; beside, the session was now drawing to a close; he therefore wished as few alterations as possible to be made in it, lest they should not get it through before the adjournment.[119]

Substantively, the debates in the House in most part focused on the wisdom of establishing federal courts inferior to the Supreme Court, with the concerns concentrating on fear of federal court encroachment on state judicial power.[120] The following comments are typical of those *opposed to* the creation of inferior federal courts.

> Mr. TUCKER was in favor of striking out the whole clause, and against dividing the United States into districts, for the purpose of instituting inferior Federal courts. He said the State courts were fully competent to the purposes for which these courts were to be created, and that they would be a burdensome and useless expense.[121]

> Mr. LIVERMORE. Will any gentleman say that the Constitution cannot be administered without this

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career as a representative of New York in the First Congress and as the state's first Attorney General); Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 576 (2012) (discussing Benson's political and judicial careers).

[119] 1 ANNALS OF CONG. 812 (1789) (Joseph Gales ed., 1834).

[120] The Supreme Court is the only federal court explicitly named in the Constitution. Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. This Constitutional mandate to establish a supreme court led to section one of the Judiciary Act of 1789, which set up and organized the Supreme Court of the United States; establishing the number of justices, quorum requirements, the term of the Court, and the seniority of the associate justices. There was no Constitutional mandate to establish inferior federal courts.

[121] 1 ANNALS OF CONG. 813 (1789) (Joseph Gales ed., 1834).

> establishment? I am clearly of a different opinion; I think it can be administered better without than with it. There is already in each State a system of jurisprudence congenial to the wishes of its citizens. I never heard it complained that justice was not distributed with an equal hand in all of them; I believe it is so, and the people think it so. We had better then continue them than introduce a system replete with expense, and altogether unnecessary. … Now, if the State courts have hitherto had cognizance of similar cases, and proceeded on them with impartiality, what occasion is there for a new institution? I cannot possibly conceive it, unless it be to plague mankind.[122]

Similarly, the following comments are typical of those *in favor of* establishing inferior federal courts essentially arguing that inferior federal courts were essential to federal judicial power under the Constitution.

> Mr. SMITH. With respect to the first point, it seems generally conceded that there ought to be a district court of some sort. The Constitution, indeed, recognises such a court, because it speaks of "such inferior courts as the Congress shall establish;" and because it gives to the Supreme Court only appellate jurisdiction in most cases of a federal nature. …[123]
>
> Mr. BENSON. [I]f the House decided [against establishing inferior federal courts], it would involve a total abandonment of the judicial power, excepting those cases the honorable gentlemen mean to provide for, namely, the Courts of Admiralty and Supreme Courts. The honorable gentleman had observed that difficulties would arise out of the proposed establishment; but these difficulties or embarrassments are not to be charged to the House, they grow out of the Constitution itself.[124] Mr. SEDGWICK . . . I shall only remark, that we are so circumstanced that two distinct independent powers of judicial proceedings must exist; at least I do not see how

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[122] *Id.* at 813–14.

[123] *Id.* at 828.

[124] *Id.* at 835.

> we shall get rid of the difficulty, if it is one, until there shall be a change in the Constitution.[125]

Underpinning the entire debate, however, were the competing rights of debtors and creditors.[126] Samuel Livermore of New Hampshire[127] was particularly concerned about the rights of debtors in the proposed federal courts.

> Mr. LIVERMORE. The bill proposes that the State courts shall have concurrent jurisdiction with the district courts. Now under these two establishments debtors may be worried and distressed more then is necessary for the plain and simple administration of justice. A debtor may be in the custody of a State officer, or he may be committed to prison; at the same time there comes an officer from the Continental court, what is to be done with the unfortunate person? Is the man to be divided, that one half may appear in one court, the other in another?[128]

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[125] *Id.* at 856.

[126] *See, e.g.*, Holt, *supra* note 5, at 1458 ("Courts and juries usually help creditors collect debts. But in the new United States during the democratic and depression-ridden 1780s, the tables were turned. John Marshall found that Virginia court reform in 1784 was opposed by those who were 'against every Measure which may expedite & facilitate the business of recovering debts & compelling a strict compliance with contracts.' A solution to this problem was to establish federal courts, whose judges might not be so susceptible to local clamor raised by debtors and whose marshals might select a different sort of jury, or who might sit without a jury in the fashion of equity and the civil law.").

[127] Samuel Livermore, a New Hampshire Senator and representative in the First Congress, opposed the Federal Judiciary Act of 1789 and later voted mostly with the Federalists. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1165 (2013) (describing Livermore's career, politics, and speeches during the First Congress).

[128] 1 ANNALS OF CONG. 827 (1789) (Joseph Gales ed., 1834). Although he was obviously concerned about the person of the debtor, Livermore was far less worried about that of a criminal defendant. In the debates on what would become the Eighth Amendment, he somewhat acidly noted: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?" *Id.* at 782–83.

Livermore spoke again on the subject two days later.

> Another burden, he said, was the rapidity in the course of prosecution in [the federal] courts, by which debtors would be obliged very suddenly to pay their debts at a great disadvantage. Something like this occasioned the insurrection in the Commonwealth of Massachusetts.[129] In other States, similar modes of rapidity in the collection of debts have produced conventions. … This new fangled system would eventually swallow up the State courts, as those who were in favor of this rapid mode of receiving debts, would have recourse to them.[130]

In opposing arguments like those made by Livermore, Theodore Sedgwick of Massachusetts[131] got right to the point. He outlined one of the main reasons behind the establishment of inferior federal courts, creating judicial fora in which debts to British creditors could be enforced.[132] In this regard, the state courts, as they favored debtors pursuant to state legislation, were not to be trusted.[133]

> Mr. SEDGWICK. [For the] United States … a single concession was the price of an honorable peace [with Great Britain following the American Revolution]. The discharge of *bona fide* debts due from the citizens of America to the subjects of Britain was all that Britain required. Now, is it not obvious to every man, that this

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[129] Livermore here is referring to Shays' Rebellion. *Id.* at 852.

[130] *Id.*

[131] Theodore Sedgwick was a Federalist, representative in the First Congress, member of the U.S. House of Representatives, Senator, Speaker of the House of Representatives, and a judge on the Massachusetts Supreme Judicial Court. *See* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment,* 86 IND. L.J. 979, 1060 n.425 (2011); Deanell Reece Tacha, *Judges on Judging: Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 287 n.46 (1991).

[132] *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496–97 (1925) ("[W]e may say that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction, and that as a reason it was by no means without validity.").

[133] *See* THE FEDERALIST NO. 80 (Alexander Hamilton) (arguing in part for the need to establish federal courts in order to protect foreigners).

> honorable stipulation ought by all means to be considered the supreme law of the land? Yet, what was the event? State after State, Legislature after Legislature, made laws and regulations in positive opposition to the treaty; and the State judiciaries could not, or did not, decide contrary to their State ordinances.[134]

To Sedgwick and many others, the states' failure to honor debts to British creditors created an "ignominious stain" that should "put us on our guard against trusting essential powers out of our hands, contrary to our duty, and contrary to the wishes of the people."[135] This notion that only *federal* courts could be trusted to respect the rights of creditors would underlie the first Process Acts as well.[136]

Following the debates, the Judiciary Act passed the House on September 17, 1789.[137] As the House had amended the original Senate bill, the legislation was returned to the Senate for the Senate's approval.[138] The Senate struck several of the House amendments and passed the bill on September 19, 1789. The House concurred and voted to approve the legislation without debate on September 21, 1789.[139] The Judiciary Act of 1789 was signed into law by President George Washington on September 24, 1789.[140]

The new legislation established the federal judiciary (except for the Supreme Court itself, which had been established by the Constitution).[141] It set the number of Supreme Court justices at six[142] and divided the nation into thirteen judicial districts,[143] each with a district court and one district

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[134] 1 ANNALS OF CONG. 836–37 (1789) (Joseph Gales ed., 1834).

[135] *Id* at 837.

[136] Federal courts were enforcing the rights of British creditors. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Jones v. Walker, 13 F. Cas. 1059 (C.C.D. Va. 1800) (No. 7507).

[137] 1 ANNALS OF CONG. 928–29 (1789) (Joseph Gales ed., 1834).

[138] *See id.* at 933–37.

[139] *Id.* at 937.

[140] *Judiciary Act of 1789: Primary Documents in American History*, LIBR. CONG. (May 20, 2021), https://guides.loc.gov/judiciary-act [https://perma.cc/5HXA-KDM5] (discussing the date that Washington signed the Act).

[141] *Id.*

[142] Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. at 73.

[143] *Id.* § 2, 1 Stat. at 73.

judge.[144] The act also grouped the district courts (with the exception of those in Maine and Kentucky) into three circuit courts: the eastern, middle, and southern.[145] The district courts in Maine and Kentucky were designated to serve as their own circuit courts.[146] The act further prescribed the judicial oath of office,[147] permitted the appointment of clerks,[148] and set forth the subject matter jurisdiction for the district courts, circuit courts, and the Supreme Court.[149]

The Judiciary Act of 1789 also contained, in section 34, what would become known as the Rules Decision Act. Maddeningly vague, section 34 provided as follows:

> *And be it further enacted*, 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.[150]

The meaning of this provision would prove elusive for 150 years until *Erie Railroad Co. v. Tompkins*[151] was decided by the Supreme Court in 1938. In *Erie*, the Court overruled *Swift v. Tyson*[152] and held that the Rules Decision Act compels federal courts sitting in diversity to apply the law of the applicable state, whether legislative or common law. "[T]he law to be applied in any case is the law of the state. And 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. There is no federal general common law."[153] Although there was some confusion in its early application,[154] the Rules Decision Act was always deemed to apply to a

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[144] *Id.* § 3, 1 Stat. at 73.

[145] *Id.* § 4, 1 Stat. at 74.

[146] *Id.* § 10, 1 Stat. at 77–78.

[147] *Id.* § 8, 1 Stat. at 76.

[148] *Id.* § 7, 1 Stat. at 76.

[149] *Id.* §§ 9, 11–13, 1 Stat. at 76, 78–81.

[150] *Id.* § 34, 1 Stat. at 92.

[151] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938).

[152] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

[153] *Erie*, 304 U.S. at 78.

[154] *See* United States v. Mundell, 27 F. Cas. 23, 31 (C.C.D. Va. 1795) (No. 15,834) (holding that federal court must apply state rule regarding mode of *capias ad*

state's substantive law (however that was defined) and not its system of procedure. Procedure and process were for the Process Acts.

In addition to setting up and organizing the federal court system, the Judiciary Act of 1789 included several hints as to the procedural framework that would guide the federal courts. For example, section 14 of the act provided that the federal courts "shall have the power to issue writs of *scire facias*, *habeas corpus*, *(e)* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[155] The act further provided that the federal courts could "require the parties to produce books or writing in their possession or power, which contain evidence pertinent to the issue;"[156] "make and establish all necessary rules for the orderly conducting [of] business in the said courts;"[157] and stay executions for 42 days on judgments entered in the circuit courts.[158] Additionally, the Judiciary Act provided that a writ of error shall serve as a supersedeas;[159] that depositions were authorized under certain circumstances;[160] and that defects in the form of writs would not affect their enforceability.[161] In short, the Judiciary Act of 1789 provided a fair amount of detail on the practices and procedures to be employed in the federal courts. Nevertheless, something more was required; specifically, rules for the issuance and application of final process.[162]

IV. THE IMPORTANCE OF FINAL PROCESS

Process is power. Specifically, process is "the paper which issues from the Court, and is an authority to the officer to do that which it

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satisfaciendum (as to requirement of bail upon service) under the Rules Decision Act, and not under the Process Acts).

[155] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81–82.

[156] *Id.* § 15, 1 Stat. at 82.

[157] *Id.* § 17, 1 Stat. at 83.

[158] *Id.* § 18, 1 Stat. at 83.

