Law and the Experience of Politics in Late Eighteenth-Century North Carolina: North Carolina Considers the Constitution

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In mid-summer 1788, nearly three hundred delegates assembled in Hillsborough to consider whether North Carolina would ratify the Constitution drafted the previous year in Philadelphia. When the convention began the delegates were certain of two facts: First, regardless of their decision, a government would soon be established; ten states had already ratified the Constitution, one more than necessary. Second, the opponents of the Constitution knew they had a substantial majority in the...
That majority refused to succumb to the success of the Constitution in other states; they did, however, make a significant concession to the political realities by deciding to seek amendments to rather than outright defeat of the Constitution. Thus, after eleven days of what may only loosely be termed deliberation, the North Carolina convention temporized. They would not ratify the Constitution, but neither would they formally reject it. Instead, they resolved to wait until a bill of rights had been presented to Congress and until a subsequent convention of states was called to amend the Constitution. Eighteen months later, after Congress submitted a bill of rights to the states, North Carolina quietly ratified the Constitution. For a decision that today seems to have such extraordinary import (the decision to join in union with the other states) to turn on such an apparently insignificant gesture (the submission, not the ratification, of a bill of rights) suggests something of the paradoxical na-

3. New York Hist. Soc., Lamb Papers, Federal Constitution 1788-1789, Timothy Bloodworth to John Lamb (June 23, 1788) (stating existence of decided majority against the proposed government). In spite of that knowledge, however, some still thought that North Carolina might follow the lead of Virginia and combine ratification with proposed amendments. See, e.g., 1 The Pettigrew Papers 528 (S. Lemmon ed. 1971), Charles Pettigrew to Peter Singleton (July 14, 1788) (Pettigrew thought North Carolina would follow lead of Virginia).

4. 2 McRee's Iredell, supra note 2, at 230, Davie to Iredell (notes decision to give weight to proposed amendments).

5. Elliott's Debates, supra note 1, at 242. Clason gave the debates the name "The Non-Ratifying Convention of North Carolina." A. Clason, Seven Conventions 120 (1888). North Carolina's action was what Antifederalist leaders had proposed in 1787. S. Boyd, The Politics of Opposition: Antifederalists and the Acceptance of the Constitution 19-20 (1979). Thomas Jefferson had made a similar suggestion. See 5 The Writings of Thomas Jefferson 5 (P. Ford ed. 1985), Jefferson to Madison (February 6, 1788). See Willie Jones' speech in the North Carolina convention, Elliott's Debates, supra note 1, at 225-26. Although the decision was unique among the states, this was not the first time that North Carolina had temporized on an important matter. In 1776, when the provincial congress attempted to draft a constitution for the state, the delegates were unable to agree; they postponed the debate for six months. See 1 S. Ashe, History of North Carolina 527-31, 556-69 (1908) (history of 1776 constitution); 10 Colonial Records of North Carolina 1037-38 (W. Saunders ed. 1980) (hereinafter CRNC), letters to James Iredell from Samuel Johnston and Thomas Jones (May 1776) (constitution issue not discussed fully); H. Lefler & W. Powell, Colonial North Carolina 281-83 (1973); H. Wagstaff, State Rights and Political Parties in North Carolina, 1776-1861 9-12 (Johns Hopkins University Studies in Historical and Political Science, ser. 24, nos. 7-8, 1906) (history of 1776 constitution). Some years later, when the Articles of Confederation came before the state legislature, the legislators first sought to approve only part of the Articles; they later ratified the entire document. M. Jensen, The Articles of Confederation 186 (1940) (account of writing and ratification); Douglas, Thomas Burke, Disillusionsed Democrat, 26 N.C. Hist. Rev. 150, 168-69 (1949) (partial ratification originally); 12 SRNC, supra note 1, at 229, 411-12, 599, 608-09, 708-09, 711, 717-18 (partial, then complete, ratification); 13 SRNC, supra note 1, at 102, 452 (partial, then complete, ratification).

6. There is no journal of this convention other than the abbreviated report in 22 SRNC, supra note 1, at 36-53. This convention also proposed amendments, eight in number, none of which were ever ratified. For an effort at explaining the abrupt about-face, see Newsome, North Carolina's Ratification of the Federal Constitution, 17 N.C. Hist. Rev. 287, 296-99 (1940).
ture of the constitutional debate in North Carolina.

Part of the paradox arises from the fact that the delegates' task of considering the proposed Constitution forced them into one of two debating positions: they were either for the Constitution or against it. There was no apparent position of compromise. Indeed, as Governor Samuel Johnston told the Convention, "If we reject any one part, we reject the whole." Such a bipolar world necessarily exaggerated differences between individuals during discussion of particular provisions. When the time came to conclude the convention, however, the delegates crafted a solution which more accurately reflected the fact that the two camps agreed on more points than they disagreed. Instead of rejecting the Constitution outright, they temporized by resolving to await a bill of rights.

To emphasize the temporary nature of their solution, the delegates approved two additional resolutions, both of which appealed to even the most enthusiastic supporters of the Constitution, indicating North Carolina's willingness to respond favorably, albeit later, to the new constitutional government. The first resolution addressed the most pressing need for a source of income for the national government. The convention recommended, "by a large majority," that as soon as Congress enacted an impost on imported goods, the state legislature should impose the same impost and appropriate the receipts to Congress. The other resolution addressed the greatest perceived evil created by the state governments under the Confederation. The convention unanimously recommended that the legislature make every effort to redeem the state's paper money as soon as possible. Those resolutions reveal the substantial agreement on the need for a national government with greater powers than under the Articles of Confederation.

Beneath the creative expedience of the

7. Elliot's Debates, supra note 1, at 15.
9. For examples of the effect of these resolutions, see Massachusetts Hist. Soc., George Thatcher Papers, George Thatcher to Mrs. George (Sarah) Thatcher (Sept. 16, 1788) (North Carolina passed two resolves "much to their honour."); Pennsylvania Hist. Soc., Gratz Collection, John Swann to James Iredell (Sept. 21, 1788) ("I now have the pleasure to assure you that her [North Carolina's] conduct is considered in a much less censorious light. The resolutions passed by the Convention were too [conclusive?] of a federal disposition at least, not to have had considerable influence in changing the public opinion."); Southern Historical Collection, John Rutledge Papers, John Brown Cutting to John Rutledge, Jr. (Oct. 9, 1788) ("To manifest however their affection for the Union and zeal for national credit and honor" North Carolina passed the two resolutions).
10. Elliot's Debates, supra note 1, at 251. For a discussion of the important divisions over the question of an impost under the Articles of Confederation, see J. Main, supra note 8, at 72-84.
11. Elliot's Debates, supra note 1, at 251-52.
12. For a contemporaneous, though anonymous, view of the different positions, see A North Carolina Citizen on the Federal Constitution, 1788, 16 N.C. Hist. Rev. 36 (Boyd ed.
convention's solution, however, lay historical and radical differences between the Federalists and the Antifederalists.

THE BACKGROUND

One key to understanding the differences between the Federalists and the Antifederalists lies in the realization that the debate over the Constitution was primarily a debate about law. However much might be learned from an economic, social, or other adjectival analysis of the debates, the delegates were first and foremost talking about law, about which they had a fundamental disagreement. For the Antifederalists, law was politics. As such, it was subject to the usually beneficial, though sometimes malevolent, influences of shifting majorities in any assemblage. On the one hand, the law might be the ameliorative considerations of a jury deciding in favor of "justice" rather than "the law." But, on the other hand, it might be the demands of a legislature that taxes be paid in specie which was dear rather than commodities which were abundant. For the Antifederalists, the solution required to minimize any injurious tendencies was to make the law ever more the customary sense of a small and homogenous community, avoiding the need for commands from a distant legislature wherever possible. Only by retaining its smallness could a community hope to maintain the homogeneity necessary to maximize the beneficial effects of "law" at the expense of the political evil.

By contrast, for the Federalists, the law offered a means of controlling politics. Rather than the rough-and-tumble, kaleidoscopic justice of custom, the Federalists sought a more predictable and more certain result which could come only from a legal system which placed limits on the many competing interests, each seeking advantage in a temporary

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13. See 2 McRee's Iredell, supra note 2, at 148 (Iredell wrote in 1786 under the pseudonym "An Elector": No one will "den[y] the constitution [of North Carolina] is a law," to be sure the "fundamental law", but a law nonetheless.)

14. It might also be a justice of the peace, untrained in law as most of them were, deciding according to his own perception of the community's interest. See J. Davis, The Office and Authority of a Justice of the Peace 112 (Newbern 1784) (book intended for "the unlearned Reader"); J. Boyd, The County Court in Colonial North Carolina 39-40 (unpublished M.A. thesis, Duke University 1926) (types of laws administered by the county courts) [hereinafter Boyd's MA thesis]. For much of the eighteenth century there were also many lawyers who had little knowledge of the law. A. Ekirch, "Poor Carolina": Politics and Society in Colonial North Carolina, 1729-1776 at 25, 27 (1981).

