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CONGRESSIONAL CONTROL OVER FEDERAL COURT JURISDICTION: A DEFENSE OF THE TRADITIONAL VIEW

*Julian Velasco**

The extent of Congress's authority to control the jurisdiction of the federal courts has been the subject of unending academic debate.¹ The or-

* Associate Attorney, Sullivan & Cromwell, New York City; former law clerk to the Honorable E.A. Van Graafeiland, U.S. Court of Appeals, Second Circuit, 1994-95; J.D., Columbia University School of Law, 1994; B.S.B.A., Georgetown University, 1991. I would like to thank Professor Akhil Reed Amar who, as my Federal Jurisdiction teacher, provided the inspiration for this Article. This Article is dedicated to my wife, Jennifer DeWan Velasco.

1. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter Amar, *Two Tiers*]; Akhil Reed Amar, *Reports of My Death are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) [hereinafter Amar, *Reply*]; Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 Nw. U. L. REV. 442 (1991) [hereinafter Amar, *Reply to Friedman*]; Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter Amar, *Judiciary Act*]; Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988 (1982); Irving Brant, *Appellate Jurisdiction: Congressional Abuse Of the Exceptions Clause*, 53 OR. L. REV. 3 (1973); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST. COMMENTARY 89 (1990) [hereinafter Casto, *Two Tiers*]; William R. Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101 (1985) [hereinafter Casto, *First Congress*]; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984) [hereinafter Clinton, *Guided Quest*]; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986) [hereinafter Clinton, *Early Implementation*]; Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1 (1990); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction:*

thodox view long has been that Congress possesses nearly plenary authority to restrict federal court jurisdiction. There has been no shortage, however, of commentators who have taken exception to that view. Because Congress has only rarely tested the limits of its authority, there have been few opportunities for the Supreme Court to address the issue. Moreover, the few Supreme Court pronouncements that do exist can largely be classified as *dicta*. The resulting scarcity of law in this area has fueled the speculation of academics and legislators alike.

The controversy can be broken down into at least three issues. The first issue concerns congressional authority to control the jurisdiction of the inferior courts. The Constitution grants Congress the authority to ordain and establish, from time to time, such inferior courts as it may choose. Nevertheless, some argue that Congress's authority is limited to deciding which inferior courts to create, not whether to create them.

The second issue involves congressional authority over Supreme Court jurisdiction. Although the Constitution grants Congress the authority to make "Exceptions" and "Regulations" to the Supreme Court's appellate jurisdiction, some argue that Congress's authority is limited by other constitutional provisions, both explicit and implicit.

Historical Basis, 47 MINN. L. REV. 53 (1963); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1961) [hereinafter Ratner, *Supreme Court*]; Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982) [hereinafter Ratner, *Majoritarian Constraints*]; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982) [hereinafter Redish, *Supreme Court*]; Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982) [hereinafter Redish, *Reaction*]; Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990) [hereinafter Redish, *Common Sense*]; Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959 (1982); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973); Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977) [hereinafter Wechsler, *Law and Logistics*]; Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965) [hereinafter Wechsler, *Courts and Constitution*]; Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189; Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995).

The third issue deals with congressional authority to curtail the jurisdiction of both the Supreme Court and the inferior courts simultaneously. Even if congressional authority over Supreme Court appellate jurisdiction and jurisdiction of the inferior courts is plenary, some argue that there are still limits on Congress's ability to restrict both simultaneously.

The heart of the debate lies in whether Congress is authorized to remove specific subjects from the jurisdiction of federal courts when motivated by hostility to their substantive decisions. Throughout history, various members of Congress have attempted to do just that, generally without success.² According to the traditional view, Congress is free to use its power in this manner. While most traditionalists believe this would be imprudent, some believe it could serve a legitimate function. Critics, however, argue that this would be an abuse of Congress's power because it would invite the state courts to disregard the federal precedents on the matter. Thus, they view it as an illegitimate attempt by Congress to amend the Constitution indirectly by statute, rather than by the stricter procedures set forth in Article V of the Constitution.

The Supreme Court's 1996 decision to grant certiorari on an expedited basis in the case of *Felker v. Turpin*³ temporarily sparked hopes and fears that the Court would issue a rare pronouncement on the limits of Congress's power. *Felker* involved a challenge to certain provisions of the "Antiterrorism and Effective Death Penalty Act of 1996," which limited the Supreme Court's review of second or successive federal habeas corpus appeals. The Court ordered arguments on whether these provisions amounted to an unconstitutional restriction on the jurisdiction of the Supreme Court. Because the Court decided that the Act "does not repeal [its] . . . authority to entertain a[n original] petition for habeas corpus" under 28 U.S.C. § 2241, it held that "there can be no plausible argument that the Act has deprived [it] of appellate jurisdiction in viola-

2. For a very limited sampling, see S. 1760, 97th Cong. (1981) (discussing a bussing remedy in school desegregation cases); S. 1742, 97th Cong. (1981) (discussing voluntary prayer in public schools); H.R. 867, 97th Cong. (1981) (addressing abortion); H.R. 2365, 97th Cong. (1981) (addressing gender discrimination in the military); S. 917, 90th Cong. (1968) (discussing state criminal convictions based on voluntary confessions); H.R. 11926, 88th Cong. (1964) (discussing state apportionment plans); S. 2646, 85th Cong. (1957) (discussing activities of congressional committees; legislation regarding subversive activities; state bar admission requirements). Each of these bills, and many others like them, failed to pass Congress.

3. 116 S. Ct. 2333 (1996).

tion of Article III, § 2.”⁴ Thus, the Court did not reach the issue and failed to offer any guidance on how it might otherwise have ruled.

This Article presents a defense of the traditional view. Not long ago, it was said that “no commentator thus far ha[d] offered a complete, coherent and convincing account of congressional power to limit federal jurisdiction.”⁵ This Article analyzes the text as well as the history and structure of Article III in an attempt to address that issue. By setting forth a comprehensive interpretation of Article III that reaffirms the traditional view, this Article shows that the modern assault on that position, while insightful, is fundamentally misguided.

In Part I, this Article canvasses the existing academic commentary on the issue and suggests various weaknesses in each of the theories that would serve to limit Congress’s power. In Part II, this article provides a comprehensive interpretation of Article III that is consistent with the traditional view, while avoiding the errors made by previous commentators, proponents and critics alike. In Part III, this Article reviews the historical evidence to determine how well the competing theories of federal jurisdiction are supported. Finally, in Part IV, this Article discusses certain structural issues and demonstrates both the error and the futility of reinterpreting the Constitution to limit Congress’s control over federal jurisdiction. Ultimately, this Article concludes that the traditional view presents the best account of Congress’s ability to restrict federal court jurisdiction.

I. THE COMPETING THEORIES

A. *Orthodoxy*

The traditional view is that Congress possesses nearly unlimited authority to restrict the jurisdiction of the federal courts.⁶ This view is based on the combination of two well-established principles: that Congress may regulate the jurisdiction of the inferior courts, and that Congress may make exceptions and regulations to the appellate jurisdiction of the Supreme Court.

The existing records of the Constitutional Convention show that, although the existence of a Supreme Court was presupposed, whether there should be any inferior courts was sternly debated. In fact, at one

4. *Id.* at 2339. Ironically, it is not entirely clear that the Court has the authority to entertain an original application for *habeas corpus* because the Court’s original jurisdiction does not include *habeas corpus* cases. See *infra* notes 324 and 359 and accompanying text.

5. Amar, *Two Tiers*, *supra* note 1, at 206.

6. Congress is not permitted to expand the jurisdiction of the federal courts beyond the limits of the judicial power. See *infra* note 195 and accompanying text.

point the Framers voted not to establish inferior courts at all. In the “Madisonian Compromise,” however, the delegates ultimately decided to avoid the issue by granting Congress the discretion to decide whether to establish inferior courts.⁷ In *Sheldon v. Sill*,⁸ the Supreme Court acknowledged that Congress had the authority to decide not only whether inferior courts should be created, but also the extent of their jurisdiction.⁹ The Supreme Court has reaffirmed this holding repeatedly.¹⁰

In addition, the Constitution prescribes that the appellate jurisdiction of the Supreme Court shall be subject to “such Exceptions, and . . . Regulations as the Congress shall make.”¹¹ In *Ex parte McCordle*,¹² the Supreme Court ruled that Congress has the authority to prescribe

7. Reflecting this compromise, the Constitution provides, “The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1; see PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 10-11 (3d ed. 1988) [hereinafter HART AND WECHSLER]; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 124-25 (Max Farrand ed. 1911) [hereinafter RECORDS].

8. 49 U.S. (8 How.) 441 (1850).

9. *Id.* at 448. The Court stated:

Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Id.

10. See *Ankenbrandt v. Richards*, 504 U.S. 689, 697-98 (1992) (stating that Congress may limit the jurisdiction of the Article III courts it chooses to create); *Palmore v. United States*, 411 U.S. 389, 401-02 (1973) (“[Congress] was not constitutionally required to create inferior Art. III courts . . . Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III.”); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“The Congressional power to ordain and establish inferior courts includes the power ‘of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.’” (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845))); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (“There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (stating that every inferior court “derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.”); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 521 (1898) (“It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time.”).

11. U.S. CONST. art. III, § 2, cl. 2.

12. 74 U.S. (7 Wall.) 506 (1869).

whatever exceptions and regulations to Supreme Court appellate jurisdiction it may choose.¹³ Despite the fact that *McCardle* was pending and oral arguments already had been heard, the Supreme Court dismissed the case after Congress repealed the jurisdictional grant.¹⁴ This suggests that Congress's power over Supreme Court appellate jurisdiction is extremely broad.¹⁵ The Supreme Court has reaffirmed this view as well.¹⁶

13. The Court stated:

[T]he appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as the Congress shall make."

.....

The exception to appellate jurisdiction in the case before us . . . is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus*, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Id. at 512-14.

14. *See id.* at 508.

15. *See* CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 42 (5th ed. 1994) ("[*McCardle*] has long been read as giving Congress full control over the Supreme Court's appellate jurisdiction . . .").

16. *See De La Rama Steamship Co. v. United States*, 344 U.S. 386, 390 (1953) (citing *McCardle*); *Colorado Cent. Consol. Mining Co. v. Turck*, 150 U.S. 138, 141 (1893) ("[I]t has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."); *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 378 (1893) ("This court . . . can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress."); *The "Francis Wright,"* 105 U.S. 381, 386 (1882) ("What [the Supreme Court's appellate] . . . powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. . . . Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."). *But see* *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting) ("There is a serious question whether the *McCardle* case could command a majority view today.").

The Supreme Court had endorsed broad congressional power over its appellate jurisdiction prior to *McCardle*. *See Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865) ("In order to create such appellate jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority."); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress . . ."); *Turner v. Bank of North-America*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799) ("[T]he political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. . . . [C]ongress is not bound, and it

Finally, the traditional view has had no difficulty combining the holdings of *Sheldon* and *McCardle* to reach the conclusion that Congress could exclude entire categories of cases from the federal court jurisdiction altogether.¹⁷ The Supreme Court apparently embraced this view in at least one case.¹⁸ True traditionalists maintain that Congress is free to restrict federal court jurisdiction for virtually any reason—including explicit hostility to the decisions of the federal courts.¹⁹ Congress could exceed its authority only by violating some independent constitutional

would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.”); *see also* *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (“If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it.”).

17. *See, e.g.*, Bator, *supra* note 1, at 1038 (“If the Constitution means what it says, it means that Congress can make the state courts . . . the ultimate authority for the decision of any category of case to which the federal judicial power extends.”); Gunther, *supra* note 1, at 914:

Those who read the exceptions clause broadly with respect to the Supreme Court and who accept the widely held view about broad congressional control of lower federal court jurisdiction find it hard to see anything in article III that would bar congressional action, as a matter of sheer constitutional power, to remand federal constitutional issues for final state court adjudication. Such a scheme seems consistent with the constitutional language and the Framers’ intent . . . ;

Wechsler, *Courts and Constitution*, *supra* note 1, at 1005 (“Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of lower courts and of the Supreme Court’s appellate jurisdiction.”).

18. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, *with such appellate review by this Court as Congress might prescribe.*” (emphasis added)).

19. *See* Wechsler, *Courts and Constitution*, *supra* note 1, at 1005-06:

There is, to be sure, a school of thought that argues . . . that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts—which 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 Constitution as “the supreme Law of the Land . . .”;

see also Gunther, *supra* note 1, at 920 (“In my view, the basic structure of article III affords precisely that power to Congress, and that power may even be exercised, as Herbert Wechsler argued years ago, to express disaffection with Court decisions.”); *cf.* Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845 (1975):

It seems to me to say that Congress may make any exceptions it regards as wise to the appellate jurisdiction of the [Supreme] Court. For my part, I stand with Herbert Wechsler on this question, and see no ground at all, none at all, for importing exceptions into this ‘exceptions’ power. (footnote omitted).

provision.²⁰ For example, if Congress granted jurisdiction to a court conditioned upon its reaching an unconstitutional result, such a grant (or the condition) could be disregarded as an unconstitutional invasion of the judicial power.²¹ Similarly, if Congress enacted a jurisdictional statute barring access to the federal courts based on race or gender, it would be unconstitutional under the Equal Protection guarantee of the Fifth Amendment Due Process Clause.²² Finally, it might easily be conceded that Congress has no authority to remove cases from the Supreme Court's original jurisdiction.²³ Beyond those limits, however, Congress is believed to possess plenary authority to restrict the jurisdiction of the federal courts.

B. The "Essential Role"

For many, the idea that Congress could exclude an entire category of cases from the jurisdiction of the federal judiciary based on hostility to substantive decisions is wholly unsatisfactory. Therefore, commentators have suggested solutions that would place some limits on congressional power while recognizing its broad discretion.

Perhaps the most famous of these solutions comes from the late Professor Henry Hart. In his article, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*,²⁴ Professor Hart recognizes the implications of *Sheldon* and *McCardle*, but refuses to sur-

20. See Bator, *supra* note 1, at 1034 ("It is commonplace to say that Congress' power to regulate the jurisdiction of the . . . federal courts cannot be exercised in a manner that violates some other Constitutional rule. In that sense—and in that sense only—it can be said that Congress' power is not plenary.").

21. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (holding unconstitutional a jurisdictional statute requiring courts to dismiss a case if it finds a factor that will require a result objectionable to Congress); see also Gunther, *supra* note 1, at 910 ("[E]ven if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution. That is a significant limitation."); Redish, *Supreme Court*, *supra* note 1, at 923 ("Although Congress may possess authority to remove completely from the Supreme Court's appellate jurisdiction substantive areas of law, it may not instead provide the Court with jurisdiction but direct it to act in an unconstitutional manner or require that the Court interpret the Constitution in a particular way.").

22. See Bator, *supra* note 1, at 1034 ("[A] statute which said that whites only may resort to the district courts would be invalid."); Gunther, *supra* note 1, at 916 ("Congress could not limit access to the federal courts on the basis of race or wholly irrelevant criteria such as a litigant's height, weight, or hair color.").

Although the Equal Protection clause of the Fourteenth Amendment only applies to the States and not the federal government, the Supreme Court has held that the Fifth Amendment's Due Process Clause guarantees equal protection vis-à-vis the federal government. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

23. See *infra* Part II.G.2.

24. See Hart, *supra* note 1, at 1363.

render to them. Rather, he devises his own limiting principle for the congressional power to regulate Supreme Court appellate jurisdiction: “[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”²⁵ Professor Hart understood that this measure is an “indeterminate” one, but found it to be less problematic than “reading the Constitution as authorizing its own destruction.”²⁶ Although he admitted that the Supreme Court had never done or said anything to suggest that it was prepared to adopt his view, this did not disturb him. Professor Hart maintained that the Court has never had any reason to adopt his view as, “Congress so far ha[d] never tried to destroy the Constitution.”²⁷

Professor Hart’s “essential role” theory, while appealing, presents many intellectual difficulties. The indeterminacy that does not seem to trouble him is nevertheless deeply problematic for others. According to the Supreme Court, for instance, inability to discern a workable standard for resolving an issue is grounds for dismissing it as “nonjusticiable.”²⁸ Moreover, Professor Hart’s theory was developed out of whole cloth, and had absolutely no basis in either the text of the Constitution or any Supreme Court decision.²⁹ It is therefore more an exercise in “wishful thinking” than legal reasoning.³⁰

25. *Id.* at 1365.