[159] *Id.* § 23, 1 Stat. at 85.

[160] *Id.* § 30, 1 Stat. at 88–89.

[161] *Id.* § 32, 1 Stat. at 91.

[162] *See* Warren, *supra* note 25, at 427 (stating that the "first bill for regulating Federal process was considered by Congress during the later days of the debates on the Judiciary Act, (which distributed and regulated the jurisdiction of the Federal Courts but which contained no provisions as to process, except the grant of power to issue certain writs).").

commands."[163] It is not the paper itself that is important of course; it's the power behind the paper. Now, the holes in the procedural framework put in place by the Judiciary Act of 1789 were significant. As noted, rules for the application of final process were lacking, and, without them, enforcement of judgments in favor of creditors, or for that matter in favor of anyone, would be difficult if not impossible. Final process has been described as the "fruit" or "life" of the law.[164] And, in civil cases involving money judgments, so it is. "For a commercial community it is of great importance that the legal machinery for collecting debts should be both just and swift … But … expedition in arriving at a judgment is of little worth unless proper means are supplied for enforcing the payment of the judgment."[165] Without the power to enforce through final process, a court's judgment is nothing more than an abstraction; in effect, an advisory opinion.

In his *Commentaries*, William Blackstone provides a discussion of process and procedure contemporaneous with the Judicial Act of 1789 and the first Process Acts.[166] Blackstone examined both the step-by-step of litigation and the nature and importance of process. As for the step-by-step, Blackstone outlined it neatly: "The general therefore and orderly parts of a suit are these; 1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment, and its incidents: 7. The proceedings in nature of appeals: 8. The execution."[167]

Blackstone then devoted individual chapters to the various "parts of a suit" noted above. Of particular importance to the discussion here is Blackstone's discussion of process.

Blackstone distinguished process from the step-by-step of the proceedings.

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[163] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 32 (1825).

[164] *See* HERMAN, *supra* note 1, at 1.

[165] Shippen Lewis, *Eliminating Archaic Features of Execution Process in Pennsylvania*, 63 U. PA. L. REV. 652 (1915).

[166] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *270. After discussing remedies and jurisdiction, "I am now, in the last place to examine the *manner* in which these several remedies are *pursued* and applied, by action in the courts of common law . . . ." *See id.* at *271 ("What therefore the student may expect in this and the succeeding chapters, is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of . . . .").

[167] *Id.* at *272.

> THE next step for carrying on the suit, after suing out the original [writ], is called the *process*, being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. *Mesne* process is also sometimes put in contradistinction to *final* process, or process *of execution*, and then it signifies all such process as intervenes between the beginning and the end of a suit.[168]

Process therefore describes, in essence, the very power of the court. That is the power to compel. The power to compel the defendant to appear in court and answer the original writ *via* original process. The power to compel witnesses to provide testimony through *mesne* process. And, critically, the power to enforce judgments through final process or the process of execution.

It is this concept of final process or the process of execution that merits the most discussion. Indeed, Samuel Livermore, a member of the House of Representatives from New Hampshire, correctly forecast the problems associated with a failure to specify the mode and nature of final process during the debates on the Judiciary Act of 1789.

> Mr. LIVERMORE. But after the trial follow judgment and execution. Now what mode will you pursue to complete your process? There are various ways of levying an execution in the different States; in some States the land is attached; in others, the personal estate; sometimes the debtor is confined in jail, or, in case he breaks jail, the county has to pay the debt. I hope the Government will not adopt this last mode, or escapes may be made in great number. I apprehend we shall find the execution offer no inconsiderable obstacle to our system.[169]

A specification of the mode of final process or the process of execution is vital as "[i]t is the end in both the English senses of the word, being not only the final proceeding in an action, but the object also, for which the

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[168] *Id.* at *279.

[169] 1 ANNALS OF CONG. 784 (1789) (Joseph Gales ed., 1834).

action is prosecuted, putting the party into actual possession of the lands, goods, or money to which he is entitled."[170] In other words, final process not only embodied the very thing that the plaintiff sought, but also the very real impact of the legal proceedings on the person of the defendant. And that impact could be quite severe indeed.

According to Blackstone, where money only is recovered, the successful plaintiff has recourse to five modes of execution: "either against the body of the defendant, or against his goods and chattels; or against his goods and the *profits* of his lands; or against his goods and the *possession* of his lands; or against all three, his body, lands, and goods."[171] These modes of execution took the form of writs, the most common which were: *capias ad satisfaciendum*, the "intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages";[172] *fieri facias*, which authorized the seizure of goods in satisfaction of a debt;[173] and *levari facias*, which authorized not only the seizure of goods, but also a levy on profits from land.[174] The application of these writs and their effect took various forms throughout the original states, and were subject to alterations from state legislatures.

Debtors were at the mercy of these modes of execution following a successful lawsuit for the collection of money. Indeed, because process described the true power of a court to compel, the process of execution provided the only means to collect a debt from a recalcitrant debtor.[175] And the use of that power—in particular, the power to imprison for indebtedness—could extract an enormous toll on the person of the debtor, and by extension, the debtor's family, business associates, and other creditors.[176] "By the law of imprisonment for debt ... a creditor could put his debtor in prison and keep him there, until he starved to death or paid the debt, and that without any regard to the merits or demerits of his

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[170] HERMAN, *supra* note 1, at 1–2.

[171] BLACKSTONE, *supra* note 166, at *413.

[172] *Id.* at *414. Of course, this most severe writ for the collection of money owed could not be used "against any privileged persons, peers or members of parliament, nor against executors or administrators." *Id.*

[173] *Id.* at *417.

[174] *Id.*

[175] *See id.* at *412–14.

[176] *See* HERTTELL, *supra* note 31, at 14.

prisoner."[177] In other words, the power of final process was formidable, a power to be reckoned with.

V. THE THREE PHASES OF FEDERAL CIVIL PRACTICE PRIOR TO 1938

Following the passage of the Judiciary Act of 1789, Congress, apparently recognizing the need for a least some type of procedural framework to apply in the federal district courts, enacted the first of several "Process Acts" to control that procedure.[178] The Process Acts controlled federal court procedure until the enactment of the Federal Rules of Civil Procedure in 1938.[179] The pre-1938 period subdivides into three major phases defined by the Process Acts; that is, the federal legislation enacted by Congress to regulate process and procedure in the federal district courts: (1) 1789 to 1828, when the federal courts in the original states were directed to use state practice in existence as of a single date, September 29, 1789; (2) 1828 to 1872, when the date the federal court used as the reference point for state practice, if it followed state practice at all, depended on the state's date of admission to the United States, thus creating different dates certain for different states;[180] and (3) the phase from 1872 to 1938, in which the federal courts—pursuant to the Conformity Act of 1872—followed state practice existing at the time the lawsuit was filed, not as of a date certain.[181] It is important to note that the adherence to state procedural rules was far from mandatory as the federal courts had ample discretion to pick and choose state rules to follow or to create their own.[182] This procedural autonomy was a feature of the system, and not a bug.

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[177] *Id.* at 13.

[178] Process Act of 1789, ch. 21, 1 Stat. 93.

[179] Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 77 (2007).

[180] Charles Clark used the labels "static conformity" for the phase from 1789–1828, and revised "static conformity" for the phase from 1828–72. In both cases, he was describing the situation where the federal courts theoretically adhered to state procedure as of a certain date. *See* Clark & Moore, *supra* note 24, at 399–401.

[181] *See id.* at 401.

[182] *See id.* at 403–04.

VI. THE FIRST PROCESS ACTS, THE RANDOLPH REPORT, AND THE JUDICIARY ACT OF 1793

The period immediately following passage of the Judiciary Act of 1789 is replete with critical developments in the early evolution of the federal judiciary. The developments were many, but a key thread running through this time was a preoccupation with process, specifically final process, issuing from the federal courts.

A. The First or Temporary Process Act

The first Process Act[183] provided in part:

> That until further provision shall be made . . . the forms of writs and executions, except their style, and modes of process . . . in the circuit and district courts, in suits at common law, *shall be the same in each state respectively as are now used or allowed in the supreme courts of the same*. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of civil law.[184]

The first Process Act was passed on September 29, 1789, five days after the passage of the Judiciary Act of 1789,[185] which established the federal court system. The debates on the Judiciary Act in the First Congress were extensive,[186] with much of the discussion focused on the creation of lower federal courts in each of the states.[187] The debates on the

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[183] According to Julius Goebel, Jr. in the first volume of the *History of the Supreme Court of the United States*, the First Process Act was a "younger brother, so to speak, of the more famous [Judiciary Act of 1789], but doomed to be little regarded by historians, for the subject matter was hardly such to captivate those to whom the larger aspects of institutional development were to be more beguiling." JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 509 (1971).

[184] Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (1789) (emphasis added).

[185] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789).

[186] *See* 1 ANNALS OF CONG. 813 (1789) (Joseph Gales ed., 1834). As the Senate debated in closed session until midway through the Third Congress, the only debates available from the First and Second Congresses are those in the House of Representatives. *See* MILDRED AMER, SECRET SESSIONS OF THE HOUSE AND SENATE 2 (2008) ("The Senate met in secret until 1794.").

[187] *See, e.g.*, *id.*at 833 ("The word 'may' is not positive, and it remains with Congress to determine what inferior jurisdictions may be necessary, and what they will ordain or

Process Act were far less so, with the only discussion extant related to in whose name writs should issue.[188] In the context of the debate on the Judiciary Act itself, there *was* mention of which mode of execution following judgment the district courts should follow, and the problems that could arise in selecting the appropriate mode.[189] Now, certainly the *form* of an execution was in the contemplation of the first Process Act, and so to was the execution remedy itself as it was considered part of the "modes of process" expressly mentioned in the act. As explained 30 years later by Chief Justice Marshall in *Wayman v. Southard*,[190]

> The term [process] is applicable to writs and executions, but it is also applicable to every step taken in a cause. It indicates the progressive course of the business from its commencement to its termination; and "modes of process" may be considered as equivalent to modes or manner of proceeding.[191]

However, none of this clearly answered the question as to whose rules—federal or state—would control process. Selecting the mode of execution and how it was to be applied was no small matter, as at the time, debtors could be imprisoned for failure to pay debts as they came due.[192] Recall that this issue was raised by Samuel Livermore during the debates of the Judiciary Acy of 1789 itself. [193] In this regard, Livermore was prescient given the circumstances that led to the enactment of the 1828

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establish; for if they choose or think that no inferior jurisdictions are necessary, there is no obligation to establish them."). Some of the opposition to the creation of lower federal courts was quite florid. *See id.* at 814 ("Now, if the State courts have hitherto had cognizance of similar cases, and proceeded on them with impartiality, what occasion is there for a new institution? I cannot possibly conceive it, unless it be to plague mankind.").

[188] *See id.* at 949 ("The first amendment was to strike out the words 'the President thereof' in the first clause; which declared, that 'all writs or processes, issuing out of the Supreme or Circuit Courts, should be in the name of the President of the United States,' so as to allow writs and processes to issue only in the name of the United States.").

[189] *See id.* at 814 ("I apprehend we shall find the execution offer no inconsiderable obstacle to our system.").

[190] 23 U.S. (10 Wheat.) 1 (1825).

[191] *Id.* at 27–28.

[192] *See* Nino C. Monea, *A Constitutional History of Debtors' Prisons*, 14 DREXEL L. REV. 1, 8 (2022).

[193] 1 ANNALS OF CONG. 814 (1789) (Joseph Gales ed., 1834).

Process Act some thirty years later, in which substantial consternation arose during the Panic of 1819 regarding the modes of execution the federal district courts were employing following judgment.[194]

The first Process Act was reported out of committee in the Senate on September 17, 1789.[195] Although the reported bill does not appear in the *Annals of Congress*, it is included in *The Documentary History of the Supreme Court of the United States, 1789–1800*. The bill and its history provide deep clues as to the divisions within Congress with regard to the autonomy of the federal judiciary.