Both the Federalists and the Antifederalists shared a long history of debate about law in North Carolina. For much of that history they also shared the view that law was politics. The early disputes between the legislators and the royal governor closely resembled the later efforts by the Antifederalists to preserve local government against the most venal predicted effect of the proposed Constitution — “consolidation.”17 To a significant degree, the difference between the colonial disputes and the later constitutional arguments was the replacement of royal authority by the Federalists.18

For the Antifederalists and their predecessors the primary goal was to resist the imposition of “law” by a distant authority, whether it be the colonial assembly sitting in a coastal town or the constitutional congress sitting even further away. In contrast, the antecedents of the Federalists lay in the nationalist faction that had begun in North Carolina by 1783.19 This faction arose from an emerging distrust of the state legislatures, which seemed all too subject to transitory control by interests unappreciative of the need for consistent legislation. In place of the thirteen mercurial legislatures, the Federalists hoped to put a national congress. But even more important for an understanding of the debate in North Carolina, the Federalists hoped to enact a set of laws that would provide certainty and stability in the place of the laws that the Antifederalists and local interests perceived as being equitable and just.

That the two sides were not always consistent in their arguments or in their membership is not surprising. As the legal and political systems developed during the colonial period, legal arguments were often selected based upon the need to justify a particular outcome.20 In spite of the chameleon-like quality of the debate, it is clear that for much of the colonial period most colonists adhered to the notion that law was custom.21 That

16. As Merrill Jensen notes, this was not a new idea, it had been popular through much of the eighteenth century. M. Jensen, supra note 5, at iii n.8. For a study of gradual efforts to implement similar thoughts in North Carolina, see S. Koesy, Continuity and Change in North Carolina, 1775-1789 (unpublished Ph.D. dissertation, Duke University 1963).


18. Id.


20. Cf. A. Ekihr, supra note 14, at 79 (“For the most part, constitutional differences, when they did arise, seem to have masked more fundamental conflicts.”)

21. Cf. C. Raper, NORTH CAROLINA: A STUDY IN ENGLISH COLONIAL GOVERNMENT 222-23 (1904). For an early example, see the enactment of the General Assembly in 1715 declaring that the laws of England were “the [I]laws of this Government, so far as they are compatable [sic] with our Way of Living and Trade.” Act of 1715, ch. 31, § 5, 1821 N.C. Laws ch. 5, § 1, 23 SRNC, supra note 1, at 39. A similar act was passed in 1749. Id. at 327. The later act was disallowed by an Order in Council in 1754. H. Taylor, Creditor vs. Debtor: A Study of the Statutory, Administrative, and Procedural Aspects of Debt Recovery in Colonial North Carolina (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill 1972); cf.
is, for most colonists the primary source of law was the habit of the local community; it was what they had unconsciously done for years gone by. Law was not the enactment of a sovereign, at any location.

In fact, North Carolina had a purer experience with small, local governments than any other state. The unique characteristics of that shared colonial history were that North Carolina had few slaves, no plantation aristocracy, no centers of commerce and culture. . . . [Its] preoccupation with local problems — conflicts between settlers and Indians, between east and west, between assemblies and governors — combined with geographic and cultural isolation to give North Carolina a uniquely parochial character at a time when events were causing other colonies to develop a more American outlook.22

Alone among the states, as of 1787, North Carolina had not developed a substantial commercial center, or a city of any size for that matter. North Carolina did not even have what could properly be called a permanent capital. (One of the tasks of the Hillsborough Convention was to fix the site for a capital.)23 In short, as one resident wrote in about 1770, North Carolina was “the Best poor mans Country I Ever heard of.”24

The consequence of North Carolina’s experience was to make even more substantial the inevitably important role of local government throughout the colonial period and early years of independence. From the earliest decades of the colony’s existence the local government was the county court.25 Even as late as 1767, when Governor Tryon described the government of the colony, his report focused almost exclusively on the courts.26 That government, as Michael Kay has described it was highly personalized. It was not composed of office holders who were remote from the people and were paid out of public funds earmarked for such expenses, but of men who resided in the midst of the inhabitants, gained most of their living as private citizens, and were paid for their public duties primarily by direct collections from the people in

J. IREDELL, LAWS OF THE STATE OF NORTH CAROLINA 17 n.(a) (1791).

22. Klein & Cooke, Introduction to H. Lefler & W. Powell, supra note 5, at xiii; id. at 153, 174-76; Newsome, supra note 6, at 295 (reasons for initial refusal of ratification). It was in precisely this kind of isolation that Jackson Turner Main finds the origins of antifederalism. J. Main, supra note 8, at 7, 274. The most recent scholarly study of eighteenth-century North Carolina is A. Ekirch, supra note 14. On the point mentioned in text, Ekirch’s second chapter is especially useful. See id. at 19-47.

23. For the various resolutions and disputes on this task in the convention, see 22 SRNC, supra note 1, at 26-35.


25. Boyd’s MA thesis, supra note 14, at vii. See also Paul McCain, THE COUNTY COURT IN NORTH CAROLINA BEFORE 1780, at v (1964) (Trinity College Hist. Soc. Papers ser. 31) (“For almost two hundred years before the adoption of the Constitution of 1868 the county court was the principal institution of local government in North Carolina.”)

the form of fees and commissions.  

With virtually every aspect of government influenced in some way by these local courts, the colonists saw from the start that the same judges who decided criminal and civil disputes also administered local government. There was little concept that any judicial function should be separate from an administrative function, certainly not at this lowest level of colonial government. In fact, even though the entity was termed a "court," it was not uncommon for administrative matters, those concerning roads, mills and the like, to take precedence over judicial matters. The political process that led to the selection of the justice of the peace was therefore the same process whether one wanted to be a judge or an administrator. Thus, it is no wonder that for the decided majority of colonial North Carolinians, law and politics were indistinct.

As a consequence, when local disputes took on a political tone, they frequently concentrated upon the county court. Not infrequently those disputes were taken to the legislature, whose members were often the same people who were justices of the peace or other officials at the county level. In the early colonial years the members of the legislature stood substantially united; most often they reflected the views of the colonists in disputes with the crown or its local representative, the royal governor.

One of the earliest occasions for dispute about the nature of law was the arrival of a new governor, Gabriel Johnston, in the colony in 1734. Shortly afterward, the grand jury of the province (the colony not being large enough yet to have more than a single grand jury) prepared an address in which it complained that it could find no law requiring that the quit rents due the crown be paid in a particular currency or at places designated by the governor. Instead, the grand jurors contended, it had "always been the Custom, Time out of Mind, to pay" the rents on the land in question, the grand jurors therefore concluded, equating custom and habit with "law," that to require otherwise was "contrary to the Laws and Usages of this Province." The colonists were perfectly capable of basing their argument on a written document — in this instance, the

30. For accounts of the ebb and flow of factionalism in the North Carolina General Assembly, see A. Ekirch, supra note 14.
deed to the proprietors in 1668 (the “Great Deed of Grant”) — but their preference was apparent in their argument that any requirement of payment in sterling was “contrary to our Laws, Customs, and even to the Conditions of the Grand-Deed.” Any “laws” that might exist were only those approved by the proper authority in England. Since he could find no such law that supported the colonists’ position, he concluded that they were obligated to pay quit rents according to his proclamation.