26. *Id.*

27. *Id.*

28. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In fact, many of the factors considered relevant for political-question analysis would suggest that the courts should consider the issue nonjusticiable:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

29. Professor Hart himself virtually concedes as much. *See supra* text at note 27; *see also* Gunther, *supra* note 1, at 903 (“Proponents of the [essential role] thesis cannot readily (and do not) rely on the constitutional language”); Amar, *Two Tiers*, *supra* note 1, at 220 (“[Essential functions] arguments have little grounding in explicit text or firm constitutional history.”).

30. *See* Redish, *Supreme Court*, *supra* note 1, at 911; *see also id.* at 906-07 (quoting Hart, *supra* note 1, at 1372).

When Professor Henry Hart made that statement in 1953, he provided absolutely no indication of exactly what Supreme Court functions were to be deemed “essential,” how anyone was to answer that question, or on what basis he found such

Professor Leonard Ratner has attempted to refine Professor Hart's thesis by defining the "essential role" of the Supreme Court. According to Professor Ratner, the Supremacy Clause of the Constitution³¹ requires that federal law shall be uniform throughout the United States and shall prevail over state law in the event of conflict.³² Believing the Supreme Court to be "the constitutional instrument for implementing the supremacy clause," Professor Ratner argues that the Supreme Court's "essential appellate functions under the Constitution are (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."³³

Although Professor Ratner adds substance to Professor Hart's thesis, his theory also lacks the support of constitutional text or Supreme Court precedent. In addition, Professor Ratner's thesis generates problems of its own. First, the claim that the Constitution requires uniformity of decisions is questionable.³⁴ Even if uniformity were constitutionally required, however, the Supreme Court would not be necessary to fulfill this function. Congress could create unreviewable specialty courts which could provide the required uniformity in their area of expertise—*e.g.*, an Abortion Court.³⁵

Second, Professor Ratner provides scant support for his conclusion that the Supreme Court was intended to be "the principal instrumentality for

a limitation in the Constitution. In light of this, Professor Hart's comment could at best be characterized as conclusory and at worst as simply off-hand.

....

To quote Professor Hart, who perhaps should have better heeded his own implied warning, "whose Constitution are you talking about—Utopia's or ours?"

Id.

31. U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

32. See Ratner, *Supreme Court*, *supra* note 1, at 160.

33. *Id.* at 161.

34. See Amar, *Two Tiers*, *supra* note 1, at 263 ("Article III in fact requires no such uniformity, as the permissibility of vesting unreviewable jurisdiction in various lower federal courts illustrates."); Sager, *supra* note 1, at 57 ("[U]niformity and institutional self-defense were matters that could have been safely entrusted to the discretion of Congress.").

35. See *infra* notes 433-35 and accompanying text; see also *infra* Part II.E.

implementing the supremacy clause."³⁶ Read narrowly, the Supremacy Clause applies only to state courts; read properly, it applies equally to *all courts*.³⁷ *The Federalist*, upon which Professor Ratner relies heavily, acknowledged that Supreme Court review was unnecessary.³⁸ If necessary, the supremacy of federal law can be enforced by the inferior courts without any need for Supreme Court appellate review of state court cases.

Professor Ratner argues further that *Ex parte McCardle* was not necessarily contradictory to the "essential role" theory. Although in that case the Supreme Court permitted Congress to repeal its habeas corpus jurisdiction under one act, he noted that "the Court carefully pointed out that the repeal did not affect its jurisdiction to issue writs of habeas corpus under . . . [another act]."³⁹ Moreover, shortly thereafter in *Ex parte Yerger*,⁴⁰ the Court specifically held that the alternative path of habeas corpus review remained open. Thus, Professor Ratner concluded that "[c]learly the language of *Ex parte McCardle* does not sanction congressional impairment of the essential Constitutional functions of the Supreme Court."⁴¹ Far more clear, however, is the fact that neither *McCardle* nor *Yerger* actually contradict the traditional view. In *Yerger* the Court acknowledged explicitly and unequivocally that its appellate habeas corpus jurisdiction is given subject to regulation by Congress.⁴²

A further problem with the "essential role" theory, as articulated by Professors Hart and Ratner, is that it fails to articulate an "essential role" for the Supreme Court beyond that for the federal judiciary as a whole. The Constitution vests judicial power equally in the Supreme Court and in the inferior courts.⁴³ The Constitution also makes all Article III judges

36. Ratner, *Supreme Court*, *supra* note 1, at 165 & n.41.

37. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959).

38. This was true both as to cases heard in state courts, see THE FEDERALIST NO. 82, at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals . . ."), and as to cases heard in lower federal courts, see *id.* No. 81, at 486 ("Justice through . . . [the inferior courts] may be administered with ease and dispatch and appeals may be safely circumscribed within a narrow compass.").

39. Ratner, *Supreme Court*, *supra* note 1, at 179.

40. 75 U.S. (8 Wall.) 85 (1869).

41. Ratner, *Supreme Court*, *supra* note 1, at 180.

42. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1868). The *Yerger* Court merely stated that the importance of habeas corpus in the constitutional scheme "forbid[s] any [statutory] construction giving to doubtful words the effect of withholding or abridging this jurisdiction." *Id.*

43. The Constitution provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. No special role for the Supreme Court can be discerned from this language. See generally *infra* Part II.B. But see Evan H.

structurally equal:⁴⁴ they are all appointed by the President with the advice and consent of the Senate,⁴⁵ provided life tenure⁴⁶ subject to impeachment,⁴⁷ and are guaranteed undiminishable salaries.⁴⁸ Given these facts, it is difficult to argue that the Supreme Court has an “essential role” over and above that of the entire federal judiciary.⁴⁹

This critique is hardly fatal, however, as the theory can be modified to protect the “essential role” of the entire federal judiciary, rather than just the Supreme Court’s. This is the view taken by Professor Leonard Sager, who argues that “[u]nrestricted use of the state courts as the exclusive forums for article III business is . . . inconsistent with the constitutional commitment to a radically independent federal judiciary.”⁵⁰

Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828-34 (1994) (discussing the importance of the distinction between “supreme” and “inferior” courts).

44. Professor Amar has been a particularly forceful advocate of this argument. See, e.g., Amar, *Judiciary Act*, *supra* note 1, at 1510, 1536-39; Amar, *Two Tiers*, *supra* note 1, at 221-22.

45. It should be noted, however, that the Constitution *requires* only that the Supreme Court justices be appointed in this manner:

[B]y and with the Advice and Consent of the Senate, [the President] shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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. The judges of the inferior courts would presumably be “inferior Officers” who could be appointed by the other methods prescribed in the above passage. *But see* Amar, *Two Tiers*, *supra* note 1, at 235 n.103 (questioning the validity of this theory).

46. “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .” U.S. CONST. art. III, § 1.

47. “[A]ll civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.

48. “The Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

49. Arguably, the Supreme Court is unique in certain respects. It is the only court created by the Constitution itself. Its existence is mandatory, and its Justices *must* be appointed by the President with the advice and consent of the Senate. See U.S. CONST. art. III, § 1; *id.* art. II, § 2, cl. 2. Also noteworthy is that the Constitution does not establish “the Supreme Court,” but rather “one supreme Court”—*i.e.*, one court which shall be supreme. U.S. CONST. art. III, § 1. See, e.g. Caminker, *supra* note 43, at 828-34 (discussing the importance of the distinction between “supreme” and “inferior” courts).

50. Sager, *supra* note 1, at 64-65.

To support his theory, Professor Sager points to the “judicial independence requirements of Article III.”⁵¹ The Constitution merely requires, however, that federal judges be “independent;” nowhere does it tie this requirement to the adjudication of cases *per se*. If there were such a requirement, it would have to apply to all cases within the judicial power because the “independence requirements” apply equally to all the enumerated cases.⁵²

Professor Sager also relies on an analogy to non-Article III federal tribunals, stating that if Congress’s ability to give Article III cases to federal tribunals whose judges do not enjoy Article III security is limited, Congress should be similarly limited in its ability to relegate Article III cases to the state courts.⁵³ Non-Article III federal tribunals, however, are not analogous to state courts. The constitutional status of “Article I” courts is questionable, which is why their jurisdiction must be limited.⁵⁴ In contrast, the constitutional status of state courts of general jurisdiction is unimpeachable. Thus, Professor Sager’s argument that congressional

51. *See id.* at 61-68. Article III provides for life tenure and undiminishable salaries; these requirements apply to all Article III courts but not to other tribunals. *See* U.S. CONST. art. III, § 1.

52. “[T]he salary and tenure provision is in no way limited to cases involving constitutional rights. Rather, it applies to *any* case heard by an article III court, which of course includes such mundane fare as diversity cases and the like.” Redish, *Reaction*, *supra* note 1, at 152; *see infra* Part II.G.1.

Even if the requirement could somehow be limited to certain categories of cases within the judicial power (such as those arising under federal law), each and every case in those categories would have to be heard by an Article III court. It is implausible that the salary and tenure provisions were intended implicitly to require so much.

53. *See Sager*, *supra* note 1, at 63.

54. The Constitution provides that “[t]he judicial Power of the United States, *shall* be vested” in Courts whose judges “*shall* hold their Offices during good Behaviour, and *shall* [receive an undiminishable salary].” U.S. CONST. art. III, § 1 (emphasis added). Non-Article III federal tribunals do not meet these requirements and therefore cannot exercise the judicial power of the United States. *Cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71-76 (1982). In *Northern Pipeline*, the Supreme Court held portions of the Bankruptcy Act of 1978 unconstitutional because it vested too much authority in non-Article III federal tribunals. *See id.* at 87. The plurality, led by Justice Brennan, was of the opinion that “[t]he judicial power of the United States must be vested in Art. III courts.” *Id.* at 63-64; *see also id.* at 59. Faced with numerous precedents permitting the existence of non-Article III tribunals under some circumstances, the plurality reduced them to three limited instances, “each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.” *Id.* at 64. “Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.” *Id.* at 70.

limits applicable to non-Article III federal tribunals should also apply to state courts is a *non sequitur*.

Professor Sager's version of the essential role is not very demanding:

[T]here must be limits on Congress' ability to make the state courts the exclusive arbiters of article III matters. And those limits surely are crossed when Congress attempts to divest the Supreme Court, and all other federal courts, of jurisdiction at least to review state court decisions on constitutional challenges to governmental behavior.⁵⁵

Such a description of the "essential role" seems quite reasonable. It is well-defined, yet flexible, and deferential to congressional authority. Professor Sager's approach, however, lacks an adequate legal foundation. Although Professor Sager makes strong policy arguments, he does not demonstrate that his theory is constitutionally mandated or judicially enforceable.⁵⁶

In short, there is no constitutional support for the theory that a judicially enforceable "essential role" exists for the Supreme Court or the federal judiciary.

C. Mandatory Jurisdiction

For some, the idea that Congress exercises any control over the federal judiciary is unnerving. It should come as no surprise, then, that even stronger limits—virtually eliminating congressional discretion altogether—have been suggested.

One of the earliest restrictive theories can be found in Justice Joseph Story's opinion in the case of *Martin v. Hunter's Lessee*.⁵⁷ In *Hunter's Lessee*, a recalcitrant Virginia Court of Appeals refused to obey a mandate from the Supreme Court, insisting that the latter had no appellate jurisdiction over state court decisions.⁵⁸ When the case returned to the

55. Sager, *supra* note 1, at 65. Professor Sager's thesis has been criticized on the ground that "there is no logical way to limit the need for an article III court to police the states to cases involving assertions of constitutional rights." Redish, *Reaction*, *supra* note 1, at 148. There is, however, a logical basis for this limitation. If Congress were biased in favor of the states over the federal government, then there would be little benefit to allowing Article III courts to police state court interpretations of federal statutes. Given that Congress could refuse to pass substantive federal law and could defer to state control, it could certainly limit itself to passing laws which are favorable to the states. Amendments aside, however, the Constitution is beyond the reach of Congress. An independent interpretation of the Constitution would therefore serve a useful function. Nevertheless, there is no basis in the Constitution for such a limit.

56. *Cf.* Gunther, *supra* note 1, at 898 (emphasizing the "distinction between constitutionalism and wisdom").

57. 14 U.S. (1 Wheat.) 304 (1816).

58. *See id.* at 322.

Supreme Court, Justice Story argued at length that the judicial power of the United States was mandatorily vested in the federal judiciary by the Constitution.⁵⁹ Justice Story also argued that cases arising under federal law, particularly federal criminal law, could not be heard in state court.⁶⁰ Thus, he concluded that Congress was required to create at least some inferior courts, if only to hear such cases.⁶¹

It is ironic that Justice Story, who at some points in his opinion paid close attention to the text of Article III,⁶² apparently ignored its mandate on this point. The Constitution clearly states that Congress “may” establish inferior courts,⁶³ not that it “must.”⁶⁴ It is clear that the Framers

59. *See id.* Justice Story stated:

The language of [Article III] throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested)

. . . .

If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all.

Id.

60. *See id.* at 337. Justice Story is particularly forceful with respect to criminal cases, stating “[n]o part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals.” *Id.* Justice Story continues, however, stating that no cases arising under federal law could be heard in state courts:

In the first place, as to cases arriving under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States.

Id. at 334-35.

61. *See id.* at 331. Justice Story stated:

[C]ongress are [sic] bound to create some 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. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. 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.

Id.

62. Justice Story’s attention to the text is evident from his arguments. *See infra* text accompanying note 59 (analyzing Justice Story’s argument that “shall” does not mean “may”); *see also infra* text accompanying note 84 (analyzing Justice Story’s argument that the word “all” is used selectively throughout Article III, Section 2 of the Constitution).

63. “The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress *may* from time to time ordain and establish.” U.S. CONST. art. III, § 1 (emphasis added).

64. “If ‘shall’ means ‘must,’ then ‘may’ has to mean ‘can, but need not.’” Amar, *Two Tiers*, *supra* note 1, at 212.

intended to provide Congress with the discretion to create inferior courts.⁶⁵ Moreover, Justice Story mistakenly assumed that certain cases were necessarily beyond the purview of state courts.⁶⁶ Accordingly, his conclusion that inferior courts are necessary to fulfill the constitutional plan was flawed.

History has all but ignored Justice Story's thesis.⁶⁷ Justice Story himself appeared to believe that the mandatory language of the Constitution was neither self-executing nor enforceable by the courts.⁶⁸ Yet, there are

65. See *supra* note 7 and accompanying text.

66. Since Congress was not obligated to create any inferior courts, the Constitution must make sense under the assumption that no inferior courts would be created. The Framers must have envisioned that some courts would be available to hear cases arising under federal law. The obvious candidates would be the state courts. This intuition is confirmed by the Supremacy Clause, which states that the "constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, § 2; see also THE FEDERALIST NO. 82, *supra* note 38 (arguing that federal court jurisdiction is generally concurrent with state court jurisdiction). History has proven this true. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947); *Claffin v. Houseman*, 93 U.S. 130 (1876).

67. See *Palmore v. United States*, 411 U.S. 389, 401 n.9 (1973) ("[T]he . . . statements in *Hunter's Lessee* . . . did not survive later cases."); see also Bator, *supra* note 1, at 1031 ("The position that the Constitution obligates Congress to create lower federal courts, or (having created them) to vest them with some or all of the jurisdiction authorized by article III, has been repudiated by an unbroken line of authoritative judicial and legislative precedent.").

68. See, e.g., *White v. Fenner*, 29 F. Cas. 1015 (C.C.D.R.I. 1818) (No. 17,547). The entire opinion of the court read as follows:

BY THE COURT. This court has no jurisdiction, which is not given by some statute. The 11th section of the judicial act of 1789, c. 20, declares, that the circuit court shall have original cognizance, among other cases, of suits "between a citizen of the state, where the suit is brought, and a citizen of another state." No clause of this or any subsequent act has enlarged this jurisdiction so as to embrace the present case. The constitution declares, that it is mandatory to the legislature, that the judicial power of the United States shall extend to controversies "between citizens of different states"; and it is somewhat singular, that the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them. The language of the act is so clear, that there is nothing on which to hang a doubt. Neither of the parties in this suit is a citizen of the state, where the suit is brought. The suit must, therefore, be dismissed.

Id.

This case strongly suggests that Justice Story's two-tiered theory is not exactly the same as Professor Amar's; otherwise, he would not have considered diversity jurisdiction to be mandatory. See *infra* Part I.D; see also *infra* notes 164, 364-66 and accompanying text. But see *infra* note 84 and accompanying text.

still those who maintain that the establishment of inferior courts is constitutionally required.