Whereas the Judiciary Act set up the overall structure of the new federal court system, the Process Act was intended to supply the technical rules by which the courts would be guided. But, as with the Judiciary Act, those who favored a strong, centralized federal court system had to contend with those who feared a loss of autonomy by the individual states.[196] At the outset, it is clear that the bill—inasmuch as it proscribes a uniform set of rules for the federal judiciary—is the work of those interested in a consolidated federal government, an autonomous federal judiciary, and a coherent procedural framework. There is little in the reported bill that mandates the tying of federal judicial practice to that in the states. Indeed, the bill reads like a mini-Federal Rules of Civil Procedure, with provisions related to original process and commencement of civil actions: action commenced by process, summons or *capias ad respondendum*, which compelled the defendant to appear or which authorized the actual seizure

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[194] It should be noted that Livermore was vehemently against the establishment of lower federal courts (and perhaps the establishment of a federal judiciary at all). As he stated immediately following the passage quoted in the text.

> Now, why engage in a plan so obnoxious and difficult without necessity? Gentlemen will not pretend to be afraid of erroneous decisions, because they may be subject to appeal and revision, which furnishes as great security as it is possible to have in any system of jurisprudence whatever. For my part, I contemplate with horror the effects of the plan; I think I see a foundation laid for discord, civil wars, and all its concomitants. To avert these evils, I hope the House will reject the proposed system.

Id. at 814.

[195] *See id.* at 80.

[196] 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, 108 (Maeva Marcus et al. eds., 1992).

of the defendant (with the forms of the writs included),[197] some type of preliminary notice to the defendant of the charges against him,[198] the requirement that the defendant respond to the action,[199] default judgments,[200] and more. Importantly, the reported bill also provided in detail for the process of execution, including the use of a *capias ad satisfaciendum* "in the first instance."[201]

In the debates that followed the reporting of the bill, the Senate largely stripped the bill of the uniform federal rules and instead *seemingly* endorsed wholesale reliance on state rules on practice and process, rather than just as to the modes of executions provided for in the reported bill.[202] The stripped-down bill was sent to the House where there was disagreement as to in whose name writs should issue.[203] The Senate bill listed the name of the President, and the House, as ever fearing a creeping royalism, vehemently disagreed.[204]

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[197] *See id.* at 115.

[198] *See id.* at 116.

[199] *See id.*

[200] *See id.* at 117.

[201] *See id.* at 117–18.

[202] This occurred over the course of two days as the Senate passed the bill on September 19, 1789, and then sent it to the House. 1 ANNALS OF CONG. 82 (1789) (Joseph Gales ed., 1834); *see id.* at 903 (receipt of the bill in the House). "By September 19, when the bill was sent to the House, its twelve sections had been reduced to two. The details of this rather dramatic excision are largely unknown, as the Senate debate was not reported." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 196, at 110.

[203] The first amendment was to strike out the words "the President thereof" in the first clause; which declared, that "all writs or processes, issuing out of the Supreme or Circuit Courts, should be in the name of the President of the United States," so as to allow writs and processes to issue only in the name of the United States. On agreeing to the motion for striking out these words, the yeas and nays were called . . . .

1 ANNALS OF CONG. 914 (1789) (Joseph Gales ed., 1834).

[204] Mr. STONE hoped the House would insist upon their amendment. He thought substituting the name of the President, instead of the name of the United States, was a a declaration that the sovereign authority was vested in the Executive. He did not believe this to be the case. The

The first Process Act only *seemingly* directed federal court reliance on state rules on practice and process. In reality, the nod in the direction of state rules and state interests was nothing more than a feint; the federal courts retained control of all process issuing from their respective courts and could apply whatever rules of practices that they wished.[205] Examination of a more complete rendition of the first Process Act makes this clear.

> That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of civil law … *Provided*, That judgments in any of the cases aforesaid where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out *capias ad satisfaciendum* in the first instance and be at liberty to pursue the same until a tender of the debt and costs in gold or silver shall be made.[206]

In short, Congress dictated that in "suits at common law," the federal courts shall follow the procedures of the state courts in the states in which they sat, *as that procedure existed on September 29, 1789*; and in "causes

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> United States were sovereign; they acted by an agency, but could remove such agency without impairing their own capacity to act. He did not fear the loss of liberty by this single mark of power; but he apprehended that an aggregate, formed of one inconsiderable power, and another inconsiderable authority, might, in time, lay a foundation for pretensions it would be troublesome to dispute and difficult to get rid of. A little prior caution was better than much future remedy.

Id. at 916.

[205] *See* Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (1789).

[206] *Id.* (emphasis added).

of equity," the procedure shall be different, "according to the course of civil law" (this created a formal procedural division between law and equity).[207] *But*, there was one writ or mode of proceeding not dependent on state law and over which the federal courts retained complete control: the writ of *capias ad satisfaciendum*—the harshest form of execution. The first Process Act permitted a judgment holder to use the writ of *capias ad satisfaciendum*—and thereby summarily imprison a debtor—*in the first instance* even when other writs were permitted to be used in succession "until a tender of the debt and costs in gold and silver shall be made."[208] Requiring the satisfaction of the debt in gold or silver was particularly severe as access to specie was limited. So, even though the federal courts were supposedly required to apply state rules, a federal remedy for imprisoning a debtor was preserved and could be used in the *first instance*.[209] No provision was made for states admitted after 1789.[210] By its terms, the act was temporary and would last only to the conclusion of the next Congress, unless renewed.[211]

B. The Randolph Report

At the time, no one thought that the Judiciary Act of 1789 or the first Process Act were the last word on the federal judiciary. Rather, most believed that change would come as experience revealed flaws in the system. The focus was on process issuing from the federal courts. As stated by President Washington in his address to Congress in 1790:

> The laws you have already passed for the establishment of a judiciary system have opened the doors of justice to all description of persons. You will consider, in your wisdom, whether improvements in that system may yet be made; and, particularly, *whether a uniform process of execution on sentences issuing from the federal courts*, be not desirable through all the States.[212]

In response to Washington and on its own, Congress actively sought out recommendations for improvement, and specifically sought

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[207] *Id.*

[208] *Id.* § 2, 1 Stat. at 93–94.

[209] *Id.*

[210] *Id.*

[211] *Id.* § 3, 1 Stat. at 94.

[212] 2 ANNALS OF CONG. 1730 (1791) (emphasis added).

recommendations from the Attorney General of the United States Edmund Randolph.[213] Randolph proposed loosening the ties between federal and state practice and in particular proposed normalizing the modes and application of final process across all federal courts in his report to the House of Representatives dated December 27, 1790.[214] The report was in response to an order from the House dated August 5, 1790.[215] In the report, Randolph specifically proposed that:

> [The] writs, summonses, and other process [that] shall be issued from the several district courts for the commencement and prosecution of any civil action, suit, or matter therein; and that the forms and modes of proceeding in conducting the same to a trial or hearing *shall be such as the Supreme Court … shall direct*.[216]

In other words, process would be directly controlled by the federal courts. Until the Supreme Court made the direction, the federal practice would adhere to that of the state in which the federal court sat, *but not as to a date certain*.[217] The federal court would adhere to the contemporary procedure in the state court, not a past procedure. Randolph went even further and recommended that the district courts limit the writs they issued in connection with execution process to four: *elegit*, *capias ad satisfaciendum*, *fieri facias*, and *levari facias*.[218]

Randolph proposed to normalize the modes of final process in the federal courts because, as he himself put it in note 16 to his report:

> These four forms of execution are intimately known to every lawyer in the United States, being among the

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[213] *See id.* at 1799. From Virginia, Edmund Randolph was the state's governor, a delegate for the state at the Constitutional Convention, the nation's first Attorney General in 1789, and the Secretary of State in 1794. Scott Ingram, *Presidents, Politics, and Pardons: Washington's Original (Mis?)Use of the Pardon Power*, 8 WAKE FOREST J.L. & POL'Y 259, 318 n.34 (2018) (describing Randolph's career).

[214] *See* 2 ANNALS OF CONG. 1838–39 (1791); 1 AMERICAN STATE PAPERS: MISCELLANEOUS 21 (1834) (No. 17).

[215] *See* 2 ANNALS OF CONG. 1719 (1791) (requesting report "relative to the administration of justice under the authority of the United States, as may require to be remedied.").

[216] 1 AMERICAN STATE PAPERS, *supra* note 214, at 28.

[217] *See id.*

[218] *See id.*

> elements of his science, and having their essence settled by adjudications. Perhaps at a day not far remote, it may be thought an accession to freedom and commerce, to emancipate the person of a debtor from the grasp of his creditor, and to substitute lands under due caution, against frauds and oppressions, for the payment of debts accruing after a certain time. The respite of execution is to afford an opportunity to obtain a writ of error, or indeed an appeal.[219]

Randolph here says two important things, and remember, he says this in response to a request from Congress for improvements to the administration of justice in the federal courts. First, that the writs used to effect final process should be uniform throughout the federal system. Why? Predictability and ease of use as these writs are "intimately known to every lawyer in the United States."[220] Second, Randolph hints in note 16 of his report of a more forgiving time, it seems, where "the person of a debtor [is emancipated] from the grasp of his creditor."[221] Randolph hints again of kindness to debtors in the body of his report, wherein he bridles at the "severity of the Roman law," which would permit a "mode of executing a sentence … by putting the plaintiff into possession of all the defendant's estate, in order that he may pay himself."[222]

Kindness to debtors (as well as several other aspects of Randolph's proposal, most significantly the elimination of Supreme Court review of state court cases touching on federal questions) was anathema to the Federalists of the time and prompted a response from the devout Hamiltonian Egbert Benson.[223] Benson proposed a constitutional amendment that would enshrine federal judicial supremacy by effectively

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[219] THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 196, at 164.

[220] *See id.* In another part of his report, Randolph again endorsed uniformity by proposing that the Supreme Court issue reports of its decisions, to "promote uniformity through the whole judiciary of the United States." *Id.* at 136.

[221] *Id.* at 164.

[222] *Id.* at 136.

[223] Renee Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL OF RTS. J. 811, 827 (2014) ("Federalists generally thought it imperative to repay debts, for the credit and prosperity of the new nation.").

making state courts into lower federal courts.[224] Neither Randolph's nor Benson's proposals were ever acted upon by Congress.

C. The Permanent Process Act of 1792

After being renewed twice,[225] the first Process Act was made permanent in 1792. The debates on the 1792 act again emphasized the relationship between American debtors and British creditors.[226] Recall that even though the first Process Act supposedly required the federal courts to follow state rules, the act permitted the use of the writ of *capias ad satisfaciendum*—the harshest form of execution—*in the first instance* even when other writs were permitted to be used in succession "until a tender of the debt and costs in gold and silver shall be made."[227] In debating the permanent Process Act, the House considered whether to eliminate the requirement that the debt be satisfied in specie.[228] The idea was to favor American debtors in their dealings with foreign creditors, specifically, British creditors, and to keep American gold and silver within the confines of the new country.[229]

> This motion [to strike out the language requiring satisfaction of the debt in gold and silver] was founded on the particular circumstances of persons indebted to foreigners. It was said that the law, with this clause in it, would annihilate the power of the several States to pass insolvent laws; and, in consequence, those unfortunate debtors would be entirely in the power of a set of persons who retained the most rancorous enmity against the Revolution, and the persons most conspicuous in their exertions to bring about that event.[230]

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[224] THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 196, at 168 (describing Benson's proposed amendment to transform state courts into lower federal courts).

[225] *See* Act of May 26, 1790, ch. 13, 1 Stat. 123; Act of Feb. 18, 1791, 1 Stat. 191; *see also* 1 ANNALS OF CONG. 966 (1789) (Joseph Gales ed., 1834); 2 ANNALS OF CONG. 1757 (1791).

