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**A NEO-FEDERALIST VIEW OF ARTICLE III:
SEPARATING THE TWO TIERS OF FEDERAL
JURISDICTION†**

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Located at one of the critical joints where the two great structural principles of the Constitution—federalism and separation of powers—intersect, Article III jurisdiction has been the center of much judicial,¹ legislative,² and

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¹ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (discussing congressional power over Supreme Court original jurisdiction); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (discussing congressional power over Supreme Court appellate jurisdiction); *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850) (discussing congressional power over lower federal court jurisdiction); cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (discussing the scope of "the judicial Power of the United States").

² Among the first, and most significant, achievements of the first Congress was the enactment of the Judiciary Act of 1789, 1 Stat. 73, which set up various federal courts and regulated their jurisdiction. Since 1789, federal jurisdiction has been a recurrent congressional concern. For a brief catalogue of the major jurisdictional legislation, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 32-47 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]. A more detailed account of many of these congressional enactments may be found in F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928), and Surrency, *A History of the Federal Courts*, 28 Mo. L. REV. 214 (1963).

Recently, there have been many proposals in Congress to restrict federal court jurisdiction in politically sensitive areas involving school prayer, school desegrega-

academic³ attention, and even more confusion. Although the nation has thus far been spared major constitutional confrontations between Congress and the federal courts,⁴ the architecture of Article III remains the subject of much debate. Probably the two most famous commentators on Article III jurisdiction, Joseph Story and Henry Hart, contradict each other.⁵ In fact, a close reading of the literature on Article III suggests that no commentator thus far has offered a complete, coherent and convincing account of congressional power to limit federal jurisdiction.⁶

This essay presents a new interpretation of Article III that refines and synthesizes earlier commentary by recharting the contours of, and connections between, federalism and separation of powers in federal jurisdiction. Careful reanalysis of text, history, and structure will show that, although neither Story nor Hart was completely correct, each contributed important insights. Justice Story was correct in emphasizing that federal and state courts are not created equal, and that the mandatory language of Article III does impose important limits on congressional power to shift cases from federal to state courts. Professor Hart was right in stressing the importance of state court general jurisdiction as a necessary backdrop for interpreting Article III. Thus, following Hart, I seek to establish that the Framers did not intend to require the creation of lower federal courts; but, following Story, I shall show that they did require that some federal court—supreme or inferior—be open, at trial or on appeal, to hear and resolve finally any given federal question, admiralty, or public ambassador case.

In offering a new synthesis of the old Article III debate, I mean to do more

tion, and abortion. Some of these proposals would restrict only lower federal court jurisdiction. *See, e.g.*, S. 158, 97th Cong., 1st Sess. (1981) ("Human Life" Bill restricting jurisdiction of inferior federal courts to entertain injunctive and declaratory actions challenging state abortion laws, but leaving Supreme Court appellate jurisdiction intact); H.R. 900, 97th Cong., 1st Sess. (1981) (same bill). Other proposals seek to oust all federal jurisdiction. *See, e.g.*, S. 1742, 97th Cong., 1st Sess. (1981) (eliminating all federal court jurisdiction over cases attacking voluntary prayer in public schools). *See generally* Baucus & Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992 n.18 (1982) (collecting recent jurisdiction-stripping proposals).

³ A useful bibliography of the scholarly literature up to 1981 may be found in *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 135 (1981) ("Bibliographic Note" compiled by William Van Alstyne). A compilation of more recent literature may be found in Gunther, *Congressional Power to Curtail Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896 n.3 (1984).

⁴ *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (averting constitutional crisis); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (first congressional statute failing judicial review was a jurisdictional statute).

⁵ *See infra* notes 13-47 and accompanying text.

⁶ *See infra* notes 48-85 and accompanying text.

than simply set the historical and scholarly record straight on arcane and antiquarian issues of jurisdiction. Many of these issues lie at the center of current policy debates over the proper roles of the state and federal courts in protecting the rights guaranteed by the Constitution and laws of the United States. Some commentators and policymakers have argued for expansive federal court supervision of federal rights; others seek to move ever more of the responsibility for safeguarding these rights to the state courts. My broader aim here, therefore, is to reorient current understandings of the role of federal courts in the constitutional system our Federalist forefathers bequeathed us. By setting forth a comprehensive interpretation of Article III that rediscovers and reclarifies first principles of federal jurisdiction in our constitutional system, I hope to show that those who seek to shunt the ultimate protection of federal rights into the state courts have abandoned those first principles for a brand of "federalism" at war with the interpretivist approach on which they pretend to rely.⁷

⁷ In placing heavy, if not exclusive, reliance on constitutional text, history, and structure, I seek in this essay to present a quintessentially interpretivist account of federal jurisdiction. I shall thus rely on conventional interpretivist historical sources (*e.g.*, the Federalist Papers) and conventional interpretivist rules of construction (*e.g.*, where possible, all words in the Constitution are to be given effect). Although conventional legal analysis is, by definition, more common than unconventional analysis, *e.g.*, Note, *Choosing Representatives By Lottery Voting*, 93 YALE L.J. 1283 (1984) (presenting legal thought experiment), it requires no less methodological justification, and thus a few words explaining my choice of approach are appropriate here.

First, I note that the Article III debate in the scholarly literature has thus far been waged largely on interpretivist terms, although scholars have been less than uniform in assigning relative weights to arguments from text, from history (Convention, ratification, and post-constitutional), and from structure. In seeking a comprehensive synthesis and resolution of the Article III debate, I have taken the debate as I found it, and entered it on its own terms.

Second, I believe that an interpretivist resolution of the Article III debate is possible. Careful reexamination of Article III suggests that its text, history, and structure are both determinate and mutually-reinforcing. Thus, analysis will suggest that—unlike so many other constitutional provisions, *cf. infra* note 169—Article III does lend itself to one "best" interpretivist reading. *See also* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985) (interpretivism both more tractable and more worthwhile when examining separation-of-powers structure of Constitution); *cf. infra* note 86.

Third, although I believe that there is more to constitutional law than interpretivism, narrowly understood, I recognize that many other actors in our legal culture—Congressmen, judges, scholars, and practitioners—subscribe to a narrower brand of interpretivism. Because I seek to convert them to my vision of federal jurisdiction, I must speak their language. I have emphasized the many interpretivist arguments underlying my view of federal jurisdiction instead of the other non-interpretive and more policy-oriented arguments that buttress my views, since the

Section I of this essay canvasses various major commentaries on Article III and suggests their weaknesses.⁸ Section II offers a "neo-Federalist" interpretation of Article III that escapes these weaknesses by returning to first premises of federal jurisdiction, thereby identifying the scope and limits of congressional power.⁹ This interpretation builds on Story's critical

latter can be casually dismissed by self-proclaimed interpretivists like Senator Helms or Justice Rehnquist, but the former cannot be.

Fourth, it may be possible to construct a coherent constitutional jurisprudence that bridges the chasm between a procrustean and necrophilic interpretivism, *e.g.*, R. BERGER, *GOVERNMENT BY JUDICIARY* (1977), and a radically indeterminate non-interpretivism, *e.g.*, M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982), by viewing the interpretivist Constitution as presumptively binding law that may nonetheless be modified upon certain special showings, for example, of changed circumstances—much as hoary case law is presumptively binding upon a common law court, but may be overruled and updated under various circumstances. *Cf.* G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (suggesting that courts treat old statutes like old case law). Such a hybrid jurisprudence, whose elaboration I hope to attempt in a later essay, obviously requires the sort of careful interpretivism I shall try to offer here as its starting point for constitutional analysis.

Finally, even if the legal/historical scholarship I shall present in this essay has absolutely no binding or presumptive legal or political force, I feel obliged to present it in order to expose some of the important weaknesses of earlier legal/historical scholarship, which has often failed to capture and accurately re-present the Federalists' philosophy and world-view. The Federalists were simply extraordinary people—scholars and statesmen who accomplished one of the few truly successful revolutions in the history of the planet, and who forged a nation that has not only endured but thrived. We can learn much by studying these people, and the Constitution that they created and we inherited. Even if the Constitution they built then is not in any way binding on us now, we must nonetheless *choose* whether to accept our constitutional inheritance, in whole or in part. To exercise that choice intelligently, we must first understand what it is the Federalists thought they were creating. It would surely be tragic if we rejected our rich constitutional legacy out of sheer ignorance or misunderstanding of some of the most important structural features of the Federalist Constitution; it would surely be ironic if our repudiation of our collective constitutional (birth)rights constituted something less than a knowing and intelligent waiver.

⁸ See *infra* notes 12-85 and accompanying text.

⁹ See *infra* notes 86-171 and accompanying text.

In labeling my interpretation as "neo-Federalist," I do not mean to suggest any affinity to the "New Federalism" championed by Justice Rehnquist—a federalism emphasizing states rights and the parity of state and federal judges. Indeed, my purpose is largely to bury, rather than praise, this "New Federalism," by showing that it precisely inverts the Federalist political science underlying the Philadelphia Constitution. Rehnquist's vision of federalism is in many ways far closer to Luther Martin's than to James Madison's or James Wilson's; the "New Federalism" is largely the old Anti-Federalism masquerading as the original understanding of the Constitution. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 *YALE L.J.* 1317 (1982).

insight that Article III contains two tiers of jurisdictional categories. In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear all such cases must be vested in the federal judiciary as a whole. In the second tier,

My purpose in claiming the "neo-Federalist" label is instead to highlight the myriad and important connections between my scholarship in this essay and other recent "neo-Federalist" scholarship in law and history, scholarship that seeks to understand Federalist political theory on its own terms. For my purposes here, the hallmarks of this scholarship are its emphasis on:

- (1) the Federalists' distrust of legislatures;
- (2) the Federalists' distrust of state governments;
- (3) the Federalists' reliance on federal judges—the "least dangerous branch;"
- (4) the Federalists' distinction between the People of the United States, and the Congress (one of several representatives of the People);
- (5) the Federalists' distinction between the national government and Congress (one of three co-equal branches of that government);
- (6) the Federalists' efforts to strengthen the executive and judicial branches of the national government vis-a-vis Congress;
- (7) the critical role of judicial review in Federalist theory; and
- (8) the Federalists' reliance on structural mechanisms and institutional incentives to guarantee virtue among officeholders.

In historical scholarship, the path-breaking work is undoubtedly Gordon Wood's *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). Earlier Progressive historians had sought to discredit the judges of their own era by emphasizing the anti-democratic nature of judicial review, and of the Constitution itself. *See, e.g., C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). The Progressive historians tended to equate Congress with "the People," and thus attacked the deviant role of un-elected federal judges. Wood's book resurrects Federalist political theory by more faithfully re-presenting the Federalists' world-view, which included the eight features noted above. *See also G. WILLS, EXPLAINING AMERICA: THE FEDERALIST* (1981) (emphasizing features (4)-(8) noted above).

In legal scholarship, the most important recent work is Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984). Ackerman's critique of Alexander Bickel's challenge to judicial review directly parallels Wood's response to Progressive historiography. Like Beard, Bickel saw judicial review as deviant because he equated Congress with "We the People"—the ultimate sovereigns. Like Wood, Ackerman re-presents Federalist political philosophy's defense of judicial review. For other recent examples re-presenting Federalist political theory, see Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *YALE L.J.* 694 (1985) (discussing Federalists' distrust of legislatures); Note, *A Procedural Approach to the Contracts Clause*, 93 *YALE L.J.* 918 (1984) (discussing Federalists' restrictions on state legislatures); Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 *Yale L.J.* 451 (1984) (discussing Federalists' restrictions on state governments and the policing role of federal courts in contradistinction to Congress); Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 *YALE L.J.* 1403 (1982) (discussing Federalists' distrust of state governments).

comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress. Section III demonstrates the basic consistency of this two-tier neo-Federalist model with the provisions of the Judiciary Act of 1789 and every subsequent jurisdictional regime.¹⁰ Finally, Section IV sketches the current policy implications of the neo-Federalist interpretation of Article III, and offers some policy suggestions.¹¹

I. THE ARTICLE III DEBATE THUS FAR

A. *The Debate Joined: Joseph Story and Henry Hart*

Article III lays out the structure and scope of the federal judiciary in spare and succinct language:

SECTION 1. 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.¹²

In the landmark case of *Martin v. Hunter's Lessee*,¹³ Justice Joseph Story offered an early and influential account of federal jurisdiction. The Court in *Martin* was faced with a challenge to its appellate jurisdiction over a case

¹⁰ See *infra* notes 172-214 and accompanying text.

¹¹ See *infra* notes 215-19 and accompanying text.

¹² U.S. CONST. art. III, §§ 1-2.

¹³ 14 U.S. (1 Wheat.) 304 (1816).

originating in the state courts, but presenting a federal question. The Court held that its jurisdiction had properly been invoked under section 25 of the Judiciary Act of 1789,¹⁴ and that section 25 was constitutional. The case is known less for this holding, however, than for Story's lengthy exposition on the nature and scope of the jurisdiction vested in the federal courts by Article III.¹⁵

This exposition has generated considerable confusion. Some have interpreted Story to suggest that "Congress *must* establish lower federal courts with the fullest possible jurisdiction—something Congress has never done."¹⁶ For example, statutory restrictions have always barred the doors of federal district courts to various litigants seeking adjudication of diversity issues or federal questions.¹⁷ A related interpretation reads *Martin* to require that *if* lower federal courts are created, they must be vested with plenary jurisdiction to hear all Article III cases.¹⁸

Such interpretations, however, misread Story's central argument in *Martin*. Rather than focusing on inferior courts in isolation, Story was concerned with the jurisdiction of the federal judiciary as a whole. His argument in *Martin* can be distilled into three simple premises. First, the judicial power of the United States must extend to certain cases, and must be vested—in either original or appellate form—somewhere in the federal judiciary.¹⁹

¹⁴ Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73.

¹⁵ 14 U.S. (1 Wheat.) at 327-52.

¹⁶ G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 57 (10th ed. (1980) (emphasis in original); see also Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 751 n.21 (1984).

¹⁷ Diversity jurisdiction in lower federal courts has always been qualified by minimum dollar amounts. See HART & WECHSLER, *supra* note 2, at 1051-53. General "federal question" jurisdiction was not firmly vested in federal district courts until 1875, 18 Stat. 470, and minimum dollar limits on that jurisdictional grant were not abolished until 1980, see Pub. L. 96-486, § 2(a), 94 Stat. 2369. Even today, a great many federal questions are outside the scope of district court jurisdiction under 28 U.S.C. § 1331 because they are not presented on the face of a plaintiff's "well-pleaded complaint," but instead arise at a later stage of the litigation. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-53 (1908) (statement of the "well-pleaded complaint" rule). Although these federal questions are generally acknowledged as falling within Article III's "arising under" jurisdictional grant and giving rise to Supreme Court appellate jurisdiction, they nonetheless fall outside the ambit of § 1331's statutory "arising under" jurisdictional grant to district courts. See generally *Shoshone Min. Co. v. Rutter*, 177 U.S. 505 (1900); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953).

¹⁸ See, e.g., Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 68 (1923).

¹⁹ 14 U.S. (1 Wheat.) at 331: "But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority." See also 3 J. STORY, *COMMENTARIES ON THE CON-*

Second, there are some cases, such as federal criminal prosecutions, falling within the mandatory judicial power that could not be heard as an original matter by state courts. Federal criminal prosecutions were, for Story, "unavoidably . . . exclusive of all state authority."²⁰ Any delegation of such cases to state trial courts, therefore, would impermissibly vest "the judicial Power of the United States" in non-Article III courts.²¹ Third, the Supreme Court's original jurisdiction could not be expanded to take cognizance of all such exclusively federal cases.²² From these three premises, Story deduces his conclusion: Congress is obliged to establish "one or more inferior courts" in which "to vest all that jurisdiction which, under the Constitution is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance."²³

Thus far Story. Yet the conclusion he reaches simply cannot be right: Article III plainly imposes no obligation to create lower federal courts. Indeed, it is precisely the contrast between the permissive clause—"such inferior Courts as the Congress *may*" ordain—and the mandatory clauses—"the judicial Power *shall* be vested" and "*shall* extend"—that makes Story's first premise so compelling. If "shall" means "must," then "may" has to mean "can, but need not." A further nail in *Martin's* coffin is furnished by Henry Hart and Herbert Wechsler: the records of the Constitutional Convention—records unavailable to Story in 1816—clearly reflect a "Madisonian compromise" to give Congress the choice of creating inferior federal courts or proceeding through state trial courts.²⁴

To reject Story's conclusion, however, is not to refute each of his premises; as a logical matter, the invalidity of the former only establishes the faultiness of at least one of the latter. Hart and Wechsler's historical argument suggests that Story's second premise—that certain federal matters, such as federal criminal prosecutions, are exclusive of all state authority—cannot stand. If the Constitution invites Congress to decline to create lower federal courts, then it seems necessarily to contemplate a world where

STITUTION § 1696 (1833) ("But it is clear, from the language of the constitution, that, in one form or the other, it is absolutely obligatory upon congress, to vest all the jurisdiction in the national courts, in that class of cases at least, where it has declared, that it shall extend to 'all cases' ") (emphasis in original); cf. Wheaton, *A Federalist of 1789*, in *The New York American*, Aug. 3, 1821 (Court Reporter), reprinted in HART & WECHSLER, *supra* note 2, at 314 n.2 ("So far as Congress may constitutionally restrain *original* jurisdiction as to such cases, they must give that which is *appellate*: and appellate jurisdiction where there is no original federal jurisdiction, must, of course, be exercised on the judgment of the state courts.") (emphasis in original).

²⁰ *Martin*, 14 U.S. (1 Wheat.) at 337; see also 3 J. STORY, *supra* note 19, § 1750.

²¹ *Martin*, 14 U.S. (1 Wheat.) at 330-31.

²² *Id.* at 330.

²³ *Id.* at 331 (emphasis in original).

²⁴ See HART & WECHSLER, *supra* note 2, at 11-13.

violations of federal criminal law could be prosecuted in the first instance in state trial courts. As will become more clear in Section II of this essay, leaving such cases to the state courts would in no way impermissibly vest “the judicial Power of the United States” in non-Article III tribunals, so long as these cases were ultimately appealable to the Supreme Court. To permit enforcement of federal criminal laws in state trial courts is simply to recognize the concurrent general jurisdiction of those courts to entertain all varieties of cases arising under all varieties of laws.

Post-Convention history and case law further undermine Story’s second premise. In *The Federalist* No. 82 Alexander Hamilton declared himself

of [the] opinion, that in every case in which [state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth [T]he inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.²⁵

Beginning in the early 1800s, Congress regularly provided for state court prosecution of federal criminal cases.²⁶ Despite Story’s concerns about the constitutionality of such statutes²⁷—especially where they *obliged* state courts to entertain suits²⁸—prosecutions in consenting states were affirmed by the Supreme Court as early as 1820 in *Houston v. Moore*.²⁹ Subsequent case law has built upon and extended *Houston’s* vision of cooperative federalism. In *Claffin v. Houseman*,³⁰ the Court held that concurrent state court jurisdiction to entertain federal causes of action would be presumed from congressional silence.³¹ In *Tennessee v. Davis*,³² the Court upheld

²⁵ THE FEDERALIST No. 82, at 555 (A. Hamilton) (J. Cooke ed. 1961). Hamilton’s rule that concurrent state court jurisdiction is to be presumed in the absence of a clear congressional statement to the contrary parallels his views on the “concurrent [legislative] jurisdiction” of state legislatures to impose taxes on all articles other than exports and imports. See THE FEDERALIST No. 32 (A. Hamilton).

²⁶ See Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925) (chronicling early history of enforcement of federal criminal laws in state courts).

²⁷ See 3 J. STORY, *supra* note 19, § 1750 (arguing that federal criminal jurisdiction cannot be delegated to state tribunals and questioning the constitutionality of congressional enactments making such delegations).

²⁸ See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16, 621-22 (1842) (separate opinion of Story, J.) (intimating that Congress may not constitutionally require state judges to enforce Fugitive Slave Law).

²⁹ 18 U.S. (5 Wheat.) 1 (1820) (upholding state court jurisdiction to try militiaman for violation of federal military law). *Contra id.* at 47 (Story, J., dissenting).

³⁰ 93 U.S. 130 (1876).

³¹ *Id.* at 136 (concurrent state court jurisdiction to hear case brought under the Bankruptcy Act of 1867 is permissible where not excluded by express congressional provision).

³² 100 U.S. 257 (1880).

removal of a state criminal prosecution into federal court, thus exploding Story's claim that one sovereign in a federal system could not enforce the penal laws of the other.³³ And in *Mondou v. New York, N.H. & H.R.R. Co.*,³⁴ *McKnett v. St. Louis & S.F.Ry. Co.*,³⁵ and *Testa v. Katt*,³⁶ the Court required state courts to entertain federal suits where they would hear analogous state-law claims.³⁷

The unsupportability of Story's second premise should prompt close examination of the other two, yet both survive scrutiny. The third—the unconstitutionality of extending the Supreme Court's original jurisdiction—is rooted in no less venerable a case than *Marbury v. Madison*.³⁸ It also comports with the least strained reading of the text of Article III. Although Congress is given explicit power to make exceptions and regulations to the Court's appellate jurisdiction, it enjoys no similarly explicit power to extend the Court's original jurisdiction, whose outer boundaries seem fixed by the Constitution itself.³⁹

³³ *Id.* at 271 (state murder prosecution against federal officer is properly removable into federal court); see Warren, *supra* note 26, at 545, 592-94; Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966 (1947).