One of the difficulties faced by the colonists was that in the absence of adequate printing facilities, no printed documents were readily circulated and available, not even the enactments of the legislature. Governor Gabriel Johnston, who preferred certainty of the law, regularly complained to the Assembly that he could not “find one compleat [sic] Copy of the Laws; [neither had he] seen two Copies that agree.” The Assembly conceded that there was a problem and even admitted that it might not have been as careful as it should in wording certain statutes. But, it did not view the problem as overly significant, for, after all, law was what the people had become accustomed to doing; they knew the law because they lived it every day. Thus the Assembly believed that “the Sense and Meaning of the honest Law-makers [was] sufficiently expressed.” Furthermore, the Assembly saw little to be gained from a precise expression of certain laws since the only result had been that “a Person of great Learning” had criticized certain paragraphs and then taken six or seven times the fees authorized by law. To these members of the Assembly, the definite, written law represented only the imposition of an outside

32. South Carolina Gazette, Aug. 2-9, 1735.
33. Id., July 26-Aug. 2, 1735.
34. Id., Aug. 9, 1735 (address at prorogation of Assembly). Citizens of western counties would later use very similar language in protests against the Assembly’s requirement that taxes be paid in specie rather than in commodities. 8 CRNC, supra note 5, at 75-80; North Carolina Archives, Legislative Papers Nov.-Dec. 1768, Petition from Inhabitants of Orange and Rowan Counties (regarding grievances over sinking fund tax).
35. For early examples of laws aimed at correcting this problem in the courts, see Act of 1749, ch. 4, 23 SRNC, supra note 1, at 346 (1749 statute authorizing county courts to purchase certain law books); Act of 1715, ch. 66, § 15, 23 SRNC, supra note 1, at 94-96 (1715 statute requiring county court clerks to make laws of province available to judges and parties). For other acts authorizing collection and printing of statutes, see Act of 1746, ch. 1, 23 SRNC, supra note 1, at 268 (act appointing commissioners to revise and print the laws of the colony); Act of 1748, ch. 7, 23 SRNC, supra note 1, at 308; Act of 1749, ch. 6, 23 SRNC, supra note 1, at 332.
36. South Carolina Gazette, May 21-28, 1737; see also id., Mar. 1, 1739 (complaint that laws were “dispersed in a few obscure incorrect Copies”); id., Apr. 11-19, 1740 (relates that in Governor Johnston’s travels throughout the colony he had met many who complained of the lack of copies of laws).
37. Id., May 28, 1737. Just over three decades later, Hermon Husband wrote a similar argument in favor of jurors being able to interpret the laws. Hermon Husband’s Continuation of the Impartial Relation, 18 N.C. Hist. Rev. 48, 58 (1941).
38. South Carolina Gazette, May 21-28, 1737.
authority; they saw no reason to favor such an authority.

A later dispute concerning custom arose within the Governor's Council itself in 1739. The occasion for the dispute was a proposal to change the name of Newton to Wilmington. After all eight members of the Council cast votes, they found that they had split evenly, 4-4.\textsuperscript{39} The senior member then claimed the right to cast another vote to break the tie, which he did.\textsuperscript{40} The four members who thereby became the losing minority responded with a written protest based on custom.\textsuperscript{41} The minority argued that there was no precedent for such action "in any of his Majesty's Colonies in America since the first Settlement of them."\textsuperscript{42} The importance of the departure from precedent was evident in their conclusion:

We conceive, that where a Right is so strongly asserted as in this Case, it behoves the Parties asserting that Right to produce some Instances parallel to it, either at Home or abroad, in support of that Assertion, in order to regulate our Judgment and determine our Opinions in the Case; [since the only precedent was one in which a divided vote led to the failure of the proposal,] it is plain we conceive, that the present Claim of the first Counsellor is an Innovation and destructive to the Rights of the Upper House, which we are determined as far as in us lies to leave unviolated to our Successors.\textsuperscript{43}

In the following decades, the legal system of the colony continued to develop, as did the controversy between the colonists and the crown. There even began to be splits among the colonists. One of the earliest splits was evidenced by a petition from Anson County in 1769 complaining that "Lawyers, Clerks, and other petitioners [sic]; in place of being obsequious Servants for the Country's use are become a nuisance, as the business of the people is often transacted without the least degree of fairness, the intention of the law evaded."\textsuperscript{44} For those colonists at least, lawyers represented the law's growing rigidity, which increasingly set the law against customary concepts of fairness and justice.

The localized nature of custom was evident also in later disputes during which some colonists began to refine their position by rejecting any custom that was not their own. In those circumstances, they argued that their own colonial legislature should be allowed to enact a statute to make the law certain. The key example of refinement of the colonists' position occurred in the dispute between the Assembly and the governor over an attachment provision in the colony's law.\textsuperscript{45} "Attachment" is a process by

\textsuperscript{39} Id. July 2-9, 1740.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} 8 CRNC, supra note 5, at 76 (emphasis added).
\textsuperscript{45} For further discussion on this dispute, see generally 1 S. Ashe, supra note 1, at 408-414; Taylor, The Foreign Attachment Law and the Coming of the Revolution in North Carolina, 32 N.C. Hist. Rev. 20 (1975); H. Taylor, supra note 20, at 177-211; Sellers, supra note 17, at 27-30.
which a creditor, who is unable to obtain repayment of a debt, can enlist
the aid of a court in seizing sufficient assets of the debtor to secure pay-
ment. The ostensible concern of the North Carolinians was debt owed
them by people who lived in England and did business in North Caro-
olina. Because the debtors themselves never came to the colony, the cred-
itors could not have them personally seized to enforce a debt. The only
recourse the colonial creditors had was to obtain a court’s order to seize
and later to sell assets owned by the English debtor. If the process for
obtaining a court order required that the English debtor answer the suit,
the difficulty of transatlantic communication meant that any effort to re-
cover debts would be dramatically prolonged. The colonists therefore preferred an attachment provision that al-
lowed a court to issue an order (a “writ of attachment”) directing the
sheriff to seize certain property of the debtor. The only requirement of
that law was that the sheriff first report that the debtor could not be
found within his jurisdiction — and of course it surprised no one that a
resident of England could not be found in a North Carolina county. The
essence of the law was to enable the colonists to proceed more easily
against the assets of English debtors, much to the disadvantage of the
debtors. Understandably, English merchants pressured the crown to dis-
allow any attachment provision. Both sides refused to concede, with the
result that after the court law expired in 1773, the colony had no judicial
system until 1777 when the state legislature re-created the system.

During the dispute between the Assembly and the governor, the rec-
ognition of custom as flexible and serving a local interest reappeared. On
this occasion, though, the colonists spurned any concept of custom that
recognized a transnational basis for its authority. The colonists rejected
the attachment practices in England as being no more than the custom of
municipalities. Such practices were “confined to Liberties and
Franchises governed by particular Circumstances of Place and People,

46. For a contemporaneous explanation of the law, see J. DAVIS, supra note 14, at 22-
26.
47. For a discussion of the problems associated with transatlantic debt collection, see
H. Taylor, supra note 21, at 30-34.
48. The efforts would have been prolonged under a bill proposed by the Council,
which required twelve months notice to the debtor. 9 CRNC, supra note 5, at 558-59. As
Ashe explained, the House refused to approve because the proposal “was an innovation in
law and usage which had ever prevailed in the province.” 1 S. ASHE, supra note 1, at 408.
49. There was also complaint that the law was used unfairly to seize the assets of
North Carolina merchants when they were away from home. Instructions to Orange County
Representatives (1773), 9 CRNC, supra note 5, at 701-04; Boyd’s MA thesis, supra note 14,
at 146-47.
1, at 48.
51. Alexander Elmsly wrote from London to Samuel Johnston that in the City of
London and certain other “old” towns, attachment lay by custom. Southern Historical Col-
lection, Hayes Papers (Johnston Family Series), Elmsly to Johnston (May 17, 1774). In this
letter Elmsly also explained the origins of the most recent instruction to the royal governor
concerning the attachment provisions. Id.
and so essentially local in the Application of them, as not to admit to being extended by any Analogy to this Province." The Assembly also rejected any contention that the judges might interpret the law and adapt it to the province. Their reasoning reflected both their mistrust of judges appointed by the royal governor and their understanding of statutory law as a check on the discretionary flexibility of custom: "to secure a Privilege so important, the Mode of obtaining it should be grounded in Certainty, the Law positive and express, and nothing left for the exercise of Doubt and Discretion."

The Assembly's argument also revealed another aspect of the changing debate. Once the colony began to develop commercially, it also had need for a more certain law, "positive and express," than was required in the earlier years of the colony. Into the 1770s, the colony retained its sense of fundamental difference between custom and statute. But, the colony had begun to change sufficiently to make an appeal to statute attractive to some interests. Custom was the law of equity, the law that decided each case according to the perceived justice of its facts. Statutory law was the law of rules, the law that decided each case in a predictable manner so that, in particular, commerce could develop with regularity. In the 1780s the distinction between custom and statute would reappear under the guise of the dispute between the Federalists and the Antifederalists. To the Antifederalists, written law represented the intrusion of both law and commerce from outside the small, local community; it represented the loss of local control of justice. To the Federalists, written law was the epitome of what was required for ordered growth and development.