[226] 3 ANNALS OF CONG. 582 (1792).

[227] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94.

[228] 3 ANNALS OF CONG. 581 (1792).

[229] *Id.* at 582.

[230] *Id.* at 581.

The counterargument—that the states could not be trusted to protect the rights of creditors—was familiar.

> To leave it optional with the debtor to say in what manner he will pay his debts, or to subject the creditor to the caprice of the several State Governments whose laws may be founded on very opposite principles, will put it out of his power to get his debts paid agreeably to the Treaty of Peace …. [T]o say that foreign creditors shall be subjected to the Legislative provisions of the several States, which are known to clash, some of which had made paper a tender, others of which have depreciated paper in circulation, is, to defeat every just expectation founded on the Treaty of Peace and the Constitution.[231]

In its final form, the 1792 act provided that the "forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of" the 1789 act.[232] The language used—"modes of proceeding" versus "modes of process"—was slightly different than that used in the 1789 act, perhaps indicating an intention to distinguish between the form of writs and other process and the actual proceedings before the district court, whereas under the 1789 act, there may have been confusion between the two. The 1792 act also omitted the language that a creditor could employ a *capias ad satisfaciendum*, which would imprison the debtor "until a tender of the debt and costs in gold and silver shall be made."[233] Rather, the 1792 act permitted the use of the *capias ad satisfaciendum* but left it to the states to determine the manner of the satisfaction of the debt.[234]

More critical was that the 1792 act, unlike the 1789 act, permitted the federal courts to make "such alterations and additions [to the state practice] as the said courts respectively shall in their discretion deem expedient."[235] The 1792 act also made clear that the practice in the federal courts was subject to federal regulation.[236] The express permission to deviate from

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[231] *Id.* at 582.

[232] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[233] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94.

[234] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

[235] *Id.*

[236] *See id.* at 276

state practice severely undercut the notion that federal practice was required to conform to that in the states as of a date-certain, September 29, 1789. Adding to the strangeness, the 1792 act again provided no guidance for the federal courts sitting in states admitted *after* 1789—although most of those after-admitted states "very wisely adopted voluntarily the state practice".[237]

Although not apparent in the original record of legislative proceedings, Courts and commentators would later ascribe this odd set-up to the tensions existing at the inception of the United States between the states and the federal government.[238] Under this formulation, federal judges felt that, with regard to actions at law, it was best "to yield rather than encroach" on state practice.[239] It was best to do this because Congress, like the framers of the Constitution,[240] had sought in enacting the Process Acts and establishing the federal judiciary "to allay as far as possible jealousy between the State and Federal Governments and to relieve the fears of encroachment by the latter."[241] The conformity of federal law to state was as of a date-certain because permitting the state to change the federal practice by changing its own (that is, if the conformity was "dynamic" and thus subject to state whim) was seen as an "intolerable delegation of rulemaking power" to the states.[242] While convenience certainly played a

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[237] Warren, *supra* note 25, at 436.

[238] The tensions were real. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled."); *see also* 1 THE FOUNDERS' CONSTITUTION 242–43 (Philip B. Kurland & Ralph Lerner eds., 1987) (discussing the strain between the federal and state governments at the time of the drafting of the Constitution).

[239] Fullerton v. Bank of United States, 26 U.S. (1 Pet.) 604, 614 (1828) (stating that "it is administering justice in the true spirit of the Constitution and laws of the United States, to conform, as nearly as practicable, to the administration of justice in the Courts of the state.").

[240] *See, e.g.*, THE FEDERALIST NOS. 45, 46 (James Madison), NOS. 31, 82 (Alexander Hamilton).

[241] Warren, *supra* note 25, at 427.

[242] *See* Beers v. Haughton, 34 U.S. (9 Pet.) 329, 359 (1835) ("State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the national courts."); *see also* 4 REG. DEB. 93 (1828) ("But it could not be expedient to submit that the laws, which each state might pass from time to time, should govern the Federal Courts.").

role in setting up the procedural framework,[243] the idea that the Process Acts established some sort of balance between federal and state interests is erroneous. The federal courts were not bound by state rules at all, despite the language of the acts.[244] And, as I have argued before, the federal courts always retained control over a court's true power, the power of process.

D. The Judiciary Act of 1793

On November 6, 1792, President Washington again asked Congress for improvements to the federal judiciary.

> I cannot forbear to bring again into the view of the Legislature the subject of a revision of the Judiciary system. A representation from the Judges of the Supreme Court, which will be laid before you, points out some of the inconveniences that are experienced.[245] In the course of the execution of the laws, considerations arise out of the structure of that system, which, in some cases, tend to relax their efficacy. As connected with this subject, provisions to facilitate the taking of bail upon processes out of the Courts of the United States, and a supplementary definition of offences against the Constitution and laws of the Union, and of the punishment for such offences, will, it is presumed, be found worthy of particular attention.[246]

Congress went to work, and the result was the Judiciary Act of 1793.[247] Although not specifically requested by Washington, the act seemed to consolidate even further federal control over process and procedure in the federal courts. Section 7 of the act provided:

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[243] *See* Bank of United States v. Halstead, 23 U.S (10 Wheat.) 51, 64 (1825) (stating that the enactors of the first Process Acts "had in view . . . state systems then in actual operation, well known and understood, and the propriety and expediency of adopting which, they could well judge of and determine.").

[244] *See e.g.*, *Beers*, 34 U.S. (9 Pet.) at 359.

[245] The "inconveniences" centered on the difficulties and burdens associated with riding circuit. *George Washington and the Supreme Court*, MOUNT VERNON, https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/george-washington-and-the-supreme-court [https://perma.cc/RFD9-23A9].

[246] 3 ANNALS OF CONG. 608–09 (1792).

[247] Act of March 2, 1793, ch. 22, 1 Stat. 333.

> *And be it further enacted*, That it shall be lawful for the several courts of the United States … to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively ….[248]

No reference was made to the practice in the states at all.

VII. THE FIRST PROCESS ACTS WERE NOT DESIGNED TO PREVENT ENCROACHMENT ON STATE SOVEREIGNTY BY THE FEDERAL COURTS; RATHER, THEY WERE A DECLARATION OF FEDERAL POWER AND CONTROL OVER PROCESS ISSUING FROM THE FEDERAL COURTS

According to Charles Clark and Charles Warren, the Process Acts of 1789 and 1792 sought to assuage any fears that the newly sovereign states may have had regarding the newly formed federal government; consequently, any proposed reforms to create a uniform federal procedure may have seemed like encroachments upon state sovereignty.[249] Under this reading, the implementation of the federal court system was a compromise between those who saw the nascent country as one, unified nation and those who saw it as "a generally loose federation of independent states," and federal procedure in actions at law was similarly a series of compromises.[250] The Supreme Court was even in on the act, stating in the case *Fullerton v. Bank of United States* that, "it is administering justice in the true spirit of the Constitution and laws of the United States, to conform, as nearly as practicable, to the administration of justice in the Courts of the state."[251]

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[248] *Id.* § 7, 1 Stat. at 335.

[249] *See* Warren, *supra* note 25, at 427 (arguing that Congress had sought in enacting the Process Acts and establishing the federal judiciary "to allay as far as possible jealousy between the State and Federal Governments and to relieve the fears of encroachment by the latter.").

[250] Clark & Moore, *supra* note 28, at 145.

[251] 26 U.S. (1 Pet.) 604, 614 (1828); *see also Ex parte* Biddle, 3 F. Cas. 336, 337 (C.C.D. Mass. 1822) (No. 1,391) (opining that the "whole structure of our judicial establishment manifestly contemplates, that in cases within the reach of their jurisdiction

In reality, the nod in the direction of state power by the Process Acts was nothing more than illusory. Yes, both the 1789 and 1792 Process Acts bade that the federal courts follow the rules of the state in which they sat. But, at the same time, the Process Acts retained for their own use *in the first instance* and irrespective of the state rules, the writ of *capias ad satisfaciendum*, and the 1792 act expressly permitted the federal courts to deviate from state practice if they saw fit.[252] This retention of power by the federal courts, and especially the retention of control over final process, was critical. Why? Because process is power; in particular, process is the power to enforce.[253] To be sure, application of state rules of practice by the federal courts was in deference to the state and convenient for local practitioners. However, this acknowledgment of state rules of practice was nothing more than a feint to state interests and not particularly significant; the federal courts still retained control over what mattered most, the power over process and the power to enforce. The case of *Brewster v. Geltson*[254] illustrates this point—the point that application of state rules of practice (as opposed to rules regarding process) was relatively unimportant—nicely. In *Brewster*, the plaintiff sought in federal court in New York to collect a portion of a forfeiture that he claimed under the collection law as an informer.[255] The key issue at trial was the extent of the plaintiff's assistance in procuring the forfeiture.[256] The jury found in favor of the plaintiff.[257] The defendant objected to the charge offered to the jury and filed a timely bill of exceptions with the trial court, asking for a new trial on the grounds that the verdict was against the weight of the evidence.[258] The defendant did not file a writ of error; that is, an appeal.[259]

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the courts of the United States are to administer the same remedial justice, that would be administered in the proper state courts.").

[252] *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 35–36 (1825).

[253] *See id.* at 9 (arguing that the "Court is nothing without its process.").

[254] 4 F. Cas. 82 (C.C.D.N.Y. 1825) (No. 1,853).

[255] *Id.* at 82.

[256] *See id.* at 84.

[257] *See id.* at 82.

[258] *See id.*; *see also* 3 NATHAN DANE, A GENERAL ABRIDGMENT & DIGEST OF AMERICAN LAW 549, 551 (1824) (explaining that at the time, a bill of exceptions was generally used to object to a discrete point of law, like the judge's charge to the jury).

[259] *See* 2 ALEXANDER M. BURRILL, A TREATISE ON THE PRACTICE OF THE SUPREME COURT IN THE STATE OF NEW YORK 131–32 (1846).

The issue for the court was whether the arguments in a bill of exceptions could be heard without a concomitant writ of error.[260] The state rule in New York at the time was that a bill of exceptions should be heard and decided upon prior to the filing of a writ error.[261] Not so, however, in federal court. In applying the Process Acts, the court held that the state rules were to apply only upon being adopted by the federal court, and this state rule had not been so adopted.[262] Therefore, absent the application of the state rule, "a bill of exceptions [could], technically, only be used on a writ of error," which was not present.[263] Nevertheless, the court held that it did not matter, and that the bill of exceptions could be entertained, and a new trial granted.

> A bill of exceptions can, technically, only be used on a writ of error: *but there can be no good reason* why it should not be received as a substitute for a case, showing what took place upon the trial, and as a statement of facts upon which the motion for a new trial is to be founded.[264]

The importance of this ruling should not be understated. The power of process was not at stake in *Brewster*, and it simply was of no consequence whether the state rule of practice applied or not. So, there was "*no good reason*" to adhere to the technical federal court rule and dismiss the bill of exceptions. The court granted the motion for a new trial.[265]

Fullerton v. Bank of United States[266] provides another example. At issue in that case was the application of an Ohio law enacted in 1820 that regulated actions between a bank and co-signers on a note.[267] The Ohio law dealt with the awarding of costs in an action against multiple co-signers.[268] The context in *Fullerton* is important. Ohio did not become a part of the United States until 1802. Therefore, the first Process Acts of 1789 and 1792 did not technically apply to it.[269] Nevertheless, without officially

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[260] *See Brewster*, 4 F. Cas. at 83.

[261] *See id.*

[262] *See id.* at 83.

[263] *Id.* at 84.

[264] *Id.* (emphasis added).

[265] *Id.* at 85.

[266] 26 U.S. (1 Pet.) 604 (1828).

[267] *Id.* at 604.

[268] *See id.* at 613 & 615.