³⁴ 223 U.S. 1 (1911).

³⁵ 292 U.S. 230 (1934).

³⁶ 330 U.S. 386 (1947).

³⁷ *Id.* at 389-94 (state court with adequate general jurisdiction to hear a claim arising under state law is not free to refuse enforcement of a similar claim arising under federal law); 292 U.S. at 232 (state court of general jurisdiction may not constitutionally refuse to entertain a cause of action arising under federal law while agreeing to hear causes of action arising under the law of other states); 223 U.S. at 56-59 (rights arising under federal regulations may be enforced, as of right, in the courts of the states when their jurisdiction, as fixed by local law, is adequate to the occasion).

³⁸ 5 U.S. (1 Cranch) 137 (1803). It is of course the *holding* of *Marbury* that the Supreme Court's constitutionally-defined original jurisdiction may not be enlarged by Congress. *Id.* at 176-80.

³⁹ Robert Clinton has recently suggested that the exceptions and regulations clause may have been designed simply to allocate between the Supreme Court's original and appellate jurisdiction. Under this thesis, every "exception" to appellate jurisdiction must be offset by a complementary expansion of original jurisdiction. The evidence Professor Clinton adduces on behalf of this thesis, however, is terribly thin. See Clinton, *supra* note 16, at 778, 793, 827. Clinton fails to offer any textual argument attempting to square this thesis with the apparent meaning of the words of the clause—which simply speak of exceptions and regulations to *appellate* jurisdiction and in no way suggest a power to expand the Supreme Court's seemingly bounded *original* jurisdiction. In the teeth of a more straightforward and less stilted reading of the text of Article III, Clinton places sole reliance on historical evidence.

The historical evidence that Clinton offers is at best slender. He relies solely on a side-by-side comparison of two intermediate working drafts of the Philadelphia Convention's Committee of Detail—drafts that were probably not even made avail-

Story's first premise—the mandatory character of some federal jurisdictional categories—is more controversial. Yet again, the text is clear: “the judicial Power of the United States *shall* be vested” in a national judiciary, and “*shall* extend to *all* cases” in certain enumerated categories—namely, those involving federal questions, admiralty issues, or public ambassadors.⁴⁰ These are words of obligation, paralleling the usage of “shall” in myriad other sections of the Constitution.⁴¹ Unless clearly overruled or modified by other language of the Constitution, this mandatory language must be given effect. Story is thus on solid ground on his first and third premises; only the second—the unconstitutionality of allowing jurisdiction over certain matters in the state trial courts—fails.

Henry Hart, in his famous *Dialogue* on congressional control of Article III jurisdiction,⁴² errs in the opposite direction. Hart acknowledges early on that Congress need not create lower federal courts.⁴³ In the next breath, he notes that the exceptions and regulations clause empowers Congress to restrict the Supreme Court's appellate jurisdiction.⁴⁴ Hart appears to be

able to other Philadelphia Convention members, much less to the later state ratifying conventions. Further, these drafts simply do not support his thesis. Clinton correctly notes that the first of these drafts did give Congress the power to shift cases from the Supreme Court's appellate to its original jurisdiction, but that this explicit power disappeared in the second draft, in which the exceptions and regulations clause made its initial appearance. From this comparison, Clinton concludes that the exceptions clause may have been designed to serve the same allocative function as had the earlier language in the first draft. Yet the inference is at least as strong in the other direction; the explicit allocative language of the first draft was changed and the exceptions clause inserted because the Committee intended something *different* in the second draft, and sought to prevent additions to the Court's original jurisdiction. Indeed, the full Convention ultimately rejected a proposal that apparently would have permitted extensions of Supreme Court original jurisdiction. *See infra* note 168 (discussing rejection of proposed substitute to the exceptions clause: “In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct.”).

Finally, this prong of Clinton's general thesis conflicts with a powerful and unbroken line of congressional exceptions that stretches back to the first judiciary act. *See infra* Section III.

⁴⁰ U.S. CONST. art. III, §§ 1, 2 (emphasis added).

⁴¹ The “shall” language can be read as authorizing, rather than obliging, federal jurisdiction, but the branch that is thereby empowered is the federal judiciary, not Congress. Thus, even if the Article III empowerment can be declined by the federal judiciary, it must be honored by—and is therefore mandatory vis-a-vis—Congress. In the words of the *Martin* court: “The language of the [judiciary] article throughout is manifestly designed to be mandatory upon the legislature.” 14 U.S. (1 Wheat.) at 328 (emphasis added); *see infra* notes 96, 118 and accompanying text.

⁴² Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

⁴³ *Id.* at 1363-64.

⁴⁴ *Id.* at 1364.

troubled by the breadth of this power, so he proposes a limit: congressional exceptions may not vitiate the "essential role" of the Court.⁴⁵ Hart acknowledges the indeterminacy of this limit, but finds such indeterminacy more satisfying than "reading the Constitution as authorizing its own destruction."⁴⁶

For Hart, the lesson to be drawn from these readings of the exceptions and inferior courts clauses is clear. By combining its power to regulate lower court jurisdiction and restrict Supreme Court appellate review, Congress may constitutionally create a gap in federal court jurisdiction such that no Article III court would be authorized to hear a given set of Article III cases—even cases presenting issues of constitutional law. This scenario does not seem to disturb Hart. He draws comfort in part from his "essential role" limitation, but even more so from the availability of the state courts: "In the scheme of the Constitution [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."⁴⁷

Hart's and Story's arguments thus present symmetrical flaws. Story uses the mandatory clauses of Article III to read the permissive inferior court clause out of the Constitution. Hart employs the permissive exceptions and inferior court clauses to sidestep the requirement that the judicial power *shall* be vested in *federal* courts and *shall* extend to *all* cases arising under the Constitution, laws and treaties of the United States.

B. *The Debate Continued: Recent Commentary*

1. The Story School

More recent scholarship has tended to compound the mistakes of Story and Hart. Theodore Eisenberg, a student of the Story school,⁴⁸ has argued

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1401; *see also id.* at 1372-73:

It's hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court (outside the original jurisdiction of the Supreme Court) if Congress chooses to provide some alternative procedure. The alternative procedure may be unconstitutional. But, if so, it seems to me it must be because of some other constitutional provision, such as the due process clause.

Cf. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965):

[T]he plan of the Constitution for the courts . . . was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by [the supremacy clause.] Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government.

⁴⁸ The terms "Story school" and "Hart school" are used not to suggest personal

that the founding fathers believed that all cases listed in Article III would be heard, either at trial or on appeal, by a federal tribunal.⁴⁹ For Professor Eisenberg, this right was to be safeguarded by an automatic right to appellate review by the Supreme Court. Since such review is now discretionary, Eisenberg claims that inferior federal courts must be established to hear at least some of the cases that the Supreme Court cannot, as a practical matter, hear itself. Eisenberg's result—the mandatory establishment of lower federal courts—is strikingly similar to Story's, but his path to this end is different, resting upon the notion that the Supreme Court's appellate jurisdiction was intended by the Framers to be plenary and undiminishable, notwithstanding the exceptions clause.⁵⁰ But like Story's exposition in *Martin*, Eisenberg's argument has a fatal flaw: whereas Story reads the permissive inferior court clause out of the Constitution, Eisenberg compounds error by premising his argument on an interpretation of Article III that strips

discipleship, but rather as constructs that provide a shorthand for the basic positions in the Article III debate. The "Story school," as used here, refers to scholars who, like Story, believe that Congress is constitutionally required to vest certain categories of Article III cases in Article III courts. The "Hart school" refers to those scholars who would allow Congress much broader discretion to withdraw jurisdiction from all federal courts.

⁴⁹ Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

⁵⁰ *Id.* at 508 n.66 (citing J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1971), for the proposition that the exceptions clause was not intended to give Congress any real power to restrict the appellate jurisdiction of the Supreme Court). Others have argued that the exceptions clause was intended only to limit Supreme Court review of facts. See generally R. BERGER, CONGRESS V. THE SUPREME COURT 289 (1969); Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 ORE. L. REV. 3 (1973); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962). The Berger/Brant/Merry thesis, however, is flatly contradicted by text, history, and structure. First, the comma after "fact" clearly implies that the "exceptions" power applies to appellate jurisdiction generally and not simply to facts. This reading is confirmed by the history both of the exceptions clause—whose operation on the appellate jurisdiction clause long predated the insertion of the appositive "both as to law and facts," see 2 M. FARRAND, THE RECORDS OF THE CONSTITUTIONAL CONVENTION 172-73, 185 (1911)—and the "law and fact" clause itself, which was inserted to codify the understanding of the Committee of Detail that the appellate jurisdiction of the Supreme Court would apply to both law and fact. *Id.* at 431. Furthermore, the Berger/Brant/Merry thesis is unsupported by the Judiciary Act of 1789, whose exceptions to Supreme Court appellate review were not limited to questions of fact. See *infra* Section III (discussing provisions of the Judiciary Act of 1789). Finally, by virtually reading the exceptions clause out of the Constitution, the Berger/Brant/Merry thesis unduly restricts congressional power to allocate jurisdiction among Article III judges who enjoy structural parity. See *infra* notes 60-63, 163-71 and accompanying text.

the exceptions clause of virtually all significance.⁵¹ Moreover, given Eisenberg's premises, his conclusion is a seeming non sequitur, for he fails to explain clearly exactly why the principle of automatic *Supreme Court* review that he finds in the Constitution is satisfied by substituting *inferior federal court* jurisdiction for (now-unattainable) full *Supreme Court* appellate review of all state court decisions.⁵²

Another scholar in the Story tradition, William Crosskey, has attempted to extend Story's first premise by arguing that every case falling within the nine jurisdictional categories listed in Article III must be heard—at trial or on appeal—by a federal court.⁵³ Professor Crosskey's argument, however, explicitly rejects a critical textual distinction noted by Story himself: whereas the judicial power shall extend to "all cases" in the first three categories (defined by subject matter), it need not explicitly extend to "all" cases in the last six (defined by party).⁵⁴ History and structure identify

⁵¹ Nowhere does Eisenberg seek to reconcile his reading of the exceptions clause with the strong and unbroken line of congressional exceptions beginning with the Judiciary Act of 1789. Nor does he discuss the constitutionality of current restrictions on the *Supreme Court*'s appellate jurisdiction, such as its complete lack of appellate jurisdiction over diversity cases tried in state courts. Indeed, Eisenberg at times appears to suggest—quite mistakenly—that the *Supreme Court* has always enjoyed plenary appellate jurisdiction. See Eisenberg, *supra* note 49, at 510, 514-16; cf. *infra* Section III (discussing jurisdictional regimes from 1789 to present).

⁵² Thus, Eisenberg fails to articulate (1) exactly where—and why—the Constitution requires that a federal court be open to hear a given case, and (2) why the *Supreme Court*'s inability to hear all cases on appeal triggers a requirement that some other federal court—instead of simply some other court, as the Hart school would have it—be open to hear these cases. This "level of generality" problem, cf. J. ELY, *DEMOCRACY AND DISTRUST* 61 (1980), can only be solved by a careful parsing of the text and structure of Article III, which Eisenberg fails to provide. Although he does discuss various background understandings of the Federalist Framers, he fails to identify how those beliefs were crystalized into positive Constitutional law. Moreover, although he flirts with the notion that the Constitution may require that some federal court be open to hear all federal cases, at trial or on appeal, see Eisenberg, *supra* note 49, at 514-15, he ends up approving congressional jurisdictional restrictions that would bar all effective federal review, so long as these restrictions are "neutral" (such as minimum dollar limits) and designed to maintain the eliteness of the federal bench. *Id.* at 515-18. Given Eisenberg's premises, the logic of his "neutrality" exception is far from clear. See Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 74-75 (1975) (criticizing Eisenberg's logic). In the end, Eisenberg strikes a sensitive policy balance of various factors, but fails to offer a rigorous interpretive framework for understanding the textual and structural mandates of Article III. Although I share many of Eisenberg's policy views, I hope in this essay to put them on a firmer doctrinal footing.

⁵³ 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 610-20 (1953).

⁵⁴ See *Martin*, 14 U.S. (1 Wheat.) at 334-36; *supra* notes 19, 40 and accompanying text.

crucial differences between the first three categories—concerning federal questions, admiralty and public ambassadors—and the rest, thus confirming that the selective omission of the word “all” in the jurisdictional menu was intentional.⁵⁵ Moreover, this distinction is supported by every judiciary act since the founding of the nation.⁵⁶ Although the federal judiciary has always had the power to hear all, or virtually all, federal question, admiralty, and public ambassador cases, it has never, for example, been vested with anything close to plenary diversity jurisdiction.⁵⁷

⁵⁵ See *infra* notes 119-59 and accompanying text.

⁵⁶ See *infra* Section III (discussing various jurisdictional regimes). Crosskey is not alone in disregarding the importance of the selective use of “all” in the jurisdictional catalogue of Article III. Eisenberg’s treatment of the nine jurisdictional categories, for example, is similarly undifferentiated. See Eisenberg, *supra* note 49, at 515-16 (lumping together diversity and federal question cases). Indeed, with the exception of Story, no major commentator has recognized the significance of the Framers’ careful use of the word “all” in Article III. Crosskey is unique only in his *explicit* rejection of this prong of the Story argument.

⁵⁷ Robert Clinton has recently published an important new piece of historical scholarship, whose main argument represents an elaborate restatement of the Crosskey thesis. See Clinton, *supra* note 16. Professor Clinton’s work, based on an exhaustive and careful examination of the historical records at Philadelphia and at the state ratifying conventions, is the font of many important insights, and in myriad ways strongly supports the neo-Federalist interpretation I shall present here. For example, Clinton offers much evidence to show that the Federalists intended the mandatory “shall” language of Article III to impose important limitations on Congress’s ability to shift cases from the independent and co-equal national judiciary to state courts lacking Article III status. Unfortunately, Clinton’s work is afflicted by two major flaws.

First, like Crosskey, Clinton lumps together all nine jurisdictional categories in Article III; indeed, Clinton does not even appear to be aware of the selective use of the word “all” in the jurisdictional menu—perhaps because he misreads Story’s argument in *Martin*, where the selective use is discussed at length. Compare *supra* notes 17-19 and accompanying text and *infra* note 88 with Clinton, *supra* note 16, at 751 n.21.

Second, Clinton at times places too much reliance on constitutional “legislative history,” even when such history is in conflict with the clear words of the Constitution itself. Thus, in seeking to reconcile his view that the words of the Constitution require plenary diversity jurisdiction with the many important congressional restrictions on that jurisdiction in the Judiciary Act of 1789, Clinton resorts to a dubious argument that the widespread questioning of the need for such jurisdiction in the state ratifying conventions somehow “constructively engrafted onto the Constitution” additional congressional power to restrict federal jurisdiction over “insignificant” diversity cases. *Id.* at 750 n.18, 840. Elsewhere, Clinton deviates from Crosskey by tangentially offering a new interpretation of the exceptions clause that would, for all practical purposes, eliminate all Congressional power to remove cases from the Supreme Court’s appellate jurisdiction—despite a strong and unbroken line of such

2. The Hart School

(a) *The Nationalist Strain*. Other scholars have followed Henry Hart. Leonard Ratner, for example, has focused on the nationalist strain in the *Dialogue* by attempting to give content to Hart's suggestion that congressional exceptions to the appellate jurisdiction of the Supreme Court must not destroy the Court's "essential" functions. For Professor Ratner, the constitutional "suprem[acy]" of the Supreme Court requires that it be open "(1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority."⁵⁸

"Essential functions" arguments like Ratner's, however, are particularly problematic. Based solely on assertions about the necessary structure of the judiciary, these arguments have little grounding in explicit text or firm constitutional history. As a consequence, the more specific any purely structural "essential functions" formulation, the more vulnerable; the less specific, the less useful and determinate.

Ratner's formulation, for example, reads "suprem[acy]" for all that it might be worth instead of the least that it must be worth. Uniformity need not be viewed as a constitutional requirement, but can instead be seen as a constitutional option committed to the discretion of Congress.⁵⁹ Moreover,

exceptions dating back to 1789. Yet even Clinton admits that this novel interpretation would make the exceptions clause redundant of other language in Article III—and bad English besides. *Id.* at 780. To make matters worse, the "legislative history" Clinton adduces for this thesis is scanty, resting upon the suspect premise that the phrase—"with such exceptions *as are herein contained*"—in one Convention document prepared by Hamilton meant the same thing as a *different* phrase—"with such exceptions . . . *as the legislature shall make*"—in another Convention document prepared elsewhere by others. *Cf. supra* note 39.

By contrast, the neo-Federalist interpretation I shall offer here places primary reliance on Constitutional text and structure, and uses "legislative history" simply to confirm that Article III means what it seems to mean. *See infra* note 86.

⁵⁸ Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

⁵⁹ It is not at all clear that uniformity is a value inherent in the constitutional structure. For example, the three branches of the federal government need not have uniform interpretations of the Constitution. Congressmen may (indeed, must, if they take seriously their oaths of office!) decline to pass any law they deem unconstitutional, even if they believe the Supreme Court would uphold the law. *See infra* note 67 and accompanying text; *see also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 30 (1979); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). Similarly, the President may exercise his veto power over any congressional act he deems unconstitutional regardless of Supreme Court case law. Section 25 of the Judiciary Act of 1789, whose provisions are generally seen as casting strong light backwards on the Constitution, is also inconsistent with a strong uniformity requirement. *See infra* notes 189-91 and accompanying text.

even if the Constitution requires uniformity, Supreme Court review is not necessary to accomplish that end; the need for a uniform last word does not require that the Supreme Court always have that word. For example, a national Article III Tax Court, from which no appeal would lie, would also achieve uniformity in tax questions.⁶⁰

A related, somewhat ironic, flaw in Ratner's purely structural argument is its failure to recognize the most important structural feature of Article III, namely, the structural parity of all Article III judicial officers—Supreme Court justices and lower federal judges.⁶¹ All are appointed by the President and confirmed by the Senate; all enjoy life tenure (subject only to impeachment), and the guarantee against diminution of salary. By insisting that only the Supreme Court can perform certain "essential functions" embodied in Article III, Ratner reads into that Article a curious rigidity and hierarchy, and ignores the exceptions clause's clear delegation of power to Congress to allocate jurisdiction among structurally equal federal courts.⁶² Indeed, the rigidity that Ratner imposes on Article III makes it difficult for him to account for the jurisdictional regime in place for the first century of our

⁶⁰ Nor would such a court necessarily offend the constitutional "suprem[acy]" of the Supreme Court. The high court would still be "supreme" in that:

(1) it would remain the only court created by the Constitution itself, and whose establishment is obligatory on Congress, *see infra* note 93 and accompanying text;

(2) it would remain the only court whose jurisdiction derives from the Constitution itself, *see infra* note 168;

(3) it would remain the only court with a constitutionally irreducible core of original jurisdiction, *see infra* notes 158-160 and accompanying text; and

(4) it would remain the only court from which no appeal could constitutionally lie. Thus, the court's "suprem[acy]" could be read to mean that the court must be "supreme" only if and when it takes jurisdiction. *Cf.* Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. L. REV. 143, 150 (1982) (suggesting that Article III salary and tenure guarantees apply only "if and when" Congress chooses to bypass state courts).

⁶¹ *See Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 45-57 (1981) (discussing parity of all federal courts in acting as a check on states); *id.* at 61-68 (discussing institutional guarantees of competence and independence of federal judiciary as a whole). Professor Sager's incisive focus on the structural parity of the federal judiciary allows him to square his version of the "essential functions" argument with broad congressional power to shift appellate jurisdiction away from the Supreme Court. *See id.* at 56-57. Like other "essential functions" theories, however, Sager's impressive model is vulnerable because it lacks a firm textual footing.

⁶² *Cf. id.* at 56 (positing an "essential functions" theory that places such functions in the federal judiciary as a whole, thus recognizing the allocative role preserved for Congress by the exceptions clause).

constitutional government. Until 1891, the Supreme Court had no general appellate jurisdiction over criminal cases decided by federal circuit courts—even when such cases posed the most important of constitutional issues.⁶³

(b) *The States' Rights Strain*. Martin Redish's work also builds upon Hart's *Dialogue*, but emphasizes its states' rights strain. To Professor Redish, the notion that a state court may end up as the last word on the meaning of the Constitution comports with the structure of our constitutional government.⁶⁴ To prevent unconstitutional encroachments by states, Redish argues, Article III need not be read as obliging Congress to give plenary jurisdiction to federal courts but only empowering it to do so. Redish here analogizes to the preemption doctrine: Congress is empowered by the Constitution to pass laws that displace state legislation, but cannot be required to do so. The greater congressional power to promote states' rights by refusing to pass federal laws includes the lesser power to foster cooperative federalism by passing national laws and providing for exclusive and unreviewable state court jurisdiction.⁶⁵ To prevent unconstitutional encroachments by Congress or the President, exclusive and unreviewable state court jurisdiction is sufficient; state courts are no less independent of these branches than is the national judiciary. Taken to its logical conclusion, Redish's structural thesis eliminates the need for federal courts: Congress can police the states, and state courts can police Congress.⁶⁶

Though superficially attractive, Redish's argument deeply misapprehends the structure of the Constitution by conflating issues of separation of powers and federalism. Unlike the case of federal legislation, where each branch can effectively veto a law because of scruples about its constitutionality,⁶⁷ the

⁶³ Congress granted the Court general power to review federal criminal cases by the Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827. Until two years before that enactment, the Court's criminal appellate jurisdiction over federal courts was limited to habeas corpus proceedings and decisions in which the federal circuit court below was divided on a question of law. See Sager, *supra* note 61, at 53 n.105.