For example, Professor Julius Goebel has argued that the Framers' choice of the words "ordain and establish" in Article III suggests that Congress was not intended to have discretion to create inferior courts.⁶⁹ This thesis has been dismissed as "uncharacteristically thinly supported and unpersuasive."⁷⁰ Leaving aside the question whether the words "ordain and establish" are more imperative than their predecessor "constitute[],"⁷¹ the same sentence clearly states that Congress *may* create inferior courts. It is difficult to believe that the Committee on Style, whose purpose was merely "to revise the style of and arrange the articles which had been agreed to,"⁷² would have undone the Madisonian Compromise, particularly in such a cryptic manner.

Another advocate of mandatory inferior courts, Professor Theodore Eisenberg, recognizes that under the Madisonian Compromise, Congress was granted the discretion to establish and abolish inferior courts. He argues, however, that in light of changed circumstances, the option to abolish the inferior courts is no longer constitutionally viable.⁷³ This theory has been criticized extensively.⁷⁴ The premise that changed circumstances could somehow amend the structural provisions of the

69. 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 247 (1971). Goebel asserts:

That the Committee [on Style] intended to convey the sense of an imperative is apparent from the choice of the most forceful words in the contemporary constitutional vocabulary—"ordain and establish"—to direct what Congress was to do.

Id.

70. PAUL M. BATOR, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 13 n.46 (2d ed. 1973).

71. The draft submitted to the Committee on Style read as follows: "The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States." See GOEBEL, *supra* note 69, at 246.

72. 2 RECORDS, *supra* note 7, at 553; see also *id.* at 554, 564.

73. Eisenberg, *supra* note 1, at 513. Eisenberg asserts:

It is . . . no longer reasonable to assert that Congress may simply abolish the lower federal courts. When Supreme Court review of all cases within Article III jurisdiction was possible, lower federal courts were perhaps unnecessary. As federal caseloads grew, however, lower federal courts became necessary components of the national judiciary if the constitutional duty of case by case consideration of all federal cases was to be fulfilled. It can now be asserted that their existence in some form is constitutionally required.

Id.

74. See Amar, *Two Tiers*, *supra* note 1, at 217-18; Bator, *supra* note 1, at 1035-36; Gunther, *supra* note 1, at 914; Redish & Woods, *supra* note 1, at 70-75; Sager, *supra* note 1, at 35-36.

Constitution *ipso facto* is incredible.⁷⁵ The argument of changing circumstances, if anything, suggests the desirability of congressional discretion to assess from time-to-time the need for inferior courts.⁷⁶ Professor Eisenberg's theory also proves too much. If federal court review of all cases arising under federal law is essential, then even the existing scheme of *certiorari* from state court decisions would appear to be constitutionally deficient.⁷⁷ Professor Eisenberg's permission to make exceptions for the "preservation of the quality of federal justice"⁷⁸ is of questionable value⁷⁹ and lacks any constitutional grounding.

Justice Story's theory has also been developed in another direction, building upon his claim that "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."⁸⁰ Professor Robert Clinton is a principal advocate of the "mandatory vesting" theory.⁸¹ Professor Clinton argues that the constitutional language, particularly the use of the word "shall," establishes that Congress was not intended to have

75. See Bator, *supra* note 1, at 1036; Gunther, *supra* note 1, at 914; Redish & Woods, *supra* note 1, at 71-72. One wonders how far this principle could be taken by the Supreme Court. Could the Court, for example, decide that the Presidential veto is no longer necessary or justifiable? Could it decide, under the principle of "one man, one vote," as pronounced in *Reynolds v. Syms*, 377 U.S. 533 (1964), that equal suffrage in the Senate among all states, regardless of population, was no longer constitutional? (Although Article V specifically forbids this, the prohibition is perhaps unenforceable: just as an act cannot make itself unrepeatable by future legislation, neither can a constitution make itself unamendable.) Surely, if the court cannot alter the constitutional provisions for the structure of the *other* branches, it cannot be permitted to change the constitutional provisions for the structure of its own branch. Cf. THE FEDERALIST NO. 10, *supra* note 38 at 44 (James Madison) ("No man is allowed to be a judge in his own cause . . .").

76. See HART & WECHSLER, *supra* note 7, at 382:

The fundamental premise of Madison's compromise was the perception that the extent to which lower federal courts were needed to assure the effectiveness of federal rights should be a matter for legislative judgment made from time to time rather than a matter for constitutional judgment made once for all time. . . .

Thus the fact that conditions today are different from those in 1789 with respect to the need for and role of lower federal courts seems to support the wisdom of the compromise rather than furnish an excuse for its abandonment.

Id.

77. Given that the Supreme Court is only able to hear a small fraction of all federal cases that are tried in state court, the practice of *certiorari*, rather than appeal as of right, is inadequate to fulfill the alleged "constitutional duty of case by case consideration of all federal cases."

78. Eisenberg, *supra* note 1, at 516.

79. "Eisenberg fails to recognize that violence to constitutional rights may be achieved just as much by a neutral scheme promoting efficiency as by legislation spurred by 'substantive disagreement' with judicial decisions." Redish & Woods, *supra* note 1, at 74.

80. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816).

81. See Clinton, *Guided Quest*, *supra* note 1, at 741; see also Clinton, *Early Implementation*, *supra* note 1, at 1515.

discretion over the jurisdiction of the federal judiciary. As will be argued more fully later, however, the Framers' use of the word "shall" does not support this conclusion.⁸² In addition, Professor Clinton, like Justice Story, ignores other constitutional language which directly mitigates that result.⁸³

D. The Two-Tier Theory

Yet another approach that has developed, the "two-tier theory," can be viewed as a compromise position. Remarkably, this theory can also be traced back to Justice Story's opinion in *Martin*.⁸⁴ According to this view, the judicial power is mandatorily vested in the federal judiciary, but it need not extend to all the categories of cases enumerated in Article III; rather, there are two tiers to federal jurisdiction. In the first tier are cases arising under federal law, cases affecting ambassadors, etc., and cases of admiralty and maritime jurisdiction. In this tier, the judicial power must extend to "all Cases"—*i.e.*, each and every case. Thus, Congress's power is limited to deciding which federal courts, the Supreme Court, an inferior court, or both, should have jurisdiction.⁸⁵ The second tier is comprised of the enumerated "controversies." Because the judicial power need not extend to *all* such controversies, Congress has the authority to decide the extent of federal court jurisdiction.

82. See *infra* Parts II.A and II.C.

83. See *generally infra* Part II.

84. 14 U.S. (1 Wheat.) 304, 333-34 (1816).

It will be observed that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn In [the first] . . . class the expression is, and that the judicial power shall extend to *all* cases; but in . . . the second class, the word "*all*" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

Id.

It is not entirely clear that Justice Story espoused precisely the two-tier theory but the language quoted above suggests that he did. See *supra* note 68 and accompanying text; *infra* notes 164, 364-66 and accompanying text.

85. This may seem similar to Clinton's view of congressional authority, but it applies only to cases in the first tier. The difference is greater than it may appear. For Clinton, the Exceptions Clause is itself merely distributive in nature. For Justice Story, the Exceptions Clause has the traditional meaning view, but is limited by other provisions of Article III.

Professor Akhil Reed Amar, a modern advocate of this theory, has developed it extensively and forcefully.⁸⁶ Professor Amar claims that, while many interpretations of Article III focus only on certain portions of the text to the exclusion of others, this theory provides a comprehensive interpretation of Article III. In addition, he argues that the structure and history of Article III strongly support this thesis.

Professor Amar's textual argument is one of relative superiority. He claims that this interpretation is more comprehensive than the others. Yet there is much that Professor Amar overlooks. For example, he improperly regards the terms "cases" and "controversies" as synonymous.⁸⁷ He makes an analogous mistake with "jurisdiction" and "judicial power."⁸⁸ He also disregards the repetition of the word "in" in the Vesting Clause.⁸⁹ Finally, as Justice Story and Professor Clinton before him, Professor Amar mistakenly assumes that word "shall" is a mandate to Congress.⁹⁰ This Article will provide an even more comprehensive interpretation of the text of Article III.

Professor Amar's structural argument is twofold, based upon the judicial independence requirements for Article III and upon the relative importance of the cases in the first tier by comparison to those in the second tier. The salary and tenure provisions of Article III, however, simply are not jurisdictional requirements in the relevant sense.⁹¹ Furthermore, Professor Amar's views as to the relative importance of the various categories of cases are debatable, particularly his assignment of "Controversies to which the United States shall be a Party" to the lower tier.⁹² His

86. See Amar, *Two Tiers*, *supra* note 1, at 205; see also Amar, *Reply to Friedman*, *supra* note 1, at 442; Amar, *Reply*, *supra* note 1, at 1651; Amar, *Judiciary Act*, *supra* note 1, at 1499.

87. See Amar, *Two Tiers*, *supra* note 1, at 244 n.128. *But cf.* Amar, *Reply*, *supra* note 1, at 1656-57 ("[T]he civil/criminal distinction, whether or not ultimately persuasive, is wholly irrelevant.").

88. Although Amar does not assume that the "judicial Power" and "jurisdiction" are exactly synonymous, he does assume that the former encompasses the latter. See Amar, *Two Tiers*, *supra* note 1, at 231 n.88 ("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 also *id.* at 233. This is an assertion for which he provides no real support. See *infra* note 196 and accompanying text; *cf. infra* notes 186-94 and accompanying text.

89. See Amar, *Two Tiers*, *supra* note 1, at 231 n.88. The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1 (emphasis added).

90. See Amar, *Two Tiers*, *supra* note 1, at 215 (finding that "shall" is a mandate).

91. See *infra* Part II.G.1.

92. Amar himself recognizes, but dismisses, the problem with assigning these categories of cases to the non-mandatory second tier. See Amar, *Judiciary Act*, *supra* note 1, at 1508, 1524. According to *The Federalist*, however, "[c]ontroversies between the nation and

theory is also undermined by the Supreme Court's original jurisdiction over "those [Cases] in which a State shall be a Party." Although he would place such cases in his permissive tier of jurisdiction, the constitutional grant of Supreme Court original jurisdiction is self-executing⁹³ and beyond Congress's power under the Exceptions Clause,⁹⁴ making federal jurisdiction over state-party cases more mandatory than permissive.⁹⁵ In any event, without the support of the text, Professor Amar's structural arguments fail, for jurisdiction over even the most important categories is not necessarily mandatory in each case.

Finally, Professor Amar argues that the Judiciary Act of 1789, and the records of the Constitutional Convention, two of the best indicators of

its members or citizens can only be properly referred to the national tribunals." THE FEDERALIST NO. 80, *supra* note 38, at 476; *see also* HART AND WECHSLER, *supra* note 7, at 386-87 ("Why did the drafters of Article III single out cases affecting ambassadors, etc., for mandatory treatment and leave Congress an option in cases in which the United States was a party?"); Casto, *Two Tiers*, *supra* note 1, at 91 ("But why are cases involving the United States itself relegated to the less important second tier? Surely the leaders in the early Republic did not view government litigation as less important than cases in the first tier."). Other categories also cause problems. *See, e.g.*, Meltzer, *supra* note 1, at 1582-84.

93. *See* California v. Arizona, 440 U.S. 59, 65 (1979) ("The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation.") (*citing* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 96 (1861); Florida v. Georgia, 58 U.S. (17 How.) 478, 492 (1855); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 332 (1816)).

94. *See* U.S. CONST. art. III, § 2, cl. 2.

95. This undermines not only Amar's structural arguments, but his textual arguments as well. The awkward omission of the selectively-used word "all" becomes difficult to explain. Thus, it is not surprising to find Amar defending the indefensible: congressional control over the Supreme Court's original jurisdiction. *See* Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 478-88 (1989); Amar, *Two Tiers*, *supra* note 1, at 254-55 n.160. Even the Marshall court, which Professor Amar believes supported his two-tier theory, did not believe that Congress could restrict the Supreme Court's original jurisdiction. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 820-21 (1824).

In order to support his position, Amar relies on the Necessary and Proper Clause. There is no reason, however, to view congressional control over the Supreme Court's original jurisdiction as either "necessary" or "proper," particularly in light of the "mandatory" language of the Granting Clause: "the supreme Court *shall* have original Jurisdiction." U.S. CONST. art. III, § 2, cl. 2 (emphasis added). Moreover, the fact that there is an explicit Exceptions Clause for the Supreme Court's appellate jurisdiction strongly suggests, particularly under generally accepted rules of construction (such as *inclusio unius est exclusio alterius*—the inclusion of one is the exclusion of others) that Congress has no authority to make exceptions to the Supreme Court's original jurisdiction. Amar must realize that even if state-party cases seem to be within the permissive tier under the first paragraph of Article III, Section 2, this inference must be tempered by other language in Article III which clearly leads to a different result—just as Amar might argue that, although the Exceptions Clause seems to apply to "all other cases before mentioned," the inference must be tempered by other language in Article III which limits that power.

the original intent of the Framers,⁹⁶ support his thesis.⁹⁷ Although at first the various drafts of the Constitution from the Convention may seem to support Professor Amar's theory, this Article will demonstrate that, upon closer examination, they do not.⁹⁸ In addition, Professor Amar's attempt to show that the first Congress departed remarkably little from the plan of the Constitution is unpersuasive to many who believe that there were significant gaps between the constitutional limit of federal jurisdiction and that provided for by the Judiciary Act—even as to cases in the first tier.⁹⁹ By comparison, the Judiciary Act is perfectly compatible with the traditional view.¹⁰⁰

E. Other External Limits

It has become popular to insist that even if Congress has plenary authority to restrict the jurisdiction of the federal courts, it cannot use this power to violate any other provisions of the Constitution.¹⁰¹ Thus, Congress may not violate the constitutional guarantees of due process and equal protection in formulating any jurisdiction-stripping statute. Although it has been argued that a statute that would remove certain subjects from federal jurisdiction premised on hostility to the substantive decisions of the Supreme Court would violate those constitutional guarantees,¹⁰² these arguments are unpersuasive.

Due process arguments are doomed to fail. The Supreme Court long has held that due process does not require any level of appellate re-

96. That the records of the Constitutional Convention are a reliable indicator of the Framers is obvious. For discussion of the first Judiciary Act as an indicator of the original intent, see *infra* note 321-22 and accompanying text.

97. See generally Amar, *Judiciary Act*, *supra* note 1; see also Amar, *Reply*, *supra* note 1; Amar, *Two Tiers*, *supra* note 1.

98. See *infra* Part III.A.

99. See *infra* notes 340-50 and accompanying text (elaborating on Section 25 of the Judiciary Act of 1789); see also HART AND WECHSLER, *supra* note 7, at 386 ("Why did [the Judiciary] Act leave some significant gaps in federal court jurisdiction, even in the 'mandatory' categories?"); Meltzer, *supra* note 1, at 1585-1602 (questioning the historical roots of the two-tier thesis in the Judiciary Act of 1789).

In his defense, Amar never sought "to prove that Congress has always self-consciously understood the limits of its power to regulate jurisdiction." Amar, *Two Tiers*, *supra* note 1, at 260 n.175. Nevertheless, his "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." *Id.*

100. At the least, the First Judiciary Act is perfectly compatible with the view presented in this Article. See *infra* notes 321-32 and accompanying text (providing the subsequent history to the Judiciary Act of 1789).

101. See *supra* note 21 (presenting other sources that discuss the unconstitutional invasion of judicial powers).

102. See, e.g., Sager, *supra* note 1, at 68-77; Tribe, *supra* note 1, at 129; see also Van Alstyne, *supra* note 1, at 264.

view,¹⁰³ much less a right to Supreme Court review.¹⁰⁴ Adjudication by a state court is adequate under the due process guarantee.

Equal protection arguments fare significantly better. Because no person is to be “den[ied] . . . the equal protection of the laws,”¹⁰⁵ Congress is not permitted to discriminate unfairly against a particular class of litigants. Thus, Congress is not permitted to restrict access to the federal courts based on race, gender, creed, etc.¹⁰⁶ Any statute that did so would properly be held unconstitutional by the courts.