[269] *Id.* at 604.

adopting it by written rule, the federal district court in Ohio "in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state Courts."[270] "It has not been deemed necessary to make any material alterations since; but as far as it was found practicable and convenient, the state practice has, by an uniform understanding, been pursued by that Court without having passed any positive rules upon the subject."[271] And so, the practice continued for 25 years, even though the practice "may have begun and probably did begin in a mistaken construction of the Process Act."[272]

So, without written authorization and in a "mistaken construction" of the Process Act, the Ohio federal court had been following state practice. Even though the Process Acts were not adhered to, and the Ohio state practice never formally adopted, did the 1820 state act at issue in *Fullerton* apply in federal court? Of course it did. And why? Because as in *Brewster*, it really did not matter whether the federal court applied the state rule. It was easy to defer to state practice when process was not at stake.

> But what right is violated, what hardship or injury produced, by the operation of this Act? It was passed for the relief of the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the costs of a single suit, if he should elect to bring several actions against drawer and endorser. Nor does it subject the defendants to any inconvenience, from a joint action; since it secures to each defendant, every privilege of pleading and defence of which he could avail himself if severally sued.[273]

Again, this is nothing more than a feint in the direction of state interests. No "hardship," "injury," or "inconvenience," and the federal court still held all the power.

Finally, in this regard, *Brown v. Van Bramm*[274] provides an early and perhaps even more compelling example. At issue in that case was the applicability and effect of a Rhode Island state rule regarding entry of

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[270] *Id.* at 612.

[271] *Id.* at 613.

[272] *Id.*

[273] *Id.* at 614–15.

[274] 3 U.S. (3 Dall.) 344 (1797).

judgment upon the failure of a party to appear.[275] As had the courts in *Brewster* and *Fullerton*, the Court in *Van Bramm* applied the nondescript and uncontroversial Rhode Island rule, and affirmed the entry of judgment.[276] What is interesting about the case is that for Justice Chase, who concurred in the judgment, even that unremarkable application of a state rule was going too far. He refused to apply the state rule.

> Chase, Justice. I shall be governed, in forming my opinion, by what the common law says must be the effect of a judgment by default; without regarding the practice of the State. If, indeed, the practice of the several States were, in every case, to be adopted, we should be involved in an endless labyrinth of false constructions, and idle forms.[277]

This is important. Even though it did not matter whether the Court applied the state rule (the result would be the same, so why not apply it?), one justice seemed to refuse to be bound by *any* element of state practice. In other words, Justice Chase could not even be bothered to *pretend* that there was some sort of balance between federal and state interests in the federal courts.[278]

Contrast *Brewster, Fullerton,* and *Van Bramm* with *Picquet v. Swan*,[279] a case involving original process and, therefore by necessity, power. In *Picquet*, brought in federal court in Massachusetts, the lawsuit was brought against a non-resident to satisfy a debt.[280] The debtor was never served within the state and never appeared to defend.[281] Nevertheless, the action commenced and certain property of the debtor within Massachusetts was attached.[282] The question before the court was whether a default judgment could be entered against the debtor.[283] The lawsuit had been initiated through Massachusetts state process known as "trustee process."[284]

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[275] *See id.* at 351–52 (argument of counsel); *id.* at 356 (resolution by the Court).

[276] *See id.* at 356.

[277] *Id.* at 346.

[278] *Id.* (Justice Paterson held a likely more mainstream view. He at least acknowledged that he would be bound by the state rule in "some cases.").

[279] 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134).

[280] *Id.* at 609.

[281] *Id.*

[282] *See id.* at 609–10.

[283] *See id.* at 610.

[284] *Id.* at 609.

Massachusetts state law apparently authorized the service of trustee process on non-residents.[285]

The court acknowledged that under the Process Acts, the modes of process and proceedings in the state courts "were adopted into the judicial proceedings of the courts of the United States."[286] Nevertheless, the state rules "can have no effect, where they contravene the positive legislation of congress; nor can they give a jurisdiction to this court, which it might not independently of them maintain."[287] In other words, when process is involved, a determination of the extent of that power lies with the federal court, and not the state.

> If the state jurisprudence authorizes its own courts to take cognizance of suits against non-residents, by summoning their tenants, attornies, or agents, or attaching their property, whether it be a farm or a debt, or a glove, or a chip, it is not for us to say, that such legislation may not be rightful, and bind the state courts. But when the circuit courts are called upon to adopt the same rule, it ought to be seen, that congress have, in an unambiguous manner, made it imperative upon them.[288]

Here, the state rule had not been made imperative upon the federal courts, and as a result the federal rule, and thus federal power, trumped that of the state. Federal process would control.

The illusion of balance between federal and state interests would persist until 1825, when the Supreme Court dispelled it in *Wayman v. Southard* and *Bank of United States v. Halstead*. In those cases, the Court made clear what had actually been the case all along—the federal courts had always had complete power over process issuing from their courts.[289] In *Wayman*, Chief Justice Marshall said the quiet part out loud; the whole purpose behind the Process Acts was to provide a federal court haven for creditors seeking to avoid the application of pro-debtor rules in the states.

> The perplexity arising from this state of things was much augmented by the circumstance that, in many of the States,

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[285] *See id.*

[286] *Id.* at 610.

[287] *Id.* at 611.

[288] *Id.* at 614.

[289] 23 U.S. (10 Wheat.) 1 (1825).

> the pressure of the moment had produced deviations from that course of administering justice between debtor and creditor, which consisted, not only with the spirit of the constitution, and, consequently, with the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the States themselves.[290]

The whole idea was to protect creditors until the states returned to their senses.

> Congress, probably, conceived, that this object would be best effected by placing in the Courts of the Union the power of altering the 'modes of proceeding in suits at common law,' which includes the modes of proceeding in the execution of their judgments, in the confidence, that in the exercise of this power, the ancient, permanent, and approved system, would be adopted by the Courts, at least as soon as it should be restored in the several States by their respective legislatures.[291]

Wayman and *Halstead* and their impact will be discussed in detail later in this article.

VIII. FEDERAL COURT REFUSAL TO FOLLOW STATE RULES AS TO PROCESS LED TO A CRISIS DURING THE PANIC OF 1819

Although the system ushered in by the first Process Acts theoretically promoted certainty in federal practice, it was not certain at all. This was due to the ability of the federal courts to establish their own rules of proceeding to augment and improve upon those of the state. For example, in *Palmer v. Allen*,[292] the Supreme Court considered whether a Connecticut state rule requiring a *mittimus*[293] before committing an individual to prison in a civil case applied in federal court. A *mittimus* was, in effect, a warrant that recited the reasons for the detainment; that is, it was a procedural safeguard that had to be satisfied prior to

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[290] *Id.* 46–47.

[291] *Id.* at 47.

[292] 11 U.S. (7 Cranch) 550 (1813).

[293] An order directing a jailer to detain a person. *See* Laurent Sacharoff, *Pretrial Commitment and the Fourth Amendment*, 99 NOTRE DAME L. REV. 1021, 1024 (2024).

imprisonment.[294] The question before the Court was whether the Process Acts gave "efficacy to the laws of Connecticut on this subject, and impose[d] upon the officers of the United States an obligation to conform their conduct to the provision of those laws."[295] In a typical application of the Process Acts, the Court held that the federal court, which had never employed the *mittimus* practice, was not required to follow the state rule.

> But it is equally clear to this Court, that the law above alluded to commonly called the process act, does not adopt the law of Connecticut, which requires the mittimus in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint upon their state officers in the execution of the process of their Courts, and is altogether inoperative upon the officers of the United States, in the execution of the mandates which issue to them.[296]

Notice how the Court scoffs at the "restraint" a *mittimus* imposes on *state* officials in the execution of process. No such restraint would be imposed on the "officers of the United States."[297] This was a reading of the Process Acts altogether at odds with the idea that the federal courts were required to follow state rules as to the form of writs and the forms and modes of proceeding.[298]

Consequently, because the federal courts were not required to recognize changes in state practice and could in any event modify the state practice as they saw fit, the Process Acts quickly became inconvenient in application, particularly for the states. The crux of the inconvenience was, as ever, the relationship between, and the corresponding rights of, debtors and creditors, especially when times got bad.

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[294] *Id*. at 1024 (describing a *mittimus*).

[295] *Palmer*, 11 U.S. (7 Cranch) at 564.

[296] *Id.* at 564–65.

[297] *Id.*

[298] Federal court control of process did not extend to actions that had their genesis in *state court*, only to actions originating in federal court. For example, in *Mason v. Haile* 25 U.S. (12 Wheat.) 370 (1827), the court sustained the retroactive application of a state law abolishing imprisonment for debt in a state court action. The Court ruled on the ground that the law did not impair debtors' obligations under the Contract Clause, as the law only operated upon imprisonment, which affected "the remedy and that in part only." *Id.* at 378.

A. The Panic of 1819

"One of the most striking problems generated by the panic was the plight of the debtors."[299]

And times got bad in 1819.

But first, some background. During and after the War of 1812, domestic manufacturing interests grew rapidly to replace imports previously supplied by Great Britain.[300] This was coupled with a change in monetary policy as the banking industry spread outside of its New England roots.[301] As there was no uniform currency at the time (other than specie – that is, gold and silver coins), these newer banks would issue their own bank notes to pay their stockholders and lend to the federal government.[302] As the federal government was then, as now, a voracious borrower, note issuance expanded greatly among the banks outside of New England.[303] Given the conservatism of the New England banks in terms of note issuance, specie tended to gravitate toward New England and away from the newer banks.[304] This in turn led to the suspension of any promise to redeem notes with specie outside of New England.[305] Meanwhile, the war saw a rise in prices and the end of the war brought with it pent-up demand for foreign imports.[306] Banks catered to the demand with expansionist monetary policies, easy credit, and continued issuance of their own notes.[307] These notes would depreciate as their issuance increased and their value would fluctuate wildly from bank to bank.

> The rise in export values and the monetary and credit expansion led to a boom in urban and rural real estate prices, speculation in the purchase of public lands, and rapidly growing indebtedness by farmers for projected improvements. The prosperity of the farmers led to prosperity in the cities and towns—so largely devoted

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[299] MURRAY N. ROTHBARD, THE PANIC OF 1819: REACTIONS AND POLICIES 35 (1962).

[300] *Id.* at 3.

[301] *Id.*

[302] *Id.* at 4.

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.* at 5.

[307] *Id.* at 6.

> were they to import and export trade with the farm population.[308]

None of this expansion was managed by a national bank as the charter for the first Bank of the United States expired in 1811.[309] To stabilize the currency, manage inflation, and pay off government war debt, Congress authorized the creation of a second Bank of the United States ("the Second Bank") in a bill that was signed by President James Madison in April 1816.[310] The Second Bank opened in January 1817 in Philadelphia, and began engaging in the same credit expansion policies as had the banks outside New England.[311] By the beginning of 1818, the Second Bank "had loaned over $41 million. Its note issue outstanding reached $10 million, and its demand deposits $13 million … contrasted to a specie reserve of about $2.5 million."[312] So, with the Second Bank's help, the boom continued, but a reckoning was at hand.[313]

The reckoning was caused by the premium placed on specie and the upcoming due dates in autumn of 1818 and the summer of 1819 for over $4 million in debt incurred overseas for the Louisiana Purchase, which had to be repaid in specie.[314] Recognizing that it lacked sufficient coin to begin repayment of the debt, the Second Bank panicked.

> The Bank saw no choice but to demand some of the millions of dollars that were owed to it—in specie—by the hundreds of state banks whose notes made up the bulk of its deposits. Its directors now tried to stop the hemorrhage of the Bank's specie and to curtail loans that had been continually extended.[315]

The Second Bank's sudden employment of contractionary policies led to severe deflation and the total amount of currency in circulation fell by

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[308] ROTHBARD, *supra* note 299, at 9.