THE CONVENTION

The proceedings of the Hillsborough convention resonated with those historical differences. No sooner had the Federalists proposed to discuss the Constitution clause-by-clause (as had been done in each state which had not ratified the Constitution unanimously) than the Antifederalists objected. According to Willie Jones, the leader of the Antifederalists, everyone had had enough time to study the Constitution. Every delegate was doubtless ready to vote. Jones' lieutenant, Thomas Person, echoed that belief in seconding a motion to vote immediately.55

The Federalists were aghast at the thought that there would be no deliberations. Yet even their leader, James Iredell, recognized that the Antifederalists were correct as a matter of fact. The Constitution had been a topic of considerable discussion for more than nine months, since

52. South Carolina Gazette, March 29, 1773.
53. Id.
54. ELLIOT'S DEBATES, supra note 1, at 4. For further commentary about Willie Jones, see Robinson, Willie Jones of Halifax, 18 N.C. Hist. Rev. 1, 133 (1941).
55. ELLIOT'S DEBATES, supra note 1, at 4.
56. Id. at 4-6.
September of 1787. The delegates themselves had known for over three months that they were to attend the convention. And, of course, there had been an even longer time to consider any perceived weaknesses in the Articles of Confederation. No delegate came to Hillsborough uninformed. The initial skirmishes at the convention therefore did not reflect a dispute about the factual question of how much additional time was required for the delegates to consider the Constitution. Instead, the debate grew out of a fundamental disagreement about the proper role for the delegates to a convention. This disagreement, in turn, reflected the long-standing and basic differences of opinion about the proper nature of law and government. According to the Antifederalists, the delegates assembled to cast the vote directed by their constituents. As William Lancaster, an Antifederalist from Franklin County, explained later in the convention, “every delegate was bound by their instructions.” Or, as Lancaster also said, he and every other delegate was “bound by the voice of the people.” Iredell’s response for the Federalists could not have afforded greater contrast: “We have been sent hither, by the people, to consider and decide this important business for them.” Recognizing the fundamental nature of the disagreement over Willie Jones’ motion to vote immediately, Iredell devoted substantial time to his answer. He explained that he might vote against the Constitution even though his constituents had elected him with the expectation that he would vote for it. Iredell avowed that he would feel no embarrassment in returning to his home and reporting that he had been convinced by the arguments of those at the convention.

But Iredell’s assurance was in itself frightful to the Antifederalists. It provided immediate evidence of the dangers anticipated from a govern-

57. For example, Davie wrote Iredell early in 1788 and commented upon the developing discussion of “Anti-federal principles.” Duke University Archives, Iredell Papers, Davie to Iredell (Jan. 22, 1788). Davie also wrote to Hugh Williamson that “a formidable party” had begun to form against the constitution. Free Library of Philadelphia, Hampton L. Carson Collection, Davie to Williamson (Feb. 12, 1788). See also Rhode Island Historical Society, Henry Marchant Papers, Silas Cooke to Henry Marchant, New Bern (Apr. 20, 1788) (“The new constitution is the grand subject of speculation here at present, the [people] are much divided upon it . . . .”) Cf. S. Boyd, supra note 5, at 110; H. Wagstaff, supra note 5, at 21-23.

58. Elliot’s Debates, supra note 1, at 13-14.

59. Cf. A North Carolina Citizen, supra note 12, at 36, 38-40 (unidentified author describes discussion of constitution in spring or summer of 1788); Newsome, supra note 6, at 289.

60. Elliot’s Debates, supra note 1, at 215.


63. Elliot’s Debates, supra note 1, at 5-6.
ment operating at a distance from its constituents, a government that necessarily would comprise heterogeneous interests. If Iredell’s position held, delegates might go from North Carolina to meet with delegates from very different areas, such as New England, and be convinced (Willie Jones and his followers would say “corrupted”) to vote against the wishes of their constituents. Iredell’s position was all the more foreboding since the North Carolina convention would last but a few weeks at most, while delegates to Congress would remain away for much longer periods of time. Members of the House of Representatives would remain away for as much as ten years, forewarned Joseph McDowell, Antifederalist delegate from Burke County. “At such a distance from their homes,” he predicted, “and for so long a time, they will have no feeling for, nor any knowledge of, the situation of the people.” The order of his statement was suggestive of the basic Antifederalist position that law was equity: “feeling for” the people took precedence over “knowledge.”

The lack of contact with the people was all the more troubling for McDowell and others of his fellow Antifederalists from the western part of the state because they anticipated that the congressional delegates would be chosen from residents of the seaboard. Easterners would “not know of the western part of the country, and,” McDowell admitted, “vice versa.” According to Antifederalist Joseph Taylor of Granville County, the expanse of the thirteen states was simply too large for the “consolidated” government envisioned by the Constitution. The delegates from the western counties spoke from their own experience with insignificant representation in the various colonial and state assemblies. For example, in 1774 one of Governor Burke’s correspondents noted that there was an inconsistency between complaints about inadequate representation in Parliament and the unequal treatment of the western counties in the meeting in Halifax that year. “It is not in character to dispute the power of Parliament,” he wrote, “when we say we are not represented and yet quickly to submit to so unequal a representation in a body formed by ourselves.”

If the delegates from North Carolina could not know the interests of different sections of their own state, it was inevitable that “men who come from New England [were] different from us. They are ignorant of our situation; they do not know the state of our country. They cannot

64. Elliot’s Debates, supra note 1, at 88. Davie provided an illustration of the close-ness of the two positions when he explained that in the federal convention the North Carolina delegation had argued for limiting the president to a single term of four or five years. The “return of public officers into the common mass of the people, where they would feel the tone they had given to the administration of the laws, was the best security the public had for their good behavior,” Id. at 103. Davie also thought it unlikely that even Senators could remain in office for more than one term. Id. at 122-23.
65. Id. at 70, 88.
66. Id. at 88.
67. Id. at 24.
with safety legislate for us.”

Judge Samuel Spencer of Anson County, the leading debater for the Antifederalists, nicely summarized their position:

... [f]rom all the notions which we have concerning our happiness and well-being, the state governments are the basis of our happiness, security, and property. A large extent of country ought to be divided into such a number of states as that the people may conveniently carry on their own government. This will render the government perfectly agreeable to the genius and wishes of the people. If the United States were to consist of ten times as many states, they might all have a degree of harmony. Nothing would be wanting but some cement for their connection. On the contrary, if all the United States were to be swallowed up by the great mass of powers given to Congress, the parts that are more distant in this great empire would be governed with less and less energy. It would not suit the genius of the people to assist in the government.

But, however much the Federalists tried, they could not budge the Antifederalists from their basic apprehension. The irrepressible Archibald Maclaine, representing the town of Wilmington, pointed out unavailing that the “members of the general government, and those of the state legislature, are both chosen by the people.” And, he asked rhetorically, “If the elections be regulated in the best manner in the state government, can it be supposed that the same man will lose all his virtue, his character and principles, when he goes into the general government, in order to deprive us of our liberty?” Likewise, William R. Davie, the Federalist delegate from the town of Halifax who had represented the state in the convention in Philadelphia, countered Judge Spencer’s observation with the statement that the “people of the United States have one common interest; they are all members of the same community.” The fundamental disagreement over the nature of government and of representation went unresolved as the delegates agreed “by a great majority” to discuss the Constitution clause-by-clause.

But the convention immediately stalled again over another fundamental disagreement. Reverend David Caldwell, Antifederalist from Guilford County, proposed six maxims which he described as the “fundamental principles of every safe and free government.” He urged the con-
vention to accept them and then to use them as a litmus test to determine whether the Constitution was fit for adoption. Not all of the Antifederalists agreed with Caldwell’s tests. (Judge Spencer, for example, disagreed with at least one.) But the tests did provide additional examples of the fundamental split between the Antifederalists and the Federalists.

Caldwell’s first maxim was that a “government is a compact between the rulers and the people.” The notion of a “compact” was unique to neither Caldwell nor the Antifederalists, but it did reveal a telling anachronism in their thought. Fifteen years earlier Iredell himself had used the same argument, though about the British crown. “[T]he constitution of this country [North Carolina],” he had written, “is founded on the provincial charter, which may well be considered as the original contract between the King and the inhabitants; [the governor’s commission is like] a special letter of attorney, impowering and directing the Governor in what manner to execute that contract on the part of the King.”

Although Caldwell would later retreat somewhat from his characterization, he and other delegates regularly referred to the need to protect the people from the “rulers” who would be set up by the Constitution. The choice of term was pejorative, recalling as it did the British monarch from whom the country had so recently rebelled. For the Antifederalists, any additional layer of government beyond the homogeneous, small community was an admission of failure. To add the overlay was to add “rulers” and was to admit that the people could not govern themselves. Furthermore, the additional layer of government necessarily required “rules” which also contradicted the more equitable process that the Antifederalists envisioned. The Federalists countered by arguing that this first maxim indicated that the Antifederalists had not yet accepted the revolutionary dogma that the people themselves were sovereign. But Caldwell’s Antifederalist companion from Guilford County, William Goudy, made it

1st. A government is a compact between the rulers and the people. 2d. Such a compact ought to be lawful in itself. 3d. It ought to be lawfully executed. 4th. Unalienable rights ought not to be given up, if not necessary. 5th. The compact ought to be mutual. And, 6th, It ought to be plain, obvious, and easily understood.