⁶⁴ See Redish, *supra* note 60; Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Redish & Woods, *supra* note 52.

⁶⁵ See Redish, *supra* note 60, at 146-48.

⁶⁶ *Id.* at 150-53; Redish, *supra* note 64, at 912-13.

⁶⁷ At the federal level, the general structure of the Constitution enables each branch to nullify a law it deems unconstitutional—Congress by declining to pass it; the President by vetoing it, declining prosecution under it, or pardoning those convicted under it; and the courts by exercising judicial review. Of course, there are limits and exceptions to this general structural feature of one-branch veto in federal separation of powers. The President's veto may be overridden; conversely, a simple congressional majority, once having passed a law, cannot repeal it—even if it later deems the law unconstitutional—without the concurrence of the President. Nevertheless, built into the general structure of the Constitution is a libertarian bias based

federal judiciary is the only branch of the national government with its own independent check against any unconstitutional legislation by states.⁶⁸ Indeed, the Constitutional Convention explicitly rejected both congressional and executive “negatives” over state laws in favor of judicial review by the federal courts.⁶⁹

on checks against laws and in favor of the broadest of the various constructions of the constitutional right given by the three branches. See THE FEDERALIST No. 73, at 495-96 (A. Hamilton) (J. Cooke ed. 1961):

The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government, at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

See also *id.* No. 44, at 305 (J. Madison) (J. Cooke ed. 1961) (“In the first instance, the success of [congressional] usurpation will depend on the executive and judiciary departments, which are to expound and give effect to legislative acts . . .”).

⁶⁸ The national judiciary is the only branch that alone may nullify any state practice deemed unconstitutional. Of course, Congress and the President may *jointly* act against a state law they deem unconstitutional by respectively enacting and signing legislation preempting the offending state law. In exceptional circumstances, Congress may pass such a law even without the President’s signature, by a 2/3 supermajority in each chamber. Even in these instances, however, the powers of the nonjudicial branches are limited to those substantive areas where Article I explicitly grants power to the legislature. Many unconstitutional state practices—a law impairing the obligation of intrastate contracts, for example—might not be remediable by preempting national legislation. See *The Civil Rights Cases*, 109 U.S. 3, 12 (1883) (contracts clause “did not give to Congress power to provide laws for the general enforcement of contracts”).

⁶⁹ For state legislation, James Madison sought to replicate the one-branch veto structure by providing Congress, the national executive, and the national judiciary each with a negative on state laws. His original resolutions, introduced at the Convention by Edmund Randolph, provided that the national legislature would have the power “to negative all laws passed by the several States, contravening in the opinion of the National Legislature, the articles of Union,” and that the national executive council would command a defeasible veto over “every act of a particular Legislature.” 1 M. FARRAND, *supra* note 50, at 21. In a similar vein, Alexander Hamilton’s proposed constitution provided that “the better to prevent [passage of state law contrary to the federal constitution or laws] the Governour or president of each state shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is Governour, or President.” *Id.* at 293. The Convention ultimately rejected these proposals, instead making judicial review over the states by the national judiciary the centerpiece of their plan to assure state compliance with the Constitution. See *infra* notes 71-83, 134-46 and accompanying text.

Redish wrongly equates one branch of the federal government—Congress—with the whole. Article I of the Constitution confers only the federal *legislative* power upon Congress. Yet by suggesting that Congress may, in its unfettered discretion, determine whether or not to extend to the federal judiciary the power to police the states, Redish would allow Congress to deny the exercise of a power constitutionally delegated to the federal judiciary. Congress may no more waive the Article III *judicial* power of federal judges to strike down unconstitutional state conduct in the course of adjudicating all federal question cases than it may waive the Article II *executive* power of the President to grant pardons or command state militias. In short, Congress cannot waive powers conferred by the Constitution upon other, equal and independent, branches. In cases posing issues of constitutional law, Redish's preemption analogy is sorely misplaced: since Congress did not create the Constitution, it cannot oust the constitutionally-prescribed role of the national judiciary to decide all cases arising under that document.⁷⁰

The Framers' preference for judicial control over the states is not hard to understand: they expected Congress to be excessively vulnerable to state pressures, parochial interests,⁷¹ and the passions of temporary majorities.⁷²

Although Madison was unsuccessful in replicating the one-branch veto structure for state legislation, he and other Framers had good reason to believe that if only one branch should have a unique check against unconstitutional state legislation, that branch should be the national judiciary, not Congress. Although the political and parochial nature of the House, Senate and President would render them heavily dependent on local authorities, 3 M. FARRAND, *supra* note 50, at 134 (letter from J. Madison to T. Jefferson), "the Judicial authority, under our new system [would] keep the States within their proper limits." *Id.*; see also *infra* note 71 (discussing THE FEDERALIST Nos. 45 & 46). Sophisticated Anti-Federalists also recognized this. "Col. Taylor regarded the controul of the Fedl. Judiciary over the State laws as more objectionable than a Legislative negative on them." 3 M. FARRAND, *supra* note 50, at 524 (letter from J. Madison to W.C. Rives).

⁷⁰ Redish's preemption argument makes for an exceedingly curious criticism of Lawrence Sager's thesis that there must be an Article III court open to hear every case raising constitutional questions. See Sager, *supra* note 61, at 67. Redish criticizes Sager for limiting his thesis to cases posing constitutional issues, see Redish, *supra* note 60, at 148, while simultaneously seeking to discredit Sager with a preemption analogy that only works, if at all, for nonconstitutional issues. Even for nonconstitutional cases, Redish's argument is fatally flawed because the greater congressional power to pass a law does not subsume the lesser power to pass a law conditioned with a requirement of unreviewable adjudication in state court. See *infra* note 150.

⁷¹ See THE FEDERALIST No. 45, at 311 (J. Madison) (J. Cooke ed. 1961):

The State Governments may be regarded as constituent and essential parts of the federal Government . . . Without the intervention of the State Legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of

To have expected Congress alone to police state legislators—who would, after all, directly select the Senate and whose electors would automatically decide all House races⁷³—would be to have expected a political and (predictably) parochial sentry to guard the vault of constitutional rights from political and parochial state legislators. The Constitution's nobility,⁷⁴ attainder,⁷⁵ and *ex post facto*⁷⁶ clauses were applied to both Congress and state legislatures, because the Framers feared that all legislatures—including Congress—would be susceptible to similar majoritarian diseases.⁷⁷ Only federal judges would enjoy the independence, detachment and competence to disregard the flames of faction and the passions of temporary majorities.⁷⁸

themselves determine it. The Senate will be elected absolutely and exclusively by the State Legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures. Thus each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them.

See also THE FEDERALIST No. 46, at 318 (J. Madison) (J. Cooke ed. 1961): "A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the Legislatures of the particular States."

⁷² See THE FEDERALIST No. 48, at 333-34 (J. Madison) (J. Cooke ed. 1961):

The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

... [I]n a representative republic . . . where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

Cf. THE FEDERALIST No. 78, at 522 (A. Hamilton) (J. Cooke ed. 1961) (federal judiciary will be "least dangerous to the political rights of the constitution").

⁷³ U.S. CONST. art. I, § 2, cl. 1.

⁷⁴ *Id.* art. I, § 9, cl. 8; *id.* art I, § 10, cl. 1.

⁷⁵ *Id.* art. I, § 9, cl. 3; *id.* art I, § 10, cl. 1.

⁷⁶ *Id.* art. I, § 9, cl. 3; *id.* art I, § 10, cl. 1.

⁷⁷ See THE FEDERALIST Nos. 46, 48 (J. Madison) (applying lessons of state legislative experience to discussion of federal legislature); 2 M. FARRAND, *supra* note 50, at 110 (remarks of James Madison) (to similar effect); *id.* at 78 (remarks of George Mason) (to similar effect); see also G. WOOD, *supra* note 9, at 403-09, 430-63 (discussing Federalists' distrust of legislatures); R. BERGER, *supra* note 50, at 8-22 (to similar effect).

⁷⁸ THE FEDERALIST No. 78, at 527-29 (A. Hamilton) (J. Cooke ed. 1961):

"[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would on that account be justifiable in a violation of those provisions

....

Thus, in discussing the evils to be prevented by Article III judicial review, Hamilton specifically singled out two in his famous *Federalist* No. 78: the bill of attainder and the *ex post facto* law. Because the Framers viewed these evils as generic legislative diseases requiring specific restrictions on the powers of both state and national legislatures,⁷⁹ they obviously did not trust one legislature (Congress) to police the others, but instead committed the task to national judges independent of all legislatures:

By a limited constitution I understand one which contains certain specified exceptions to the *legislative* authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice *no other way than through the medium of the courts* of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.⁸⁰

The reasons for not trusting Congress to police the states are mirrored by symmetrical reasons for not trusting state court judges to police Congress. In many cases, the interests of such courts and Congress would not be truly adverse. Both were likely to be too closely tied to state legislatures⁸¹ and

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other be fatal to their necessary independence.

See also THE FEDERALIST No. 71, at 482 (A. Hamilton) (J. Cooke ed. 1961):

The republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. . . . [Public] guardians [should] withstand the temporary delusion, in order to give [the people] time and opportunity for more cool and sedate reflection.

Moreover, above and beyond the issue of judicial independence was the issue of judicial competence—an Article III value Redish inexplicably ignores. “There is yet a further and weighty reason for the permanency of judicial offices; which is deducible from the nature of the qualifications they require.” THE FEDERALIST No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961).

⁷⁹ See *supra* notes 74-76 and accompanying text.

⁸⁰ THE FEDERALIST No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961) (emphasis added); see also *id.* at 526 (“[T]he courts of justice are . . . the bulwarks of a limited constitution against *legislative* encroachments . . .”) (emphasis added); 3 J. STORY, *supra* note 19, § 1606 (“There can be no security for the minority in a free government, except through the judicial department.”); *id.* § 1608; 3 J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553-54 (1901) (remarks of John Marshall at Virginia ratifying convention) (“To what quarter will you look for protection from infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.”).

⁸¹ In contrast to the elaborate specifications for Article III judges, the Constitution nowhere specifies how state court judges are to be chosen, what tenure and salary

excessively vulnerable to parochial and political pressures. Consider again two of the Framers' worst fears: congressional enactment of an *ex post facto* bill or a bill of attainder. Passage of such a bill would necessarily imply that a

protections they shall enjoy, how independent from state legislators they shall be, how they may be removed, etc. In the absence of such specifications, there seem to be no real justiciable limits in the original Constitution to check the politicization of the state judiciary or its subservience to the legislative branch. *See infra* notes 102-15 and accompanying text. In 1776, the judiciaries of the several states were rarely equal, independent and coordinate branches of state governments, but were often exceedingly dependent on state legislatures. *See* G. WOOD, *supra* note 9, at 150-61. The movement for judicial independence made some progress during the revolutionary period. *See id.* at 436, 452. Even in 1787, however, it was clear to the Federalists that "courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." THE FEDERALIST No. 81, at 547 (A. Hamilton) (J. Cooke ed. 1961); *see also* 2 M. FARRAND, *supra* note 50, at 27-28 (remarks of James Madison):

In all the states, [State Tribunals] are more or less dependent on the Legislatures. In Georgia, they are appointed annually by the Legislature. In R. Island, the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the legislature, who would be willing instruments of the wicked & arbitrary plans of their masters.

See also 1 M. FARRAND, *supra* note 50, at 203 (remarks of Edmund Randolph) (state executives and judiciaries often only nominally independent of state legislatures). For further quotations to the same effect, *see infra* notes 139-45 and accompanying text.

In some states the lack of structural judicial independence led to the widespread assumption of judicial functions by the legislature itself. *See* THE FEDERALIST No. 48 (J. Madison); G. WOOD, *supra* note 9, at 159-61, 407-09, 451-54; Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 497-98 (1928). Even today, the situation of state judges is far less secure than that of their federal counterparts. "[Forty-six] of the 50 states have not provided life tenure for trial judges who hear felony cases." *Palmore v. United States*, 411 U.S. 389, 410 (1973). Even if a state grants its judges lifetime tenure, such judges are still far less secure than Article III officers, since state statutes and constitutions are far more easily amended than the federal Constitution. *See* Sager, *supra* note 61, at 63 n.149.

Redish, like other members of the Hart School, seeks to use the due process clause to give meaning to the open textured and undefined concept of "state judge." *See* Redish, *supra* note 60, at 161-66; Redish, *supra* note 64, at 915-16; *see also* Hart, *supra* note 42, at 1372-73 (quoted *supra* note 47) (relying on due process clause in contradistinction to Article III). This approach, however, ignores the independent values embodied in Article III, above and beyond the requirements of due process. Indeed, in contrast to the precise requirements of structural independence laid down by Article III (lifetime tenure, salary guarantees, etc.), the due process clause is singularly fuzzy and indeterminate as to the extent to which a judicial officer must be independent of the legislature. *Cf.* Carter, *supra* note 7 (separation-of-powers clauses more determinate than due process clause). Moreover, to rely exclusively on due

majority delegation from at least one state voted for it. The Framers could hardly have expected the state court judges in that state to be neutral and detached arbiters of that act's constitutionality, for those judges might well be excessively dependent on the state legislature whose agents in Congress were the very individuals pushing for passage. Indeed there was little in the original Constitution to prevent the state legislature from composing itself into the state "court" that entertained the case.⁸²

In a variant of this hypothetical, suppose the state legislature itself first passed an unconstitutional *ex post facto* law, and then secured a congressional bill "approving" the law. Once again, the state "court" judging the constitutionality of the federal approval might have little incentive or independent institutional will to restrain this species of congressional encroachment upon the Constitution. Although congressional approval can cure *some* conduct by state legislatures that would otherwise be unconstitutional—cases involving preemption, intergovernmental immunity, imposts on imports and exports, duties on tonnage, interstate compacts, and burdens on interstate commerce are examples—Congress has no *general* constitutional authority to forgive all otherwise unconstitutional action by states. By viewing Congress as a sufficient policeman over states in all constitutional cases, Redish confuses the preemption and dormant commerce clause exceptions for the structural rule of the Constitution.⁸³

Redish's misunderstanding of constitutional structure is paralleled by a misreading of the text of Article III. Indeed, Redish offers the most dramatic illustration of the Hart school's divide-and-conquer approach to Article III, in which the inferior court and the exceptions clauses are jointly deployed to

process to derive a constitutional minimum of independent, nonpolitical adjudication is to posit a truly radical deficiency in the original Constitution, which, of course, had no due process clause. Thus, contrary to the dramatic finale of Hart's *Dialogue*, "all the important answers" could *not* have been "clear ever since September 17, 1787." Hart, *supra* note 42, at 1401. Hart suggests that if Congress were to abolish lower federal courts and eliminate the Supreme Court's appellate jurisdiction, state courts would automatically fill the breach. Under Hart's logic, however, the only thing that would prevent Congress from also ousting state court jurisdiction is his interpretive gloss on the due process clause that there be some court open to hear every constitutional question. *Id.* at 1372. Yet the due process clause was not made part of the Constitution until 1791.

⁸² See *supra* note 81.

⁸³ Cf. *infra* note 133 (discussing structural differences between areas where Congress may cure otherwise unconstitutional conduct, and areas where it may not). It should also be noted that Congress enjoys power under the "republican guarantee" clause, U.S. CONST. art. IV, § 4, to restructure state governments it deems "unrepublican." See *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867) (congressional invocation of republican government power to uphold Reconstruction Act). Congress's potential ability to restructure state courts under this grant of power—whose exercise is generally not justiciable in federal courts, see *Baker v. Carr*, 369 U.S. 816 (1962)—is further reason for rejecting the Hart school's thesis that state courts can always be trusted to be sufficiently independent of Congress.

outflank the mandatory "shall be vested" and "shall extend" provisions. For Redish, any interpretation of Article III requiring that some cases be ultimately decided by federal judges is fatally hooked on the horns of a textual dilemma: "either the clear history and language concerning Congress's power over lower court jurisdiction or the equally clear language about Congress's power to make exceptions to the Supreme Court's appellate jurisdiction would have to give way."⁸⁴ The "shall" language of Article III apparently falls in an interpretive blind spot: "At no point, of course, does Article III expressly state that there exists a right to an Article III forum in constitutional cases."⁸⁵ The obvious tension between the clear words of Article III and these assertedly self-evident observations of a respected constitutional scholar suggests a serious need to go back to first principles of text, history, and structure.

II. ARTICLE III: A NEW SYNTHESIS

Article III presents a set of precise and interconnected requirements. To understand fully the purport and operation of the Article, we must disassemble it into its several working parts. Once the individual components are examined and understood, we may piece them together and so obtain a coherent interpretation of the entire Article. The results of this dissection and reassembly can be summarized as follows:

First, Article III vests the judicial power of the United States in the federal judiciary, and not in state courts, or in Congress. Second, the federal judiciary must include one Supreme Court; other Article III courts may—but need not—be created by Congress. Third, the judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors. Fourth, the judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress by virtue of its powers to create and regulate the jurisdiction of lower federal courts, to make exceptions to the Supreme

⁸⁴ Redish, *supra* note 60, at 149 (emphasis in original). The logic of Redish's argument is curious, for it seems to imply that clear delegations of power to Congress may never be constrained by other limiting language in the Constitution. Yet Redish obviously does not subscribe to such an extravagant view. Indeed, his later argument that due process requires that some court, state or federal, be open to hear all constitutional claims, Redish, *supra* note 64, at 915, precisely parallels the logical structure of the argument he earlier attacks: either Congress's clear power over lower federal courts or Congress's equally clear power to oust state court jurisdiction, *see* *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867), would have to give way. Redish's mistake is in focusing solely on the limiting language of the due process clause and ignoring the limiting language of Article III itself. *See supra* note 81.

⁸⁵ Redish, *supra* note 60, at 146.

Court's appellate jurisdiction, and to enact all laws necessary and proper for putting the judicial power into effect. Fifth, Congress's exceptions power also includes the power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that Congress may create. The corollary of this power is that *if* Congress chooses to make exceptions to the Supreme Court's appellate jurisdiction in admiralty or federal question cases, it *must* create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal; to do otherwise would be to violate the commands that the judicial power "shall be vested" in the federal judiciary, and "shall extend to all" federal question and admiralty cases.

Tying together the above precepts is Article III's affirmation of the parity of all federal judges, and its equal and opposite recognition that non-Article III state court judges do not enjoy such constitutional parity. The structural mechanisms to assure independence and competence in the federal judiciary—appointment, confirmation, tenure and salary guarantees, and impeachment—are the same for all Article III judges, supreme and inferior. No similar mechanisms are prescribed by the Constitution for state judges. Lower federal courts may therefore be trusted with the power to resolve finally federal questions and admiralty issues. State courts may not, although they may sit as original tribunals in such cases, subject to ultimate review by an Article III decisionmaker.⁸⁶

⁸⁶ Of course, it is not my contention that no colorable textual, structural, or historical arguments can be made on behalf of other interpretations of Article III. Indeed, if the interpretation offered here were patently self-evident, the near-orthodoxy currently enjoyed by the Hart school would be utterly inexplicable and mystifying. Rather, it is my aim to establish that, however colorable the arguments for other interpretations are, they are plainly *less* colorable than those supporting the neo-Federalist interpretation of Article III offered here: the neo-Federalist interpretation is plainly more consistent with the text and structure of the Constitution—and with the historical records of the Federalist Framers at Philadelphia—than any competing interpretation. The textual mandates of Article III are clear and straightforward; the structure of the constitutional architecture is readily discernible; and the history—while mixed, as history almost always is—strongly supports the interpretation offered here. To use the language of science, the interpretation offered here, while not "explaining" all the possible "data," accounts for far more of it than do competing interpretations, which often do violence to the text and structure of the Article, and ignore much of its history. Moreover, unlike many other interpretations of Article III, the neo-Federalist synthesis is determinate yet practical; it lays down bright-line justiciable rules without putting Congress in a constitutional straight-jacket.

One final word about the neo-Federalist historiography I shall present here: in speaking of the "intent" of the "Framers" and the "political science" of the "Federalists," I do not mean to suggest that all supporters of the Constitution unanimously subscribed to a hermetically-sealed corpus of "Federalist" tenets. The discovery of a group "intent" is almost always a simplifying reification; individuals have intents but groups do not. Indeed, a group composed of rational individuals with

A. *Establishing a Co-Equal National Judicial Branch*

“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.”⁸⁷ These opening words of Article III are rich with meaning. First, they establish that the judicial power of the United States *must* be vested in the federal judiciary as a whole.⁸⁸ The mandatory vesting

rational transitive preferences may, as a group, have an irrational, intransitive intent. See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). In re-presenting and expounding the “Framers’ ” or the “Federalists’ ” intent, I am thus deliberately imposing order on mild chaos by emphasizing the main tenets of “Federalist political science” that most important Federalists espoused—especially those Federalists like James Madison, James Wilson, and Alexander Hamilton, who had done the most systematic rethinking of republican political theory and who played the most active public role in shaping and defending the new Constitution. Finally, I should note that the history I shall present at all points supplements and supports, rather than displaces, the plain textual and structural features of the Constitution itself—which in many respects crystallized and canonized Federalist political theory, translating Federalist ideology into positive law. Cf. *supra* notes 39, 57.

⁸⁷ U.S. CONST. art III, § 1.