[309] Michael Wade Strong, *Rethinking the Federal Reserve System: A Monetarist Plan for a More Constitutional System of Central Banking*, 34 IND. L. REV. 371, 374 (2001) (describing the charter's 1811 expiration).

[310] *Id.*

[311] *See* ROTHBARD, *supra* note 299, at 11–12.

[312] *Id.* at 11.

[313] Luckily, everyone learned their lesson and nothing like this would ever happen again.

[314] ROTHBARD, *supra* note 299, at 16–17.

[315] BROWNING, *supra* note 38, at 157.

half.[316] The Second Bank's action drained specie from local banks just as those banks were calling in their own loans, while at the same time the Bank was shutting down its lending and credit.[317] Inevitably, local banks suspended note redemption in specie and then failed altogether.[318]

The Panic of 1819 caused a national economic crisis and depression.[319] The Panic was, familiarly, the direct result of a speculative boom in land and the overextension of credit by banks, which resulted in a tremendous fall in prices and a concomitant liquidity crisis. [320] A contemporary report described the situation, or at least as it was perceived, well:

> [T]he fictitious capital and boundless credit extended by banking … have produced a long train of calamities; that industry is paralyzed; that the precious metals have vanished; that the banks are tottering; that litigation is unprecedented in its extent, and ruinous in its effects; that many merciless creditors, not content with plunging unfortunate debtors into the most abject poverty, frequently take from them the whole of that property to themselves, which in better times, would pay the sums due to all, leaving the unfortunate debtor in jail and his family in misery.[321]

As the economic depression engulfed the country, prices collapsed and severe hardship spread. The indebtedness of the population of Kentucky

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[316] *See id.* at 158.

[317] *See Id.* at 157–58

[318] *Id.*

[319] ROTHBARD, *supra* note 299, at *vii*.

[320] *See id.* at 15 ("Economic distress was suffered by all groups in the community. The great fall in prices heavily increased the burden of fixed money debts, and provided a great impetus toward debtor insolvency. The distress of the farmers, occasioned by the fall in agricultural and real estate prices, was aggravated by the mass of private and bank debts that they had contracted during the boom period."); *see also* Robert G. Caldwell, *The Social Significance of American Panics,* 34 SCI. MONTHLY 298, 301 (1932) ("Then came the crash. Staple productions fell to less than half their former price; land values declined 50 to 70 per cent.; manufacturers were in distress; laborers were out of work, merchants were ruined."). For further discussion of the Panic of 1819, see DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 142–44, 217 (2007).

[321] *Draft of a Report Presented by a Committee of the House of Representatives of Pennsylvania, on the 13th January, 1820*, 15 CARLISLE REPUBLICAN, Feb. 15, 1820, at 57.

alone was estimated at over $10 million.[322] "The people of Kentucky, on the most moderate circulation, are indebted *ten millions* of dollars: There is due to the Bank of Kentucky and its branches near 5,000,000."[323] The widespread indebtedness and lack of currency or specie to repay debts ground economic activity to a halt. The result? Farmers who had mortgaged their land when prices were speculatively high became stuck with those debts and no way to repay them as land prices had plummeted.[324]

During a debate on debt relief in the Virginia General Assembly, Representative Thomas Miller described the plight of the farmer/debtors well.

> The "extravagance" of the great body of the people has consisted in nothing more than the mistaken confidence in the … appearance of prosperity which surrounded them, and living according to the increased [illegible] which were thus, for a time, afforded them. They have not partaken of the mad speculations and profusion of expense which has ruined so many. Yet they are so involved in debt as to need relief. Anticipating only a single crop when tobacco was worth $12 [per bushel], and wheat $2 [per bushel] (which is almost the universal practice in Virginia, where the people rely principally on credit) they have now … the debts thus incurred with tobacco at $5 and wheat at $1; and this too [when] their resources, without any fault of theirs, are reduced considerably more than one half.[325]

In other words, debts were incurred at the inflated price and now had to be repaid after the prices had crashed. Given the crash in prices, it simply was not possible to satisfy the debt in full.

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[322] *From the Kentucky Gazette of May 21: the Times*, LEXINGTON PUB. LIBR., KY. ROOM DIGIT. ARCHIVES (May 21, 1819), https://rescarta.lexpublib.org/jsp/RcWebImageViewer.jsp?doc_id=4086b9c4-2fd5-4231-a294-0b3dbb3b0cfa/KYLX0000/20191112/00001576 [https://perma.cc/VL7C-RJMK].

[323] *Id.*

[324] *The Panic of 1819*, LUMEN LEARNING, https://courses.lumenlearning.com/wm-ushistory1/chapter/the-panic-of-1819/ [https://perma.cc/W47N-MCHG].

[325] *Very Brief Sketch of Certain Points in the Debate on the Execution Law*, RICH. ENQUIRER (Va.), Feb. 1, 1820, at 2.

> Our laws in relation to debtors and creditors we are fully persuaded, require revision not only to protect the creditor from the frauds of his debtor, but as to what is more interesting to humanity—to protect the debtor from the unjust severity of his creditor.[326]

"The plight of the numerous debtors during the panic was particularly arresting, and it inspired many heatedly debated proposals for their relief."[327] As a result of the general economic hardship, many states began to change the rules related to protection of debtors and the mode of executions on judgments.[328] Most states in the West passed laws related to debt relief. These laws divided communities along familiar lines.

> Cleveland, Ohio, was still only a village of six hundred, but it supported two competing newspapers that disagreed on all important questions. Debt relief was one that would divide almost every western community; the Cleveland Register demanded state relief from "rapacious" creditors, but the Herald called for the repeal of the minimum appraisal law and was outraged that creditors were obliged to accept such miscellaneous property as watches, dogs, and barrels, at inflated appraisals, or else wait at least six months to collect debts.[329]

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[326] *Answer of the Assembly to the Governor's Speech,* PLATTSBURGH REPUBLICAN (N.Y.), Feb. 21, 1818, at 2. The Assembly went on:

> The theory of our civil code is, in this respect scarcely less barbarous than any that ever existed. For tho' ε creditor may not sell or murder by open violence his debtor; yet our laws also allow a creditor, first to strip a debtor of all his means of subsistence, and then confine him within the four naked laws of a prison, where the laws themselves do not provide, either for feeding, clothing, or warming him.—Our great cities exhibit the singular spectacle of societies instituted for the purpose of relieving imprisoned debtors, who, if it were not for their benevolence, might perish from cold or hunger.

Id.

[327] ROTHBARD, *supra* note 299, at 37.

[328] *See* Bolton & Rosenthal, *supra* note 40, at 1106 ("[M]any states intervened in private debt contracts as a result of the severe downturn known as the Panic of 1819.").

[329] BROWNING, *supra* note 315, at 262.

Even in the hard-hit state of Kentucky, arguments were raised against debt relief. Not everyone was pro-debtor.

> The legislature is to be convened—for what? In order to shield the extravagant debtor from his honest creditor; to interfere in individual transactions, and thereby destroy that confidence among our citizens which is our greatest political cement, the main spring to activity and enterprize; to have a standard value affixed to the property of the debtor, and, in case of its being taken in execution to satisfy the debt of a creditor, (whose all may be in the hands of the honest debtor,) not to allow it to be sold for less sum than it shall be appraised at–thereby leaving the debtor comfortably in possession of the property of his creditor, and he, in that situation, to be thrown adrift and get a support as he can; to get a promulgation of replevin law–or, in other words, to leave it to the option of the debtor to say when he shall pay his honest debts.[330]

Nevertheless, rules related to debt relief became a reality in many states. States passed various laws related to halting or staying executions, setting minimum appraisals, exempting certain property from execution, abolishing imprisonment for debt in certain circumstances, and expanding the means by which debts could be repaid.[331]

And the federal courts, given the date-certain nature of the system, were not bound by these changes if they were enacted after September 29, 1789 (and, as noted, they likely weren't bound at all given the power of the federal courts to make alterations to the state rules).[332] Moreover, if the state itself had been admitted to the United States after 1789, the federal

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[330] *Louisville, Ky, May 26*, DAILY NAT'L INTELLIGENCER (D.C.), June 11, 1819, at 3.

[331] *See* BROWNING, *supra* note 315, at 262–63, 267.

[332] *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49–50 (1825) (refusing to apply Kentucky rule as to executions that was enacted after 1792); *see also* 4 CHARLES WRIGHT & ALAN MILLER, FEDERAL PRACTICE AND PROCEDURE § 1002 (2d ed. 1987) (stating that the "matter was of considerable practical importance because a static conformity made it impossible for the federal courts to apply state laws enacted subsequent to 1789 for the relief of debtors."); Clark & Moore, *supra* note 24, at 399 ("Many states had since 1789 passed laws on [attachments and executions] quite favorable to the debtor class; and if the federal district and circuit courts did not adapt their practice to the change, this class felt itself aggrieved.").

courts were not bound by any of the rules enacted in the state. So, just as envisioned by Samuel Livermore in 1789, the mode of execution on judgments rendered by a federal district court became a problem because the states were changing their rules to benefit debtors and the federal courts were not in any way required to recognize or adhere to them. Indeed, many federal courts were actively not following the new rules, which were designed to benefit debtors *vis a vis* creditors.[333]

B. The Situation in Kentucky

The economic situation in Kentucky was particularly bad.[334] On average, crop prices dropped 51% below their 1817 value.[335] Kentucky farmers faced additional economic pressure with decreases in land value and a drought that threatened their crops' viability.[336] To relieve some of the distress caused by the Panic of 1819, Kentucky—like many other states—began passing laws that benefited debtors with regard to seizure of their property and person to satisfy unpaid debts.

> The debtor is quite as deserving of legislative notice as the creditor. Who fights our battles in the time of war? Who defends our country, while [creditors] are speculating on the distresses of the country, monopolizing and extorting three or four prices for the provisions necessary for the army? They are those men who now stand in need of relief; the debtors are found in the ranks of your army risking their lives and their health, and spending their time in support of the nation's rights.[337]

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[333] *See, e.g.*, United States v. Wilson, 21 U.S. (8 Wheat.) 253, 254 (1823) (refusing to release debtor from prison even though debtor had obtained a certificate of discharge under New York law that abolished imprisonment for debt).

[334] The question of relief for debtors was a political one, however, and the state seemingly split into two parties, one in favor of relief and one opposed. *See Kentucky,* CONN. MIRROR (Hartford), Jan. 10, 1825, at 2. The pro-relief party was ascendant in the early 1820s and passed the debtor relief laws discussed here. *Id.*

[335] Matthew Gerard Schoenbachler, The Origins of Jacksonian Politics: Central Kentucky, 1790–1840, at 125–28 (Apr. 25, 1996) (Ph.D. dissertation, University of Kentucky) (ProQuest).

[336] *Id.*

[337] *A Draft of Mr. Henry Daniel's Speech on the Property Law Bill*, KY. REP., Feb. 16, 1820, at 1.

The laws enacted included: a suspension of sales of property taken under execution for sixty days at the outset of the crisis,[338] an abolishment of imprisonment for debt,[339] an exemption of the "necessary tools and implements of trade" of any mechanic from execution,[340] an exemption of property granted to "poor widows" from execution,[341] and a direction that property under execution could only be sold for 3/4 of its appraised value unless consented to by the defendant.[342]

The clash between state interests and the federal courts took its most famous form in the state of Kentucky and is embodied most starkly in the Supreme Court cases *Wayman v. Southard*[343] and *Bank of the United States v. Halstead*.[344] The import of these two cases was not lost on the court watchers of the day; the two decisions were anxiously awaited. As reported in the *Rhode Island American* on February 15, 1825:

> The United States' Supreme Court commenced its annual term at Washington, on Monday the 7th instant—present, Chief Justice Marshal, and Justices Washington, Duval, and Thompson. Justices Johnson and Story, arrived on Tuesday, and took their seats upon the Bench. It is understood that Mr. Justice Todd will be confined at home during the term by indisposition. The business of the Court commenced on Tuesday; *and a speedy decision in the case argued at the last term, involving the constitutionality of the State Insolvent Laws*.[345]

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[338] Act of Dec. 16, 1819, ch. 456, 1819 Ky. Acts 811.