However, there are those who argue further that, in allocating jurisdiction, Congress is not permitted to discriminate among various constitutional rights. The fundamental problem with this view, however, is that “rights don’t have rights; *people* have rights.”¹⁰⁷

According to Professor Lawrence Tribe, Congress is not permitted to impose impermissible burdens on constitutional rights.¹⁰⁸ Being forced to litigate a matter in state courts simply cannot be considered an “impermissible burden” *per se*. Professor Tribe’s argument, however, is that a “selective repeal [of jurisdiction] . . . sends a clear signal to hostile state and local officials,”¹⁰⁹ and, therefore, must be considered “a severe impingement upon the rights thus placed beyond the shield of federal protection.”¹¹⁰ Ironically, Professor Tribe argues that a “wholesale repeal [of federal jurisdiction], even under strict scrutiny, would not necessarily be invalidated.”¹¹¹ Under this view, the Exceptions Clause seems to be an all-or-nothing power. Congress can give full jurisdiction, or enact a “wholesale repeal,” but it is not permitted to make specific “exceptions”

103. See generally *Lindsey v. Normet*, 405 U.S. 56, 64 (1972); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

104. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.” (emphasis added)).

105. U.S. CONST., amend. XIV, § 1; see *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that although the Fourteenth Amendment Equal Protection Clause applies only to states, the Fifth Amendment Due Process Clause guarantees equal protection vis-à-vis the federal government).

106. See *Gunther*, *supra* note 1, at 916 (“Congress could not limit access to the federal courts on the basis of race or of wholly irrelevant criteria such as a litigant’s height, weight, or hair color.”).

107. Redish, *Supreme Court*, *supra* note 1, at 917.

108. Tribe, *supra* note 1, at 141-46. But see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 48 n.27 (2d ed. 1988) (“[T]he essay’s broader attempt to impeach jurisdictional statutes under various Bill of Rights provisions seems in retrospect to have been somewhat overreaching.”).

109. Tribe, *supra* note 1, at 145-46.

110. *Id.* at 144.

111. *Id.* at 145.

to a general rule of jurisdiction. This result suggests that the argument is unsound. It is “wholesale repeal,” if anything, that would be suspect under the Exceptions Clause.¹¹² As Professor Tribe himself notes, “[T]he reference to exceptions and regulations indicates that something substantial is to remain after Congress’s subtractions have been performed.”¹¹³

Professor Sager notes that “Congress is not empowered to burden the exercise of a constitutional right—not, at least, without a compelling justification.”¹¹⁴ Thus, he argues that “constitutional claimants . . . [cannot be] deprived of timely and effective judicial relief.”¹¹⁵ A jurisdictional statute that merely grants state courts finality over a particular constitutional issue, however, does no such thing. The state courts remain available to grant “timely and effective judicial relief” for any and all rights they find in the Constitution.

The theoretical premise of such arguments—that state courts would accept an invitation from Congress to disregard the Constitution—is questionable. Indeed, state courts are at least as independent of Congress as Article III federal courts because Congress has no authority to infringe upon their independence at all.¹¹⁶ Moreover, under the Supremacy Clause, state courts are all bound to enforce the Constitution.¹¹⁷ It must be presumed that they will do so.

That state courts might come to different substantive conclusions than the Supreme Court does not mean that they are disregarding the Constitution.¹¹⁸ Nowhere does the Constitution state that the Constitution *as interpreted by the Supreme Court*, or that the decisions of the Supreme Court, shall be the “supreme Law of the Land.”¹¹⁹ If jurisdiction is the

112. See *infra* note 211 and accompanying text (explaining jurisdictional restriction as an exception).

113. Tribe, *supra* note 1, at 135.

114. Sager, *supra* note 1, at 70.

115. *Id.*

116. See Redish, *Supreme Court*, *supra* note 1, at 912 (“Vis à vis Congress at least, state courts remain as independent as article III federal judges, because Congress has no power to regulate either their salary or tenure.”).

117. U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

118. For example, it cannot fairly be said that the inability to find a substantive right to abortion must be due to a disregard for the Constitution itself; at most, it is only a disregard for Supreme Court precedent.

119. See TRIBE, *supra* note 108, at 34-35:

[A]t least so long as the manner in which our nation’s fundamental document is to be interpreted remains open to question, the ‘meaning’ of the Constitution is sub-

authority to decide a case, it must include the authority to decide the case wrongly.¹²⁰ Corrections, if any, must come on appeal.¹²¹ State courts may decide cases wrongly—just as the Supreme Court may decide cases wrongly.¹²² But just as the latter is constitutionally acceptable, so must be the former. It would be incredible for federal courts to rule unconstitutional a jurisdiction-stripping statute merely because state courts could decide such cases incorrectly.¹²³

Furthermore, at least with respect to certain rights, an exception to federal jurisdiction could be said to discriminate against a class of litigants, and not simply against the particular subject matter. An example is abortion, a constitutional right subject to exercise only by women. Violation of the constitutional guarantee of equal protection (in contrast to a violation of an anti-discrimination statute), however, requires a showing of

ject to legitimate dispute, and the Court is not alone in its responsibility to address that meaning. Rather, a variety of actors must make their own constitutional judgments, and possess the power to develop interpretations of the Constitution which do not necessarily conform to the judicially enforced interpretation articulated by the Supreme Court. . . .;

Amar, *Two Tiers*, *supra* note 1, at 258 n.170:

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 . . . the several branches must cooperate . . . ;

Wechsler, *Courts and Constitution*, *supra* note 1, at 1006:

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. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land. That is, at least, what *Marbury v. Madison* was all about. I have not heard that it has yet been superseded, though I confess I read opinions on occasion that do not exactly make its doctrine clear.

But see *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that “the interpretation of the . . . [Constitution] enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States, ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”). Of course, the mere fact that the Supreme Court maintains this position does not necessarily make it so. *See infra* note 413 and accompanying text. Both as a matter of principle, see *infra* note 120 and accompanying text, and as a practical matter, see *infra* note 121 and accompanying text, it is difficult to see how this doctrine could be enforced without appellate review by the Supreme Court.

120. *See* *Lamar v. United States*, 240 U.S. 60, 64-65 (1916) (“Jurisdiction is a matter of power and covers wrong as well as right decisions.”).

121. *Fauntleroy v. Lum*, 210 U.S. 230, 235 (1908) (“[T]he judgment is unimpeachable, unless reversed.”).

122. *See infra* notes 407-12 and accompanying text; *see also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (describing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), as “an unconstitutional assumption of powers by courts of the United States”).

123. *See infra* note 412 and accompanying text.

discriminatory purpose.¹²⁴ It would be wrong to attribute a sexist intent to any such jurisdiction-stripping statute. Opponents of abortion rights are not misogynists; that there are significant numbers of women among them demonstrates this fact.

The true motivation in the case of such controversial jurisdiction-stripping proposals is simply hostility to the Supreme Court's decisions, which are seen as exceeding legitimate authority under the judicial power. Without more, this cannot be deemed a constitutionally illegitimate motive. Although under the principle of "separation of powers" each branch of government is independent of the others, the principle of "checks and balances" encourages each branch to use its legitimate powers to prevent overreaching by the other branches.¹²⁵ It is unquestioned, for example, that if the federal courts perceive that Congress or the President is exceeding legitimate authority, the courts may use the judicial power to decide cases in conformity with the Constitution and rule the statute or action unconstitutional.¹²⁶ It is also unquestioned that if the President feels that Congress or the courts exceeded their authority, he may use the veto power or the pardon power to counteract them. Likewise, if Congress views the President as exceeding his authority, it can use the power of the purse to restrict him.¹²⁷ Similarly, if Congress perceives the Supreme Court to be exceeding its constitutional authority, Congress is permitted—even obliged—to use its legitimate powers, including those under the Exceptions clause, to curb the Supreme Court. Far from being illegitimate, congressional hostility to federal court decisions should be considered a "compelling interest."¹²⁸

124. See *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

125. "[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others Ambition must be made to counteract ambition." THE FEDERALIST NO. 51, *supra* note 38, at 321-22 (James Madison). See generally *infra* Part IV.A.

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 172-80 (1803).

127. U.S. CONST. art. I, § 9, cl. 7. ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.")

128. See Ratner, *Supreme Court*, *supra* note 1, at 954:

[R]emoval of [certain categories of] . . . cases from the Supreme Court's appellate jurisdiction, if otherwise authorized by the exceptions and regulations clause, would not violate equal protection, because the purpose, not achievable by a less intrusive alternative, would then be the constitutionally approved and necessarily 'compelling' one of checking congressionally disapproved Supreme Court doctrine.

II. A COMPREHENSIVE INTERPRETATION OF THE TEXT

Having reviewed the existing interpretations of Article III and their limitations, this Article will now offer a new interpretation intended to avoid the errors made by previous commentators.

The appropriate starting point for any interpretation is the text of the Constitution:

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 the 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 a 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.¹²⁹

A. “*Shall be vested*”

Article III begins with the words, “The judicial Power of the United States, shall be vested” Many assume that this language was intended to be mandatory.¹³⁰ This is not an unreasonable assumption, for the word “shall” often denotes a mandatory meaning, particularly when used in legislation.¹³¹ The word is capable of many different meanings,

129. U.S. CONST. art. III, §§ 1-2.

130. See *supra* Parts I.C and I.D.

131. See BLACK’S LAW DICTIONARY 1375 (6th ed. 1990) [hereinafter BLACK’S] (“As used in statutes, contracts, or the like, this word [‘shall’] is generally imperative or

however¹³²—including even a merely permissive reading.¹³³ In Article III itself, “shall” is used in both the mandatory sense—e.g., “The trial of all Crimes, except in Cases of Impeachment, shall be by Jury”¹³⁴—as well as the permissive sense—e.g., “such Exceptions, and under such Regulations as the Congress shall make.”¹³⁵ In fact, the term commonly shifts its meaning even in midsentence.¹³⁶ Therefore, a careful examination of the Constitutional context is required to determine the proper meaning of the word “shall.”

The opening language of Article III closely parallels the opening language of the first two Articles of the Constitution, each of which estab-

mandatory.”); see also BALLENTINE’S LAW DICTIONARY 1171 (3d ed. 1969) [hereinafter BALLENTINE’S] (“Providing generally, but not always, a mandate . . .”).

132. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 939 (2d ed. 1995) [hereinafter GARNER] (“*Shall* has as many as eight senses in drafted documents.”).

133. See BALLENTINE’S, *supra* note 131, at 1171 (denoting “shall” as “[s]ometimes meaning ‘may,’”); BLACK’S, *supra* note 131, at 1375 (“[Shall] may be construed as merely permissive or directory (as equivalent to ‘may’ . . .”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1075 (10th ed. 1993) [hereinafter MERRIAM-WEBSTER’S] (“1 *archaic* A: will have to: MUST B : will be able to: CAN”). Even in dictionaries available at the time of the Constitutional Convention, the word was capable of a permissive reading. See JOHN ASH, DICTIONARY OF THE ENGLISH LANGUAGE, *Shall* (1775) (“To be hereafter determined to, to be hereafter permitted to.”). The more common definition was merely an indication of the future tense. See, e.g., N. BAILEY, UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY, *Shall* (1782) (“[T]he sign of the future tense.”); DYCHE, NEW GENERAL ENGLISH DICTIONARY, *Shall* (1765) (“[I]n *Grammar*, it is called the sign of the future tense.”). The future tense can signify either a mandate or simply a statement of fact. The latter is consistent with a self-executing interpretation of the word “shall.”

134. U.S. CONST. art. III, § 2, cl. 3.

135. U.S. CONST. art. III, § 2, cl. 2. Cf. Clinton, *Guided Quest*, *supra* note 1, at 786 n.147:

Arguably, one of the most glaring departures from the framers’ consistent use of the word “shall” in its mandatory sense is the so-called exceptions and regulations clause of Section 2, of article III. . . . While the term “shall” in this clause conventionally has been thought only to connote a future tense, the word may have been used in an imperative sense. According to the thesis of this Article, Congress was obligated to invest the entirety of the specified appellate jurisdiction in the Supreme Court or, at least, in inferior federal courts. Since article III did not fully describe . . . the size or procedures of the Supreme Court or require the creation of inferior federal courts, it was *imperative* for Congress to enact regulations to carry this constitutional mandate into effect.

Id. Clinton’s argument, however, cannot possibly apply to another permissive use of the word “shall” in Article III: “The judicial Power shall extend to all Cases . . . arising under . . . Treaties . . . which *shall* be made . . .” U.S. CONST. art. III, § 2, cl. 1 (emphasis added). Surely there was no obligation to make treaties in the future.

136. GARNER, *supra* note 132, at 939 (emphasis omitted). One such example can be found in Article III itself: “In all the other Cases before mentioned, the supreme Court shall [not ‘may’] have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall [‘may’] make.” U.S. CONST. art. III, § 2, cl. 2.

lishes one of the three branches of government. It is reasonable, therefore, to read the three provisions analogously.¹³⁷ In these provisions, the proper reading of the word “shall” is not exactly a mandatory one.

There is no doubt that the opening language of Article I was intended to be self-executing rather than mandatory.¹³⁸ By proclaiming that “[a]ll legislative powers herein granted shall be vested in a Congress,”¹³⁹ the Constitution itself establishes the legislature. It does not merely authorize—or even command—someone else to do so. Article I is more fairly paraphrased as stating that the legislature *is hereby* created than that the legislature *must be* created.

Likewise, the opening language of Article II is self-executing, not mandatory. By stating, “The executive Power shall be vested in a President of the United States of America,”¹⁴⁰ the Constitution establishes the Presidency, it does not merely require the Congress to do so.

It is only logical that the opening language of Article III be interpreted similarly. The appropriate interpretation is not that Congress must vest the judicial power in the federal judiciary, but that the Constitution itself does the vesting. It would be strange to interpret the language differently for the judiciary than for the other branches. It would be even more odd to interpret the Constitution as having *established* only two branches of government and merely *authorizing* the others to establish the third. This rings especially true since the third branch is a co-equal branch, as all will concede. Thus, the only acceptable interpretation is that the Constitution itself establishes the judiciary, and that its language is self-executing rather than mandatory.

Justice Story, therefore, was incorrect when he stated that “[t]he language of [Article III] . . . is manifestly designed to be mandatory upon the legislature.”¹⁴¹ The judiciary is no more dependant upon Congress for judicial power than the President is for executive power.¹⁴² If the Consti-

137. See Amar, *Two Tiers*, *supra* note 1, at 231-32; see also Clinton, *Guided Quest*, *supra* note 1, at 841-42.

138. Apparently, both Amar and Clinton recognize this fact. See Amar, *Two Tiers*, *supra* note 1, at 232 (“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.*” (emphasis added)); Clinton, *Guided Quest*, *supra* note 1, at 842 (“[T]he framers virtually tracked the self-executing commands of articles I and II . . .”).

139. U.S. CONST. art. I, § 1.

140. U.S. CONST. art. II, § 1, cl. 1.

141. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816).

142. The fact that Congress is constitutionally entitled to decide whether and how to create inferior courts does not change this result, for the Constitution by its own terms vests the judicial power only in whatever inferior courts Congress decides to create.

tutional mandate is merely a directive to Congress, then Congress could choose to ignore it, thereby annihilating the judiciary. The inevitable response, that the courts could rule Congress's inaction unconstitutional and directly follow the Constitution, is proof that the language is indeed self-executing.

Under either interpretation, it remains true that the Constitution *requires* that there be a federal judiciary vested with the judicial power. Nevertheless, it is important to arrive at the correct interpretation of these words. The self-executing interpretation, unlike the mandatory one, reaffirms the equality of the judicial branch of government which, like the legislative and executive branches, is established by the Constitution. More importantly for present purposes, it shows that there is no mandate to Congress in the opening language of the Constitution. The word "shall" is simply not addressed to Congress.

B. "In"

The judicial power is vested by the Constitution, but in whom is it vested? A cursory examination leads to the conclusion that it is vested in the federal judiciary as a whole. This is the view of most commentators. A careful reading of the constitutional text, however, shows that it is not so simple.

The Constitution vests the judicial power "*in* one supreme Court, and *in* such inferior Courts as the Congress may from time to time ordain and establish."¹⁴³ It is important to note what the Constitution *does not* do. It does not vest judicial power "*in* a federal judiciary, which shall consist of one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish." Nor does it vest judicial power "*in* one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish." If either of these alternatives were adopted, it could fairly be said that the judicial power was vested in the federal judiciary as a whole.