Id.

76. Id. at 12.
78. 1 Higginbotham’s Iredell, supra note 19, at 164. Iredell frequently repeated that argument in the years before the Declaration of Independence. See, e.g., id. at 26-62 (“To the Inhabitants of Great Britain” 1774); 331 (“The Principles of an American Whig” 1775-1776); 339-40 (June 1776).
79. Elliot’s Debates, supra note 1, at 12.
80. E.g., id. at 10, 137, 167.
clear that they were not interested in a lawyer’s “quibble upon words.” They were concerned about practical politics. The concession that a community needed rulers only introduced an additional likelihood of an abuse of power. “[I]f rulers be not well guarded,” Goudy stated, “that power [of the people] may be usurped from them.” Thomas Burke, North Carolina’s quintessential democrat, had epitomized the same view a decade earlier when he wrote from the Confederation Congress to Governor Caswell: “The more experience I acquire, the stronger is my conviction, that unlimited power cannot be safely entrusted to any man, or set of men, on earth.” Burke continued his letter with the observation “that Power of all kinds has an irresistible propensity to increase a desire for itself. It gives the passion of ambition a velocity which increases in its progress; and this is a passion which grows in proportion as it is gratified.” Those statements echoed the warning of “Honestus” in the Wilmington Centinel just before the convention met. He reported that “all the people of the ancient republics lost their liberty by being too liberal in bestowing too much power to their chosen leaders, though ever so virtuous and disinterested in their private life and situations, but when once granted, it is not so easily to be altered or recalled.”

Caldwell’s second maxim was equally significant. It provided that the Constitution itself should be “lawful.” The idea grew out of the concept that social mores, or custom, could be used to criticize the law; that equity could soften any harsh rules of “law.” The maxim’s phrasing recalled a debate in the First Continental Congress over an appeal to natural law. The radicals in that Congress were Caldwell’s predecessors: both saw merit in an appeal to some basis outside the legal system for the security of legal rights. Both were confronted by a more conservative group who saw in law an authority in itself, without an appeal to some other authority. Indicative of the Federalist reply in North Carolina was one of the “Instructions to Chowan County Representatives” in September 1783, which the editor of Iredell’s papers suggests was written by Iredell himself. The text instructed the delegates to secure permanent salaries for the judges and the attorney general. In the absence of permanent salaries the officials “cannot be truly independent, which is a point of the utmost moment in a Republic where the Law is superior to any or all the Individuals, and the Constitution superior even to the Legislature.” To the Antifederalists it was inconceivable that law could be superior to “all the Individuals.” The individuals, in their small, homogeneous communities,

82. Elliot’s Debates, supra note 1, at 10.
83. Id.
86. June 18, 1788, “To the People of the State of North Carolina.”
87. Elliot’s Debates, supra note 1, at 9.
88. See M. Jensen, supra note 5, at 60.
89. 2 Higginbotham’s Iredell, supra note 19, at 449.
were the law.

Iredell's concept had prior application in discussions about the North Carolina Constitution of 1776. In 1784 Samuel Johnston described the government of the state for a friend. One of the characteristics that he thought preferable in the North Carolina government to all previous governments was the fact that:

our Constitution which existed before the Government and which created and regulated it is considered in the Nature of a Charter not to be violated and every Law, made contrary to or inconsistent with the principles laid down and marked by it, is considered absolutely void and not binding on the Citizens, this [illegible] is a kind of Security for the Stability of our Government without which our affairs would be in such a State of fluctuation as must eventually produce Anarchy.\textsuperscript{90}

Johnston had no reason to allow an appeal to anything outside the Constitution; to do so would produce what he termed "fluctuation" and assuredly "anarchy." To the Antifederalists an appeal outside the written law produced equity, so long as the community was small enough to remain homogeneous.

The difference between the Antifederalists and the Federalists suggested by Caldwell's second maxim provided the basis for additional disputes later in the convention. For the moment, however, the convention was content to drop the issue, but the two positions remained. On the one hand the Antifederalists saw law as equity, which had two consequences. First, they saw law, whether written or customary, as a flexible tool to be crafted to fit the equity of the moment. Second, because any law, even a constitution, was so flexible, there was a particular need for explicit restrictions in any written document. Without such restrictions, the lust for power inherent in human nature would permit the "rulers" to abuse the flexibility of the law. On the other hand, the Federalists saw law as a system of rules that, in itself, provided the limits to power. The government, being the creature of the Constitution, could not act outside the creating force. There was no need, in the eyes of the Federalists, for Caldwell's rules or for any other statements of limitation on the powers of the government.

The convention sensed that there was nothing to be gained from further discussion of Caldwell's maxims. Accordingly, (we are told it was after "some little altercation")\textsuperscript{91} the convention at last began to consider the Constitution section-by-section. What followed was, at times, little more than a parody of a debate. The Antifederalists said little; the Federalists provided both point and counterpoint, first stating a criticism and

\textsuperscript{90} Southern Historical Collection, Hayes Collection (Johnston Family Series), Johnston to Alexander Scrysmoure, July 11, 1784. An undated fragment of an argument contains similar phrasing. Id., folder 107. Johnston made a similar argument within the convention. ELLIOT'S DEBATES, supra note 1, at 64. See also 2 McRee's IREDELL, supra note 2, at 145, "To the Public" (Aug. 17, 1786). The statements may seem to anticipate judicial review; Iredell's address certainly did so. See id. at 145-49.

\textsuperscript{91} ELLIOT'S DEBATES, supra note 1, at 13.
then offering a rebuttal. After some initial sarcasm from the Antifederalists, the convention settled into a pattern of long speeches by the Federalists, with short interjections by the Antifederalists. More often than not, however, the debaters talked past one another. The fundamentally different premises prevented any chance for persuasion.

THE PREAMBLE

Before the convention could get to the text of the Constitution, the Antifederalists objected to the first three words of the preamble, “We the People.” David Caldwell and Joseph Taylor saw in that phrase confirmation of their belief that legislators would usurp power. As Taylor explained, he was:

astonished that the servants of the legislature of North Carolina should go to Philadelphia and, instead of speaking of the state of North Carolina, should speak of the people. I wish to stop power as soon as possible; for they may carry their assumption of power to a more dangerous length. I wish to know where they found the power of saying, We, the people, and of consolidating the states.

The appearance of another form of the dreaded “consolidation” showed that the fear of losing the states as viable organs of government was never far from the Antifederalists’ thoughts.

The response of the Federalists was logically correct but persuasively impotent; they seemed either unwilling or unable to answer the Antifederalists directly. The Federalists pointed out that the Philadelphia convention had only proposed the Constitution; it had not ratified it. Their arguments about the need for a change from the Articles of Confederation were conceded, but with an insistence that the Philadelphia convention had still exceeded its powers.

ARTICLE I — CONGRESS

By the time the delegates reached the text of the Constitution itself, they had been in convention for more than three days. Debate on the first article, the provisions for Congress, then occupied just over two addi-
tional days. Although delegates mentioned many different issues, the Antifederalists concentrated on two provisions: section four, which allowed Congress to “make or alter” regulations for the “Times, Places and Manner of holding Elections for Senators and Representatives”; and section eight, which gave Congress the power “To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”

William Goudy summarized the Antifederalist position on both provisions. Speaking on the latter provision, he declared, “This clause with the clause of elections, will totally destroy our liberties.”

Not even the Federalists could wholeheartedly endorse the provision that allowed Congress to regulate elections. Governor Samuel Johnston, an ardent supporter of the Constitution, conceded that he could not “comprehend the reason of this part.” For him the proper strategy would be to join with other states that had ratified the Constitution and had directed that the provision be removed. But that compromise would not satisfy the Antifederalists who saw the clause as an attack on state legislatures; it “look[ed] forward to a consolidation of the government of the United States, when the state legislatures may entirely decay away.” Or, as James McDowell foretold, the states would only “be kept up as boards of elections.”

Even though Federalists such as Iredell professed allegiance to the states, insisting that the Constitution itself depended upon the continuation of the states, the Antifederalists remained unpersuaded. They condemned the provision as unnecessarily vague and therefore easily subject to abuse. If, they asked, the provision was needed only when a state failed to provide for election, why had the language not been explicit?