[339] Act of Dec. 17, 1821, ch. 279, 1821 Ky. Acts 340.

[340] Act of Dec. 9, 1820, ch. 91, 1820 Ky. Acts 111.

[341] Act of Dec. 21, 1820, ch. 133, § 2, 1820 Ky. Acts 159–60.

[342] Act of Dec. 21, 1821, ch. 327, § 3, 1821 Ky. Acts 415–16. Property that did not sell for 3/4 of its appraised value would be returned to the defendant. *Id.* § 5, at 418.

[343] 23 U.S. (10 Wheat.) 1, 47–48 (1825).

[344] 23 U.S. (10 Wheat.) 51,52 (1825).

[345] R.I. AM. AND PROVIDENCE GAZETTE, Feb. 15, 1825, at 3 (emphasis added). *See also* MIDDLESEX GAZETTE (Middleton, Conn.), Feb. 16, 1825, at 2 (reporting that it is "expected that the case argued at the last term involving the constitutionality of the State Insolvent Laws will be decided in a few days.").

The report could not have been more correct. Both *Wayman v. Southard* and *Bank of United States v. Halstead* were decided on February 15, 1825.[346]

1. Wayman v. Southard

In *Wayman*, the question before the Supreme Court was whether Kentucky state rules relating to executions on judgments, enacted after September 1789, applied to judgments issued by the Kentucky federal courts.[347] The specific Kentucky legislation involved required the plaintiff to endorse on the execution or other order for sale that "notes on the Bank of Kentucky or its branches, will be accepted in discharge of this execution."[348] If the plaintiff failed to make the endorsement that it would accept payment in notes, the defendant would be entitled to replevy the debt within two years upon issuance of approved security, and a replevy bond was often attached to the writ of execution.[349] This was no small requirement given the severe shortage of specie and the abundant supply of bank notes.[350] In fact, given that nearly all specie was drained from the state, it may have been well nigh impossible to repay a debt in gold or silver coin. Kentucky was obviously trying to ease the pressure on its debtors, increase the likelihood that they would be able to repay their debts, and keep its economy at least somewhat liquid.

The argument in favor of the Kentucky law applying in federal court was, given the Process Acts, that the state retained full authority over executions, even over those on judgments rendered in the federal courts, and thus the Kentucky rules at issue requiring the plaintiff's endorsement applied in this case.[351] Debtor's counsel argued that that the Process Acts gave the federal courts power to regulate the forms of process only, and not their substance or effect.[352] Moreover, any federal court regulation of

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[346] *Wayman*, 23 U.S. (10 Wheat.) at 20; *Halstead*, 23 U.S. (10 Wheat.) at 51.

[347] Wayman, 23 U.S. (10 Wheat.) at 2–3.

[348] Act of Feb. 11, 1820, ch. 544, § 1, 1820 Ky. Acts 917–18.

[349] *Id.* § 6, at 918–19.

[350] Already by late 1818, banks in Kentucky had suspended payments in specie. *See Alexandria,* ALEXANDRIA GAZETTE & DAILY ADVERTISER, Dec. 21, 1818, at 2. To keep the local banking system afloat, the Bank of Kentucky subsequently began to "make large issues of notes" and loan them to independent banks within Kentucky in order to "save their charters." AM. BEACON & NORFOLK & PORTSMOUTH DAILY ADVERTISER, Oct. 20, 1819, at 4.

[351] Wayman, 23 U.S. (10 Wheat.) at 21.

[352] *Id.* at 14.

process was to be confined to proceedings occurring pre-judgment, and not to enforcement of remedies post-judgment.[353]

Chief Justice Marshall strongly disagreed with any supposed balance between state and federal power in the Process Acts.[354] He viewed this balance as nothing more than illusory—a feint in the direction of recognizing state interests.[355] He went to great lengths to find that the federal courts had *always* had the power, without reference to that of the state, to regulate and control their own process, including final process and the process of execution.[356] He found this power in the Necessary and Proper Clause in the U.S. Constitution, the Judiciary Act of 1789,[357] the temporary and permanent Process Acts themselves,[358] and the Judiciary Act of 1793.[359] To the Chief Justice, the federal courts could control the process they issued *notwithstanding the Process Acts*; in effect, treating the Process Acts as if they granted the states very little control over process at all. The key question in *Wayman* then, was what form and effect would the writ of execution issued on a judgment rendered in federal court take?[360] Would its form be according to state law or within the discretion of the federal court?[361]

> First, the Court described the effect of the Process Acts.
>
> So far as the Process Act adopts the State laws, as regulating the modes of proceeding in suits at common law, the adoption is expressly confined to those in force in September, 1789. The act of Congress does not recognise the authority of any laws of this description which might be afterwards passed by the States. The system, as it then stood, is adopted . . . .
>
> [The Act] also enables the several Courts of the Union to make such improvements in its forms and modes of

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[353] *See id.* at 16–17.

[354] *See id.* at 24–25.

[355] *See id.*

[356] This is not a rule of decision on which state law would control. *See id*.

[357] *Id.* at 22.

[358] *See id.* at 26.

[359] *See id.* at 33–34.

[360] *See id.* at 2–3.

[361] *See id.* at 3.

> proceeding, as experience may suggest, and especially to adopt such State laws on this subject as might vary to advantage the forms and modes of proceeding which prevailed in September, 1789.[362]

The real question, according to Justice Marshall was "whether the laws of Kentucky respecting executions, passed subsequent to the Process Act, are applicable to executions which issue on judgments rendered by the Federal Courts?"[363]

> If they be, their applicability must be maintained, either in virtue of the 34th section of the Judiciary Act, or in virtue of an original inherent power in the State legislatures, independent of any act of Congress, to control the modes of proceeding in suits depending in the Courts of the United States, and to regulate the conduct of their officers in the service of executions issuing out of those Courts.[364]

In other words, was it within the power of a state legislature to control proceedings in the federal courts? If it was, then the federal government, within its sphere, was not supreme, and federal power and federal judicial power were compromised. Certainly, the federal courts could apply the state rules *if they wanted to*, but there could be no compelling them to do so. [365] It's no surprise, then, that the Court held that the Kentucky state rules did not apply, and that the federal courts could frame and apply their own rules on executions and judgments.[366] The opinion in *Wayman v. Southard* is therefore a powerful illustration regarding the Process Acts; any "balance" between state and federal power contained within them was

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[362] *Id.* at 41–42; *see* Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 59 (1825) ("They had in view, however, State systems then in actual operation, well known and understood, and the propriety and expediency of adopting which, they would well judge of and determine. Hence the restriction in the act, *now* used and allowed in the Supreme Courts of the several States. There is no part of the act, however, that looks like adopting prospectively, by positive legislative provision, the various changes that might thereafter be made in the State Courts."). *See also Final Process in the Courts of the United States as Affected by State Laws*, 1 AM. L. REV. 23, 24–27 (1867).

[363] Wayman, 23 U.S. (10 Wheat.) at 48–49.

[364] *Id.* at 49.

[365] *See id.* at 49–50.

[366] *See id.* at 50.

simply illusory. On actions in federal court, the federal courts held all the power. They always had.

2. Bank of United States v. Halstead

The Supreme Court held something very similar in *Bank of United States v. Halstead*.[367] In *Halstead*, as it had in *Wayman v. Southard*, the Court considered the applicability of a Kentucky rule regarding executions to proceedings in federal court.[368] The rule in question "prohibit[ed] the sale of property taken under executions for less than three fourths of its appraised value,[369] without the consent of the owner."[370] This too was another rule designed to provide relief to debtors. Recall that the landowner's debts were often based on the inflated value of the land established during the boom.[371] After the crash, the value of land plummeted.[372] The Kentucky law aimed to set a balance between the inflated price and the post-crash price by setting a minimum price at which land could be sold upon execution, thereby increasing the proceeds on the sale to better satisfy the debt.[373]

In *Halstead*, the land in question was some 200 acres belonging to one Abraham Venable.[374] It had been seized upon a writ of execution, after which a writ of *venditioni exponas* was issued directing the federal marshal to sell the property at the best price offered in order to satisfy the judgment.[375] The land was appraised at $26 per acre.[376] The marshal

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[367] 23 U.S. (10 Wheat.) 51, 64–65 (1825).

[368] *Id.* at 52–53.

[369] Act of Dec. 21, 1821, ch. 327, § 3, 1821 Ky. Acts, 415, 416. (Property that did not sell for 3/4 of its appraised value would be returned to the defendant). *Id.* at 418. (The value was to be appraised by a jury).

[370] Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 52 (1825).

[371] James Narron et al., *Crisis Chronicles: The Panic of 1819—America's First Great Economic Crisis*, FED. RSRV. BANK N.Y.: LIBERTY ST. ECON. (Dec. 5, 2014), https://libertystreeteconomics.newyorkfed.org/2014/12/crisis-chronicles-the-panic-of-1819americas-first-great-economic-crisis/ [https://perma.cc/BNU3-JTTV].

[372] *Id.*

[373] COMMONWEALTH OF KY., JOURNAL OF THE HOUSE OF REPRESENTATIVES, H.R., 29th Sess., at 108 (Ky. 1821).

[374] *See* Halstead, 23 U.S. at 51.

[375] *Id.*

[376] *Id.* at 52.

exposed the land for sale and the best price offered was $5 per acre.[377] Because this was not at least three fourths of the value, the marshal returned the *venditioni exponas* and left the land unsold.[378] The creditor moved to quash the return and for an order directing the marshal to proceed with the sale without reference to the Kentucky law.[379] The question for the Supreme Court was whether the *venditioni exponas* was subject to the Kentucky statute that property could not be sold to satisfy a judgment unless it was sold for three-fourths of its appraised value. [380]

As it did in *Wayman*, the Court in *Halstead* emphasized that Congress had "uncontrolled power" to legislate the form and effect of executions and to "carry into complete effect the judgments of the Courts."[381] And the Congress had done so, beginning with the Judiciary Act of 1789.[382] The power thus vested in the federal courts to control process was only notionally limited by the Process Acts, which theoretically directed the federal courts to follow state practice as it existed on September 29, 1789.[383] I say "notionally limited" because in reality there was no such limit at all. Justice Thompson explained:

> [The Process Acts were] intended to adopt, and conform to, the State process and proceedings, as the general rule, but under such guards and checks as might be necessary to insure the due exercise of the powers of the Courts of the United States. *They have authority, therefore, from time to time to alter the process, in such manner as they shall deem expedient*, and likewise to make *additions* thereto,

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[377] *Id.*

[378] *Id.*

[379] *Id.*

[380] *See id.* at 52–53 ("Whether, if [the Kentucky law] were not repugnant to the [U.S.] constitution, it would operate upon, the bind, and direct, the mode in which the *venditioni exponas* should be enforced by the Marshal, and forbid a sale of the land levied upon, unless it commanded three fourths of its value when estimated, according to the provisions of the said act?").

[381] *Id.* at 53. The Court in *Halstead* recognized that process is power. *Id.* ("The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States.").

[382] *See id.* at 55–57.

[383] *See id.* at 54 (noting that the Process Acts stood merely as a "guide" for the procedure to be employed in the federal courts).

> which necessarily implies a power to enlarge the effect and operation of the process.[384]

If the federal courts can alter the state process as they see fit, the state process rules, in reality, have no effect in federal court.[385]

Justice Thompson, like Chief Justice Marshall before him, explained that the federal courts had ample power to disregard those state modes of proceeding that were enacted after 1789 and to alter those in existence in 1789 "to meet whatever changes might take place."[386] And, how did the federal court sitting in Kentucky adopt, or not adopt, or alter the state practice? In two ways, both to the benefit of creditors. Recall that the federal court was theoretically bound to follow the state rules as they existed in 1789.[387] But, in 1789, land in Kentucky could not be seized and sold subject to a writ of execution.[388] The state authorization for that mode of execution would not come until late 1792.[389] Did the federal court have the power to adopt the new state mode of execution authorizing the sale of land to satisfy judgments? Of course it did.