⁸⁸ For an exhaustive historical demonstration that the Framers generally used “shall” as a word of obligation, see generally Clinton, *supra* note 16.

The repetition of the word “in” in the opening sentence of Article III could be interpreted to mean that the full judicial power of the United States must be vested in the Supreme Court alone, and must also be fully vested in inferior federal courts. This interpretation is very close to the position sometimes ascribed to Joseph Story. See *supra* notes 16-18 and accompanying text. But see *Martin*, 14 U.S. (1 Wheat.) at 331; 3 J. STORY, *supra* note 19, § 1591 (lower federal courts need not be vested with the entire quantum of Article III jurisdiction). Such an interpretation of Article III, however, is deeply problematic. The “judicial Power” is not simply the power to speak in the name of the nation—a power that is vested in all Article III judges—but also comprehends the subject matter jurisdiction to decide all cases in certain categories. See *infra* notes 116-59 and accompanying text. Any interpretation that the Supreme Court alone must be endowed with the full judicial power of the United States would be inconsistent with much of post-constitutional jurisdictional history. Beginning with the Judiciary Act of 1789, Congress left many important cases falling within the mandatory judicial power to federal district courts and circuit courts, whose decisions were often unreviewable by the Supreme Court. See *infra* Section III. That Act and subsequent legislation also failed to vest in inferior federal courts anything close to full jurisdiction over all cases falling within the mandatory “judicial power.” See *supra* note 17. As this post-constitutional history suggests, to require that each Article III court enjoy the full range of mandatory Article III jurisdiction is to read into that Article an uncompromising rigidity.

A further problem with any interpretation requiring that plenary judicial power be vested in each federal court is that such an interpretation would require inferior court jurisdiction in all cases affecting public ambassadors. The original jurisdiction clause, however, strongly suggests that such cases may—and perhaps must—be exclusively

of judicial power in Article III parallels the opening passages of Articles I and II, which mandate the vesting of legislative and executive power in Congress and the President, respectively:

"All legislative powers herein granted *shall be vested* in a Congress of the United States" ⁸⁹

"The executive Power *shall be vested* in a President of the United States of America." ⁹⁰

This parallelism is striking. Read together, the first three Articles of the Constitution establish three equal and co-ordinate branches of federal government, each of which derives its power not from the other branches, but from the Constitution itself.⁹¹ This tri-partite, equilateral architecture represented a sharp—and intentional—break with the earlier Articles of Confederation, which in effect had established a one-branch federal government with virtually all delegated power conferred upon a legislative Congress empowered—but not obliged—to create a dependent federal executive and judiciary.⁹²

vested in the Supreme Court. *See infra* note 183 and accompanying text. Moreover, the history of Article III suggests little interest in the jurisdiction of inferior courts considered alone. Rather, the Framers were concerned with the jurisdiction of the national judiciary as a whole. The resolution of the Convention, adopted July 18, is illustrative: "Resolved that the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." 2 M. FARRAND, *supra* note 50, at 39 (emphasis added).

The better interpretation of the repetition of the word "in" is that the word was simply reinserted for the sake of grammatical clarity; without it, Article III might have been read to imply that the permissive "may" language concerning the creation of inferior courts also applied to the Supreme Court, whose establishment was intended to be mandatory.

⁸⁹ U.S. CONST. art. 1, § 1 (emphasis added).

⁹⁰ *Id.* art. II, § 1 (emphasis added).

⁹¹ *See, e.g.*, THE FEDERALIST No. 49, at 339 (J. Madison) (J. Cooke ed. 1961): "The several departments [are] perfectly co-ordinate by the terms of their common commission, [i.e., the Constitution]." *See also* Marshall, *A Friend of the Constitution* IX, in JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 210 (G. Gunther ed.) (1969) (federal judiciary is not "the deputy of congress" but "a co-ordinate department, created at the same time, and proceeding from the same source, with the legislative and executive departments"); *see also* G. WOOD, *supra* note 9, at 448, 550-98.

⁹² Compare U.S. CONST. art. II (direct vesting of executive power in the President by We the People of the United States); and *id.* art. III (similarly direct vesting of judicial power in national judiciary) with Articles of Confederation, art. IX, ¶ 5 ("Congress shall have authority . . . to appoint one of their number to preside . . .") and *id.* art. IX ¶ 1 ("Congress . . . shall have sole and exclusive right and power . . . [of] appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of

The independent federal judicial branch established by Article III must include "one supreme Court." It may also include "such inferior Courts as the Congress *may* from time to time ordain and establish." That Congress is only empowered, but not obliged, to create lower federal courts is further confirmed by Article I, section 8, which lists among the powers granted to Congress the seemingly discretionary power "to constitute Tribunals inferior to the supreme Court."⁹³

1. The Subordinate Role of State Courts

Although Article III speaks in terms of "judicial Power" and not "subject matter jurisdiction,"⁹⁴ section 2 of the Article makes it clear that the "judicial Power" subsumes the substantive power to decide cases falling in certain defined categories.⁹⁵ But the "judicial Power of the United States" goes beyond mere subject matter jurisdiction; it encompasses the power to speak *in the name of the nation*, to speak definitively and finally. Within its sphere, the judicial power of the United States must be supreme—over both coordinate branches and the states—just as the legislative and executive powers of the United States must be supreme within their respective spheres.⁹⁶

captures") (emphasis added). For an excellent discussion of the Federalists' desire to strengthen the executive and judicial departments of the national government, see G. WOOD, *supra* note 9, at 446-63, 547-53. See also THE FEDERALIST NOS. 47-51 (J. Madison); Ackerman, *supra* note 9, at 1013-31 (expounding the critical distinction in Federalist political science between the Congress and We the People of the United States); cf. 3 J. STORY, *supra* note 19, §§ 1570, 1609-1612 (to similar effect).

⁹³ U.S. CONST. art. I, § 8, cl. 9. For more history on congressional discretion to create lower federal courts, see HART & WECHSLER, *supra* note 2, at 11-13; Clinton, *supra* note 16, at 762-69; see also *Martin*, 14 U.S. (1 Wheat.) at 333 (legislative powers, by their nature, are discretionary).

⁹⁴ See Sager, *supra* note 61, at 22.

⁹⁵ See *infra* notes 116-71 and accompanying text.

⁹⁶ See the first resolution of the Constitutional Convention: "Resolved, That the government of the United States ought to consist of a Supreme Legislative, Judiciary, and Executive." 1 M. FARRAND, *supra* note 50, at 334; see also Marshall, *supra* note 91, at 210:

[No federal branch] can perform the duties or exercise the powers assigned to another. Each is confined to the sphere of action prescribed to it by the people of the United States, and within that sphere performs its functions alone On a judicial question then, the judicial department is the government, and can alone exercise the judicial power of the United States.

Since Article III speaks of the judicial power, and not of the judicial duty, it is plausible to believe that this power may be waived, much as Congress may waive its legislative power by declining to pass laws. *But see* *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). If the judicial power may be waived,

State courts may thus exercise concurrent jurisdiction over cases falling within the national judicial power—indeed, in some cases, they may be obliged to do so⁹⁷—but their decisions cannot be final and unreviewable. The requirement that “the judicial Power . . . shall be vested” in federal courts mandates that some *Article III* court be empowered to speak the final word on all cases within that power. In the words of Hamilton’s *Federalist* No. 82, the purport of Article III is that “the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal.”⁹⁸ If no inferior federal courts have been created, appeal would lie to the United States Supreme Court. If inferior Article III courts exist, they may sit in appellate review over state courts, obviating the need for appellate review by the Supreme Court.⁹⁹

Once again, Hamilton’s *Federalist* No. 82 is instructive. Inferior federal courts, Hamilton declares, may exercise either original or appellate jurisdiction, or both, at the discretion of Congress:

And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper instead of being carried to the supreme court, may be made to lie from the state courts to district courts of the union.¹⁰⁰

however, it can only be waived by Article III judges, as, for example, by a discretionary denial of certiorari. The judicial power may not be waived by Congress because it was never vested in Congress. Thus, Redish’s preemption analogy, *see supra* notes 64-66 and accompanying text, should be altered as follows: just as the national legislature may decline to exercise its vested legislative power to displace state law in a given area encompassed by Article I, so the national judiciary may decline to assert its vested judicial power to review a state court ruling in a given case comprehended by Article III.

⁹⁷ *See supra* notes 34-37 and accompanying text.

⁹⁸ THE FEDERALIST No. 82, at 555 (A. Hamilton) (J. Cooke ed. 1961).

⁹⁹ *See infra* notes 164-71 and accompanying text.

¹⁰⁰ THE FEDERALIST No. 82, at 557 (A. Hamilton) (J. Cooke ed. 1961); *accord* 3 J. STORY, *supra* note 19, § 1701. Currently, the regime of federal habeas corpus enables inferior federal court judges to sit in de facto appellate review over state supreme courts, although the scope of review is currently considerably narrower in habeas proceedings than on direct appeal. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (violation of exclusionary rule may be presented on appeal, but not in habeas). The clear constitutional permissibility of de jure direct appellate review renders Justice Powell’s criticisms of the current habeas corpus regime curious at best. *See* Rose v. Mitchell, 443 U.S. 545, 579 (1979) (Powell, J., concurring) (“[C]ontrary to principles

2. The Structural Superiority of Federal Judges

The reasons for vesting the last word in certain enumerated categories of cases with federal, and not state, judges are readily apparent from the next sentence of Article III: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."¹⁰¹ By virtue of their tenure and salary guarantees, Article III judges are constitutionally assured the structural independence to interpret and pronounce the law impartially. No such constitutional guarantee applies for state judges.¹⁰²

Other sections of the Constitution illuminate other important differences between state and national judges. Pursuant to Article II, section 2, federal judges are appointed by the President; state judges are not.¹⁰³ National

of federalism, a lower federal court is asked to review not only a state trial court's judgment, but almost invariably the judgment of the highest court of the State as well."). Justice Powell may well misunderstand the "principles of federalism" because he views state and federal judges as fungible, *see Stone*, 428 U.S. at 493 n.35, or because post-constitutional history—in which Congress has never exercised its power to provide for *de jure* appellate review of state courts by lower federal courts—has obscured the architecture of Article III itself. *Cf. infra* notes 110, 115, 146 (discussing ways in which post-constitutional history has shaped constitutional scholarship).

¹⁰¹ U.S. CONST. art. III, § 1.

¹⁰² *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386-87 (1821):

It would be hazarding too much, to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States, the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist

"[Article III's] provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges." THE FEDERALIST No. 79, at 532 (A. Hamilton) (J. Cooke ed. 1961); *see also Martin*, 14 U.S. (1 Wheat.) at 347: "The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."

¹⁰³ Although the appointments clause specifically requires that Supreme Court appointments be made by the President, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." U.S. CONST., art. II, § 2, cl. 2. An argument could be made that lower federal judges might be "inferior Officers" whose

judges must be confirmed by the Senate; not so with state judges. Such a rarefied appointment and confirmation procedure was designed to promote a high level of prestige and competence in the federal judiciary that could not be guaranteed at the state level.¹⁰⁴ A further clear message of Article II, section 2 is that federal judges are officers of the nation—they hold national commissions and speak in the name of the nation. Unlike state judges, national judges are paid out of the national treasury. The issue of the source of payment—distinct from the question of salary guarantee—was vital to the Framers.¹⁰⁵ Whereas the Articles of Confederation had provided for the state legislatures to pay state representatives to Congress,¹⁰⁶ the Constitution rejected this practice for all three branches of the new national government.¹⁰⁷ In the words of Hamilton at the Philadelphia Convention, “those who pay are the masters of those who are paid.”¹⁰⁸

appointment could be vested by Congress in other Article III judges. See 3 J. STORY, *supra* note 19, § 1593 n.1; 4 AMERICAN JURIST, art. v, 298 (October 1830); Shartel, *Federal Judges—Appointment, Supervising and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485 (1930). Congress, however, has never done this, and even if it could, the basic point about rarefied federal appointment procedures would remain. Indeed appointment by other Article III judges would, if anything, seem to ensure an even greater degree of professional competence and independence from the political branches. It also bears notice that by allowing the vesting of appointments in the courts of law, and not solely in the Supreme Court, the Constitution once again attests to the structural parity of all Article III judges.

¹⁰⁴ For a more complete discussion of the issue of competence, see THE FEDERALIST No. 76 (A. Hamilton); THE FEDERALIST No. 78, at 529-30 (A. Hamilton) (J. Cooke ed. 1961); see also 3 J. STORY, *supra* note 19, §§ 1523-27, 1593.

¹⁰⁵ Perhaps the clearest statement came from Archibald Maclaine at the North Carolina ratifying convention:

But if they be the judges of local or state laws, and receive emoluments for acting in that capacity, they will be improper persons to judge the laws of the Union. A federal judge ought to be solely governed by the laws of the United States, and receive his salary from the treasury of the United States. It is impossible for any judges, receiving pay from a single state, to be impartial in cases where the local laws or interests of that state clash with the laws of the Union, or the general interests of America.

4 J. ELLIOT, *supra* note 80, at 172.

¹⁰⁶ Articles of Confederation, art V, ¶ 3.

¹⁰⁷ See U.S. CONST. art. I, § 6, cl. 1 (legislature); *id.* art. II, § 1, cl. 7 (executive); *id.* art. III, § 1, ¶ 1 (judiciary). See generally 1 M. FARRAND, *supra* note 50, at 215-16 (remarks of James Madison) (“it would be improper to leave the members of the Natl legislature to be provided for by the state Legists; because it would create an improper dependence”); 2 *id.* at 292 (remarks of John Dickensen regarding payment of Congressmen from national, not state, treasury: “Mr. Dickensen took it for granted that all were convinced of the necessity of making the Genl. Govt. independent of the prejudices, passions, and improper views of the State Legislatures.”). See also M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 138 (1913).

¹⁰⁸ 1 M. FARRAND, *supra* note 50, at 373.

Finally, national judges, as national officers, are accountable to the nation for the discharge of their office in ways that state judges are not. The corollary of the Article III judge's tenure during good behavior is that he may be impeached by the national legislature upon conviction of "Treason, Bribery, or other high Crimes and Misdemeanors."¹⁰⁹ The possibility of impeachment for corruption or gross misbehavior is an important mechanism to ensure probity and integrity on the federal bench: national judges can be trusted to be judicious in part because they are impeachable.¹¹⁰ The Constitution provides no similar guarantee against misconduct by state judges.¹¹¹ The limitations on federal impeachment are equally important: unlike state judges, Article III judges may be removed from office only for misbehavior, and not merely because legislators dislike them for partisan and political reasons—or for no reason.

By prescribing the structure of appointment, the characteristics of tenure, and the mechanisms for removal, the Constitution assures the competence, impartiality, and probity of federal judges. It was in these structural and institutional guarantees that the Framers ultimately placed their trust, and not in a naively blind belief in the automatic integrity or virtue of those who would wield public power.¹¹² Thus, much of the Constitution was devoted to

¹⁰⁹ U.S. CONST. art. II, § 4.

¹¹⁰ See THE FEDERALIST No. 81, at 545-46 (A. Hamilton) (J. Cooke ed. 1961): [An] important constitutional check [is] the power of instituting impeachments This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.

Although there was much debate at the Philadelphia Convention over which organ of the national government should be empowered to impeach national offices, almost no one questioned the need for this important check. Thus, for the Federalists, the central constitutional check given to Congress against the national judiciary was impeachment, not the power to strip jurisdiction. Modern scholars have largely ignored the Federalist remedy of impeachment in discussing checks and balances in Article III. Perhaps this lapse is attributable in part to a post-constitutional development, namely the general desuetude of the impeachment device after the Republicans' unsuccessful attempts to oust Associate Justice Samuel Chase in 1804.

¹¹¹ See 3 J. STORY, *supra* note 19, § 1583 (Framers knew that "the judges of the state courts would be wholly irresponsible to the national government for their conduct in the administration of national justice").

¹¹² Thus, James Madison's political model—like Adam Smith's economic model—rested in large measure on structural mechanisms to harness the interplay of competing self-interest, in sharp contrast to the classical political scientists' near-exclusive reliance on the republican virtue of all citizens. See, e.g., THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961) ("Ambition must be made to counteract ambition"). See generally B. ACKERMAN, *supra* note 9, at 1031 ("The Economy of Virtue"); G. WILLS, *supra* note 9, at 259 (discussing Madison's struc-

defining the institutional mechanisms by which various officers would be chosen. The Framers' constitutional focus was to *constitute* various offices of government in such a way as would promote desirable traits of officeholding¹¹³—for the judiciary, competence, impartiality, honesty, and a commitment to the nation. It would have been grossly out of character for the Framers to have committed “ultimate”¹¹⁴ trusteeship of the Constitution to state judges, whose appointment, tenure and removal were nowhere even mentioned in, much less prescribed by, the document: it would have been anomalous—indeed, unthinkable—to place ultimate trust in a group of undefined state officers who might turn out to be (and who in 1787 often were) “judges” in name only.¹¹⁵

B. *Defining the Contours of Federal Jurisdiction*

The next section of Article III takes us to the heart of the national judicial power, and outlines which categories of cases are to be finally decided by Article III judges. It begins:

ture for “distilling” limited virtue); G. WOOD, *supra* note 9, 428-29, 475; *id.* at 610-12 (“The End of Classical Politics”).

¹¹³ See Carter, *supra* note 7, at 853-55 (Constitution “constitutes” government by structuring governmental offices); J. ELY, *supra* note 52, at 90 (to similar effect); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175-98* (1967) (discussing traditional understanding of a Constitution as the form in which the government’s offices and institutions are constituted).

¹¹⁴ Hart, *supra* note 42, at 1401.

¹¹⁵ See *supra* note 81 and accompanying text; *infra* notes 141-42 and accompanying text. It is the aim of this essay to establish as a matter of constitutional law what Burt Neuborne has already argued persuasively as a matter of sociology: state judges do not enjoy parity with Article III judges. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Thus, the states’ rights disciples of Hart commit a category mistake in treating state and federal judicial offices as fungible simply because both are labeled “judges.” The power of such ordinary language both to reify and obscure has long been recognized. See generally B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). By contrast, the reification of the neo-Federalist interpretation—that all *Article III* judges are created equal—is one rooted in the structure of the Constitution itself and in Federalist political science. Cf. Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 657 n.187 (1981) (discussing legal reifications).

Interestingly, the nationalist disciples of Hart often commit a symmetrical category mistake in viewing the Supreme Court alone as the third branch of government. See Ratner, *supra* note 58, at 162 n.23 (interpreting Framers’ references to the “judiciary” or to “judges” as referring to Supreme Court); R. BERGER, *supra* note 50 (entitled CONGRESS V. THE SUPREME COURT); 128 CONG. REC. S4727-30 (daily ed. May 6, 1982) (Letter from Attorney General William French Smith to Senator Strom Thurmond) (Congress may not constitutionally make exceptions to Supreme Court jurisdiction “which would intrude upon the core functions of the Supreme Court as an

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹¹⁶

The opening sentence of section 2 snugly complements the opening sentence of section 1.¹¹⁷ Section 1 ordains that the “judicial Power of the United States shall be vested” in federal courts; section 2 elaborates on that “judicial Power” by defining the cases to which it “shall extend.” Once again, “shall” is used as a word of obligation.¹¹⁸

independent and equal branch in our system of separation of powers’); *see also* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (1962) (“The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known[:] the Supreme Court . . .”). These false equations of the Supreme Court and the third branch are attributable not so much to ordinary language as to post-constitutional history and the unique historical role that the Supreme Court has come to play, in contradistinction to all other courts. *Cf. supra* notes 100, 110; *infra* note 146 (discussing other effects of post-constitutional history). We should not, however, confuse the historically familiar with the constitutionally necessary. When one looks to the Constitution itself, it is clear that the co-equal, independent, and “least dangerous” branch that it establishes is neither the Supreme Court alone, nor all judges (state and federal), but instead the national judiciary, composed of all Article III judges. *See supra* notes 60-62 and accompanying text; *cf. Redish, supra* note 64, at 909 (noting that Ratner’s constitutional “legislative history” argues not for Supreme Court jurisdiction, but Article III jurisdiction).

¹¹⁶ U.S. CONST. art. III, § 2.

¹¹⁷ *See supra* text accompanying note 87 (opening sentence of § 1).

¹¹⁸ *See generally* Clinton, *supra* note 16 (offering historical evidence to establish that “shall” generally means “must” in Article III).

It is somewhat curious that most commentators have never questioned the mandatory nature of Article III’s language that the Supreme Court “shall have original jurisdiction” in all cases affecting public ambassadors, etc., *see, e.g., Hart, supra* note 42, at 1372-73 (quoted *supra* note 47), but seem to ignore the similarly mandatory nature of the seemingly parallel command that the “judicial power shall extend” to certain enumerated cases. The usage of the word “shall” in the sentence elaborating the Supreme Court’s appellate Jurisdiction—“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . .”—also cuts against any view that the word “shall” is not mandatory upon Congress. If the phrase, “the supreme Court shall have appellate Jurisdiction” simply empowered, but did not oblige, Congress, then the exceptions clause would have been redundant.

1. The Two Tiers of Article III Jurisdiction

Nine specific—and overlapping—categories of cases are spelled out in the section 2 menu, but these categories are not all of equal importance. The judicial power must extend to “all” cases in the first three categories; not so with the final six enumerated categories, where the word “all” is nowhere to be found. The implication of the text, while perhaps not unambiguous, is strong: although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all cases in the last six. The choice concerning the precise scope of federal jurisdiction in the latter set of cases seems to be given to Congress¹¹⁹—an implication confirmed by the

Martin, 14 U.S. (1 Wheat.) at 332-33; *cf. infra* text accompanying note 125 (discussing usage of “all” in appellate jurisdiction clause).