The Constitution does something different; it repeats the word "*in*." This may be a subtle distinction, but it is important. By repeating the word "*in*," the Constitution vests the judicial power, the *entire* judicial power, in the Supreme Court, and *also* in whatever inferior courts Congress creates. The whole judicial power is vested *separately in each*; it is not simply shared by the two.¹⁴⁴ To ignore the repetition of the word

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

144. It is arguable from the text of Article III, Section 1 that while the judicial power is vested in its entirety in the Supreme Court alone, it is vested in its entirety only in the inferior courts as a whole. Thus, even under the mandatory theories, jurisdiction over each

“in” is easy, even convenient, but it is intellectually dishonest. There is no reason to suppose that it is merely excess verbiage.¹⁴⁵

Professor Amar suggests that the second use of “in” may have been added to avoid confusion; to make it clear that Congress’s discretion extends only to the inferior courts, and that the existence of one Supreme Court is mandatory.¹⁴⁶ It is doubtful, however, that the omission of the second “in” would lead anyone to such a conclusion. Alternative wording would not have been difficult to formulate, even if this were the concern of the drafters. For example, language similar to the opening language of Article I would have worked perfectly. As suggested earlier, the provision in question could have read as follows: “The judicial Power shall be vested in a federal judiciary, which shall consist of one supreme Court and such inferior Courts as the Congress may from time to time ordain and establish.” Moreover, many of the early drafts in the Constitutional Convention contained language which avoided this ambiguity and which could have been emulated.¹⁴⁷ Thus, it is only fair to assume that the use of the second “in” is significant and that the judicial power is

constitutionally-required case would not have to be vested in *each* inferior court. However, this is a strained and hyper-technical reading of the text. A natural reading of the text suggests that the judicial power is vested in its entirety in each Article III court. Once it is understood that the judicial power does not include jurisdiction, the problems disappear. See *infra* Part II.E. Even if it were determined that the judicial power is vested in the inferior courts as a whole and not in each inferior court, however, this would not affect the general argument that the grant of judicial power to the inferior courts is independent of the grant of judicial power to the Supreme Court.

145. See *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.”); see also Amar, *Two Tiers*, *supra* note 1, at 242 (“Where possible, each word of the Constitution is to be given meaning; no words are to be ignored as mere surplusage.”).

146. See Amar, *Two Tiers*, *supra* note 1, at 231 n.88.

147. For example, the very first plan considered by the Convention, provided as follows: “9. [Resolved]. That a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature” 1 RECORDS, *supra* note 7, at 21. Similarly, the resolutions sent to the Committee of Detail provided as follows: “Resolved. That a national Judiciary be established to consist of One Supreme Tribunal Resolved. That the national Legislature be empowered to appoint inferior Tribunals.” *Id.* at 132-33. Finally, an early draft of the Committee of Detail provided as follows:

“5. The Judiciary

1. shall consist of one supreme tribunal
 2. the judges whereof shall be appointed by the senate
 3. and of such inferior tribunals, as the legislature may
- (appoint) <establish>

2 *id.* at 146.

By the time the Constitution emerged from the Committee of Detail, it contained the dual “in.” See 2 *id.* at 186.

vested independently in the Supreme Court and in the inferior courts. As shall be made clear, this interpretation is not as “deeply problematic” as Professor Amar suggests.¹⁴⁸

C. “Shall extend”

Section 2 begins by stating that “[t]he judicial power shall extend to” certain enumerated cases. Once again, the Constitution uses the word “shall,” and the question arises whether or not this was intended to be mandatory. If “shall extend” is mandatory, then the federal courts may be required to hear many cases.¹⁴⁹ The constitutional text could then be paraphrased as follows: “The judicial power must be exercised in the following cases”¹⁵⁰

A mandatory reading has been defended by many commentators, most notably Professor Amar.¹⁵¹ He argues that federal jurisdiction must include all cases in his first tier of categories. However, because he believes that the judicial power is vested in the federal judiciary as a whole, he believes that the Constitution merely requires that some federal court be

148. Professor Amar believes that the judicial power includes actual jurisdiction, which would make the vesting of the entire judicial power in the inferior courts “deeply problematic.” Amar, *Two Tiers*, *supra* note 1, at 231 n.88. Once it is understood, however, that the judicial power is something different than actual jurisdiction, and is actually only the capacity to receive jurisdiction, there is no such problem with vesting the entire judicial power in each Article III court. *See generally infra* Part II.E; *infra* note 162 and accompanying text.

149. Actually, once the entire text of Article III is properly understood, even this is not true. The Constitution states only that the *judicial power* extends to the enumerated cases. Nowhere is there a command that any court’s *jurisdiction*, or the aggregate jurisdiction of all federal courts, extend to those cases. *See infra* Part II.E.

150. It has been argued that “[s]ince Article III speaks of the judicial power, and not of the judicial duty, it is plausible to believe that this power may be waived [by Article III judges], much as Congress may waive its legislative power by declining to pass laws.” Amar, *Two Tiers*, *supra* note 1, at 233 n.96. If this assertion is true, the constitutional text might fairly be paraphrased as follows: “The federal courts must be permitted to exercise the judicial Power over the following cases”

However, this is a highly questionable interpretation. Article I provides that “[t]he Congress shall have Power To” do certain enumerated things. *See* U.S. CONST. art. I, § 8. There is no obligation in this language. Had Article III read that the judiciary “shall have Power” over certain cases, then it would enjoy similar discretion. However, Article III provides that “[t]he judicial Power shall extend to” the enumerated cases. *Id.* art. III, § 2, cl. 1. Using a mandatory interpretation of “shall,” as Professor Amar does, there is no discretion here, either for Congress or the judiciary.

151. *See* Amar, *Two Tiers*, *supra* note 1, at 239-46, 254-57. Professor Clinton also defends this view in an even more demanding form: He would require that federal jurisdiction include all of the enumerated cases. *See* Clinton, *Guided Quest*, *supra* note 1, at 749-50. However, it is precisely because Clinton’s interpretation is more demanding than Amar’s that this Section will focus on the latter to the exclusion of the former. If, as will be shown, Professor Amar’s interpretation is too broad, then *a fortiori*, Professor Clinton’s is flawed as well.

available to hear each of the constitutionally-required cases. This can be either in original jurisdiction or on appeal, but according to Professor Amar, it need not be both.¹⁵²

Contrary to Professor Amar's argument, the judicial power is not simply vested in the federal judiciary as a whole. It is independently vested in the Supreme Court and in the inferior courts.¹⁵³ Thus, if "shall extend" is mandatory on Congress, the Supreme Court would have judicial power which "must" extend to the constitutionally-required cases, and the inferior courts would have judicial power which "must" extend to them as well.¹⁵⁴ This is a result that Professor Amar would have a difficult time defending.

On the other hand, "shall" can be interpreted as self-executing, as in the Vesting Clause. Under this view, there is no mandate to Congress because the work is done by the Constitution itself. This is consistent with similar uses of the word "shall" in the Constitution. Just as the Article III Vesting Clause is analogous to the Vesting Clauses in Articles I and II, so too is the enumeration of cases in Article III analogous to the enumeration of powers in Articles I and II. When Article I provides that "Congress shall have Power To" do certain things,¹⁵⁵ "shall" is clearly self-executing rather than mandatory. Similarly, when Article II provides that "[t]he President shall be the Commander in Chief," or "shall have Power" to do certain things,¹⁵⁶ "shall" is self-executing, not mandatory. The instant provision must be read similarly: the "shall" in "shall extend" is self-executing, not mandatory.

Furthermore, the word "shall" is only part of the equation. The word "extend" is not unambiguous, either.¹⁵⁷ Professor Amar implicitly interprets the word in a mandatory sense to mean "to include."¹⁵⁸ However, the proper definition of the word "extend" is a non-mandatory one,

152. Amar, *Two Tiers*, *supra* note 1, at 255-57.

153. *See supra* Part II.B.

154. Even if, as has been suggested, the mandate is only on Congress, and the courts have the "power" without the "obligation" to review such cases, Congress is still required to provide jurisdiction for both the Supreme Court and some inferior court in each constitutionally-required case. *But see supra* note 150 (arguing that constitutional text does not support this interpretation). While this is much less burdensome, it is still a tall order.

155. *See* U.S. CONST. art. I, § 8.

156. *See id.*, art. II, § 2.

157. *See* BLACK'S, *supra* note 131, at 583 ("Term ['extend'] lends itself to great variety of meanings, which must in each case be gathered from context.").

158. *See* Amar, *Two Tiers*, *supra* note 1, at 229 ("[T]he judicial power of the United States must, as an absolute minimum, comprehend [*i.e.*, include] the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors."), *quoted in* Amar, *Judiciary Act*, *supra* note 1, at 1504.

meaning “to reach.”¹⁵⁹ Thus, the relevant constitutional text is best paraphrased as follows: “The judicial power *hereby reaches* the following cases”¹⁶⁰ Despite the self-executing “shall,” the words “shall extend” are more permissive than mandatory; they are better interpreted as “can include” rather than as “must include.”¹⁶¹

This interpretation is more plausible than the mandatory interpretation in that it avoids the inherent difficulties described above. Courts are simply rendered capable of hearing any of the enumerated cases.¹⁶² In addition, this interpretation comports with a natural reading of the text of the Constitution, which seems to define the scope of judicial power rather than create any obligations.¹⁶³

159. See MERRIAM-WEBSTER'S, *supra* note 133, at 411 (“1 : to stretch out in distance, space, or time : REACH <their jurisdiction ~ed over the whole area> 2 : to reach in scope or application <his concern ~s beyond mere business to real service to his customers>”); see also NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 427 (1851) (“To stretch; to reach”) [hereinafter NOAH WEBSTER].

160. “Hereby reaches” seems to be the only plausible interpretation of the words “shall extend” in the various drafts of the Constitution generated by the Committee on Style. See *infra* notes 259, 287 and accompanying text.

161. To clarify, the argument is not simply that “shall extend” means “can include.” See *Martin v. Hunter’s Lessee*, 14 U.S. 304, 331-32 (1816) (rejecting the argument “that [the words ‘shall extend’] are equivalent to the words ‘may extend,’ and that ‘extend’ means to widen to new cases not before within the scope of the power”). Rather, the argument is that “can include” is a closer paraphrase than is “must include.” Once the distinction between jurisdiction and judicial power is understood, it becomes clear that this is the true import of the words. See *infra* Part II.E. There is no constitutional requirement that federal *jurisdiction* must include the enumerated cases; however, since the *judicial power* reaches those cases, federal jurisdiction *can include* them.

162. Cf. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (“The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it.”); *The “Francis Wright,”* 105 U.S. 381, 385 (1881) (“[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe.”); *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865) (“The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the Constitution; and [Congress] can enlarge neither one But it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given. . . .”); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (stating that Article III, Section 2, clause 1 “enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States”).

163. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 3.1, at 167 (2d ed. 1994) (“Article III of the Constitution defines the federal judicial power in terms of nine categories of ‘cases’ and ‘controversies.’”); WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 517 (1904) (“The object of [Article III, Section 2] is to define the judicial power. . . .”); cf. Amar, *Two Tiers*, *supra* note 1, at 239 (“[Article III,] section 2 elaborates on that ‘judicial Power’ by defining the cases to which it ‘shall extend.’”).

D. "All Cases" and "Controversies"

In Article III, Section 2, the Constitution enumerates the categories of cases to which the judicial power extends. More important for present purposes than the categories themselves, however, is how they are described. Both Justice Story and Professor Amar point out that for certain categories of cases, the Constitution states that the judicial power shall extend to "all cases"—which they interpret to mean each and every case—while for other categories, the judicial power extends only to "controversies"—not necessarily *all* controversies.¹⁶⁴ From "this difference of phraseology," Justice Story and Professor Amar conclude that the judicial power must extend only to certain categories of cases: those preceded by the words "all cases." For the remaining "controversies," the judicial power need not extend to each and every case. Thus, Congress has greater authority to regulate "controversies."¹⁶⁵

One major problem with this interpretation should be obvious from the prior discussion. Since "shall extend" is not mandatory,¹⁶⁶ the selective use of the word "all" cannot lead to their conclusions.¹⁶⁷ A second and more substantive problem is that both Justice Story and Professor Amar

164. "Each and every" is certainly a plausible interpretation of the word "all." Standing alone it appears to be the *best* interpretation. However, it is neither the only interpretation, nor, in the context of Article III, the best. As will be shown in this Section, "all cases" is better interpreted as "all types of cases."

However, even if "all cases" is interpreted as "each and every case," Professor Amar's conclusion is not the only one possible. Rather than distinguish between mandatory and permissive tiers of jurisdiction, the selective use of the word "all" could distinguish between exclusive and concurrent tiers of jurisdiction. Justice Story proposed such an interpretation. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333-37 (1816) ("[I]t is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress."). Because he interpreted "shall extend" as mandatory, Justice Story believed that cases in the first tier were necessarily exclusive and that those in the second tier were concurrent, with an option for Congress to make them exclusive. However, if "shall extend" is closer to 'can include' than 'must include,' then the two tiers would instead distinguish those cases in which Congress has the power to grant exclusive jurisdiction to the federal courts (because federal jurisdiction can include all such cases) and those in which Congress can grant only concurrent federal jurisdiction (because federal jurisdiction cannot include all such cases). Structural arguments as to the relative importance of the cases in the first tier support an exclusive/concurrent interpretation as much as they support a mandatory/permissive interpretation.

165. See *supra* Part I.D. Under the extreme view, "controversies" is satisfied by the assignment of two controversies to the federal courts, which quota has long ago been met. Thus, Congress would no longer need to assign any controversies at all to the federal courts. See Amar, *Two Tiers*, *supra* note 1, at 240 n.119.

166. See *supra* Part I.C.

167. Congress cannot be required to grant jurisdiction over all such cases because "shall" is not a mandate to Congress. At most, the judicial power automatically extends to all such cases. *Jurisdiction* does not. See *infra* Part II.E.

ignore an even more glaring “difference of phraseology”—the selective use of the words “cases” and “controversies.” Justice Story assumed, and Professor Amar agrees, that the words are synonymous. The evidence does not support this view.

Professor Amar’s own “quintessentially interpretivist” method should prevent him from dismissing any distinction too hastily.¹⁶⁸ He agrees that selective word choices may not be disregarded.¹⁶⁹ He even takes painstaking efforts to develop how the word “all” must have been intentionally used selectively. Yet he dismisses a plausible distinction between the very next words, “cases” and “controversies,” and concludes that the words were used synonymously.¹⁷⁰

The plausible distinction between the two words is that “controversies” has a meaning limited to civil cases, while “cases” is a broader word encompassing both civil cases and criminal cases. Such was the distinction ascribed long ago by Justice Iredell in *Chisolm v. Georgia*,¹⁷¹ which has been referred to by the Supreme Court on various occasions.¹⁷²

Professor Amar rejects the distinction by arguing that there is no evidence that any difference in meaning was intended.¹⁷³ His assignment of the burden of proof is odd. When different words are used, the better assumption is that different meanings were intended unless proven otherwise. Professor Amar offers no proof that the words are synonymous; he assumes that they are and requires proof to the contrary.

It is difficult to imagine what sort of proof one can reasonably require. There is no reason to expect explicit definitional proof from the Constitutional Convention or the ratification debates. One could hardly expect to find working definitions for every term preserved in the scant records. Rather, one should look to outside contemporary sources for definitions. Then, as now, the word “controversy” was generally synonymous with the word “dispute”¹⁷⁴—hardly a word to describe criminal proceedings. In

168. Amar, *Two Tiers*, *supra* note 1, at 207 n.7.

169. *See id.* at 242. In order to give such significance to “shall” and “all,” Professor Amar must confront the text very seriously.

170. *See infra* notes 178-79 and accompanying text. *But see infra* notes 183-85 and accompanying text.

171. 2 U.S. (2 Dall.) 419, 431-32 (1793) (“[I]t cannot be presumed that the general word ‘controversies’ was intended to include any proceedings that relate to criminal cases . . .”).

172. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 723 (1929); *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911).

173. *See Amar, Judiciary Act*, *supra* note 1, at 1543-44; *Amar, Reply*, *supra* note 1, at 1656.