The Federalists urged reassuringly that delegates to Congress could be trusted. As Archibald Maclaine argued, “It cannot be supposed that the representatives of our general government will be worse men than the members of our state government. Will we be such fools,” he asked, “as to send our greatest rascals to the general government? We must be both fools as well as villains to do so.” The Antifederalists did not expect rascals for delegates or fools for electors. They did, however, expect that

98. U.S. CONST. art. I, §§ 4, 8. For an account of the development of the debate over whether Congress should have an independent income, see J. Main, supra note 8, at 72-80.
99. Elliot’s Debates, supra note 1, at 93. One of the Bloodworths had a similar thought when he said that the constitution “if adopted in its present mode, must end in the subversion of our liberties.” Id. at 55. (The reporter of the debates never identified which of the Bloodworths was speaking. All commentators, however, have assumed that it was Timothy, not James, who spoke.)
100. Id. at 50.
101. Id.
102. Id. at 51.
103. Id. at 51.
104. Id. at 53.
105. Id. at 54-55.
106. Id. at 64; cf. id. at 69 (Maclaine).
power would be abused; the nature of human beings assured it. After all, they had already seen that the “best” delegates had exceeded their powers in Philadelphia. No amount of rhetorical questioning could satisfy the Antifederalists.

When the debate turned to the eighth section of article I, the Antifederalists repeated arguments which had been well honed in the debate against the even more distant parliament in London. The idea that taxation should be imposed only by representatives of those taxed was of course a major element of the debate with Britain.107 The justification of that argument reflects the understanding that colonial North Carolinians had of the nature of law and the meaning of “constitution.”

Maurice Moore had published a traditional attack on taxation by Parliament in 1765, with the basic theme that there should be no taxation without representation.108 One argument, though, was especially telling with respect to the later debate on the Constitution. Moore pointed to a long practice of imposing taxes for the public benefit only by the people’s representatives. From that practice he concluded that “it is clearly to be inferred, that the right of prescribing the measure and manner of raising all taxes is a constitutional one, which was enjoyed by the ancestors of the Colonists.”109

Once again Judge Spencer encapsulated the Antifederalist position: he asserted that the “most certain criterion of happiness that any people can have, is to be taxed by their own immediate representatives, — by those representatives who intermix with them, and know their circumstances, — not by those who cannot know their situation. Our federal representatives cannot sufficiently know our situation and circumstances.”110 The likelihood of abuse was all the more fearful when the government also controlled the army, as would be the case under the Constitution. To join the power of the sword with the power of the purse was to assure tyranny.111

Judge Spencer suggested that the Constitution should not allow the national government to tax individuals directly.112 Instead, he proposed

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107. For example, North Carolina’s delegates to the First Continental Congress were instructed to “assert our rights to all the privileges of British subjects particularly that of paying no taxes or duties but with our own consent.” 9 CRNC, supra note 5, at 1048. See Haywood, The Mind of the North Carolina Opponents of the Stamp Act, 29 N.C. Hist. Rev. 317 (1952).


109. Id. James Iredell used a similar argument in 1774. See 1 Higginbotham’s Iredell, supra note 19, at 255.

110. Elliot’s Debates, supra note 1, at 80. Spencer had previously complained that “[e]very power is given over our money to those over whom we have no immediate control.” Id. at 75. Cf. Southern Historical Collection, Revolutionary Papers, Freeholders of Pitt County (Aug. 15, 1774) (“That it is the first Law of Legislation” and of the British Constitution “that citizens are taxed by their own Representatives.”)

111. See, e.g., Elliot’s Debates, supra note 1, at 56, 93, 169, 172.

112. Id. at 80-82.
to amend the Constitution to continue a variant of the practice under the Articles of Confederation. Congress would have an ultimate power to tax individuals, but it should first requisition the states for money, leaving to the states the means for raising the sums by taxation.\textsuperscript{113} In explaining the reason for that preference, Spencer reiterated the Antifederalist theme that knowledge of local conditions was an essential element in enhancing the ameliorative tendencies of law.\textsuperscript{114} The state legislatures, he argued, would "know every method and expedient by which the people can pay, and they will recur to the most convenient."\textsuperscript{115}

To the Federalists, Spencer's amendment was both irrelevant and cumbersome. To them the "radical vice" of the Articles of Confederation was that it acted on states rather than on individuals.\textsuperscript{116} Richard Dobbs Spaight, another of the delegates to the Philadelphia convention and a Federalist representative from Craven County, explained why it was necessary to cure the vice. Spaight's response to Spencer revealed much about the difference between the two sides. Spaight argued that he need do no more than point to the experience under the Confederation to prove that requisitions were simply inefficient. Moreover, he observed, "the state officers will more probably commit abuses than" would federal officers appointed to collect taxes.\textsuperscript{117} The proposed national government would provide the necessary corrective by putting the government in the hands of a "better" sort who would be less likely to commit the degradations experienced in North Carolina and other states. Another Federalist delegate, Whitmill Hill from Martin County, provided a similar insight. To support his belief that the delegates to Congress could be trusted,\textsuperscript{118} Hill responded to Spencer by noting "that Congress are acquainted with us — go from us — are situated like ourselves."\textsuperscript{119} But he had "no confidence in the [state] legislature; the people do not suppose them to be honest men."\textsuperscript{120}

Once again the debate in the convention echoed a long-standing dis-

\textsuperscript{113.} \textit{Id.}
\textsuperscript{114.} \textit{Id.}
\textsuperscript{115.} \textit{Id.} at 81. See also one of the convention's proposed amendments to the constitution:
\begin{quote}
When Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state of the quota of each state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass any law which shall be effectual for raising such a quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state.
\end{quote}
\textit{Id.} at 245.
\textsuperscript{116.} \textit{Id.} at 21-22 (Davie).
\textsuperscript{117.} \textit{Elliot's Debates, supra} note 1, at 82. For a discussion of the Federalists' general distrust of state governments see G. Wood, \textit{supra} note 81, at 519-64. For further discussion about Richard Dobbs Spaight, see Andrews, \textit{Richard Dobbs Spaight}, 1 N.C. Hist. Rev. 95 (1924).
\textsuperscript{118.} \textit{Elliot's Debates, supra} note 1, at 86.
\textsuperscript{119.} \textit{Id.} at 85.
\textsuperscript{120.} \textit{Id.} at 87.
pute. For example, efforts to provide a check on the state legislators had proved a sticking point for the drafters of the North Carolina Constitution in 1776. Samuel Johnston wrote to James Iredell that he feared he could not accede to the draft. “Numbers,” he explained, “have started in the race of Popularity and condescend to the usual means of success.”

Shortly thereafter Johnston reported that the provincial congress had been unable to agree on a constitution. “The great difficulty in our way is how to establish a Check on the Representatives of the people to prevent their assuming more power than would be consistent with the Liberties of the People, such as increasing the time of their duration and such like.”

A remark by Iredell was similarly revealing, though no doubt unintentionally. He warned that there was a risk of rebellion if Congress lacked the power to raise money directly from individuals. After all, he asked, “[i]s it not reasonable the people would be more apt to side with their state legislature, who indulged them, than with Congress, who imposed taxes upon them?” Once again the contrasting views of government were evident. For the Antifederalists, government represented the political response to needs; government dealt with problems in a way that provided amelioration, however indulgent and fleeting. The only government that could be assured of so acting was one that was small enough, and close enough, to be responsive. For the Federalists, such a government was not to be trusted; its enactments shifted with the changing political tides. The Federalists sought a government with an assured source of funds, one whose delegates went from them to decide upon national issues and who had the power to impose those national solutions upon individuals without any interference from mediating governments. As Iredell explained it: “[T]he representatives of the people may probably be more popular, [thus] it may be sometimes necessary for the Senate to prevent factious measures taking place, which may be highly injurious to the real interests of the public, the Senate should not be at the mercy of every popular clamor.” Of course, the Antifederalists would not concede that the “real interests of the public” were different from the “popular clamor” in their small communities.

ARTICLE II — THE EXECUTIVE

Similar differences pervaded the debate on the executive, which took no more than a full day of the convention’s time. For the most part, though, both sides viewed the executive as being relatively insignificant and not worthy of a great deal of concern. This is ironic in light of the

121. Higginbotham’s Iredell, supra note 19, at 350, Johnston to Iredell (Apr. 17, 1776).
122. Id., Johnston to Iredell (April 20, 1776), reprinted in 10 CRNC, supra note 5, at 498. For a discussion on the Constitution in general, see E. Douglas, supra note 61, at 115-35.
123. Elliot’s Debates, supra note 1, at 92.
124. Id. at 40. Iredell later remarked that the Senate was needed “to counteract the influence of the people” in the House and to preserve the states. Id. at 133.
fear of monarchy and the consequent extraordinary difficulty the Philadelphia convention experienced in drafting article II. The one topic that provoked substantial discussion also revealed the minor role envisioned for the president. Judge Spencer objected to the failure to separate the executive from the legislative powers, especially with respect to treaties and nominations. Spencer observed that other than his military powers, the president could "do nothing in the executive department without the advice of the Senate." Since the Antifederalists anticipated that members of Congress, and senators especially, would be corrupted by long stays in the capital, they were apprehensive that this combination of executive and legislative powers would further the destruction of liberty. The particular concern was the treaty power which could be used to override any state law. With the careful calculation of a pessimist, the Antifederalists announced that approval of a treaty required as few as ten senators. (The calculation went this way: two-thirds of the Senate could ratify a treaty; a quorum of the first Senate, with twenty-six members, would be fourteen members; two-thirds of that quorum would be ten.) Thus, as Joseph McDowell complained, their "lives and property [were] in the hands of eight or nine men" on all matters but treaties and then only ten.