> When, therefore, the law of Kentucky made land subject to executions, it was carrying into effect the spirit and object of the act of Congress, for the Circuit Court so to alter and add to the form of its execution, as to authorize the taking and selling the debtor's land.[390]

So, the federal court in Kentucky adopted the rule that authorized the taking and selling of the debtor's land.[391] What of the rule at hand that limited the sale of land subject to a writ of execution to situations where

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[384] *Id.* at 60 (emphasis added).

[385] *See id.* at 59. Even though Justice Thompson was asserting near unlimited federal court power over process issuing from the federal courts, he still felt the need to make a feint in the direction of state interest. Disingenuously, he stated: "This course was no doubt adopted, as one better calculated to meet the views and wishes of the several States, than for Congress to have framed an entire system for the Courts of the United States, varying from that of the State Courts." *Id.*

[386] *Id.* at 62.

[387] *See id.* at 57.

[388] *Id.* at 55.

[389] *Id.*

[390] *Id.* at 61.

[391] *Id.* at 63.

the offered price was at least three fourths of the appraised value? Did that rule apply? Of course not. "An officer of the United States cannot, in the discharge of his duty, be governed and controlled by State laws, any farther than such laws have been adopted and sanctioned by the legislative authority of the United States."[392] And, in this case, the Kentucky law had had been neither adopted nor sanctioned by the United States.

In short, the Kentucky law was not binding on a *venditioni exponas* issuing from a federal court and, ultimately, the property at issue sold for well below three-fourths of its appraised value.[393]

At their core, *Wayman* and *Halstead* were bold and emphatic assertions of federal power over the operation of the federal courts, and an express denial that the states possessed any such power whatsoever. The Process Acts, it seemed, had not struck any balance whatsoever between federal and state interests. It was Congress, and not the state legislatures, that controlled the mode of process in the federal courts. Congress had chosen in 1789, and then again in 1792, to adopt as a guide the system existing in the states as of September 1789, and to permit the federal courts to make alterations to that system if warranted. Indeed, it is arguable that the federal courts were not bound by any state rules, whether in existence as of 1789 or not, given that they could change or mold state rules to present circumstances as they saw fit. And, the states were essentially powerless in this regard. Any changes to the procedures employed in the federal courts had to come from Congress. The states could not make changes to that system by changing state law. If the federal courts adopted state modes of process, fine, but they were not required to, and in *Wayman* and *Halstead*, they did not. This disregard for locally enacted rules designed to benefit state residents, in favor of those crafted by the federal courts, "aroused intense excitement and indignation in Kentucky, as well as in the other new states of the West,"[394] where the impact of the Panic of 1819 and resulting depression was most severe.[395]

The prevailing reaction to the Court's decisions was one of dismay. The Richmond (Va.) Enquirer reported on a message from the Governor of Kentucky to the Kentucky state legislature where the governor

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[392] *Id.*

[393] *See id.* at 66.

[394] Warren, *supra* note 25, at 439.

[395] *See* Bolton & Rosenthal, *supra* note 328, at 1107–08 (noting impact of deflation and debt crisis on "frontier states.").

"remonstrat[ed] against the power given to the Federal Courts of making Execution Laws."[396] The governor complained:

> that the Federal Courts could make *Execution Laws* for themselves, the Federal judges of Kentucky had used the power by imprisoning debtors, and by subjecting their property to execution not provided in the statute books of the state. … [T]he opinion of the Supreme Court on points involving the rights of the State, is not binding, and he proposes that Kentucky shall deny the use of her jails to the federal courts, for imprisonment not recognised by State laws.[397]

In Ohio, one commenter was astonished that the local bank in Cincinnati was ordered to commence selling all property of debtors "without valuation … in consequence of the late decision of the Supreme Court of the United States, in relation to the relief laws of Kentucky."[398] The writer feared this disregard of state law favoring debtors would result in "gross injustice and inequality."[399] The writer went on to lament that local creditors and out-of-state creditors would now be treated differently, with the former confined to state court and the state rules, while the latter able to take advantage of federal disregard of the state rules in federal court.[400]

> Complaints were heard from as far away as New Hampshire.
>
> Some members from the Western States complain that the Judges of the U. States Courts have there assumed authority [over modes of process] not granted by the constitution or the laws. … In Kentucky the question was one of great importance [and] the judges of the Federal

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[396] *Variety*, RICH. ENQUIRER (Va.), Dec. 6, 1825, at 4.

[397] *Id.*

[398] *Ohio. The United States' Bank and the State Laws*, RICH. ENQUIRER (Va.), June 17, 1825, at 2.

[399] *Id.*

[400] *See id.*

> tribunals were not disposed to sustain [Kentucky's relief efforts].[401]

In fact, the writer predicted "[c]omplaints respecting the defects of the present Judiciary system are so loud and so universal that we are confident very considerable changes in it will be made before the close of the present Congress."[402]

Public outcry begat political attention. In Congress, Senator Richard M. Johnson of Kentucky lamented that he represented a "State which was unfortunate enough to be the first member of this Confederacy, which had felt judicial power under the enactment of a code of laws issued under the name of Rules of Court."[403] This "code of laws" related to the rulings on execution proceedings set forth in *Wayman* and *Halstead*. In a familiar cry, Senator Johnson stated that it is the "bounden duty of Congress to look into that matter, and see if were possible that irresponsible judicial officers had assumed the right, and had exercised the power, of making laws for a sovereign and independent State."[404] This was due in part to the lack of guidance from the Process Acts of 1789 and 1792 with regard to after-admitted states. The result was "the Courts of the United States had undertaken, not only to prescribe rules of proceeding, but to exercise the highest act of sovereignty, by making laws to supply the defects of our legislation—a power which Congress cannot delegate."[405] The respective rights of debtors and creditors were discussed.

> It permitted the judgment creditor to take execution in the first instance against the body of the debtor, to hold him in prison until the money was coerced either from him or his friends. It is arming a vindictive creditor with a power over

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[401] *The Judiciary System of the United States*, PORTSMOUTH J. LITERATURE & POL. (Portsmouth, N.H.), Dec. 24, 1825, at 2.

[402] *Id.*

[403] 2 REG. DEB. 12 (1825).

[404] *Id.*

[405] *Id.* at 15. Senator Johnson remained noticeably piqued when debate arose again in 1828. *See* 4 REG. DEB. 94 (1828) ("There never did exist, since the creation of the world, a greater system of usurpation than that which had been practiced in Kentucky, by the assumption of Judges, to pass execution laws."). Johnson must have been truly enraged, because the transcript continues amusingly with the dry voice of the reporter: "[He here alluded to the laws of Draco and Solon; but our reporter could not catch the manner in which they were introduced.]" *Id.*

> the personal liberty of the debtor—to exercise the most malignant vengeance, and at once to degrade and ruin him.[406]

Then, the bill was put aside as the House and Senate were unable to agree on other aspects of amending the Judiciary Act of 1789 relating to the organization of the federal courts in the Western states and the number of new judgeships to be created nationwide.[407] Debate was joined again in 1828, with the result being the Process Act of 1828, which would substantially control process in the federal courts until 1872.[408] This next time period—1828 to 1872—is the subject of the second Note in this series, which is currently in progress.

Progressive lawyer and legal scholar Charles Warren wrote about the "serious evils arising from a condition of law which created different rights in judgment debtors and creditors, according to the forum, State or Federal, in which suit was brought."[409] Most egregiously, from the standpoint of state residents, penalties for indebtedness like imprisonment, or remedies for creditors like execution, depended not on the merits of the case, but rather on the forum *within the state itself*, federal court or state court, in which the action was brought. That federal courts were not required to apply recently enacted state rules that the state courts were applying, and instead applied rules as they existed in 1789 or 1792 or even created their own, was simply intolerable to the states.[410] The states clamored for reform.[411] The ultimate "reform" that arose in 1828, however, was nothing more than a modification of the existing framework, and it did little to ease the conflicts in the system. Debtors may have been satisfied for the time being, but the tension remained and would continue.

IX. CONCLUSION

As the procedural regime created by the first Process Acts crumpled in the late 1820s, even state courts got in on the act of protecting creditor

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[406] 2 REG. DEB. 15 (1825).

[407] *See id.* at 2643–48.

[408] *See id.* at 2649–51.

[409] Warren, *supra* note 25, at 437.

[410] *See* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power–A Case Study*, 75 NOTRE DAME L. REV. 1291, 1327–28 (2000).

[411] "It was natural that [state residents] should be disturbed, even enraged, at this situation." Warren, *supra* note 25, at 438.

rights through application of *Wayman v. Southard* and *Bank of United States v. Halstead*. For example, in *Moore v. Allen,*[412] the Court of Appeals of Kentucky held that a debtor imprisoned due to a *capias ad satisfaciendum* issuing from a federal court was *not* subject to state laws that either abolished the *ca. sa.* or extended the bounds of the prison in which the debtor was incarcerated to the boundaries of the state.[413] In *Polk v. Douglass & Cameron,*[414] the Supreme Court of Tennessee held that a state law providing a debtor with a right to redeem property sold at execution had no bearing on process issuing from a federal court.[415]

> It is a necessary incident to the judicial power, that the courts have the means of executing their judgments. The process act of Congress, of 1792, adopted the process in use in the states, as it existed in 1789, and rendered property liable to the satisfaction of the judgments of the federal courts which was liable in the states, respectively, to the satisfaction of judgments in the state courts. Lands were then liable here to unconditional sale by *fieri facias.* The law of Congress has not been changed until the act of 1828. As the act of the Tennessee assembly of 1820, ch. 11, interposes a condition to the sale of lands (if intended to apply to sales by execution from the federal courts), it interferes with the execution of the United States process, and annexes conditions to the acts of the marshal, and places him under the control of state authority.[416]

Please note that even though the court adopts the traditional and unnecessary view that the first Process Acts required a federal court to apply state process in existence in 1789, the key here is the sanctity with which federal process is treated; it is untouchable by state law. [417]

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[412] 30 Ky. (7 J.J. Marsh.) 651 (1832).

[413] *See id.* at 651–52.

[414] 14 Tenn. (6 Yer,) 209 (1834).

[415] *See id.* at 210.

[416] *Id.* at 210–11.

[417] Or is it? In *Koning v. Bayard*, 14 F. Cas. 843 (C.C.S.D.N.Y. 1829) (No. 7924), a federal court in New York held that *state law* controlled the operation of a lien on land obtained in the federal courts and that the lien existed as of the time of the docketing of the judgment even though the state law as it existed in 1789 did not expressly authorize the

Beginning with its creation in 1789, the federal judiciary controlled the issuance of final process from its own courts. No matter how the conclusion was arrived at—applying state rules as they existed in 1789, altering state rules as they saw fit, or ignoring the state rules altogether—the federal courts did as they wished when it came to final process, most often to the benefit of creditors and to the detriment of debtors. This is the theme that runs through the years 1789–1828. This would change in 1828. The new regime would not be defined by the competing rights of debtors and creditors, however, as had been the earlier one. Rather, it would be defined by confusion. Lots and lots of confusion.

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creation of the lien. For the federal court, it wasn't so much the law in existence in 1789, but the practice in the state and federal courts since that time.

> It seems to have been tacitly admitted, in cases which have arisen in several of the circuit courts of the United States, that the lien created by a judgment in the courts of the United States upon land, and the mode of proceeding to obtain satisfaction of the judgment, were regulated entirely by the state laws.

Id. at 845.