174. *Compare* 9A WORDS AND PHRASES 65-67 (1960 & 1996 Supp.), *and* 1A C.J.S. Actions § 5 (1985), *and* MERRIAM-WEBSTER’S, *supra* note 133, at 252 (“a discussion marked esp. by the expression of opposing views : DISPUTE”), *with* SAMUEL JOHNSON, A

fact, in one of the early drafts of the Constitution, the word “dispute” was used in lieu of “controversy.”¹⁷⁵ Moreover, while the term “cases” clearly refers to both civil and criminal cases, the enumerated “controversies” seem limited to civil cases.¹⁷⁶ Interpretations of the term rendered shortly after the ratification of the Constitution confirm the limited meaning of “controversy.”¹⁷⁷ In short, there is good reason to believe that “controversies” were limited to civil cases while “cases” were not.

DICTIONARY OF THE ENGLISH LANGUAGE *Controversy*, (10th ed. 1810), and N. BAILEY, UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY *Controversy* (1730), and WILLIAM PERRY, ROYAL STANDARD ENGLISH DICTIONARY 112 (3d. Brookfield ed. 1806), and JOHN ASH, A NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE *Controversy* (1775), and D. FENNING, THE ROYAL ENGLISH DICTIONARY *Controversy* (1775), and THOMAS DYCHE & WILLIAM PARDON, NEW GENERAL ENGLISH DICTIONARY *Controversy* (1765); see also 1 BLACKSTONE'S COMMENTARIES 420-21 (Tucker ed. 1803) (referring to controversies as disputes); 1 BOUVIER'S LAW DICTIONARY 667 (8th ed. 1914) (“A dispute arising between two or more persons.”) [hereinafter BOUVIER'S].

175. See 2 RECORDS, *supra* note 7, at 147.

176. The judicial power clearly extends to state civil cases under the various jurisdictional heads. However, state criminal cases are a different matter. State criminal cases may fall within the judicial power if they “aris[e] under” federal law. However, state criminal cases involving only state law issues do not fall within the judicial power. In accordance with the general principal that one sovereign will not enforce the penal laws of another, the enumerated “controversies” have not been interpreted to include criminal cases. See *Oklahoma v. Gulf, Col. & Santa Fe Ry. Co.*, 220 U.S. 290, 297-300 (1911); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289-93 (1888); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 390-99 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 377 (1816); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 536 n.2 (1833) (discussing BLACKSTONE'S COMMENTARIES).

177. In addition to *Chisolm v. Georgia*, see *supra* notes 171-72 and accompanying text. BLACKSTONE'S COMMENTARIES referred to the same distinction:

6. To *controversies* to which the United States shall be a party. The word *cases* used in the preceding clauses of this article comprehends, generally, I apprehend all cases, whether civil or criminal, which are capable of falling under these heads, respectively

The word *controversies*, as here used, must be understood merely as relating to such as are of a *civil* nature. It is probably unknown in any other sense, as I do not recollect ever to have heard the expression, *criminal controversy*. As here applied, it seems particularly appropriated to such disputes as might arise between the U. States and any one or more states, respecting territorial, or fiscal, matters Or between the U. States and their debtors, contractors, and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a *civil* nature only, such for example, as may arise between two or more states; or between citizens of different states; or between a state, and the citizens of another state; none of which can possibly be supposed to relate to such as are of a criminal nature, unless we could suppose it was meant to deprive the states of the power of punishing murder or theft, if committed by a foreigner, or the citizen of another state.

1 BLACKSTONE'S COMMENTARIES, *supra* note 174, at 420-21 (1803) (alteration in original); see also 3 STORY, *supra* note 176, at 536 n.2 (citing BLACKSTONE'S COMMENTARIES and *Chisolm v. Georgia*).

If one is not convinced that those are the appropriate meanings of the words, it nevertheless can be shown that the Constitution does not actually use the words synonymously. Admittedly, the Constitution sometimes refers to “controversies” as “cases,”¹⁷⁸ which leads Professor Amar to conclude that the words are synonymous.¹⁷⁹ “Cases,” however, are never referred to as “controversies.” So the most that can be said is that the word “cases” encompasses “controversies,” but not vice versa.¹⁸⁰ This general observation—that “cases” is broader than, but includes, “controversies”—is consistent with the civil/criminal distinction, thereby providing additional support for the interpretation.

Once it is established that the term “cases” encompasses “controversies,” among other things, the selective use of the word “all” becomes easy to understand. “All” could have been used to show that more than just “controversies” were included; in other words, “all [types of] cases,” as opposed to “controversies” only.¹⁸¹ This use of “all” with “cases” may seem somewhat redundant, but it is fairly common parlance and used to emphasize the broad meaning that is intended. While this interpretation

178. See U.S. CONST. art. III, § 2, cl. 2. In setting forth the original jurisdiction of the Supreme Court, the Constitution refers to controversies “in which a State shall be a Party” as “those [cases].” Also, in setting forth the appellate jurisdiction of the Supreme Court, the Constitution refers to “all the other cases,” which must include the “controversies.”

179. See Amar, *Two Tiers*, *supra* note 1, at 244 n.128.

180. The civil/criminal distinction is also maintained in the first Judiciary Act, which neither refers to criminal cases as “controversies,” nor grants to any federal court jurisdiction over criminal cases in any of the categories of “controversies.” See Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

181. Indeed, Professor Amar himself would have a difficult time interpreting those words, as used in the appellate jurisdiction-granting clause, in any other manner. See U.S. CONST. art. III, § 2, cl. 2 (“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.” (emphasis added)). Surely under Professor Amar’s theory, the Supreme Court’s appellate jurisdiction (and derivatively Congress’s Exceptions power) does not extend to “each and every other case before mentioned,” but only to “all the other types of cases before mentioned.”

The former interpretation would be problematic on two fronts. On the one hand, it would seem to prevent the Supreme Court from hearing the appeal of any case which happens to fall within its original jurisdiction—because only if the particular case does not fall within the Court’s original jurisdiction does the case fall within its appellate jurisdiction. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 392-405 (1821) (permitting the Supreme Court to exercise appellate jurisdiction over all cases within its constitutional grant of appellate jurisdiction, even if such cases also fall within the constitutional grant of original jurisdiction). At the very least, then, Professor Amar must read this provision as “each and every other *type of case* before mentioned.”

On the other hand, it would also mean that Congress’s Exceptions power applies in “each and every other case,” including federal question cases brought in State court. Professor Amar would have a difficult time cabining Congress under this interpretation. However, some leeway could be gained for him by reading the provision as applying generally to all the categories rather than specifically to each case.

of “all” may not be very rich in meaning, it is surely a plausible interpretation—and it accounts for the textual differences rather than merely ignoring them.¹⁸²

To this day, Professor Amar remains unpersuaded that there is any difference between “cases” and “controversies.” Nevertheless, he believes that any distinction would be “wholly irrelevant.” The fact remains, he argues, that “the judicial power shall extend to ‘all’ [criminal and civil] cases in the first tier, but not necessarily ‘all’ [civil] controversies in the second.”¹⁸³ As has been demonstrated, however, “all cases” can and should be interpreted as “all types of cases” rather than “each and every case.”¹⁸⁴ Thus, the civil/criminal distinction is most certainly not irrelevant.¹⁸⁵

E. “Judicial Power” and “Jurisdiction”

After describing cases to which judicial power extends, the Constitution goes on to describe the jurisdiction of the Supreme Court. The careful reader will pause to ponder the difference between the terms “judicial power” and “jurisdiction.” As a general matter, “difference[s] of phraseology” should be presumed intentional unless proven otherwise.¹⁸⁶ Admittedly, a distinction between “jurisdiction” and “judicial power” is difficult to maintain. The terms are generally assumed to be synonymous and are often used interchangeably.¹⁸⁷ However, a careful analysis reveals that there is a subtle difference.¹⁸⁸

182. See Amar, *Reply*, *supra* note 1, at 1656-57. While “all cases” may be technically redundant, it is by no means “awkward” as Professor Amar suggests. See *id.* at 1657. It is a perfectly normal way to emphasize the breadth of the term.

Professor Amar also argues that “if the term ‘controversies’ simply means ‘civil cases,’ the framers could have said so with great ease.” *Id.* at 1656-57. But if the term “controversies” means “civil cases,” the Framers *did say so—explicitly!* The argument that the Framers could have been more explicit can only be made against interpretations that attempt to infer too much from the text; it loses most, if not all, of its strength when the definition of a particular term is the issue.

183. *Id.* at 1657.

184. See *supra* notes 171-82 and accompanying text.

185. It should be noted that even if “all cases” means “each and every case,” Amar’s argument can be turned on him. The fact is irrelevant. Only the judicial power extends to “all” such cases. As will be shown in the next Section, there is no command that actual jurisdiction—other than perhaps the Supreme Court’s original jurisdiction—extend to any case at all.

186. See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

187. Any number of sources could be cited to demonstrate the fact that the terms “judicial Power” and “Jurisdiction” are often used interchangeably, so the point must be conceded *ab initio*.

188. One interesting discussion of the difference, however, occurs in the case of *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 622-23 (1838). In the course of a discussion about

The term "jurisdiction" predates the Constitution. Although it is a broad and vague term, the commonly understood meaning is the authority of a given court to hear and decide a given case.¹⁸⁹ The term "judicial power," on the other hand, is original to the Constitution. To properly understand the meaning of "judicial power," comparison should be made to its constitutional analogues, the legislative power and the executive power. The legislative power of the United States is the power to enact laws for the United States. The executive power is the power to execute the laws and act on behalf of the United States. The judicial power, therefore, might best be understood as the general power to adjudicate

how the circuit courts had the constitutional power but not necessarily the statutory jurisdiction to issue writs of mandamus, the Court digresses into dictum about the distinction between the "judicial Power" and "Jurisdiction":

That there is a distinction, in some respects, cannot be doubted; and, generally speaking, the word power is used in reference to the means employed in carrying jurisdiction into execution. But, it may well be doubted, whether any marked distinction is observed and kept up in our laws, so as in any measure to affect the construction of those laws. Power must include jurisdiction, which is generally used in reference to the exercise of that power in courts of justice. But power, as used in the constitution, would seem to embrace both. Thus, all legislative power shall be vested in Congress. The executive power shall be vested in a President. The [j]udicial 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, &c. This power must certainly embrace jurisdiction, so far as that term is applicable to the legislative or executive power. And as relates to judicial power, the term jurisdiction is not used, until the distribution of those powers among the several courts, is pointed out and defined.

There is no such distinction in the two sections of the [Act of February 27, 1801] in the use of the terms power and jurisdiction, as to make it necessary to consider them separately. If there is any distinction, the two sections, when taken together, embrace them both.

Id. (emphasis added).

This language aptly demonstrates both that there is a subtle difference between the terms and the fact that the difference is not often strictly observed.

Although the Court states that "power, as used in the constitution, would seem to embrace both [power and jurisdiction]," the Court is not speaking specifically of the *judicial power*, but only of the term "power" generally. With respect to the judicial power, the Court notes that the subtle distinction is maintained in the Constitution even if not in the various statutes which followed.

189. See BALLENTINE's, *supra* note 131, at 690 (3d ed. 1969) ("[T]he right of a tribunal to exercise its power with respect to a particular matter."); BLACK'S, *supra* note 131, at 853 ("It is the power of the court to decide a matter in controversy . . ."); BOUVIER'S, *supra* note 174, at 1760-68 ("The authority by which judicial officers take cognizance of and decide causes. . . . The power to hear and determine a cause." (citation omitted)); GARNER, *supra* note 132, at 488 ("[T]he power of a court to decide a case or enter a decree."); *cf.* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 718 (1838) ("Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them."); United States v. Arrendondo, 31 U.S. (6 Pet.) 691, 709 (1832) ("The power to hear and determine a cause is jurisdiction."). *But see supra* note 187 and accompanying text.

cases and interpret the laws in the name of the United States.¹⁹⁰ In other words, the judicial power is the general power of the judiciary while jurisdiction is the authority to exercise that power in a given case.¹⁹¹ The distinction is subtle, but nonetheless important.

The Constitution provides that the judicial power “shall be vested” in certain courts and “shall extend” to certain cases. The judicial power is clearly irrevocably vested and unalterably defined by the Constitution. Congress has no control over the judicial power. In fact, the Framers specifically rejected a proposal that would have given Congress control over the judicial power.¹⁹² By contrast, the Constitution explicitly grants Congress control over the Supreme Court’s appellate jurisdiction¹⁹³ and implicitly over the inferior courts’ jurisdiction.¹⁹⁴

190. See BLACK’S, *supra* note 131, at 849 (“The authority exercised by that department of government which is charged with the declaration of what law is and its construction. The authority vested in courts and judges, as distinguished from the executive and legislative power.”); BOUVIER’S, *supra* note 174, at 1740 (“The authority vested in the judges. The authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law.”); JONATHAN S. LYNTON, *BALLENTINE’S LEGAL DICTIONARY AND THESAURUS* 353 (1995) (“1. The powers granted to a court or to the JUDICIAL BRANCH of government by its constitution and statutes. 2. The power of a court to perform a judicial act or to carry out a judicial function.”); see also Amar, *Two Tiers*, *supra* note 1, at 233 (describing judicial power as including “power to speak in the name of the nation, to speak definitively and finally”). But see *supra* note 187 and accompanying text.

191. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838) (“Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them”); see also *supra* notes 162 (citing cases stating that the Constitution grants Article III courts the capacity to receive jurisdiction) and 187 (quoting *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 622-23 (1838)).

Others have focused on the distinction between the terms and have come to the same conclusion. See, e.g., HAROLD W. CHASE & CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION* 5 (1974) (“It is important in the study of constitutional interpretation to understand the distinction between ‘judicial power’ and ‘jurisdiction.’ ‘Jurisdiction’ is the authority of a court to exercise ‘judicial power’ in a particular case.”); EDWARD F. COOKE, *A DETAILED ANALYSIS OF THE CONSTITUTION* 94 (6th ed. 1995) (*Judicial power* “means the power of a court to hear and pronounce a judgment and carry that judgment into effect,” while *jurisdiction* “is the authority of a court to exercise judicial power in a specific case.”); WILLIAM A. SUTHERLAND, *NOTES ON THE CONSTITUTION OF THE UNITED STATES* 518 (Fred B. Rothman & Co. 1991) (1904) (“Jurisdiction is the power . . . to adjudicate or exercise judicial power . . .”).

192. See *infra* text accompanying notes 288 and 293.

193. U.S. CONST. art. III, § 2, cl. 2 (the Exceptions Clause).

194. Since Congress has the power “[t]o constitute Tribunals inferior to the supreme Court,” the Necessary and Proper Clause permits Congress to define the jurisdiction of those courts. See U.S. CONST. art. I, § 8, cls. 9 and 10; see also *supra* notes 9-10 and accompanying text.

This scheme makes sense. It would be odd if any branch could take away the “power” of any other branch; therefore, Congress arguably should not be able to control the judicial power. On the other hand, the ability of one branch to exercise its power is often limited by other branches. For example, Congress’s ability to exercise its legislative power is limited by the presidential veto as well as by judicial review. Thus, it is not unusual that Congress is able to control the jurisdiction of the judiciary.

Constitutional scholars unanimously consider the first paragraph of Article III, Section 2 to set forth the limit of federal jurisdiction. In other words, an Article III court may not exercise jurisdiction over any case that does not fall within one of those categories.¹⁹⁵ However, the language does not require that the jurisdiction of the federal courts be extended to the full limits of the judicial power. Professor Amar finds such a requirement by interpreting the judicial power as different than, but including, actual subject matter jurisdiction. He offers, however, no analytical support for this interpretation.¹⁹⁶ Moreover, this would lead to a problematic result: because the entire judicial power is vested in the inferior courts, they would have jurisdiction over all the enumerated cases.¹⁹⁷ The same would be true for the Supreme Court, although the

195. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (“[T]he statute cannot extend the jurisdiction beyond the limits of the constitution.”); see also *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 491 (1983) (“This Court’s cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution.”).

196. See Amar, *Two Tiers*, *supra* note 1, at 231 n.88.

The key issue is the applicability of the Exceptions Clause, which applies only to jurisdiction and not to judicial power. See U.S. CONST. art III, § 2, cl. 2. Regardless of whether the judicial power and jurisdiction refer to two different concepts or are synonymous, the Exceptions Clause is not limited by, but rather controls, the words “shall extend.” See *infra* notes 217 and accompanying text (assuming judicial power differs from jurisdiction) and 201 (assuming judicial power is synonymous with jurisdiction). Only if the judicial power is different than, but necessarily and co-extensively includes, actual subject matter jurisdiction could the words “shall extend” be read to limit the Exceptions power in any way—and even that interpretation raises significant problems of its own. See *infra* notes 197-98 and accompanying text.