In two instances, however, Article III does seem to use the word “shall” to empower, but not oblige, the other branches to act: (1) “and Treaties made, or which shall be made” and (2) “with such Exceptions, and under such Regulations as the Congress shall make.” In both instances, however, the text of Article III makes specific, unambiguous reference to distinct powers of nonjudicial branches, and the nonobligatory nature of these empowerments seems to be suggested by context. *See Martin*, 14 U.S. (1 Wheat.) at 333: “the legislative powers are given in language which implies discretion, *as from the nature of legislative power* such a discretion must be exercised” (emphasis added).

All other uses of “shall” in Article III, however, reflect a different convention. In this, the Judiciary Article, the constitutional text generally directly empowers and/or obliges the judicial branch of government, and not the Congress. It is the judiciary that *shall* be vested with the judicial power that *shall* extend; it is the judges that *shall* enjoy life tenure and salary protections; it is the Supreme Court that *shall* have original jurisdiction in some cases and a defeasible appellate jurisdiction in others. Thus, even if the verb “shall” is here, too, seen as simply empowering but not obliging, *but see* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (quoted *supra* note 96); 3 J. STORY, *supra* note 19, § 1570 (citing *Cohens*), it is the judiciary that is being empowered, and thus only the judiciary—and not Congress—may waive the power. *See supra* notes 41, 96; *infra* note 205 and accompanying text.

Hence, to view the federal judiciary as a mere creature of Congress that may be abolished by Congress for all practical purposes, *cf. Redish, supra* note 60; Redish, *supra* note 64; *supra* notes 64-70 and accompanying text, is to misunderstand the structure of Article III and of the Constitution. Instead of merely allowing Congress to create a federal judiciary as did the Articles of Confederation, *see supra* notes 91-92 and accompanying text, the Constitution created a co-equal branch of government with self-executing jurisdiction, *see infra* note 168.

¹¹⁹ Arguably, federal courts must have the power to hear at least some miniscule subset of cases in each of the last six categories; the use of the plural, “Controversies,” suggests that “the judicial Power shall extend to [at least two] Controversies” in each category. As any such restriction on congressional power would be both trivial and practically unenforceable, I shall for expository ease follow the principle *de minimis non curat lex*, and speak as if Congress could abolish all jurisdiction in these categories.

“exceptions and regulations” and the “necessary and proper” clauses.¹²⁰

¹²⁰ See *infra* note 160 and accompanying text. Interestingly, the two-tiered jurisdictional catalogue comprehending “all Cases” in certain categories and “Controversies” (but not necessarily all controversies) in other categories made its first appearance in the same draft where the exceptions clause also first appeared. 2 M. FARRAND, *supra* note 50, at 172-73. In this draft, however, the predicate of the command “shall extend to all cases” was not (as in the final version of Article III) “the judicial Power,” but rather “The Jurisdiction of the Supreme (National) Court.” Thus, the draft provided that:

- (1) Supreme Court jurisdiction shall extend to all cases in certain categories;
- (2) Supreme Court jurisdiction shall extend to (not necessarily all) controversies in other categories;
- (3) In certain categories, the Court’s “Jurisdiction shall be original;” and,
- (4) In “all the other Cases before mentioned, it shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make.” *Id.*

Only one interpretation of this draft can logically reconcile the congressional power to make exceptions granted in paragraph (4) with the language of paragraphs (1) and (2), and the apparent impermissibility of adding to the Supreme Court’s original jurisdiction in paragraph (3): although exceptions may be made regarding the controversies in paragraph (2), they may not be made regarding the mandatory cases in paragraph (1). Any other reading would mean that paragraph (4) constituted an implicit repeal of paragraph (1). This is an inference that should not be lightly indulged if an alternative reading is possible that would harmonize all the words of this draft. Thus, under the interpretation offered here, the congressional exceptions power was always closely connected to the distinction between the mandatory and permissive categories of cases. For further discussion of this draft, see *infra* note 128 and accompanying text.

Robert Clinton offers an interesting but odd interpretation of this draft. He argues that the exceptions clause in this draft permitted deletions from the Supreme Court’s appellate jurisdiction in all categories, but only in favor of lower federal court jurisdiction. Clinton, *supra* note 16, at 775-86. Yet Clinton fails to show how such a broad exceptions power may be squared with paragraph (1), which commands that the *Supreme Court’s* jurisdiction shall extend to all cases in certain categories. Moreover, if such exceptions can be made, it is somewhat unclear why they may be made only in favor of lower federal courts. Clinton’s interpretation hinges on a textual linchpin that simply does not exist. He claims that this draft “required that the judicial power of the United States ‘shall extend’ to the Supreme Court, and whatever federal courts, if any, Congress chose to create.” *Id.* at 792 n.167. Yet this draft does not provide that “the judicial power of the United States shall extend,” as Clinton implies, but rather that “the jurisdiction of the *Supreme Court* shall extend.” Moreover, contrary to Clinton’s muddled suggestion that the judicial power “shall extend” to all federal courts, the Framers provided that the judicial power “shall *be vested*” in federal courts, and “shall extend” to cases, not courts.

Although the language of this early draft thus does not appear to empower Congress to transfer final resolution of the cases in paragraph (1) to lower federal courts, subsequent amendments to the draft’s language did result in the conferring of such congressional power. See *infra* notes 163-71 and accompanying text. The key textual change came when the Convention replaced the words “the jurisdiction of the

(a) *Text.* The selective use by the Framers of the word "all" may not be lightly presumed to be unintentional. Where possible, each word of the Constitution is to be given meaning; no words are to be ignored as mere surplusage.¹²¹ "All" is used not once, not twice, but three separate times in the opening sentence of section 2. The word is then omitted six times. This selective repetition and omission tends to confirm the presumption of intentional insertion.¹²² This presumption is further strengthened by the next sentence of Article III, which carefully modifies the cases affecting public ambassadors falling within the Supreme Court's original jurisdiction with the qualifier "all," thus harmonizing with the language of the jurisdictional menu: "In all Cases affecting Ambassadors, other public Ministers and Consuls, . . . the supreme Court shall have original Jurisdiction."¹²³

The clause governing the Supreme Court's appellate jurisdiction also suggests that the word "all" is used in an emphatic sense.¹²⁴ If extending the Supreme Court's appellate jurisdiction to "all the other Cases before mentioned" meant simply that Congress could contract that jurisdiction at will, there would have been no need for an explicit exceptions and regulations clause. Unless the exceptions clause is to be dismissed as redundant verbiage, its inclusion strongly supports the inference that "all" means just that.¹²⁵

(b) *History.* The records of the Constitutional Convention also strongly corroborate the notion that the Framers used the word "all" intentionally and with care, purposefully establishing a two-tiered jurisdictional structure. The draft constitution produced by the Committee of Style omitted the word "all" in the clause setting out the Supreme Court's original jurisdiction. That

Supreme Court" in paragraph (1) with the phrase, "the judicial Power of the United States." 2 M. FARRAND, *supra* note 50, at 430-32. Such a change was in keeping with the Framers' recognition of the structural parity of all Article III judges.

¹²¹ *Martin*, 14 U.S. (1 Wheat.) at 334 ("It is hardly to be presumed that the variation in the language could have been accidental."); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

¹²² Because he views virtually all federal jurisdiction as merely permissive, at Congress's discretion, Redish cannot offer any good explanation for the inclusion of the word "all" in the first three jurisdictional categories. Conversely, because he views virtually all federal jurisdiction as mandatory, Crosskey cannot offer any good explanation for the omission of the word "all" in the last six jurisdictional categories. Only a two-tiered model of jurisdiction, recognizing both a mandatory core and a permissive penumbra of federal jurisdiction, can make sense of all the words included in and omitted from Article III.

¹²³ U.S. CONST. art. III, § 2; *see infra* note 160.

¹²⁴ U.S. CONST. art. III, § 2: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . with such Exceptions . . . as the Congress shall make." (Emphasis added).

¹²⁵ *Cf. supra* note 118.

one word was thereafter specifically inserted by the Convention during the last days at Philadelphia.¹²⁶

Earlier versions of the judicial article in the Committee of Detail, which was charged with the task of translating the Convention's initial resolutions into the first complete draft constitution, offer further valuable and powerful evidence. The first major Committee draft, composed by Edmund Randolph with emendations by John Rutledge, provided that:

7. The jurisdiction of the supreme tribunal shall extend
 1. to all cases, arising under laws passed by the general [Legislature]
 2. to impeachments of officers, and
 3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony,
 - in the collection of the revenue
 - in disputes between the citizens of different states
 - [in disputes between a State & a Citizen or Citizens of another State]
 - in disputes between different states; and
 - in disputes, in which subjects or citizens of other countries are concerned
 - [& in Cases of Admiralty Jurisdn].¹²⁷

The structure of federal jurisdiction in this early version is apparent. In one class of cases—containing the prototype of the eventual “arising under” category—jurisdiction would be plenary and mandatory. In the second class of cases—containing prototypes of what eventually became the party-defined categories—national jurisdiction was not mandatory but permissive, at the discretion of “the general [Legislature].”

¹²⁶ Compare 2 M. FARRAND, *supra* note 50, at 576 (Committee on Style draft) with *id.* at 661 (Final Draft of Constitution). Unfortunately, the decisions to make this and several other stylistic changes are nowhere recorded in the Convention Journal or Madison's notes. There is thus no surviving evidence concerning the date of the change, or the discussion and votes surrounding it. Presumably, however, the one-word change was made deliberately and self-consciously; to presume otherwise is to impute capriciousness to the Convention.

¹²⁷ 2 M. FARRAND, *supra* note 50, at 146-47 (as in original). The bracketed material indicates emendations in Rutledge's handwriting. The language and structure of this early committee draft closely follow the final wording of the Convention's resolution on federal jurisdiction, as recorded by Madison, the resolution's author: “the jurisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony.” *Id.* at 46.

This resolution is noteworthy in two respects. First, it highlights the special significance to the Framers of federal question jurisdiction, which is separated from all other possible jurisdictional categories. Second, it strongly hints at a two-tier jurisdictional scheme, with a mandatory tier in which federal jurisdiction “shall extend to all cases,” and a permissive second tier, where the discretionary verb “may” replaces the obligatory “shall,” and the indeterminate adjective “such” replaces the unambiguous “all.”

This general two-tiered jurisdictional structure was preserved in what appears to be the next major draft of the Committee, prepared by James Wilson with notations from John Rutledge:

The Jurisdiction of the Supreme (National) Court shall extend to all Cases arising under Laws passed by the Legislature of the United States; to all Cases affecting Ambassadors (and other) [other] public Ministers [& Consuls], to the Trial of Impeachments of Officers of the United States; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies between [States—except those wh. regard Jurisd or Territory,—betwn] a State and a Citizen or Citizens of another State, between Citizens of different States and between [a State or the] Citizens (of any of the States) [thereof] and foreign States, Citizens or Subjects.¹²⁸

Jurisdiction in the first tier would mandatorily extend to “all” cases in certain categories, but would not necessarily extend to all cases in the second tier. While retaining the structure of the Randolph draft, however, the Wilson draft did reshuffle the placement of some categories: admiralty jurisdiction, for example, was inserted in the first tier.¹²⁹ The language of the

¹²⁸ *Id.* at 172-73 (as in original). The bracketed material indicates emendations in Rutledge’s handwriting.

Although the word “all” does not appear in the impeachment clauses of the Randolph and Wilson drafts, it seems probable that this category fell in the mandatory, rather than the permissive, class of cases. The omission of the word “all” was probably of little significance to the Committee, however, since impeachments were dealt with at length in other sections of these drafts.

A further point of interest in the Wilson draft is its reference to disputes in the mandatory tier as “Cases” and disputes in the permissive tier as “Controversies.” All subsequent drafts preserved this distinction, and it survives in the final text of Article III. Some have suggested that the technical legal meaning of the words “Cases” and “Controversies” diverge, and that while the former comprehends both civil and criminal disputes, the latter is limited to the civil sphere. *See* 3 J. STORV, *supra* note 19, § 1668 n.2 (citing *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (separate opinion of Iredell, J.)). This argument, however, is belied by the sentence setting out the original jurisdiction of the Supreme Court. In this sentence, the several categories of “Controversies” to which a state is party in the jurisdictional menu are referred to as “Cases,” thus suggesting that the two words are legally synonymous. Similarly, the reference in the appellate jurisdiction clause to “all the other Cases before mentioned” seems to comprehend categories of disputes earlier labeled “Controversies.” Thus, the better interpretation of the usage of two different words to define the legal disputes comprehended by Article III is that the different wording simply represents yet another way—in addition to the selective usage of “all” and the distinction between party-defined and subject matter-defined jurisdiction—in which the first three jurisdictional categories were set off as structurally different from the last six.

¹²⁹ The language and categorization within this two-tiered structure may also have been influenced by a Resolution that had been introduced earlier by William Paterson

Wilson draft seems to reflect the ultimate consensus of the Committee, as its language closely tracks the phrasing of the ultimate Committee Report, which in turn closely resembles the eventual text of the Article III jurisdictional menu.

(c) *Structure*. Constitutional structure and policy provide further support for the distinction between the three mandatory categories and the six permissive ones. The permissive categories were listed last precisely because they were deemed less important. Defined solely by the status of the parties to them, cases in these categories might concern only trivial subjects.¹³⁰ To guard against particular—and foreseeable—instances of special bias in state tribunals, the Framers wanted to allow impartial national courts to hear such cases, if necessary. But the necessity would not be uniform and

as part of the celebrated New Jersey Plan offered as a states' rights alternative to Madison's and Randolph's Virginia Plan. The Paterson plan provided that the federal judiciary

shall have authority to hear & determine in the first instance on all impeachments of federal officers, & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue.

1 M. FARRAND, *supra* note 50, at 244. This resolution strongly suggests that even states' rights advocates at the Convention recognized a need for a mandatory core of jurisdiction in which the federal judiciary would have the last word. The apparent influence of this resolution on Wilson's Committee draft is confirmed by an earlier, private version of Wilson's draft which borrows verbatim from the Paterson resolution on the judiciary. See 2 M. FARRAND, *supra* note 50, at 157. Wilson's Committee draft is thus best seen as blending the mandatory subject matter-defined jurisdictional cores of Randolph and Paterson, and following the Randolph approach by creating a penumbral class of permissive party-defined jurisdictional categories.

¹³⁰ In marked contrast to his ringing defense of federal question jurisdiction, *see infra* text accompanying notes 141, 145, Madison offered only a tepid and half-hearted defense of diversity jurisdiction, which he believed could have been omitted by the Convention without much harm: "I will not say it is a matter of much importance. Perhaps it might be left to the state courts." J. ELLIOT, *supra* note 80, at 433; *see also id.* at 570 (remarks of Edmund Randolph at Virginia ratification convention) ("[I do] not see any absolute necessity for vesting [the federal judiciary] with jurisdiction in these cases"); *id.* at 549 (remarks of Edmund Pendleton) ("I think, in general, these decisions might be left to the State tribunals . . . I think it will, in general, be so left by the regulations of Congress"); *id.* at 556 (remarks of John Marshall) ("Were I to contend that this was necessary in all cases and that the government without it would be defective, I should not use my own judgment."); 2 *id.* at 491 (remarks of James Wilson at Pennsylvania convention) ("This part of the jurisdiction, I presume will occasion more doubt than any other part."); *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 450 (1805) (oral argument of former Attorney General Charles Lee) ("The jurisdiction given to the federal courts in cases between citizens of different states, was, at the time of the adoption of the constitution, supposed to be of very little importance to the people."). *See generally* Friendly, *supra* note 81.

unwavering—it would vary from state to state and from year to year. Instead of laying down an absolute rule of mandatory national jurisdiction in all such cases, the Framers were content to commit the issue to a congressional discretion that could accommodate fluctuating circumstances—much as they had earlier agreed to commit the creation of inferior federal courts *vel non* to congressional discretion. The wisdom of the Convention's decision has been confirmed by the history of the nation since 1789. Today, for example, plenary diversity jurisdiction seems undesirable as a policy matter.¹³¹ Foreseeing such contingencies, the Framers presciently declined to require full diversity jurisdiction. The first three categories, however, present a very different picture. Defined by subject matter and not party identity,¹³² these cases were vitally important *per se* to the Framers.¹³³

2. The Critical Importance of Mandatory Cases

(a) "*Arising Under*" Cases. The first category comprehends all cases arising under the Constitution, laws, and treaties of the United States. With respect to cases arising under the Constitution, the need for mandatory

¹³¹ For a recent thoughtful and influential proposal to eliminate most diversity jurisdiction, see H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 139-52 (1973); *cf.* Redish, *supra* note 60, at 152 (noting that plenary diversity jurisdiction would be overbroad).

¹³² Cases "affecting" public ambassadors were defined by subject matter, not party identity. *See* *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 855 (1824) ("This court can take cognizance of all cases 'affecting' foreign ministers; and therefore, jurisdiction does not depend on the party named in the record."); Marshall, *supra* note 91, at 213-14 (first three jurisdictional categories defined by "the character of the cause;" last six by "the character of the parties").

¹³³ *See* *Martin*, 14 U.S. (1 Wheat.) at 347 (national jurisdiction in first tier supported by "reasons of a higher and more extensive nature" than for second tier).

Unsurprisingly, the distinction between the mandatory and permissive categories in Article III closely parallels the distinction between those types of otherwise-unconstitutional conduct that Congress may cure and those areas where Congress is not given the last word by the Constitution. Mandatory "arising under" jurisdiction is closely connected to individual constitutional rights against temporary majorities, where Congress would be an untrustworthy guardian, and to separation-of-powers restrictions against retroactive legislation, which restrictions are directly binding on Congress. *See* *supra* notes 71-83 and accompanying text; *infra* notes 146-51 and accompanying text. In these areas of individual rights and legal entitlements, the Framers committed the last word to an apolitical federal judiciary, not Congress.

The permissive categories of jurisdiction, on the other hand, deal with the status of the United States as a party to lawsuit, interstate disputes, and economic discrimination by states against out-of-staters. These categories are closely connected to the areas of intergovernmental immunity, interstate compacts, and the dormant commerce clause—areas where the Constitution does recognize Congress as a sufficient policeman over states, and where Congress can "cure" (prospectively, at least) otherwise-unconstitutional state conduct. *See* *supra* note 83 and accompanying text.

jurisdiction of the national judiciary was manifest.¹³⁴ The Framers expected

¹³⁴ It is especially hard to square the Hart school's "primary" and "ultimate" reliance on state judges in constitutional cases with the fact that many of our most precious constitutional rights are rights against the states themselves. Indeed it is noteworthy that Hart's famous *Dialogue* was published in 1953—before *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and its progeny dramatized the special role of federal courts in protecting individual constitutional rights against states by breathing new life into fourteenth amendment promises that had long lain dormant.

Martin Redish has tried to blunt the effect of modern fourteenth amendment case law by suggesting that the original Constitution did not contain many important limitations on state power; therefore, the Framers would not have found it anomalous to place ultimate reliance on state courts. Redish, *supra* note 60 at 152-53. Yet Redish is flatly wrong here: the Civil War amendments represent a continuation of—and not a break with—the animating spirit of the original Constitution. The self-executing restrictions on states imposed by Article I, section 10 were considered among the most important provisions of the entire Constitution, and federal courts were to have a special role in policing these restrictions. Thus, in defending the jurisdiction of the federal courts, Hamilton wrote:

What for instance would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union and others with the principles of good government. [Federal] power must either be a direct negative on the state laws, or an authority in the federal courts to over-rule such as might be in manifest contravention of the articles of union. . . . The latter appears to have been thought by the convention preferable to the former

THE FEDERALIST No. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961); *see also supra* notes 67-83 and accompanying text. Indeed, the entire Federalist enterprise of establishing a new and stronger federal government was largely conceived of as a way to erect a strong bulwark of individual rights against overweening state governments. *See* 5 WRITINGS OF JAMES MADISON 27 (Hunt ed. 1904) (Letter from James Madison to Thomas Jefferson):

The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform, therefore, which does not make some provision for private right must be materially defective.

See also THE FEDERALIST Nos. 10, 43, 44 (J. Madison); 2 M. FARRAND, *supra* note 50, at 288 (remarks of John Mercer) ("What led to the appointment of this Convention? The corruption and mutability of the Legislative Councils of the States."); R. BERGER, *supra* note 50, at 10-11; G. WOOD, *supra* note 9, at 463-67 ("The Abandonment of the States"); *supra* note 69.

Redish's argument that state courts may exercise unreviewable jurisdiction in cases where individual constitutional rights are at stake is also hard to square with his view that Article I courts may not exercise such jurisdiction. Some Article I courts may well enjoy more structural independence from political branches than state

that the national judges would uphold the Constitution by denying effect to any purported law inconsistent with it.¹³⁵ In fact, the words "this Constitution" in the "arising under" category were specifically and self-consciously inserted by the Convention with the power of judicial review in mind.¹³⁶ Only a federal judiciary with tenure and salary guarantees would possess the requisite competence and independence to discharge this most delicate duty faithfully. As Oliver Ellsworth explained to the Connecticut ratification convention:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the *national* judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void; and upright, independent judges will declare it to be so.¹³⁷

The history of the supremacy clause demonstrates the Framers' fear that unsupervised judicial review by state court judges would be insufficient to protect constitutional liberty. On July 17, the Convention overruled a prior decision by the Committee on the Whole to give Congress a "negative" over unconstitutional state laws. Instead, the Convention adopted an early version of the supremacy clause.¹³⁸ As Gouverneur Morris observed, an adequate check on states could be provided by a "negative" in the national "Judiciary department."¹³⁹ Although Roger Sherman suggested in this de-

courts. Indeed, Redish himself admits that the logic of this prong of his argument is "at the very least, awkward." M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 46 (1980).