The Federalists’ response was entirely logical and proper, but not likely to persuade. Davie conceded the value of separating powers; he had even argued in its favor that it was one of the advantages the Constitution had over the Articles of Confederation. But he urged that no one could realistically expect "absolute and complete separation." Even in the government of North Carolina there were examples of a mix of powers: the legislature appointed judges and fixed the salary of the governor. Iredell supported this argument by pointing out that the ability of the Senate to control treaty-making power was actually an assurance that the sovereignty of the states would be respected. But, once again, Iredell's remarks revealed the important distinction between the two posi-

126. Elliot's Debates, supra note 1, at 116-17.
127. Id. at 117.
128. Id. at 118.
129. Id. at 119.
130. Id. Compare the similar objection from William Porter of Rutherford County. Id. at 115.
131. Id. at 121. See also id. at 20-23 (Davie's earlier comments on the same topic.). Iredell described the separation of powers as the "[o]ne great alteration from the Articles of Confederation." Id. at 73. See also id. at 206 (Spaight's comment on separation of powers).
132. Id. at 21.
133. Id. See also North Carolina Constitution of 1776, Declaration of Rights 4 ("[T]he legislative, executive and supreme judicial powers of government ought to be forever separate, and distinct from each other.")
134. Elliot's Debates, supra note 1, at 125.
tions. To Iredell, the Senate did not exist merely to preserve the interests of the state sovereignties, it also existed to control the fluctuating popular interest within the states: “There ought to be some power given to the Senate to counteract the influence of the people by their biennial representation in the other house, in order to preserve completely the sovereignty of the states.”

ARTICLE III — THE JUDICIARY

By the time the delegates reached article III, the judiciary article, they had been in convention for an entire week. They would not spend two full days on the judiciary. Nevertheless, this debate went to the heart of the dispute between the Federalists and the Antifederalists. For the Antifederalists the federal judiciary posed more than merely another threat of consolidation, though it did that as well. Of utmost importance was the failure of the proposed Constitution to protect trial by jury in civil trials. This failure struck at the core of the Antifederalists’ view of law as ameliorative; the jury, along with the local legislature, provided the twin pillars upon which their view of law was based.

Judge Spencer began the debate by stating the familiar fundamental objection: the federal judiciary would usurp the place of the state courts, which would “produce that consolidation through the United States which is apprehended.” He illustrated his concerns by arguing that the “state courts [were] sufficient to decide the common controversies of the people, without distressing them [the people] by carrying them to such far distant tribunals.” The response of the Federalists was twofold. First, they argued that in any government there must be a judiciary with power coextensive with that of the legislature. And second, they argued that Congress would surely take the inconvenience of travel into account and establish inferior courts in every state. Davie went so far as to argue that without a federal judiciary the Constitution itself would be disobeyed. But his argument again carried him too far to offer the Antifederalists any reassurance. Davie contended that “[w]ithout a general controlling judiciary, laws might be made in particular states to enable its citizens to defraud the citizens of other states.” For illustration, he pointed to the various acts passed by legislators to relieve debtors. “By

135. Id. at 133.
136. Both sides could point to a long history of trial by jury in England and to the early reference in the proprietors’ instructions of 1676, urging the governor to promote laws to “best secure the antient and native rights of Englishmen, and in particular the tryall of all Criminall [sic] Causes and matters of fact by a jury of 12 sufficient freeholders.” 1 CRNC, supra note 5, at 231.
137. ELLIOT’S DEBATES, supra note 1, at 137, 164.
138. Id. at 138.
139. Id. at 139, 158.
140. Id. at 139. Maclaine thought that Congress would also provide local means for redressing grievances against federal officials. Id. at 47.
141. Id. at 156-57.
142. Id. at 157.
such iniquitous laws," he concluded, "the merchant or farmer may be de-
frauded of a considerable part of his just claims. But in the federal court,
real money will be recovered with that speed which is necessary to accom-
modate the circumstances of individuals."143

Few comments were more revealing than the ease with which Davie
implicitly sided with the creditors. For both Davie and the Federalists,
the federal courts would enforce the national law directly against individ-
uals and against equitable claims of need.144 But that was precisely the
wrong balance insofar as the Antifederalists were concerned. Matthew
Locke, an Antifederalist from Rowan County, disputed Davie's imputa-
tion about the state courts. In revealing words, Locke disagreed that "ju-
stice and equity are given up at once in the states."145 He was no defender
of paper money and other relief measures, conceding that if "the evil
could have been avoided, it would have been a very bad law."146 But, sid-
ing with debtors with even gentler implication, Locke argued that "neces-
sity, sir, justified it in some degree."147 It was that necessity, that justice
and equity, which the Antifederalists were unwilling to abandon to the
certain control of a national government.

On this point, at least, the Regulators had anticipated the Antifeder-
alist position.148 Hermon Husband's "basic arguments [were] directed
against professional lawyers and judges whom he saw as increasing their
own importance and power at the expense of the jury, in whom Husband
would invest final judgment not only of evidence but of questions of law
also."149 Likewise, there was strong objection to the denial of a trial by
jury even to those who had sided with the British. The objection was so
strong that North Carolina superior court judges declared an act of the
legislature unconstitutional in Bayard v. Singleton150 in 1787. "An Inde-
pendent Citizen" castigated the legislature for its action.151 The author of
the broadside argued, in the style of the Antifederalists, that his position
was so evident that anyone could know it simply by appealing to "the

143. Id. at 159.
144. See "A Citizen of North Carolina," State Gazette of North Carolina, Sept. 16,
1788.
145. ELLIOT'S DEBATES, supra note 1, at 169.
146. Id.
147. Id.
148. For a discussion of the Regulators' "Country" values, see Ekirch, The North
Carolina Regulators on Liberty and Corruption, 1765-1771, 11 PERSP. IN AM. HIST. 199 (D.
Fleming ed. 1977-1978). That article is incorporated into chapter six of A. EKIRCH, supra
149. J. Whittenburg, Backwoods Revolutionaries: Social Context and Constitutional
Theories of the North Carolina Regulators, 1765-1771 (unpublished Ph.D. dissertation,
University of Georgia 1974). For Husband's argument, see Hermon Husband's Continuation,
supra note 37, at 57-64.
150. 1 N.C. 15 (1787). This was one of the earliest assertions of the power of judicial
review. See generally L. Boudin, GOVERNMENT BY JUDICIARY 63-68 (1932); C. Haines, THE
151. "An Independent Citizen" to "the Honorable W.R. Davie, Esq." (July 30, 1787),
reprinted in SOME EIGHTEENTH CENTURY TRACTS, supra note 108, at 461-86.
feeling of his own breast."\(^{152}\) Nothing could "save him from destruction" but "an impartial trial by a jury of his neighbors well acquainted with him and his cause, and the malignity of his accusers."\(^{153}\) It was clear to this author, as it was to the Antifederalists, that a jury was required to assert the sense of the community against the intervening assertions of accusers, all of whom were malign. There was no apparent expectation that the jury would be neutral; rather the jurors would be neighbors ready to reach a result depending upon the necessities of the case. Furthermore, anticipating the maxims of Reverend Caldwell, this author disputed that whatever a legislature declared to be law was law. "This imaginary omnipotence of Assembly, that whatever is ordained must be law, without any exception of right or wrong, must be restrained within bounds of reason, justice, and natural equity."\(^{154}\) To guarantee those restraints, every statute was to be tested against the "written laws of God," "fundamental rights and franchises declared in the great charter," the "constitution," and "truth."\(^{155}\) Even though Federalists such as Iredell agreed that the judiciary could review legislative enactments, they narrowed the standard to the Constitution itself. The Federalists would not permit the inquiry to broaden beyond the limiting language of the Constitution; they certainly would not introduce the notions of "truth" and "justice" into the inquiry as would the Antifederalists.