197. While the argument that the judicial power is vested only in the Supreme Court and in the inferior courts as a whole is not grammatically foreclosed, the better reading of the Vesting clause is that each Article III court is fully vested with the judicial power of the United States. See *supra* note 144. This reading both supports and is supported by the interpretation of the judicial power as the general power of the judiciary rather than jurisdiction as such. If the judicial power is vested in each Article III court, then it cannot possibly include jurisdiction—or Congress would have no authority to control jurisdiction at all. At the same time, if the judicial power is the general power of the judiciary “to speak in the name of the nation,” then the fact that any Article III court can exercise judicial review suggests that the judicial power is fully vested in each Article III court, even

more specific Exceptions Clause could be said to control the general language of the Vesting Clause.¹⁹⁸ However, because there is no Exceptions Clause vis-à-vis the inferior courts, the inferior courts' jurisdiction would have to include all of the cases to which the judicial power extends.

It may seem troubling that there is a ceiling for federal court jurisdiction, but not an analogous floor. The only minimum discernable from the text of the Constitution, however, is the Supreme Court's original jurisdiction.¹⁹⁹ Moreover, the events at the Constitutional Convention strongly suggest that the aggregate jurisdiction was not intended to always be co-extensive with the judicial power. To the contrary, the Framers of the Constitution left the establishment of inferior courts to Congress's discretion. Furthermore, the Framers were uncertain Congress would establish such courts.²⁰⁰ In light of this, one would expect the Framers to have explicitly qualified the Exceptions Clause if they had intended to limit it in the absence of inferior courts. The fact that the Exceptions Clause is not qualified strongly suggests that the Framers had no such intention.²⁰¹

if such court lacks jurisdiction over certain cases. In any event, the interpretation proposed in this Article does not hinge on this distinction.

198. Professor Amar, however, finds this interpretation problematic. See Amar, *Two Tiers*, *supra* note 1, at 241 n.120 ("This is an inference that should not be lightly indulged if an alternative reading is possible that would harmonize all the words . . .").

199. Perhaps some indeterminate minimum jurisdiction can be inferred from the fact that Congress is only granted the authority to make exceptions and regulations to the Supreme Court's appellate jurisdiction, rather than the explicit authority to control federal jurisdiction at will. This contention will be dealt with later. See *infra* notes 211-14 and accompanying text. For now it will suffice to note that the only categories of cases which constitutionally require federal court jurisdiction are those few that fall within the original jurisdiction of the Supreme Court.

200. See *supra* note 7 and accompanying text (discussing the Framers granting to Congress discretion to establish inferior federal courts).

201. Even if one is not convinced of the distinction between jurisdiction and judicial power, the traditional view remains on solid ground. The argument of both the mandatory and two-tier theories is, essentially, that Congress's power under the Exceptions Clause is limited by the fact that the judicial power or jurisdiction "must include" the enumerated cases. If, however, the judicial power or jurisdiction only "reaches" the enumerated cases, see *supra* Part II.C., then Congress's power under the Exceptions Clause would not be limited thereby. As it originated in the Committee of Detail, the Exceptions Clause was clearly permitted to modify the language, "shall extend." See *infra* note 287 and accompanying text. There is no reason to suppose that the relationship between the words "shall extend" and the Exceptions Clause was implicitly modified thereafter.

In fact, as long as "shall" is self-executing rather than mandatory, see *supra* Parts II.A and II.C, the traditional view survives: although the judicial power/jurisdiction automatically extends to all the cases and to the controversies, Congress is permitted to make exceptions and there is no "must extend" to limit that power. *But see supra* note 196.

F. "Exceptions" and "Regulations"

After describing the original jurisdiction of the Supreme Court, the Constitution states that "[i]n 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."²⁰² This sentence should be examined carefully.

"[A]ll the other Cases before mentioned" is a reference to the cases within the judicial power—i.e., those enumerated in the preceding paragraph of Article III.²⁰³ Constitutional interpreters generally admit that Congress's power under the Exceptions Clause applies to all of the enumerated categories of cases within the Supreme Court's appellate jurisdiction, including those arising under federal law. Opponents of that power simply find other ways to limit it.

"[T]he supreme Court *shall* have appellate jurisdiction," once again, could be viewed either as mandatory or self-executing.²⁰⁴ Interpreted mandatorily, it means that the Supreme Court *must* have appellate jurisdiction. However, this interpretation makes little sense given the Exceptions Clause that follows.²⁰⁵ On the other hand, interpreted as self-executing, it means that the Constitution itself vests the Supreme Court with appellate jurisdiction, subject to the Exceptions Clause. This latter interpretation seems most proper.²⁰⁶

The meat of the sentence is the Exceptions Clause, which limits the Supreme Court's appellate jurisdiction by "such Exceptions, and . . . such Regulations as the Congress shall make."²⁰⁷ The term "Regulations" is not very problematic. It could be characterized as the "authority to 'or-

202. U.S. CONST. art. III, § 2, cl. 2.

203. *See id.*

204. *See id.*

205. Professors Clinton and Amar disagree. Amar, *Two Tiers*, *supra* note 1, at 241 n.120 (interpreting "shall" as mandatory); Clinton, *Guided Quest*, *supra* note 1, at 782 (same). Justice Story disagreed as well, although he seemed to concede that "shall extend" is controlled by the Exceptions Clause. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 332 (1816) ("The [Exceptions Clause itself] shows that the framers of the constitution used the words ["shall extend"] in an imperative sense. What necessity could there exist for [the Exceptions Clause] if the preceding words were not used in that sense?").

206. The distinction is a subtle one, but even those who have heretofore supported the "mandatory" view would likely concede that it is actually self-executing. Otherwise, one wonders what would happen if Congress should ignore the mandate. Even *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), which supported very broad congressional power, admitted that, at least technically, the Constitution itself vests the Supreme Court with appellate jurisdiction. *See id.* at 512.

207. U.S. CONST. art. III, § 2, cl. 2.

ganize' Supreme Court jurisdiction."²⁰⁸ When Congress creates rules of procedure or evidence, it is regulating the Supreme Court's jurisdiction. This is not threatening to those who espouse mandatory theories of jurisdiction because it is, to some extent, a necessary function.

Exceptions, on the other hand, are threatening. A plain reading of the term suggests that it means a departure from the general rule.²⁰⁹ The Constitution establishes a general rule—that the Supreme Court has appellate jurisdiction over “all the other [enumerated] Cases”—but allows Congress to make exceptions. Any departure from the general rule would be an exception. Since the Constitution permits “such Exceptions . . . as the Congress shall make,” there do not appear to be internal limits on this power.²¹⁰

Experts have argued that in order for a jurisdictional restriction to be an “exception,” it must be relatively minor.²¹¹ Even accepting this debatable proposition for the sake of argument,²¹² Congress would still have an enormous degree of control over the Supreme Court's jurisdiction. Even if an exception were made for some of the most controversial subjects—e.g., abortion, school prayer, and busing—it would not be so great as to find that there was no longer an exception but a new rule.²¹³ Surely any

208. Clinton, *Guided Quest*, *supra* note 1, at 778; *see also* Ratner, *Supreme Court*, *supra* note 1, at 170 (“A ‘regulation’ in the latter part of the eighteenth century, as today, was a rule imposed to establish good order.” (footnote omitted)).

209. “Dictionaries in existence at the time of the Constitutional Convention defined an ‘exception’ as an exclusion from the application of a general rule or description.” Ratner, *Supreme Court*, *supra* note 1, at 168.

210. U.S. CONST. art. III, § 2, cl. 2. Professor Clinton argues that the word “exceptions” was merely intended to grant Congress a distributive power to exclude cases from the Supreme Court's appellate jurisdiction *only if* it vested jurisdiction in a lower federal court. *See infra* notes 268-69 and accompanying text. This is an interpretation that the words will not bear. Professor Amar's interpretation of Article III leads to a similar conclusion with respect to the first tier of jurisdiction. However, his view does not stem from his interpretation of the Exceptions Clause, but rather from other language in Article III. *See supra* note 85 and accompanying text. Thus, Professor Amar's interpretation is significantly more defensible than Professor Clinton's.

211. *See* Ratner, *Supreme Court*, *supra* note 1, at 170 (“[A]n exception cannot destroy the essential characteristics of the subject to which it applies.”); Sager, *supra* note 1, at 44 (“An ‘exception’ implies a minor deviation from a surviving norm; it is a nibble, not a bite.”). *But see* THE FEDERALIST NO. 81, *supra* note 38, at 486 (“Justice through [the inferior courts] may be administered with ease and dispatch and appeals may be safely circumscribed within a narrow compass.”).

212. A more moderate position asserts that “a total abolition of appellate jurisdiction would be impermissible; . . . something substantial is to remain after Congress' subtractions have been performed.” Tribe, *supra* note 1, at 135.

213. *See* Redish, *Supreme Court*, *supra* note 1, at 902 (“[I]t is clear that even if all the currently proposed jurisdiction-curbing legislation . . . were enacted, that tipping point [*i.e.*, the ‘point the “exception” has become so large that it has effectively superseded the “rule”] would not have been reached.”).

one of those subjects would qualify as an exception, and Congress is permitted to make multiple "Exceptions." So even if an exception must be "a nibble [rather than] a bite,"²¹⁴ multiple nibbles can amount to a sizeable bite.

There are also those who argue that it would be improper for Congress to take certain subjects out of the Supreme Court's appellate jurisdiction. This theory is indefensible considering the text of the Constitution. The reference to "all the other Cases before mentioned" must mean that in each enumerated category the Supreme Court has appellate jurisdiction subject (in each case) to Congress's control.²¹⁵ Thus, even in the category of cases "arising under" federal law, Congress has the authority to make such exceptions and regulations to the Supreme Court's jurisdiction as it chooses. This authority must extend equally to mundane and controversial cases, for there is nothing that limits its operation to the former.

Finally, Professor Amar argues that "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."²¹⁶ However, it is only the judicial power, *not jurisdiction*, that "shall extend" to the enumerated cases.²¹⁷ Moreover, "shall extend," as has been shown, is not so much mandatory as descriptive.²¹⁸ Thus, there is no conflict.

G. *The Remainder*

The majority of Article III, including the essential provisions dealing with federal court jurisdiction, has now been reviewed. In order to ensure that nothing has been overlooked, however, this Article will now review, if only briefly, the remaining language.

214. Sager, *supra* note 1, at 44.

215. Actually, an argument could be made that there should be no appellate jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party," because those are assigned to the Supreme Court's original jurisdiction and its appellate jurisdiction is limited to "all the *other* Cases." U.S. CONST. art. III, § 2, cl. 2 (emphasis added). However, the Supreme Court has rejected this view. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 392-405 (1821) (allowing Supreme Court appellate jurisdiction over all cases within constitutional grant of appellate jurisdiction, even if such cases also happen to fall within constitutional grant of original jurisdiction). Even the more moderate argument, that the Supreme Court cannot exercise appellate jurisdiction over cases which fall exclusively within the constitutional grant of original jurisdiction, is irrelevant for present purposes: it does not affect the interpretation of the remainder of Article III, and any problems it generates apply equally to all interpretations of Congress's authority. See *infra* notes 237-39 and accompanying text.

216. Amar, *Two Tiers*, *supra* note 1, at 255.

217. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . .").

218. See *supra* notes 159-61 and accompanying text (discussing "shall extend").

1. Independence of the Judiciary

The second sentence of Article III, Section 1 guarantees federal judges life tenure and undiminishable salaries. Here, the Framers assured the independence of the judiciary by freeing judges from the pressures of seeking reappointment or avoiding Congress's disfavor.²¹⁹ A plain reading of the Constitution indicates no connection between these provisions and jurisdiction-stripping. They are simply tenure and salary provisions. Yet there are those who seek to make more of them.

Because their independence is guaranteed, Article III judges can be said to be structurally superior to state court judges, who enjoy no similar security. In addition, Article III judges are appointed and can be removed at the federal level, which assures their competence and probity. Again, there are no similar assurances with state court judges. At least two arguments can be made as a consequence. The first is that state courts are inadequate to have the final say over issues of federal law and, therefore, it is important to have a federal court open to hear, if only on appeal, each case involving federal law.²²⁰ The second argument is that the tenure and salary requirements are constitutional requirements like any other and, in order for them to be meaningful, Congress's ability to remove cases from the federal judiciary must be limited.²²¹

Neither of these arguments is particularly convincing. The first ignores the crucial distinction between the desirable and the necessary.²²² It may be desirable to have federal courts hear each case involving federal law, just as it may be desirable to have federal courts hear each diversity case. But if neither is required by the text of the Constitution, then it is for the Congress to decide how desirable or practical each truly is.

The second argument reads too much into the Constitution. The Constitution requires simply that Article III judges have life tenure and undiminishable salaries. As discussed earlier, there is no constitutional requirement that cases be decided by judges meeting those requirements.²²³ In other words, "the tenure and salary provisions . . . were simply designed 'to preserve the integrity of federal courts when they actually were used,' not to assure that they *must* be used."²²⁴

In short, the tenure and salary provisions of Article III add little to the present discussion. Although they are explicit requirements no less im-

219. See THE FEDERALIST NOS. 78-79, *supra* note 38 at 469-75.

220. See Amar, *Two Tiers*, *supra* note 1, at 234.

221. See Sager, *supra* note 1, at 62-68.

222. Cf. Gunther, *supra* note 1, at 898, 908.

223. See *supra* notes 51-53 and accompanying text.

224. Gunther, *supra* note 1, at 915 (footnote omitted).

portant than any others, they simply do not have any bearing on jurisdiction-stripping issues.

2. *Supreme Court Original Jurisdiction*

The next provision states that, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction."²²⁵ This provision uses "shall" in the self-executing sense because the Constitution directly grants the Supreme Court its original jurisdiction.²²⁶ Moreover, since the Exceptions clause applies only to the Supreme Court's appellate jurisdiction, its original jurisdiction is beyond Congress's control.²²⁷ Thus, this provision is of limited relevance to this article.

Nevertheless, a few issues may be worth considering at this point. First, the Supreme Court's original jurisdiction is the only explicit minimum for federal court jurisdiction in the Constitution. Thus, Professor Amar is able to argue that the traditional view itself "bifurcate[s] article III into mandatory and permissive tiers by distinguishing between Supreme Court original and appellate jurisdiction."²²⁸ Although this is undeniable from the text of the Constitution, it does not permit Professor Amar to change the debate into a question of "*which* bifurcation theory makes the most sense?"²²⁹ The Framers had their reasons for doing what they did; commentators today may or may not find these reasons persuasive.²³⁰ Any interpretation, however, must stay tied to the text of the document being interpreted. As has been demonstrated, the traditional view remains on solid ground even when one "take[s] seriously the words 'shall' and 'all.'"²³¹

In any event, the mandate of Supreme Court original jurisdiction is a far cry from the mandate of jurisdiction over the first tier of cases in the

225. U.S. CONST. art. III, § 2, cl. 2.

226. See *supra* Parts II.A, II.C.

227. See 13 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3525, at 216-17, 221 (2d ed. 1984); see also *infra* note 324 and accompanying text.

228. Amar, *Judiciary Act*, *supra* note 1, at 1523-34.

229. *Id.* at 1523.

230. See *California v. Arizona*, 440 U.S. 59, 65-66 (1979) ("The Framers seem to have been concerned with matching the dignity of the parties to the status of the court."). Compare Amar, *Judiciary Act*, *supra* note 1, at 1523 ("[O]ne would be hard pressed indeed to develop strong structural reasons for seeing all cases in the Supreme Court's original jurisdiction as qualitatively more important than all cases in its appellate jurisdiction—including the all-important federal question category."), with Meltzer, *supra* note 1, at 1598 ("I am quite satisfied . . . with the traditional explanation for the original jurisdiction: that federal jurisdiction over another sovereign is so sensitive that only the court of greatest dignity should exercise it." (footnote omitted)).

231. Amar, *Judiciary Act*, *supra* note 1, at 1524-25.

two-tier theory. The Constitution does not grant the Supreme Court *exclusive* original jurisdiction, so there is nothing to prevent another court from having concurrent jurisdiction over those cases.²³² In fact, the judicial power of the inferior federal courts specifically extends to these cases,²³³ so Congress must at least be able to vest the inferior federal courts with concurrent jurisdiction if it chooses. Even vesting state courts with concurrent jurisdiction is not forbidden. As a policy matter, it might be thought proper for Congress at least to include a right of removal in that event,²³⁴ but again there is no explicit requirement to that effect.²³⁵ Thus, even the Supreme Court's original jurisdiction is not strictly mandatory.