¹³⁵ See generally R. BERGER, *supra* note 50.

¹³⁶ 2 M. FARRAND, *supra* note 50, at 430.

Those historians and legal scholars who have recently reviewed the historical records of the Federalists are in widespread agreement that judicial review was clearly intended by the Framers. See, e.g., R. BERGER, *supra* note 50; C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960); G. WILLS, *supra* note 9; G. WOOD, *supra* note 9; Hart, Book Review, 67 *HARV. L. REV.* 1456 (1954). But see 2 W. CROSSKEY, *supra* note 53, at 1007 ("judicial review was not meant to be provided generally in the Constitution, as to acts of Congress, though it was meant to be provided generally as to the acts of the states").

¹³⁷ 3 M. FARRAND, *supra* note 50, at 240-41 (emphasis added); see also *THE FEDERALIST* No. 39, at 256 (J. Madison) (J. Cooke ed. 1961): "[I]n controversies relating to the boundary between the [state and national power,] the tribunal which is ultimately to decide, is to be established under the general Government. . . . The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."

¹³⁸ 2 M. FARRAND, *supra* note 50, at 28.

¹³⁹ *Id.*

bate that judicial review by state judges might be sufficient to protect constitutional rights, the clear understanding of the Convention was that state court decisions must be reviewable by the national judiciary.¹⁴⁰ Madison's reply to Sherman was typical: "Confidence cannot be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependent on the Legislatures."¹⁴¹ Edmund Randolph's comment the next day was in a similar vein: "[T]he Courts of the States can not be trusted with the administration of the National laws."¹⁴²

Even those who favored limiting the federal judiciary sought state court jurisdiction only in the first instance, with appellate review by a national tribunal. John Rutledge, for example, opposed establishing any national tribunal except a single supreme one. "The state Tribunals [are most proper] in all cases to decide in the first instance[,] the right to appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts."¹⁴³

The supremacy clause, as finally worded, addressed only state court judges, but the mandatory jurisdiction created by Article III assured the Convention that the final word on constitutional questions would lie in federal courts. The Framers clearly understood the connection between Article III and the supremacy clause; indeed, the Convention specifically modified the "arising under" language of the Article to render it "conformabl[e] to a preceding amendment" changing the language of the supremacy clause.¹⁴⁴ The supremacy clause would oblige state judges to follow the supreme law of the Constitution at the trial level; appellate review by Article III judges would assure faithful and accurate discharge of this obligation. As James Madison later explained to Thomas Jefferson:

the General Convention regarded a provision within the Constitution for deciding in a peaceable [and] regular mode all cases arising in the course of its operation, as essential to an adequate System of Gov[ernment] [I]t intended the Authority vested in the Judicial Department as a final resort in relation to the States, for cases resulting to it in the

¹⁴⁰ *Id.* at 27.

¹⁴¹ *Id.* at 27-28; *see also* 1 *id.* at 124 (remarks of James Madison) (criticizing "biased directions of dependent" state judges).

¹⁴² 2 *id.* at 46; *cf.* 3 *id.* at 207 (remarks of Luther Martin before Maryland legislature) (noting Federalists' plain distrust of state courts); *supra* note 8.

¹⁴³ 1 M. FARRAND, *supra* note 50, at 124; *see also* 3 *id.* at 206 (remarks of Anti-Federalist Luther Martin before Maryland legislature) (arguing for state court jurisdiction "in the first instance" only, with review in the Supreme Court); *cf.* R. BERGER, *supra* note 50, at 286 n.6 ("it seems quite clear that it was only 'initial,' original, *not final*, jurisdiction that was to be left to the state courts, subject to an appeal to the Supreme Court") (emphasis in original); *infra* note 220 (quoting similar remarks of Professor Bator).

¹⁴⁴ 2 M. FARRAND, *supra* note 50, at 431.

exercise of its functions [T]his intention is expressed by the articles declaring that the federal Constitution and laws shall be the supreme law of the land, and that the Judicial Power of the [United States] shall extend to all cases arising under them¹⁴⁵

It would have been insufficient simply to empower, but not oblige, Congress to give federal courts jurisdiction in these cases. Both Congress and state courts might be heavily dependent on state legislatures and temporary majorities. Thus, Congress might often be disposed to forgive unconstitutional conduct by state legislatures. Similarly, state courts could not guarantee the necessary independence or competence to protect individuals from constitutional encroachments by the political branches of federal and state government.¹⁴⁶

Similar reasons support mandatory national court jurisdiction in cases arising under federal laws and treaties. The Article III power to interpret laws and treaties was necessary to complement the Article I and Article II

¹⁴⁵ 4 *id.* at 83-84 (Letter from J. Madison to T. Jefferson). Note that by speaking of the national "Judicial Department," and not merely the Supreme Court, Madison's letter points us once again to the national judiciary as a whole, thereby reconfirming the structural parity of all Article III decisionmakers. See *supra* notes 88-115 and accompanying text.

¹⁴⁶ See *supra* notes 71-83, 102-15 and accompanying text. For an especially clear statement of the dominant view at the Convention of the unique role to be played by the national judiciary in policing the conduct of states, see 3 M. FARRAND, *supra* note 50, at 56 (Edmund Randolph's suggestion for conciliating the small states):

4. That altho' every [congressional] negative given to the law of a particular State shall prevent its operation, any State may appeal to the national Judiciary against a negative; and that such a negative if adjudged to be contrary to the power granted by the articles of the Union, shall be void.

5. that any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice.

It must be remembered, of course, that under the Constitution as originally adopted, state legislatures would directly elect the Senate and indirectly elect the President by choosing electors. The passage of the seventeenth amendment and the development of national Presidential elections have tended to obscure the obvious importance of these structural links between the state legislatures and the national political branches in the original Constitution. Cf. *supra* notes 100, 110, 115 (discussing other post-constitutional developments). Thus, under the original Constitution, the national judiciary was designed to be far more insulated from the influence of state legislatures than were the national legislature and executive. Not only did the initial mode of judicial selection give states a less direct role, but more important, life tenure would eliminate any need or temptation to pander to the interests of state legislatures in order to stay in office. See THE FEDERALIST No. 51, at 348 (J. Madison) (J. Cooke ed. 1961) ("permanent tenure by which the appointments are held in [the judicial] department, must soon destroy all sense of dependence on the authority conferring them").

powers to make and enforce laws and treaties. In the words of *Federalist* No. 80: "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number."¹⁴⁷

Once again, nonmandatory jurisdiction would have been insufficient. Congress was vested with only one-third of the power of the national government, the power to legislate.¹⁴⁸ The President was vested with the power to execute the national laws, and the national judiciary with the power to interpret them. This separation of powers was designed to ensure that the laws passed by the legislature would be prospective and general. Their interpretation by an impartial and independent judiciary would prevent retroactive modification and ensure even-handed application, thereby promoting the rule of law.¹⁴⁹ If the Framers had allowed Congress to vest final interpretive authority in state judges who might lack both competence and independence, this careful separation of powers might have been easily circumvented.¹⁵⁰ Such a result was clearly not intended. Congress may no

¹⁴⁷ THE FEDERALIST No. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961); see also *Martin*, 14 U.S. (1 Wheat.) at 329 ("The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them."); *Cohens v. Virginia*, 6 Wheat. 264, 384 (1821) ("[T]he judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws."); 3 J. STORY, *supra* note 19, § 1571; *Lee, Letters of a Federal Framer* (October 1787), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 279, 306-07 (P. Ford ed. 1968) ("It is proper that the federal judiciary should have power co-extensive with the federal legislature—that is the power of deciding finally on the laws of the union.").

¹⁴⁸ It is a category mistake to view Congress as the sole repository of federal power, and thereby confuse "Congress" with "the federal government"—just as it is a category mistake to view Congress as the sole sovereign representative, and thereby confuse "Congress" with "the People." See *supra* note 9.

¹⁴⁹ See R. BERGER, *supra* note 50, at 55-56; G. WILLS, *supra* note 9, at 108-50.

¹⁵⁰ See THE FEDERALIST No. 81, at 547 (A. Hamilton) (J. Cooke ed. 1961): "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." Cf. THE FEDERALIST No. 78, at 522 (A. Hamilton) (J. Cooke ed. 1961):

The standard of good behaviour for continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. . . . In a republic it is [an] excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws. (Emphasis added).

The suggestions of Martin Redish notwithstanding, the "greater" congressional power to decline to enact federal laws does not subsume the "lesser" power to pass laws conditioned on unreviewable state court jurisdiction. Cf. *supra* note 65 and

more waive the judicial power of final interpretation than it may waive the President's power to execute the laws.¹⁵¹

accompanying text. Such a greater power/lesser power argument proves far too much, for it would likewise seem to authorize:

(1) a congressional law vesting final fact-finding power in a criminal case in an agency of congressional creation, *but see* U.S. CONST. amend. VI (right to trial by jury); or

(2) a congressional law circumventing presentment to the President, *but see* *INS v. Chadha*, 103 S. Ct. 2764 (1983).

Although Congress need not exercise its Article I power to enact a given law, if it does pass such a law, it may not condition that law in ways that violate constitutional restrictions on congressional power, such as those contained in the Bill of Rights, in the presentment clause, and in Article III's mandatory clauses.

¹⁵¹ "There was an analogy between the Executive & Judiciary departments in several respects." 2 M. FARRAND, *supra* note 50, at 34 (remarks of J. Madison) (discussing the need for the two weaker branches to be independent of the legislature). Unlike the Articles of Confederation, where the Congress dominated the other two branches, the Constitution created a national government with three independent and co-equal branches. *See supra* notes 88-92 and accompanying text. Indeed, a more equal division of power among the branches of the national government was viewed by the Framers as an absolute prerequisite to giving more power to the national government as a whole. *See* G. WOOD, *supra* note 9, at 547-53; *THE FEDERALIST* Nos. 47-51 (J. Madison); *id.* Nos. 22, 84 (A. Hamilton).

"If congress possess any discretion on this subject, it is obvious that the judiciary, as a co-ordinate department of the government, may, at the will of congress, be annihilated, or stripped of all its important jurisdiction." 3 J. STORY, *supra* note 19, § 1584. Far from being a discretionary appurtenance that may, for all practical purposes, be dismantled by Congress, the national judiciary constituted a central and indispensable "balance-wheel" in the architecture of the Federalist Constitution, *id.* § 1615—the "keystone of the arch," 2 J. ELLIOT, *supra* note 80, at 257-58 (remarks of Charles Pinckney at South Carolina ratifying convention).

Thus, far from placing sole reliance on a literalistic and wooden reading of the isolated words "shall" and "all" in Article III, the neo-Federalist interpretation of that Article is rooted in what should be a virtually self-evident structural principle: the Constitution empowers national legislators to pass national laws; a national executive to approve and execute them; and national—not state—judges to expound them finally. A congressional effort to shift final interpretive authority from federal to state courts should be seen as no less structurally anomalous than would a parallel effort to shift the President's power to veto and enforce laws, or appoint high executive officers, to state governors. *See, I.N.S. v. Chadha*, 103 S. Ct. 2764 (1983) (striking down congressional action circumventing Presidential veto power); *Buckley v. Valeo*, 424 U.S. 1, 124-36 (1975) (*per curiam*) (striking down congressional action circumventing President's appointment power); *See also* W. RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 200 (1825):

[T]he state tribunals are no part of the government of the United States. To render the government of the United States dependent on them, would be solecism almost as great as to leave out an executive power entirely, and to call on the states alone to enforce the laws of the Union.

(b) *Admiralty Cases*. The next mandatory jurisdictional category concerns admiralty. Even under the decentralized Articles of Confederation, the national courts had enjoyed jurisdiction over "piracies and felonies committed on the high seas [and] in all cases of capture."¹⁵² At Philadelphia, this jurisdiction was expanded to include "all Cases of admiralty and maritime jurisdiction."¹⁵³ According to Felix Frankfurter and James Landis, "[m]aritime commerce was then the jugular vein of the Thirteen states. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention."¹⁵⁴ In the battle over the Judiciary Act of 1789, even dedicated Anti-Federalists like Richard Henry Lee argued for creating lower federal courts—clearly non-obligatory under the Constitution—to exercise admiralty jurisdiction.¹⁵⁵ According to Hamilton's *Federalist* No. 80: "The most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes."¹⁵⁶

As with "arising under" jurisdiction, the Framers intentionally created a *mandatory* admiralty jurisdiction. The only express grant of admiralty power to the national government appears in Article III, a fact that strongly suggests a special role for national judges in admiralty. Congress, on the other hand, was given no explicit substantive power to legislate generally in admiralty; it thus would have been especially peculiar to have committed the scope of admiralty jurisdiction to the discretion of that branch.

Further, by providing for mandatory admiralty jurisdiction, the Framers vested the federal courts with the full panoply of judicial powers over national matters. The traditional triad of judicial proceedings familiar to the Framers covered suits in law, equity, and admiralty.¹⁵⁷ Mandatory "arising under" jurisdiction and mandatory admiralty jurisdiction are thus perfect complements: the former extends only to all cases "in Law and Equity," and the latter extends to all cases in "admiralty," completing the triad.

(c) *Public Ambassador Cases*. The final category of mandatory jurisdiction covers all cases affecting public ambassadors. The special status of this category has long been recognized: even members of the Hart school acknowledge that such cases fall into the inviolable and irreducible core of the Supreme Court's original jurisdiction, over which Congress has no discretion.¹⁵⁸ This power of the Supreme Court was perhaps designed as com-

¹⁵² Articles of Confederation, art. IX, ¶ 1.

¹⁵³ U.S. CONST. art. III, § 2 (emphasis added).

¹⁵⁴ F. FRANKFURTER & J. LANDIS, *supra* note 2, at 7; see also J. MCGOWAN, *THE ORGANIZATION OF THE JUDICIAL POWER OF THE UNITED STATES* 24 (1969).

¹⁵⁵ See Warren, *supra* note 18, at 66-67.

¹⁵⁶ *THE FEDERALIST* No. 80, at 538 (A. Hamilton) (J. Cooke ed. 1961).

¹⁵⁷ See 3 J. STORY, *supra* note 19, § 1683: "[A] suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both."

¹⁵⁸ See Hart, *supra* note 42, at 1372-73 (quoted *supra* note 47) (acknowledging irreducible core of Supreme Court original jurisdiction).

plementary to the President's power under Article II to receive "Ambassadors and other public Ministers": just as foreign dignitaries were given access to the nation's chief executive, so were they given access to the nation's chief tribunal.¹⁵⁹

C. *Empowering and Cabining Congress*

Once the foregoing features of Article III are understood, the precise contours of the final piece of the puzzle—the exceptions clause—are easy to trace. After setting forth the original jurisdiction of the Supreme Court,¹⁶⁰

¹⁵⁹ U.S. CONST. art. II, § 3; *see also id.* art. II § 2, cl. 2 (President shall have power to appoint "Ambassadors, other public Ministers and Consuls"); 2 M. FARRAND, *supra* note 50, at 411, 533 (amending appointment clause language, rendering it precisely parallel to language of Article III ambassador clause).

¹⁶⁰ The complete sentence reads as follows: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2, cl. 2. The Supreme Court has not always been attentive to the nuances of language of this scheme. In *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 495 (1971), for example, the sentence was quoted: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." The ellipses here, however, distort meaning. The referent of the word "those" is not "all Cases" but simply "Cases." It has long been established that the state-party cases within the original jurisdiction of the Supreme Court are limited to those cases enumerated in the first sentence of section 2. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1821); *Duhne v. New Jersey*, 251 U.S. 311, 314 (1920). These cases, however, are only a subset of *all* cases to which a state might be a party. It is clear, for example, that a suit between a state and its own citizens does not fall within the original jurisdiction of the Supreme Court.

Since "Cases . . . in which a State shall be Party" fall in the permissive, not mandatory tier of the Article III jurisdictional menu, Congress may abolish all federal jurisdiction over them—including Supreme Court original jurisdiction. Currently, for example, the Congress has exempted suits between a state and a foreign state—even where the defendant consents to suit—from the original jurisdiction of the Supreme Court. 28 U.S.C. § 1251 (1982). Such cases plainly could be heard originally by the Supreme Court, if Congress so desired; these cases are therefore part of the permissive penumbra of Supreme Court original jurisdiction, over which Congress has complete discretion. Congress may not, of course, similarly abolish the Court's core original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls." *See infra* note 183.

The power of Congress to restrict the penumbral original jurisdiction of the Supreme Court is not conferred by the explicit exceptions clause—which applies only to the Court's appellate jurisdiction—but rather arises from the fact that the Court's original jurisdiction extends to some but not necessarily all, "Cases . . . in which a State shall be Party." Because Article III does not define with precision which of these cases must be heard by a federal court—in sharp contrast to the command that *all* mandatory-tier cases be so heard—the power to delineate the boundaries of

Article III goes on to provide that "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."¹⁶¹ The opening words of this sentence establish as a starting point that the Supreme Court shall have appellate jurisdiction in *all* cases—in both the mandatory and permissive classes—except those earmarked for original jurisdiction. The "exceptions" language makes clear that this starting point is merely a point of departure; it need not be the *ending* point of Supreme Court appellate jurisdiction.

The congressional power to make exceptions, however, is strictly limited. If at all possible, the exceptions clause must be read in a way that will harmonize with, and not contradict, the earlier commands of Article III. Thus, the power to make exceptions must be read in a way that does not conflict with the mandate that the judicial power "shall be vested" in a federal judiciary and "shall extend" to all cases in certain categories.

Such a reading is not hard to find. First, the congressional power to make exceptions to the Supreme Court's appellate jurisdiction includes the power to restrict the scope of federal jurisdiction by eliminating appeals in some or all of the six permissive categories. State court judges may constitutionally be left with the last word on these cases.¹⁶² Second, the exceptions power includes the power to allocate federal jurisdiction among federal courts in cases falling in the mandatory tier—that is, federal question and admiralty cases.¹⁶³

Thus, Congress may make exceptions to the Supreme Court's appellate jurisdiction in the mandatory categories, but only if it creates other Article III tribunals with the power to hear all the excepted cases. Congress need not create such courts in the first instance;¹⁶⁴ plenary Supreme Court appellate jurisdiction of all federal question and admiralty cases decided by state courts would satisfy the requirement that the "judicial Power shall extend to all" these cases.¹⁶⁵ But if Congress seeks to make exceptions to the Su-

federal jurisdiction over these penumbral cases rests with Congress, as part of its general constitutional power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all Powers vested by this Constitution in the Government of the United States, *or in any Department or Officer thereof.*" U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

¹⁶¹ U.S. CONST. art. III, § 2, cl. 2.

¹⁶² Similarly, if Congress so desires, it may leave this last word to inferior federal court judges. See *infra* notes 163-71 and accompanying text.

¹⁶³ The third category falling in the mandatory tier, cases affecting public ambassadors, falls within the original jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2, cl. 2 (quoted *supra* note 160).

¹⁶⁴ See *supra* note 93 and accompanying text.

¹⁶⁵ An interesting question would be presented if Congress disestablished lower federal courts and some state courts declined to entertain some cases falling within

preme Court's appellate jurisdiction in these cases, then it must create

the mandatory judicial power, *e.g.*, admiralty suits. The judicial power must extend to these cases, but the original jurisdiction of the Supreme Court cannot be expanded to take cognizance of them. This dilemma resembles the problem that Justice Story thought he faced in *Martin*: either Congress must create at least one lower federal court to fill the gap in original jurisdiction created by state court abdication, or the state court must be compelled to hear these cases. *See supra* notes 13-23 and accompanying text.

The Framers did not contemplate this dilemma, because they believed that state courts of general jurisdiction would always be open to entertain all suits, and would willingly do so. *See* THE FEDERALIST No. 82 (A. Hamilton) (quoted *supra* text accompanying note 25); Hart, *supra* note 42, at 1401 (quoted *supra* text accompanying note 47). Indeed, the Convention's states' rights champions were so sure of this that they argued that Congress should not even be empowered to create lower federal courts.

The proper resolution of this unforeseen dilemma depends on the state's reasons for declining jurisdiction. If the state court is open to hear analogous suits under state law, then refusal to entertain federal claims would amount to unconstitutional discrimination against federal rights. *See* *Testa v. Katt*, 330 U.S. 386 (1947). In such a case, obligatory state court original jurisdiction—subject of course to Article III review—is appropriate. Similarly, where a litigant is claiming that a state official has acted or is acting lawlessly, the due process clause of the fourteenth amendment may require that redress be available from the state judiciary. *See* *General Oil v. Crain*, 209 U.S. 211 (1908).