Because jurors injected justice and equity into a trial, the Antifederalists were determined to oppose any government that did not guarantee the right to a trial by jury in civil cases. As Spencer said:

> Juries are called the bulwarks of our rights and liberty; and no country can ever be enslaved as long as those cases which affect their lives and property are to be decided, in a great measure, by the consent of twelve honest, disinterested men, taken from the respectable body of yeomanry.\(^{156}\)

The Federalists did not disagree in principle. Iredell, for instance, had once written that the English had "no institution [that] is more Noble, or a strong Guardian of Liberty, than the inestimable Trial by Jury."\(^{157}\) But by 1788 the two sides had come to perceive different purposes for the jury. In a jury of respectable "yeomanry," the Antifederalists found their assurance of liberty and rights. Nothing could be more stark than to contrast that claim with the comparable assurance of the Federalists, who found safety for their liberty and rights in the federal judiciary and in delegates to Congress who would be elected "from among ourselves. They will be in the same situation with us. They are to be the bone of our bone and flesh of our flesh. They cannot injure us without

\(^{152}\) Id. at 464.
\(^{153}\) Id. (emphasis in original).
\(^{154}\) Id. at 471 (emphasis in original).
\(^{155}\) Id.
\(^{156}\) Id. at 154.
\(^{157}\) 1 Higginbotham's Iredell, supra note 19, at 393.
injuring themselves. I have no doubt but we shall choose the best men in the community.  
Neither side disputed the other's characterization of the composition of the jury versus "the best men in the community." It was for that very reason that Antifederalists Galloway and McDowell feared the Congress because it would not represent the people of the backcountry. Likewise, Samuel Johnston was apprehensive about a trial by a jury whose members might be "intimate friends of my opponent."

The differences were indeed so stark that when the debate broadened to include a debate about the need for a bill of rights, the delegates could find no common ground. The Antifederalists saw in all power the likelihood of abuse and corruption. William Lenoir was confident that all men "naturally put the fullest construction on the power given them." And one of the Bloodworths recalled the theoretical maxim of Caldwell when he asserted that "[r]ulers are always disposed to abuse" their powers. In light of the fact that there was so much vagueness in the Constitution, the Antifederalists insisted that there be a bill of rights. As Samuel Spencer said, a "bill of rights would be necessary to guard against our rulers."

The function of a bill of rights, for the Antifederalists, was very much the function that Caldwell had envisioned for his maxims. Both provided a standard by which the citizenry could judge the propriety of the conduct of officials. In the proposed Constitution there was "no express negative — no fence against [essential rights] being trampled upon." The Antifederalists condemned the Constitution because it contained no phrase such as that which appeared in article two of the Articles of Confederation: "Each state retains its sovereignty, freedom, and independence, and every Power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

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158. ELLIOT'S DEBATES, supra note 1, at 57 (Samuel Johnston) (emphasis added). James Iredell held the same view. Iredell predicted that those selected for the Senate would be "two of the most respectable men in [each] State." Id. at 40.
159. Id. at 70, 88.
160. Id. at 150.
161. Id. at 206.
162. Id. at 167.
163. Id. at 138.
164. Id. at 9.
165. Id. at 168.
166. ARTICLES OF CONFEDERATION, art. II (emphasis added), reprinted in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 27 (G. Tansill ed. 1927). Thomas Burke had almost single-handedly been responsible for the inclusion of that provision in the Articles. North Carolina State Archives, Governors Letter Books, no. 1.1, Burke to Caswell (Apr. 29, 1777), reprinted in 11 SRNC, supra note 1, at 460 (spoke of necessity for maintaining separate independence of the states); M. JENSEN, supra note 5, at 170-76, 179; Hendricks, Joining the Federal Union, in THE NORTH CAROLINA EXPERIENCE 148 (L. Butler & A. Watson eds. 1984). For an account of Burke's changing philosophy, see Douglas, supra note 5.
Without such a limiting phrase, Spencer warned, the rulers might exceed the proper boundary without being taken notice of. When there is no rule but a vague doctrine, they [the rulers] might make great strides, and get possession of so much power that a general insurrection of the people would be necessary to bring an alteration about. But if a boundary were set up, when the boundary is passed, the people would take notice of it immediately.\(^\text{167}\)

To the Antifederalists the image of an ever watchful citizenry was not merely a vision, it was a vital component of their view of government comprising a small, homogeneous community. Thus, any "constituent ought to be understood by every one. The most humble and trifling characters in the country have a right to know what foundation they stand upon."\(^\text{168}\)

To the Federalists a bill of rights was worse than unnecessary, it was positively dangerous. In the words of Maclaine, "the powers of Congress are expressly defined; and the very definition of them is as valid and efficacious a check as a bill of rights could be, without the dangerous implication of a bill of rights."\(^\text{169}\) Moreover, the proper guardians of the rights of the people were not the people themselves, but the federal courts as created by the Constitution. Iredell, along with the other Federalists, saw the Constitution not as a vague, dangerous document, but as "a declaration of particular powers by the people to their representatives, for particular purposes."\(^\text{170}\) It was like a power of attorney, granting only those powers it mentioned and no others.\(^\text{171}\) Or, in the words of an anonymous essayist, the Constitution "is all a bill of Rights, and every right not there expressed is retained by the several States."\(^\text{172}\) Thus Congress had no power to interfere with trial by jury, or with any of a number of other

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\(^{167}\) Elliot's Debates, supra note 1, at 168. Spencer made a similar argument earlier. Id. at 137. Iredell did not disagree; he even used the same metaphor:

I readily agree there ought to be such a fence. The instrument ought to contain such a definition of authority as would leave no doubt; and if there be any ambiguity, it ought not to be admitted.

... If this Constitution be adopted, it must be presumed the instrument will be in the hands of every man in America, to see whether authority be usurped; and any person by inspecting it may see if the power claimed be enumerated. If it be not, he will know it to be a usurpation.

Id. at 171-72.

\(^{168}\) Id. at 201. One of Caldwell's maxims contained a similar thought: "It [the compact between the rulers and the people] ought to be plain, obvious, and easily understood." Id. at 9.

\(^{169}\) Id. at 140. Maclaine put the argument to use in the debate about impeachment. See id. at 34, 49. Cf. id. at 64 (Samuel Johnston); id. at 220 (James Iredell).

\(^{170}\) Id. at 148. Iredell earlier had said that the line "between the power which is given and that which is retained" was "most accurately drawn by the positive grant of the powers of the general government." Id. at 10. For Iredell's response to George Mason's objections on this point, see 2 McRee's Iredell, supra note 2, at 186-88.

\(^{171}\) Elliot's Debates, supra note 1, at 10.

\(^{172}\) A North Carolina Citizen on the Federal Constitution, 1788, 16 N.C. His. Rev. 36, 42 (1939).
rights, because the Constitution gave it no such power — at least in the eyes of the Federalists.173

The danger from a bill of rights arose because no one could possibly mention every right. Because a constitution was an affirmative statement of powers, not subject to equitable construction, any attempt to list certain rights would properly be construed as saying that any unlisted rights were not protected.174 In particular, it would serve no purpose to attempt to guarantee a trial by jury in civil trials because the states were so different in their customs that no single declaration could satisfy all states.175 But that response, like so many of the other Federalist responses, did little more than reassure the Antifederalists of the wisdom of their opposition. For if the states differed so in a practice as crucial as trial by jury, then they were too diverse to form a union of any longevity.176

ARTICLES IV, V, VI, AND VII — MISCELLANEOUS PROVISIONS

The final four articles occupied about two days of the convention. The reporter, however, accurately captured the nature of the debate on these articles, describing it as “desultory.”177 The only provision to attract substantial attention was that in article six declaring that the Constitution would be the “supreme law of the land.” Article six, according to Bloodworth, would “sweep off all the constitutions of the states. It is a total repeal of every act and constitution of the states. . . . It will produce an abolition of the state governments.”178 Nothing that Davie, or Maclaine, or Iredell could say would remove that fear from the Antifederalists. Davie’s statement that the enactments could “be supreme only in cases consistent with the powers specially granted, and not in usurpations,”179 was of no help. Neither was Samuel Johnston helpful in his assertion: “Without this clause, the whole Constitution would be a piece of blank paper.”180 In the end, as Willie Jones observed, the “arguments . . . had been listened to attentively, but he believed no person had changed his opinion.”181 The Antifederalists and the Federalists were simply too far separated on basic assumptions and experience for there to have been compromise and change of position.

173. Iredell and Spaight used this argument with respect to religion. ELLIOT'S DEBATES, supra note 1, at 194, 208.
174. Id. at 142, 149.
175. Id. at 150.
176. Id. at 151 (Bloodworth).
177. Id. at 1.
178. Id. at 179.
179. Id. at 182.
180. Id. at 188.
181. Id. at 217. Bloodworth uttered a curt version of the same view: “Many words have been spoken, and long time taken up; but with me they have gone in at one ear and out at the other.” Id. at 143. When called to order, he slightly modified his statement. Id. at 144.