Where no discrimination or allegations of state misconduct are involved, constitutional and policy considerations suggest that Congress should not attempt to oblige the state court to open its doors. The supremacy clause is inapplicable here because it neither confers nor obliges state court jurisdiction; it simply requires that if and when state courts take jurisdiction over a case, they follow the supreme law of the land. *See* R. BERGER, *supra* note 50, at 244. Nor does Congress enjoy explicit power to require state courts to take jurisdiction—in clear contrast to its explicit Article I, § 8 power to establish “inferior” federal courts. *See* *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) (Congress cannot confer jurisdiction on the New York courts). *But see* Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for A Revised Doctrine*, 1965 SUP. CT. REV. 187, 207 n.84 (finding Congressional power to impose jurisdiction on state court in necessary and proper clause and in logic of Madisonian compromise).

The intrusiveness on state sovereignty that mandatory state court jurisdiction would occasion is of course heightened by the fact that the *raison d'être* of such jurisdiction would be the compulsory reviewability of its exercise in federal tribunals. That intrusiveness, the lack of explicit congressional power, and the easy constitutional alternative of creating inferior federal courts all suggest that serious tenth amendment problems might result from obliging state court jurisdiction. *Cf.* *F.E.R.C. v. Mississippi*, 456 U.S. 742, 774 (1982) (Powell, J., dissenting in part) (“The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes state courts as it finds them.”) (quoting Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)). Thus, the better solution in such cases would be to create lower

another federal court to fill the gap in mandatory federal jurisdiction.¹⁶⁶ Such a court could be an original tribunal, or could sit in direct appellate review over state courts. Its decisions could, but need not, be reviewable by the Supreme Court; the Article III mechanisms of appointment, tenure and removal would guarantee sufficient independence, competence, and probity in inferior federal judges.¹⁶⁷ Thus, the "exceptions" clause gives Congress the power to structure the internal hierarchy of the federal judiciary by shifting the final power to decide various mandatory cases from the Supreme Court to other *Article III* judges—not to state judges, as the Hart school would have it.¹⁶⁸

federal courts out of respect for state autonomy—an ironic twist on the states' rights position at the Constitutional Convention. See Warren, *supra* note 26, at 592-94; Note, *supra* note 33, at 967.

¹⁶⁶ In the words of THE FEDERALIST No. 82, "appeal from the state courts to the subordinate national tribunals . . . would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court." *Id.* at 557 (A. Hamilton) (J. Cooke ed. 1961); see also THE FEDERALIST No. 81, at 546 (A. Hamilton) (J. Cooke ed. 1961) ("The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the supreme court in every case of federal cognizance. . . . And if there was a necessity for confiding the original cognizance of causes arising under [federal] laws to [state courts,] there would be a correspondent necessity for leaving the door of appeal as wide as possible.") (emphasis added); 1 M. FARRAND, *supra* note 50, at 125 (remarks of Rufus King) (establishment of lower federal courts in various states would obviate the need for extensive appeals to Supreme Court in national capital); *id.* at 124 (remarks of James Madison) (to similar effect); 3 J. ELLIOT, *supra* note 80, at 552-53 (remarks of John Marshall at Virginia ratifying convention) (to similar effect); Webster, *An Examination Into the Leading Principles of the Federal Constitution Proposed By the Late Convention Held at Philadelphia With Answers to the Principal Objections that Have Been Raised Against The System*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 153-54, *supra* note 147, (to similar effect).

¹⁶⁷ See *supra* notes 102-15 and accompanying text.

¹⁶⁸ It is important to recognize the self-executing character of Article III. The Supreme Court is created by the Constitution and derives the core of its jurisdiction directly from it. Exceptions to its jurisdiction may be made by statute, but if such statutes are unconstitutional, they are not law, and the Supreme Court therefore reverts to its constitutional core of jurisdiction. See Sager, *supra* note 61, at 23-25. Thus, if Congress were ever to enact a jurisdictional regime that opened an impermissible gap in mandatory federal jurisdiction, the proper "filling" of that gap would be to resurrect the appellate jurisdiction of the Supreme Court, rather than extending the jurisdiction of inferior federal courts. See *White v. Fenner*, 1 Mason 520, Fed. Cas. No. 17,547 (C.C.R.I. 1818) (Story, J.) ("[I]t is somewhat singular the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent [but this inferior federal] court has no jurisdiction which is not given by some statute."). Perhaps precisely to preserve the self-executing quality of Article III the Convention rejected by a 6-2 vote a proposed substitute to the

The power to structure the federal judiciary is not trivial; it has real bite. It comprehends the power to create an unreviewable Article III Tax Court—or an Abortion Court.¹⁶⁹ The power to choose *which* Article III judge shall have the last word can be abused by Congress—much as the power to “pack” the Supreme Court can be abused. Indeed, court-packing is simply one dramatic illustration of Congress’s clear power to choose which Article III judges shall effectively wield final decisionmaking power.¹⁷⁰

exceptions clause that read: “In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct.” 2 M. FARRAND, *supra* note 50, at 425, 431.

¹⁶⁹ Of course, jurisdictional statutes—like all other laws—are subject to constitutional restrictions in the Bill of Rights and elsewhere. Thus, the creation of an Abortion Court might be challengeable as an unconstitutionally-motivated violation of equal protection. See Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981). In this essay, however, I am concerned only with those restrictions on congressional power that derive from Article III itself.

I should note, however, that the sort of precise and technical parsing of Article III offered in this essay, though appropriate given the precision and rigor of the language of that Article itself and the technical nature of its subject, may be less appropriate in seeking to interpret faithfully other sections of the Constitution. For example, the fourteenth amendment has a distinctly different rhythm and feel: it speaks in terms more lofty, general, and open-ended. Faithfulness to the text itself seems to invite a higher level of interpretive generality and a different mode of legal analysis. Accord J. ELY, *supra* note 52, at 11-41 (discussing Constitution’s open-textured clauses); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107-08 (1976) (discussing need for mediating principles in interpreting general language). Cf. *National Mut. Ins. Co. v. Tidewater Transfer Co.* 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (discussing near-mathematical precision of Article III language).

¹⁷⁰ Wherever an exception is constitutionally made, prior Supreme Court opinions need not continue to be viewed as binding precedent. Article VI does not make the Constitution, laws, and treaties of the United States, as interpreted only by the Supreme Court, the supreme law of the land. Instead, different actors of government are permitted to have different understandings of that supreme law. The genius of the system is that because the several branches must cooperate before individuals may be denied liberty or property, the broadest conception of the rights at stake usually prevails. See *supra* notes 67-83 and accompanying text; *infra* notes 189-91 and accompanying text.

Current rules of precedent are thus governed not by any inherent judicial hierarchy in the structure of the Constitution or by the natural “supremacy” of the Supreme Court, see *supra* notes 59-60 and accompanying text, but by the mechanisms of review that Congress provides for: state courts are currently bound to follow Supreme Court precedent because of the simple fact that if they do not, they can be reversed. Because federal Courts of Appeals do not directly review state decisions, these courts’ decisions are generally not considered binding precedent in state court. Were Congress to redesign the appellate organizational chart, however, rules of

Nevertheless, this power was necessary if the federal government were to have the ability to adapt its judiciary to changing circumstances. Denial of congressional power to structure the federal judiciary could have come about at the Convention only at the cost of some prolixity—by specifying the number of Supreme Court justices, the number of inferior federal tribunals, the internal hierarchical structure, etc.—and great rigidity.¹⁷¹ Perhaps foreseeing that westward expansion, economic growth, changing technology, and alterations of state tribunal structures might require important modifications in the structure of the national judiciary, the Framers committed significant discretion to Congress. This discretion, of course, was constrained by the all-important requirement that the court with the last word on a federal question or admiralty issue had to be an Article III court.

III. POST-CONSTITUTIONAL HISTORY: FEDERAL JURISDICTION IN PRACTICE

A. *The Judiciary Act of 1789: Casting Light Backwards*

The Supreme Court has long acknowledged the Judiciary Act of 1789 as “[a] contemporaneous exposition of the constitution, certainly of not less authority than [*The Federalist*], passed [by] many eminent members of the Convention which formed the constitution.”¹⁷² The value of that Act as an interpretive guide to the meaning of Article III has probably been somewhat overstated, however, and the quasi-constitutional status enjoyed by the Act¹⁷³ does not seem fully warranted. Because the Anti-Federalist forces wielded far more power in the first Congress than they had at Philadelphia, it would not be surprising if the Act only imperfectly reflected the Federalist vision that had earlier been crystallized in the Constitution.¹⁷⁴ Nonetheless,

precedent would change accordingly—as well-illustrated by the workings of the current Tax Court, where identical cases on the merits may receive different dispositions, because they are appealable to different federal circuits.

¹⁷¹ See 3 J. ELLIOT, *supra* note 80, at 517, 547 (remarks of Edmund Pendleton at Virginia ratification convention) (noting constitutional straitjacket that would have been created if Article III had specified the number of inferior federal courts); 3 J. STORY, *supra* note 19, § 1591 (noting difficulties in constitutional prescription of the number and internal hierarchy of federal courts); 3 M. FARRAND, *supra* note 50, at 392 (remarks of Gouverneur Morris to U.S. Senate) (to similar effect).

¹⁷² *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821).

¹⁷³ See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 594 (1875) (“the venerable Judiciary Act of 1789 was in some sort regarded as only less sacred than the Constitution”) (statement of the case); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (the Judiciary Act of 1789 “was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning”).

¹⁷⁴ See Warren, *supra* note 18, at 53 (Act “pleased the Anti-Federalists more than the Federalists”); Warren, *supra* note 26, at 548 n.8 (Act “reflected the views of the

the Act remains a useful, though fallible, signpost to those seeking to understand Article III. It is particularly noteworthy that the basic structure of the Act resonates deeply with the interpretation of the judicial article offered in this essay.¹⁷⁵

1. The Two-Tiered Model in Action

The first Judiciary Act created major exceptions to plenary federal jurisdiction over all party-defined cases.¹⁷⁶ Where the Constitution permits the federal judicial power to extend to "Controversies between citizens of different States" the Act gave federal courts original jurisdiction only in cases involving more than \$500—no small sum in the eighteenth century—and only where the suit was one between "a citizen of the State *where the suit is brought* and a citizen of another state."¹⁷⁷ Moreover, such jurisdiction was nonexclusive. Removal from state court was permitted only in a limited number of cases (again involving a \$500 minimum amount) and no diversity case proceeding to judgment in a state court was appealable to a federal court.¹⁷⁸ Where the Constitution permitted jurisdiction in cases "to which the United States shall be a Party," the Act conferred jurisdiction on federal courts only where the United States was party-plaintiff, and then only where "the matter in dispute" amounted to more than \$100, exclusive of costs.¹⁷⁹ Once again this jurisdiction was concurrent with the states, from whose decisions no appeal to federal courts would lie.¹⁸⁰ In cases involving land grants under different states, the federal courts were given power to hear only a limited number of cases removed from state courts; once again a \$500 minimum blocked the doors of the federal judiciary.¹⁸¹

founders only as to what it was feasible and politically advisable to enact at that time").

¹⁷⁵ A detailed review of the historical records surrounding the passage of the Judiciary Act of 1789 and subsequent judiciary acts lies beyond the scope of this essay. Such a review is unnecessary here because I do not seek to prove that Congress has always self-consciously understood the limits of its power to regulate jurisdiction. Rather, my contention is that the *actions* of Congress in passing jurisdictional statutes have always by and large comported with the basic requirements of Article III with, perhaps, de minimis exceptions. At least intuitively, Congress seems always largely to have understood and followed the commands of Article III. If congressional actions speak louder than words then perhaps we have understood Article III all along without realizing it.

¹⁷⁶ See *Martin*, 14 U.S. (1 Wheat.) at 336 (noting differential congressional treatment of permissive and mandatory tiers under Judiciary Act of 1789 and subsequent statutes).

¹⁷⁷ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (emphasis added).

¹⁷⁸ *Id.* § 12.

¹⁷⁹ *Id.* § 9.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* § 12.

The Act's treatment of cases in the mandatory tier was far different. Federal District Courts were vested with plenary and exclusive jurisdiction to hear "all civil causes of admiralty and maritime jurisdiction" regardless of the amount in controversy.¹⁸² The Supreme Court was endowed under the Act with exclusive jurisdiction over "all . . . suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants" and nonexclusive jurisdiction of "all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party."¹⁸³ Lower federal courts were granted exclusive cognizance of federal crimes, while the Supreme Court was given plenary appellate review, under the famous section 25, over all state court decisions which defeated rights set up by the appellant under the Constitution, laws or treaties of the

¹⁸² *Id.* § 9. The passage providing for exclusive and plenary admiralty jurisdiction went on, in the famous § 9 "savings clause," to provide that preexisting common-law remedies in maritime cases would continue to remain enforceable: "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Since this savings clause dealt only with common law, and not admiralty, cases, it seems fully consistent with the neo-Federalist interpretation of Article III. See 3 J. STORY, *supra* note 19, § 1666 n.3.

¹⁸³ The Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (emphasis added). Section 9 of the same act provided for concurrent district court jurisdiction—exclusive of state courts—in "all suits against consuls or vice-consuls." Despite the usage of the word "all" in sections 9 and 13 and the seemingly plenary scope of both sections, the non-exclusivity of suits brought by ambassadors, public ministers and consuls is troubling under the neo-Federalist interpretation of Article III; in cases brought by foreign dignitaries, the exercise of concurrent state court jurisdiction would not be reviewable in any federal court. Thus, the Act seems to allow state courts the last word over a subset of cases falling within the mandatory tier, thereby impermissibly failing to vest the judicial power of the United States in Article III courts. See *supra* notes 94-100 and accompanying text. Moreover, in several early and important cases, the Supreme Court seemed to suggest that its original jurisdiction over all cases affecting public ambassadors was made exclusive—even vis-a-vis other federal courts—by the Constitution itself. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 820-21 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 396-97 (1821); *Martin*, 14 U.S. at 337-38; *Marbury*, 5 U.S. at 174; see also 3 J. STORY, *supra* note 19, § 1699.

The first Congress, however, may have viewed the public ambassador clause of Article III as designed solely for the protection of foreign dignitaries. Under this interpretation of Article III, although the Constitution conferred upon foreign dignitaries a right to an Article III forum, if they so desired, the right was waivable. Thus, if an ambassador chose to bring suit in state court—or to submit to private arbitration, for that matter—the first Congress may have felt that the mandate of Article III would nonetheless be satisfied. Interestingly, the first Congress's interpretation of the public ambassador clause of Article III seems to parallel its interpretation of the "arising under" clause—which Congress apparently viewed as designed solely for the protection of individual federal rights. See *infra* notes 189-95 and accompanying text.

United States.¹⁸⁴ Thus, in the mandatory tier, state courts were not permitted to be the last word.

2. The Parity of Federal Courts

In addition to its differential treatment of the two tiers of cases, the Act also established important distinctions between Supreme Court review of state court decisions on one hand, and of lower federal courts on the other. No dollar minimum limited automatic appeals from state courts arising under federal law, but appellate review over federal circuit courts was limited to civil cases involving more than \$2,000, and was nonexistent in criminal cases.¹⁸⁵ The lesson of the Act seems clear: lower federal courts could be trusted with the power of ultimate disposition of cases in the mandatory tier, but state courts could not.

Indeed, the very structure of the circuit courts created by the Act dramatized the structural equality of all federal judges. These courts were staffed not by appointing separate Article III judges, but rather by forming circuit panels in which Supreme Court justices and federal district judges sat together, with each judge—regardless of status—given an equal vote.¹⁸⁶ The Act created no analogous court pairing Supreme Court justices with state judges.

3. The Wrinkle of Section 25

In one important respect, however, the Judiciary Act may seem at first to fall short of the constitutional requirement of plenary federal jurisdiction over the mandatory tier: section 25 did not extend the jurisdiction of the Supreme Court to *all* cases where the state court below had construed the Constitution, laws, or treaties of the United States. Instead, it extended the Court's jurisdiction only to those cases where the court below had *defeated* a federal statutory, constitutional or treaty-based "title, right, privilege or exemption" set up by appellant.¹⁸⁷ Such a limitation, however, is *only arguably* an impermissible constriction of Article III's mandate that the judicial power extend to all "arising under" cases. To require that the appellant demonstrate that the court below defeated his federal rights is perhaps only to require that the case, as postured for Supreme Court review, arise under federal law—much as the "well-pleaded complaint" rule for district court jurisdiction under 28 U.S.C. § 1331 requires that plaintiff's complaint itself be based on federal law before it will be deemed to "arise under" that law.¹⁸⁸

¹⁸⁴ The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73.

¹⁸⁵ The Judiciary Act, however, did give the Supreme Court power to issue writs of habeas corpus to test in some respects the legality of confinement. *Id.* § 14.

¹⁸⁶ *Id.* § 4.

¹⁸⁷ *Id.* § 25.

¹⁸⁸ There is also an analogy here to the "mootness on appeal" doctrine. Just as a

This interpretation of "arising under" comports with the structure of Article III. If the Article were viewed as *mandating* uniformity on federal questions, then the restrictions of section 25 would be hard to defend, since they would allow overbroad and incorrect applications of federal law to stand, so long as no federal rights were violated. But Article III in fact requires no such uniformity, as the permissibility of vesting unreviewable jurisdiction in various lower federal courts illustrates. The inspiration behind "arising under" jurisdiction was rooted not in uniformity but in the importance of protecting individual rights by providing an impartial and independent national tribunal.¹⁸⁹ Where the state court decision violated no individual federal rights, but in fact gave the litigant raising a federal right more than he was entitled to as an absolute minimum, no compelling need for federal court supervision would arise. An analogy to the modern doctrine of "adequate and independent state grounds" suggests itself: a state court may not use state law to circumvent federal rights,¹⁹⁰ but may use state law to supplement federal rights, unless doing so would violate some other federal interest.¹⁹¹

case must continue to remain "live" at the appellate level, so must it continue to "arise under" federal law on appeal.

¹⁸⁹ See THE FEDERALIST No. 78, at 527 (A. Hamilton) (J. Cooke ed. 1961) ("This independence of the judges is equally requisite to guard the constitution *and the rights of individuals* . . .") (emphasis added); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat) at 388 (Article III review designed for "the protection of individuals"); 5 WRITINGS OF JAMES MADISON, *supra* note 134, at 27 (letter from James Madison to Thomas Jefferson) (discussing need to protect "private right") (quoted in full *supra* note 134).

¹⁹⁰ See *Ward v. Love County*, 253 U.S. 17, 22-23 (1920).

¹⁹¹ The analogy is strengthened by the fact that § 25 required that the basis for appeal must appear "on the face of the record." The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73. Whereas the Supreme Court today carefully reviews the opinion of the court below to determine whether the decision was based on an overgenerous reading of federal law or on supplemental state law, see, e.g., *Michigan v. Long*, 103 S. Ct. 3469 (1983); *Minnesota v. National Tea*, 309 U.S. 551 (1940), such an inquiry was foreclosed by the Act of 1789. See *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1875) (abandoning in the wake of statutory deletion of words "on the record" the Court's longstanding rule that "the opinions of . . . State courts cannot be looked into to ascertain what was decided"); cf. L. TRIBE, *supra* note 59, at 31-32 (Supreme Court should not automatically reverse state court decision resting on broader understanding of Constitution and defeating no federal rights).

Moreover, state legislators, if they have a broader conception of a given federal or constitutional right than the federal judiciary, may well feel bound by Article VI and their individual oaths of office to enact protective—or repeal offending—state laws to safeguard the right at stake. So long as they do not thereby offend any other federal rights, their actions cannot be overturned by the federal judiciary—even though such actions plainly rest upon a different understanding of federal rights than that entertained by federal courts. The first Congress may well have believed that the result

Even if the plausible interpretation of "arising under" reflected in the Act of 1789 is incorrect, the impermissible exception to the Supreme Court's appellate jurisdiction was relatively minor.¹⁹² In many cases the party against whom a federal right was overexpansively construed could colorably claim that such a misconstruction denied him a federal immunity. The limit of a federal right often represents as important a federal interest as its affirmative scope.¹⁹³

In any event, the basic point remains that the *general structure* of the Judiciary Act strongly supports the neo-Federalist interpretation of Article III presented here. Mandatory tier cases were treated differently than permissive tier cases, and appeals from state tribunals were treated differently than those from lower federal courts.¹⁹⁴ Even the wrinkle of section 25

should be no different if a state chose to act throughout its judiciary, instead of its legislature, for the internal allocation of sovereign power within a state is not usually a matter of concern for federal courts. *See supra* note 83; *see also* *Highland Farms Dairy Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 479-81 (1981) (Stevens, J., dissenting) ("I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts. . . . If a state statute expressly authorized a state tribunal to sit as a Council of Revision with full power to modify or to amend the work product of its legislature, that statute would not violate any federal rule of which I am aware."). It is interesting to note that if such a philosophy did underlie the first Congress's actions, it is a philosophy in keeping with the neo-Federalist interpretation's emphasis on the similarity of state judges and state legislators. *See supra* notes 81-83, 115 and accompanying text; *cf. Martin*, 14 U.S. (1 Wheat.) at 343-44 (emphasizing parallel nature of federal court review of state legislative, executive, and judicial action).

¹⁹² According to the tally of Felix Frankfurter and James Landis, the wrinkle of § 25 resulted in the denial of Supreme Court jurisdiction in only 16 cases from 1789 to 1914. F. FRANKFURTER & J. LANDIS, *supra* note 2, at 190 n.20 (citing cases).

¹⁹³ *See* Ratner, *supra* note 58, at 185; *cf. Sager, supra* note 61, at 52 n.104.

¹⁹⁴ *See supra* notes 176-85 and accompanying text.

In other of its *specific* details, the Judiciary Act is suspect. Although no one today seriously contends that the Supreme Court's original jurisdiction over all public ambassador cases may be restricted by Congress, § 13 of the Act did not use the "affecting" formulation of Article III, and is arguably unconstitutional in failing to give the Court jurisdiction in all cases where ambassadors might be "affected," *e.g.*, in some cases brought by an ambassador's domestic. A further minor anomaly of the Judiciary Act is that § 11 purports to create federal jurisdiction in cases where "an alien is a party" without specifying—as does Article III—that the other party must be "a State, or the Citizens thereof." *See Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (giving narrowing construction to § 11); *see also Marbury*, 5 U.S. (1 Cranch) at 173-80 (holding technical detail of Judiciary Act unconstitutional). Indeed, the entire structure of the Act of the court seems curious in that it purports to confer jurisdiction, even where jurisdiction derives directly from the Constitution itself in

strongly confirms, rather than weakens, the neo-Federalist interpretation offered here, for at worst, it suggests that Congress sought to obey the obligation to vest plenary "arising under" jurisdiction in federal courts, but plausibly misunderstood the exact purport of the words "arising under."¹⁹⁵

B. *Beyond 1789: The Evolution of Federal Jurisdiction*

More recent jurisdictional regimes also harmonize with the neo-Federalist interpretation. In 1875, lower federal courts were vested with general federal question jurisdiction, reflecting increased recognition of the importance of litigating federal issues in federal courts.¹⁹⁶ The recent abolition of the minimum dollar amount of 28 U.S.C. § 1331 carries on this tradition.¹⁹⁷ Federal courts continue to enjoy plenary jurisdiction in all admiralty cases,¹⁹⁸ and the Supreme Court's review power now extends to all cases where state courts base their decisions on the Constitution, laws, or treaties of the United States.¹⁹⁹ In criminal cases, the historical expansion of federal

self-executing fashion. *See supra* note 168; *cf. Duroseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810):

When the first legislature of the union proceeded to carry the third article of the constitution into effect [by enactment of the Judiciary Act of 1789], they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

See also *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 432 (1793) (separate opinion of Iredell, J.) (suggesting that original jurisdiction of Supreme Court derives "from the Legislature," and not, as Attorney General Edmund Randolph had argued, from the Constitution itself).

¹⁹⁵ Indeed, the precise meaning of the seemingly simple phrase "arising under" has long perplexed even the most eminent of jurists and scholars. For a smattering of the various interpretations of "arising under" that have been advanced, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 469-84 (1957) (Frankfurter, J., dissenting); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 739, 822-28 (1824) (Marshall, C.J.); *id.* at 871-903 (Johnson, J., dissenting); *Martin*, 14 U.S. (1 Wheat.) at 334-35, 341-42. *See generally* Mishkin, *supra* note 17.

¹⁹⁶ Act of March 3, 1875, 18 Stat. 470.

¹⁹⁷ *See supra* note 17.

¹⁹⁸ *See* 28 U.S.C. § 1333 (1982).

¹⁹⁹ *See* 28 U.S.C. § 1257 (1982); Act of Dec. 3, 1914, 38 Stat. 790 (extending Supreme Court review to state court decisions *upholding* federal rights). As a matter of logic, the arguments supporting the constitutionality of the wrinkle of § 25 of the 1789 Act do not necessarily imply that the extension of Supreme Court review in 1914 should have been held to be an unconstitutional expansion of the words "arising under." Given the ambiguity of this term, and its susceptibility to two virtually equally plausible interpretations, some jurists might coherently believe that the

habeas corpus has enabled lower federal courts to monitor more closely the decisions of state courts entrenching on federal constitutional rights. In contrast, diversity jurisdiction has not been similarly expanded: dollar limits still bar access to federal district courts, diversity is defined narrowly with a few exceptions,²⁰⁰ and state court diversity judgments remain unreviewable in federal court. Thus, more recent jurisdictional schemes have only sharpened the first judiciary act's differential treatment of mandatory and permissive cases.

Differential treatment of state judges and lower federal judges has also been a hallmark of post-1789 jurisdictional regimes. Although Supreme Court review under section 25 and its successors has always prevented state courts from having the last word on federal questions (even in cases involving small dollar amounts), the Court was not granted similarly broad federal question review over lower federal courts until 1925.²⁰¹ Moreover, although state court judges have never been put on court panels with Supreme Court justices—or with any other federal judges for that matter—circuit courts continued to pair Supreme Court justices with lower federal court judges until these courts were abolished in 1911.²⁰² Even today, although Supreme Court justices no longer “ride circuit,” jurisdictional statutes explicitly

judiciary should allow Congress to adopt either approach; since neither interpretation of “arising under” is plainly better, neither congressional policy is plainly unconstitutional. See THE FEDERALIST No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961) (judicial review will invalidate “all acts contrary to the *manifest* tenor of the constitution”) (emphasis added); cf. *supra* note 86. See generally Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (courts should not overturn congressional action where constitutional question is close). Another approach to the question would be to read the term “arising under” as containing *within itself* a mandatory core protecting individual federal rights—like § 25—and a permissive penumbra to allow for uniformity of federal law—like the 1914 extension. Such an interpretation of “arising under” bears some resemblance to the doctrine of “protective jurisdiction” whereby Congress may, at its discretion extend the “arising under” jurisdiction of federal courts. See HART & WECHSLER, *supra* note 2, at 859-70.

²⁰⁰ See, e.g., 28 U.S.C. § 1335 (1982) (interpleader statute). The diversity of citizenship required for the purposes of the interpleader statute has been interpreted more broadly than the “complete diversity” required by 28 U.S.C. § 1332 (1982). Compare *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (interpreting interpleader statute to require only “minimal diversity”) with *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (interpreting diversity provision of Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1332, to require “complete diversity”).

²⁰¹ The Supreme Court was not given general appellate jurisdiction over lower federal courts in criminal cases until 1891. See *supra* note 63 and accompanying text. On the civil side, jurisdictional dollar limits restricted appellate review of lower federal courts until 1925. See HART AND WECHSLER, *supra* note 2, at 1539-42.

²⁰² HART & WECHSLER, *supra* note 2, at 40-41.

permit them to sit on Court of Appeals panels with lower federal judges.²⁰³

Another important development in the structure of federal jurisdiction occurred at the turn of this century with the introduction and expansion of certiorari.²⁰⁴ The mere existence of this discretionary device does not appear to violate the letter of Article III, for the federal judiciary has continued to retain the judicial *power* to hear all mandatory cases—even though federal judges may now decline to exercise that power in particular cases. As a matter of separation of powers, there is a tremendous difference between a *court's* decision to decline to hear a case that it is empowered to entertain, and a *congressional* attempt to deny the court the *power* to hear that very same case.²⁰⁵

Nonetheless, recent developments may have resulted in a violation of the underlying logic and *spirit* of Article III: since the Framers intended that litigants in mandatory-tier cases would have a real opportunity to have their case resolved in a federal tribunal, the system today seems to fall short by denying many their real day in an Article III court.²⁰⁶ Originally, it was believed that the federal judiciary could hear all such cases—even without the need of inferior federal courts. As Madison explained in the Virginia ratification debate:

[T]he far greater number of cases—ninety-nine out of a hundred—will remain with the state judiciaries. All controversies directly between citizen and citizen will remain with the local courts. The number of cases within the jurisdiction of [national] courts is very small when compared to those in which the local tribunals will have cognizance.²⁰⁷

For a while, Madison's predictions proved valid. Between 1789 and 1801, for example, the Supreme Court disposed of fewer than 90 cases.²⁰⁸

²⁰³ 28 U.S.C. § 43(b) (1982).

²⁰⁴ See Act of March 3, 1891, 26 Stat. 826, 828 (introducing certiorari review over lower federal courts); Act of Dec. 3, 1914, 38 Stat. 790 (permitting certiorari jurisdiction over state courts upholding federal rights); Act of Sept 6, 1916, 39 Stat. 726 (expanding certiorari and restricting appeals as of right).

See generally F. FRANKFURTER & J. LANDIS, *supra* note 2.

²⁰⁵ See *supra* notes 41, 96, 118. Thus, although Article III does in certain cases create an individual right to a federal forum *vis-à-vis* Congress, it may not create such an individual right *vis-à-vis* the judiciary. Cf. Redish, *supra* note 60, at 146 (quoted *supra* text accompanying note 85).

²⁰⁶ As my reliance here on the "spirit" of Article III illustrates, I do not believe that "spiritual" constitutional arguments are unconvincing *per se*, under interpretivist premises. In my discussion in Section I of this essay of the various "spirit-of-Article III" formulations of earlier commentators like Professors Ratner and Eisenberg, my point was not that "spiritual" arguments are *generically* unpersuasive, but rather that "spiritual" arguments *that are not grounded in a proper understanding of text, history, and structure* are not compelling.

²⁰⁷ 3 J. ELLIOT, *supra* note 80, at 537-38. See generally Eisenberg, *supra* note 49, at 508-10.

²⁰⁸ J. GOEBEL, *supra* note 50, at 802-13.

Today, however, the picture is far different. Much previously-local law has now been federalized²⁰⁹ or constitutionalized,²¹⁰ mushrooming the number of cases "arising under" federal law. Because of restrictions on district court jurisdiction—created by the "well-pleaded complaint" rule and limitations on removal—many federal cases must be litigated in state trial courts. Currently, only one federal court—the Supreme Court—sits in direct appellate review over these courts. In 1983, the Supreme Court disposed of 184 cases with written opinions, and another 81 by memorandum—a significant number, but only a fraction of the more than 4,000 cases brought before it.²¹¹ For a great many parties asserting federal rights, certiorari to the Supreme Court was their only opportunity to get into federal court, and most went away disappointed.

Since the Supreme Court did have the theoretical power to hear their suits (and indeed did actually review and dispose of these suits, however perfunctorily) these litigants arguably received their legal due; yet the practical inability of the Court to hear all these cases, many of them probably meritorious, seems at war with the spirit of Article III²¹²—much as would a congressional refusal to provide enough money for federal court clerical staff, for example.²¹³ Similarly, a congressional refusal to pay the rent on

²⁰⁹ E.g., labor law, securities law, and environmental law.

²¹⁰ E.g., criminal procedure, commercial speech, and libel law.

²¹¹ *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 311 (1984) (compiling Supreme Court docket statistics).

²¹² Cf. Redish, *supra* note 60, at 153-54 (noting that if a right to a federal forum does exist, the opportunity for federal review must be real, not technical and hollow).

²¹³ It is not my contention that the expansion of federal question litigation is a changed circumstance that repeals *pro tanto* the "Madisonian compromise," thereby making lower federal courts constitutionally obligatory in today's world. Cf. Eisenberg, *supra* note 49 (discussed *supra*, at notes 49-52 and accompanying text). Rather, I am arguing that given the inability of the Supreme Court alone, *as currently constituted*, to hear all mandatory cases on the merits, *even if it wanted to*, Congress must create lower federal courts. Even today, however, Congress may constitutionally exercise its power under the "Madisonian compromise" to abolish lower federal courts—but only if it provides for effective Supreme Court review of mandatory cases. This could be done, for example, by significantly expanding the size of the high court, and having three-member panels review state decisions. En banc sittings would be permitted to resolve interpanel conflicts. Although it may seem anomalous to suggest such a structure for the Supreme Court, the anomaly exists only if we confuse the historically familiar with the constitutionally necessary. See *supra* note 115. Although the Supreme Court has never yet been organized along the lines suggested above—rather, every Supreme Court sitting has thus far been en banc—such a structure is in fact the structure governing federal Courts of Appeal today. Thus, I suggest that by limiting the *size* of the Supreme Court, Congress has promulgated a powerful de facto exception to the Supreme Court's appellate jurisdiction—as if Congress had explicitly told the Court it could only hear one out of every ten mandatory cases. Such a de facto exception satisfies the spirit of Article III only if some other federal court is open to hear all excepted cases at trial or on appeal. See *supra* note 163-71 and accompanying text.

the White House, or an attempt to slash cabinet officers' salaries, would seem to offend the spirit, if not the letter, of Article II.²¹⁴

IV. CURRENT PROPOSALS

The current state of federal jurisdiction thus appears to present a situation that, while technically in conformity with Article III's strictures, narrowly construed, nonetheless seems in tension with the broader principles underlying that Article. That tension, however, could easily be cured by congressional action.

One solution would take up the slack created by Supreme Court certiorari by allowing inferior federal courts to sit in appellate review over state court decisions, following the current *de facto* regime in federal habeas corpus. Such a solution would not necessarily require a dramatic swelling of the ranks of the federal bench.²¹⁵ The increase in the caseload of the federal judiciary could be at least partially offset by restricting nonessential diversity jurisdiction.²¹⁶ Once Article III is properly understood, it is clear that permissive diversity cases should yield to mandatory federal question jurisdiction.

If necessary, further federal judicial resources could be freed up by replacing the current appeal-as-of-right from federal district court decisions²¹⁷ with a system of discretionary review by federal courts of appeals. Again, a proper understanding of Article III makes clear the current anomaly of lavishing federal appellate resources on cases in which litigants have already had one day in federal court, when so many other litigants who begin in state court never get a real opportunity for review by any Article III decision-maker.

Another possible approach would involve amending the "well-pleaded complaint" rule to allow district court jurisdiction under 28 U.S.C. § 1331 whenever a federal question was presented by any pleading—whether a complaint, answer, reply, counterclaim, cross-claim, etc. There are two major problems with such an approach, however. First, it would involve significant judicial inefficiencies.²¹⁸ Many cases that began as purely state-

²¹⁴ See *supra* notes 151, 159 and accompanying text (discussing analogies between judicial and executive branches).

²¹⁵ Many of those generally sympathetic to the federal judiciary have expressed concern that overexpansion of the federal bench could weaken the prestige currently enjoyed by Article III judges—prestige that serves both to legitimate judicial decisions and to attract qualified candidates to the federal bench. See, e.g., H. FRIENDLY, *supra* note 131, at 30; Eisenberg, *supra* note 49, at 515.

²¹⁶ For a good discussion that seeks to separate the core diversity jurisdiction that should be retained (such as federal interpleader) from the nonessential diversity jurisdiction that should be abolished, see H. FRIENDLY, *supra* note 131, at 139-52.

²¹⁷ See 28 U.S.C. § 1291 (1982).

²¹⁸ See generally Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

law cases in state courts would need to be removed—perhaps after significant investments of time by state judges—to federal court because a federal question was presented in later rounds of the pleadings. The waste of state judicial resources created by removal is greater than that which would arise under federal appellate review. In the latter case, the time, energy, and deliberations of the state judge would not be thrown away, but would instead be crystallized in the judgment and opinion to be reviewed by the appellate court. Moreover, appellate review economizes *federal* judicial resources. Whereas district court jurisdiction may often oblige a federal judge to decide state law claims pendent to the federal claims, federal appellate review focuses only on the *federal* questions decided by the lower state court. Thus, federal appellate review takes advantage of the efficiencies of specialization of labor by allowing each set of courts to do what it does best: state courts are the last word on state law; federal courts, on federal law.

Second, even an expanded district court jurisdiction could not realistically encompass all federal questions. In civil cases, many federal questions might not appear in the pleadings, but would arise only when issue is joined at trial. In criminal cases, truly plenary federal question jurisdiction in district courts would require that virtually every state crime be prosecuted in federal court—clearly a politically unrealistic option—because virtually every criminal trial involves some federal constitutional question.

Absolutely comprehensive federal question jurisdiction by federal trial courts thus appears to be impracticable, unwieldy, and politically infeasible. The sounder approach, therefore, would be to continue to use state courts as original tribunals, and to subject their decisions on federal questions to real—not perfunctory—appellate review by Article III courts. Since the Supreme Court alone, as currently constituted, cannot effectively discharge that function, review by inferior federal courts should be given strong consideration.²¹⁹

V. CONCLUSION

I began this essay by noting the two competing schools of thought on Article III, championed by Joseph Story and Henry Hart, respectively. In the academy today, however, it might appear as if the “competition” between these two schools is all but over: in many circles, the Hart school enjoys the status of virtual orthodoxy. Indeed, in a recent symposium, Paul Bator—a powerful spokesman for the Hart school—has gone so far as to claim:

The argument advanced by Justice Story, that article III requires the Congress to vest the entire quantum of federal judicial power in federal courts, has been rejected by an unbroken line of Congressional and

²¹⁹ The other, more radical, solution to the current *de facto* gap in the federal question jurisdiction is to restructure the Supreme Court. See *supra* note 213.

Supreme Court precedents running from the time of the first Congress to the present. It no longer deserves to be taken seriously.²²⁰

Although perhaps correct concerning Supreme Court dicta,²²¹ Professor Bator is on shaky ground in making these sweeping assertions. Story's argument in *Martin* is the font of two important insights about Article III. First, the Constitution clearly does limit in important ways congressional power to shift ultimate judicial power from federal to state courts. Second, the first three categories of cases listed in Article III are structurally different

²²⁰ Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1035 (1982). Interestingly, however, Bator seems to concede a few pages later that enormous structural and historical anomalies lie at the core of the Hart school's position:

The "states rights" argument at the Constitutional Convention was that there was no need for lower federal courts precisely because the appellate jurisdiction of the Supreme Court would provide sufficient assurance of the supremacy and uniformity of federal law in cases decided by the state courts. It was the premise of this argument that the Supreme Court *would* have the power to review cases originating in the state courts concerning issues of federal law. It was plainly not contemplated that the system could work effectively with the state courts as courts of *last resort* on issues of federal law.

Id. at 1038-39 (emphasis in original); see *supra* note 143 and accompanying text.

Because he fails to appreciate the import of Article III, taken as a whole—that is, because he fails to see how the permissive exceptions and inferior courts clauses of Article III are constrained by other, mandatory clauses—Bator is driven to accept the Hart school doctrine on Article III despite its conceded quirks. Fortunately, the quirks do not inhere in Article III itself, but only in the Hart school's interpretive gloss. Ours is a perfectly good Constitution if we know how to interpret it.

²²¹ I shall not offer here a detailed account of the various major Supreme Court pronouncements on congressional jurisdiction-stripping for three main reasons. First, many of the "classic" cases have been well presented elsewhere. See *e.g.*, Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229 (1973). Second, since congressional jurisdictional regimes have always rather closely approximated the mandates of Article III, most of the "classic" Supreme Court expositions are dicta. Third, it is largely my purpose here to establish that many of these expositions are *incorrect* (or at least sloppily overbroad and misleading) dicta, for they seem to concede to Congress more authority over federal jurisdiction than the text and structure of the Constitution permit. Of course, under classic interpretivist premises, see *supra* note 9, even Supreme Court case law cannot repeal the plain requirements of the Constitution itself; and in constitutional cases, even *stare decisis* is of only limited value. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting); *Boys' Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 259 (1970) (Black, J., dissenting). Thus, like the Judiciary Act of 1789, Supreme Court case law is for an interpretivist valuable mainly for the historical light it casts on constitutional principles. Accordingly, I have focused here on the most important and comprehensive early Supreme Court exposition of Article III: *Martin v. Hunter's Lessee*.

from the last six.²²² Federal and state judges are not created equal; nor were the jurisdictional categories in Article III. Bator and the Hart school notwithstanding, most of Story's argument in *Martin* deserves to be taken very seriously indeed.

In this essay, I have attempted to do just that—to take Story's Federalist vision of Article III seriously. Yet I have not abandoned all tenets of the Hart school orthodoxy. Thus, my neo-Federalist synthesis of Article III retains important elements of both the Hart and Story traditions. Unlike Story's exposition in *Martin*, the neo-Federalist interpretation is faithful to the Madisonian compromise and recognizes the concurrent general jurisdiction of state trial courts celebrated by Hamilton's *Federalist* No. 82. Unlike Hart's *Dialogue*, the neo-Federalist interpretation recognizes the two-tiered structure of federal jurisdiction, the structural parity of federal judges, and the constitutional inadequacy of state judges in federal question cases. Although Congress enjoys considerable power to regulate federal jurisdiction, that power is nonetheless strictly bounded. All cases arising under federal law—whether in law, equity, or admiralty—must be capable of final resolution by a federal judge. Our *Federalist* Constitution demands nothing less.

²²² It is noteworthy that Story was able to discern the critical textual distinction between the first three jurisdictional categories and the last six without the benefit of the then unpublished records of the Philadelphia Convention, which strongly corroborate the importance and intentionality of that distinction. Even had these records been available to Story, however, he probably would have placed little weight on them, as his jurisprudence relied on the plain meaning of constitutional text, and disdained inquiry into the subjective and secret intents of the framers. See 1 J. STORY, *supra* note 19, § 451; Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 707 (1980).

Even more remarkable than Story's keen attention to textual detail concerning the word "all," however, is the stunning failure of subsequent scholars to reanalyze the critical distinction Story noted in the light of the now-available records of the Constitutional Convention. This failure is all the more amazing because this distinction resonates deeply with common sense intuitions that federal questions are different from diversity cases; intuitively, the former *should* be decided by federal judges, whereas the latter need not be. See, e.g., H. FRIENDLY, *supra* note 131. Similarly, many today recognize the sociological disparity between federal and state judges, see, e.g., Neuborne, *supra* note 115, yet few have attempted to resurrect *Martin*, which strongly emphasized that disparity. Indeed, Professor Sager goes to elaborate lengths to construct an elegant structural argument about Article III when a far more simple textual argument—based on *Martin*—is at hand: Sager's argument that *some* Article III court must be open to hear all constitutional cases, Sager, *supra* note 61, at 56-57, is a logical subset of Story's textual argument, as modified here.

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