One problem remains. The Supreme Court's appellate jurisdiction applies only to "all the *other* Cases before mentioned," which seems to exclude the categories of cases in its original jurisdiction.²³⁶ A very plausible argument could be made that the language was merely intended to mean that the Supreme Court has appellate jurisdiction over any case in which it did not exercise original jurisdiction (subject to the Exceptions Clause). However, this interpretation does not seem to comport with a strict reading of the text in question.²³⁷ Nevertheless, the difficulty af-

232. See *California v. Arizona*, 440 U.S. 59, 65 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930). *But see Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824).

The language in the report of the Committee of Detail would have permitted exactly this in cases of impeachment of federal officers (except for the impeachment of the President, where the draft specifically forbade assigning jurisdiction to the inferior courts). See *infra* text accompanying note 260. Such an explicit prohibition would have been unnecessary if Supreme Court original jurisdiction were understood to mean exclusive jurisdiction. The fact that the prohibition on assignment related only to the President strongly suggests that the Committee of Detail believed the Supreme Court's original jurisdiction need not be exclusive.

233. See *supra* Part II.B.

234. See Meltzer, *supra* note 1, at 1597 n.96 ("That the [Supreme Court's original] jurisdiction [in the Judiciary Act of 1789] is concurrent only, with no removal to the Supreme Court authorized should plaintiff file in a different forum, is hardly unproblematic."); *id.* at 1608 n.138.

235. Despite Professor Meltzer's misgivings, see *supra* note 234, the fact that the first Judiciary Act did allow state courts concurrent jurisdiction without a right of removal over certain cases within the Supreme Court's original jurisdiction provides strong support for this textual argument.

236. See *Osborn*, 22 U.S. (9 Wheat.) at 820 ("In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form.").

237. Nevertheless, the Supreme Court has properly interpreted the Granting clauses so as to minimize the impact of this provision by holding that the Supreme Court can exercise appellate jurisdiction over all cases within its appellate jurisdiction even if such cases also happen to fall within its original jurisdiction. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 392-405 (1821). Thus, if a case in which a state is a party also arises under federal law,

fects all interpretations equally.²³⁸ The traditional view, however, could accept this limitation without losing its essential characteristic—the view that Congress possesses nearly plenary power to *restrict* federal court jurisdiction. Even for mandatory theories of jurisdiction, this limitation would not necessarily pose any serious problems, for an inferior court could have jurisdiction over those cases, either originally, on appeal, or both. *A fortiori*, the nonmandatory traditional view would not be affected.²³⁹

3. “Both as to Law and Fact”

One final provision to consider are the words “both as to Law and Fact” in the Exceptions Clause.²⁴⁰ It has been suggested that the Exceptions Clause modifies the word “Fact” rather than “appellate Jurisdiction,” and that, therefore, Congress’s control over the appellate jurisdiction of the Supreme Court is limited to making exceptions and regulations to the Court’s ability to review findings of fact.²⁴¹ The consensus, however, is that this interpretation is incorrect.²⁴² First, the gram-

the Supreme Court can exercise appellate jurisdiction by virtue of the “arising under” grant. *See id.*

238. Actually, the impact is felt much more keenly by the mandatory theories of jurisdiction. As admitted below in the text, mandatory theories could be satisfied by granting state courts concurrent original jurisdiction over cases affecting ambassadors, etc., as long as an inferior federal court had appellate jurisdiction over such cases. If, however, Congress chose to abolish the inferior courts, then, under the mandatory view, state courts could not have concurrent original jurisdiction. This is because the federal judicial power “must” extend to such cases. Since the Supreme Court cannot exercise appellate jurisdiction over any such cases, it must exercise original jurisdiction over every such case. (This would also tie up the Supreme Court substantially.) Under the traditional view, concurrent jurisdiction does not pose a problem.

239. The traditional theorists generally do not believe that any federal review is necessary as a matter of principle. Thus, even if inferior courts were unable to hear such cases, it would present less of a difficulty for non-mandatory than for mandatory theories of jurisdiction.

Of course, because the judicial power of the United States is fully vested in the inferior courts, see *supra* Part II.B, they are capable of hearing every category of cases enumerated in the Constitution—even if those cases cannot be heard by the Supreme Court on appeal.

240. U.S. CONST. art. III, § 2, cl. 2.

241. *See* RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); Brant, *supra* note 1; Merry, *supra* note 1, at 54 & n.6. *But see* Gunther, *supra* note 1, at 908 n.58 (describing Berger’s change of opinion).

242. *See* Clinton, *Guided Quest*, *supra* note 1, at 779 (“These arguments are almost surely wrong, since the exceptions and regulations clause was introduced long before the provision relating to appellate review of law and fact was inserted into the document.”); Gunther, *supra* note 1, at 901 (“[T]his ‘facts only’ limitation enjoys very little academic support today.”).

matical structure of the sentence strongly suggests otherwise.²⁴³ Second, the records of the Constitutional Convention,²⁴⁴ as well as *The Federalist*,²⁴⁵ confirm the contrary reading. Finally, neither Congress nor the Supreme Court has ever shared this interpretation.²⁴⁶ It seems entirely safe to say that this interpretation is simply wrong.

The natural reading of the Exception Clause gives the Supreme Court appellate jurisdiction to review both the law and facts of a case, and gives Congress the ability to make exceptions and regulations which could encompass either fact or law or both.

H. Summary

The interpretation set forth above can be summarized as follows. First, the term “shall,” as used in the relevant provisions of Article III, is not mandatory on Congress, but self-executing in nature. Second, the federal judiciary must consist of one Supreme Court, but the existence of the inferior courts is entirely within Congress’s discretion. Third, the entire judicial power is irrevocably vested in each Article III court, while the only jurisdiction irrevocably vested in any Article III court is the Supreme Court’s original jurisdiction. Fourth, the judicial power can only be exercised on the enumerated cases. Fifth, there is no requirement that the judicial power be exercised in any case (other than perhaps those within the Supreme Court’s original jurisdiction). Finally, Congress is

243. See Redish, *Supreme Court*, *supra* note 1, at 914 (discussing the “insurmountable linguistic . . . obstacles” facing the theory); see also HART AND WECHSLER, *supra* note 7, at 381 n.26; Gunther, *supra* note 1, at 901 (noting the effect of grammar on interpretation of the text).

244. A prior draft of the Constitution provided simply that “[i]n all other cases before mentioned, it [*i.e.*, Supreme Court jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make.” 2 RECORDS, *supra* note 7, at 186. The records reflect the following discussion:

Mr. Govr. Morris wished to know what was meant by the words “In all the cases before mentioned it (jurisdiction) shall be appellate with such exceptions &c,” whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law.

Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.

Mr. Dickinson moved to add after the word “appellate” the words “both as to law & fact which was agreed to nem: con.

2 *id.* at 431. (footnote omitted).

Thus, it is clear that the Framers intended the Exceptions Clause to modify “appellate Jurisdiction” rather than “Fact,” and that Congress’s authority to make exceptions to Supreme Court appellate jurisdiction goes beyond mere limitations on that Court’s review of factual determinations.

245. See, *e.g.*, THE FEDERALIST NO. 80, *supra* note 38, at 481; *id.* NO. 81, at 488.

246. See Redish, *Supreme Court*, *supra* note 1, at 914-15.

free to restrict the jurisdiction of the inferior courts, the Supreme Court, or both simultaneously as long as it does not violate any other constitutional provisions.

III. HISTORICAL SUPPORT

As shown above, a truly comprehensive interpretation of Article III demonstrates the traditional view that Congress has near plenary authority to restrict the jurisdiction of the federal courts. This Article will now examine historical sources to determine how well the interpretation compares with the historical evidence dating back to the Constitutional Convention. In addition, this Article will assess how well some competing interpretations fare under the same evidence.

One point that should be kept in mind when parsing the historical sources is that the text of the Constitution is the appropriate focal point of any interpretation because it was the text, rather than any preceding debates or subsequent history, that was ratified. Further, the text was intended to stand on its own. Under the rules of the Convention, the proceedings were closed and "nothing spoken in the House [could] be printed, or otherwise published or communicated without leave."²⁴⁷ In fact, the journal of the plenary proceedings of the Convention was not published until 1819,²⁴⁸ some thirty years after the Constitution was ratified. Arguably, the Framers themselves did not want the Convention to be scrutinized in this fashion.²⁴⁹

Because the text no longer can be said to support the competing interpretations, historical evidence may be less significant than it might otherwise have been. For example, if "shall" is not mandatory, or if "all cases" does not mean "each and every case," then any evidence that Professor Amar finds supporting the relative importance of the cases in his two tiers is irrelevant because there is still no requirement for Congress to grant jurisdiction in important cases. If, however, the preceding textual arguments are fundamentally misguided, then the present interpretation may deserve reconsideration.²⁵⁰

247. 1 RECORDS, *supra* note 7, at 17.

248. *See* 1 *id.* at xii.

249. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988) ("[T]he Framers themselves did not intend that their secret deliberations at the constitutional convention would provide authoritative guidance.").

250. For example, if the records of the Constitutional Convention establish that judicial power was originally vested "in one supreme Court and such inferior Courts as the Congress shall . . . establish," and that the Framers added the second "in" to avoid confusion, then the conclusion that independent judicial power was vested in both the Supreme Court and the inferior courts would be questionable. This would not invalidate the interpretation

A. *The Constitutional Convention*

In 1787, the Constitutional Convention convened to examine the weaknesses inherent in the Articles of Confederation. Two prominent plans, discussed early in the deliberations by the Committee of the Whole were the Virginia Plan, proposed by Mr. Randolph,²⁵¹ and the New Jersey Plan, proposed by Mr. Patterson.²⁵² The major similarities between the plans included the establishment of a Supreme Court and the independence of the federal judiciary. These two points were never seriously debated at the Convention and seemed to be accepted by all the Framers. Thus, these two characteristics survived relatively unchanged in each succeeding draft of the Constitution.²⁵³ The major difference between the two plans dealt with the inferior courts: the New Jersey Plan did not

proposed in this Article, but would certainly remove one of the obstacles facing the competing interpretations. However, there is no such evidence.

251. The relevant part of the Virginia Plan read as follows:

9. [Resolved]. [T]hat a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. [T]hat the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

1 RECORDS, *supra* note 7, at 21-22.

252. The relevant part of the New Jersey Plan read as follows:

5. [Resolved]. [T]hat a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive, & to hold their offices during good behaviour, to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the Judiciary so established 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: that none of the Judiciary shall during the time they remain in Office be capable of receiving or holding any other office or appointment during their time of service, or for thereafter.

1 *id.* at 244.

253. The major difference in these provisions between the first draft and the final version of the Constitution is that the salaries of the federal judges became increasable, but remained undiminishable. See U.S. CONST. art. III, § 1 ("Compensation . . . shall not be diminished . . .").

include any, while the Virginia Plan did. This was a major issue at the Convention and, as discussed earlier, was resolved in a compromise empowering, but not requiring, Congress to establish inferior courts.²⁵⁴

Another major difference between the plans dealt with the jurisdiction of the federal judiciary. Some categories of cases were included in both, such as impeachments, piracies, cases involving foreigners, and cases involving the collection of revenue. The Virginia Plan also included a very broad grant of jurisdiction covering all "questions which may involve the national peace and harmony." The New Jersey plan had no similar provision, preferring to delineate specifically all cases over which the Supreme Court would have jurisdiction.

After some debate, a broadly-worded resolution on federal court jurisdiction was sent to the Committee of Detail: "Resolved That the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony."²⁵⁵

The Committee of Detail was commissioned "to report a Constitution conformable to the Resolutions passed by the Convention."²⁵⁶ Its work did not simply consist of cleaning up the resolutions or translating them into a Constitution. Rather, the Committee of Detail was established to develop a Constitution based on the resolutions.²⁵⁷ This necessarily involved generating details for the Constitution.

The first major Committee draft was composed by Mr. Randolph with emendations by Mr. Rutledge. This draft provided, in relevant part:

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

254. See *supra* note 7 and accompanying text.

255. 2 RECORDS, *supra* note 7, at 132-33.

256. 2 *id.* at 106.

257. Cf. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 130 (1913).

<& in Cases of Admiralty Jurisdiction>

But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachment & (in)> those instances, in which the legislature shall make it original; and the legislature shall organize it

8. The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals.²⁵⁸

The broad “arising under” jurisdictional grant remained relatively unchanged from the resolution. However, the details describing the category of cases “involving the national peace and harmony” were added. The most significant detail involved who should decide which cases fall within that broad category. It was conceivable that the courts themselves could decide whether to accept jurisdiction in any given case. However, the Committee quickly settled on Congress to make the decisions. Congress would assign certain cases to the judiciary, although only from a list provided by the Constitution itself. In addition, Congress was explicitly given broad discretion to provide for the jurisdiction of the inferior courts. Thus, the idea of Congress controlling the scope of federal jurisdiction dates back to this draft, in which it is clear that there is no obligation to assign any cases “involving the national peace and harmony” to any court.²⁵⁹

The final report from the Committee of Detail provided for federal court jurisdiction as follows:

Art. XI [X] Sect. 3. The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers, and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a

258. 2 RECORDS, *supra* note 7, at 146-47 (footnote omitted). The bracketed material indicates emendations in Rutledge’s handwriting.

259. There is no obligation for Congress to act because the Supreme Court’s jurisdiction “shall” extend only to such cases as Congress “may” assign, and the Congress “may” assign cases to the inferior courts according to its discretion. This is further evidence that “shall extend” was not intended in the mandatory sense. In the draft, at least, a mandatory reading with respect to the cases involving the national peace and harmony is nearly impossible.

party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.²⁶⁰

Much of the structure remained from the initial draft, although some notable changes were made. For example, the jurisdiction of the Supreme Court was now assigned by the Constitution, not Congress. Professor Clinton argues that with this change, Congress's authority to determine the jurisdiction of the federal courts "had disappeared entirely."²⁶¹ At the same time this change was made, however, the Exceptions Clause was introduced. Thus, Congress retained its power in a slightly different form: instead of having the power to grant jurisdiction, Congress now had the power to take it away.

Professor Clinton notes several factors to support his argument that the Exceptions Clause was not meant to grant Congress control over the Supreme Court's jurisdiction.²⁶² These factors merit detailed consideration.

Professor Clinton first notes that "during the prior deliberations of the Convention, no proposal hinting at congressional control over the scope of jurisdiction of the rational judiciary have been offered."²⁶³ To the contrary, the resolution referred to the Committee of Detail did so. By resolving that federal jurisdiction would encompass "such other questions as involve the national peace and harmony," the issue of who was to decide which cases would meet that requirement was raised. Under eighteenth century thought, Congress was the most likely candidate. In fact, Congress was settled upon quickly without contention as controller of federal jurisdiction.²⁶⁴

Second, Professor Clinton maintains that "the Committee's drafters clearly differentiated between congressional power over the *scope* of federal court jurisdiction and the allocation of that jurisdiction under the

260. 2 RECORDS, *supra* note 7, at 186-87. This is substantially similar to the Wilson/Rutledge draft which followed the Randolph/Rutledge draft in the Committee of Detail. Cf. 2 *id.* at 172-73.

261. Clinton, *Guided Quest*, *supra* note 1, at 775.

262. *See id.* ("[A] number of factors strongly suggest that the introduction of the exceptions and regulations clause was not intended to grant Congress any control over the scope of jurisdiction exercised by the Supreme Court.")

263. *Id.*

264. Even if this were not so, the Necessary and Proper Clause would have given Congress the authority to make such decisions. *See* U.S. CONST. art. I, § 8, cl. 18.

congressional authority over the *structure* of the federal judiciary.”²⁶⁵ Professor Clinton draws this conclusion from the fact that scope and structure are treated in “separate sentences and paragraphs or blocks of clauses.” This is a fairly large inference from a rather minor detail.

Professor Clinton further argues that “the framers never really drafted an exceptions and regulations clause as that term has come to be understood today.”²⁶⁶ Rather, it was actually intended as two distinct clauses. The “regulations clause,” on the one hand, granted Congress the “authority to ‘organize’ Supreme Court jurisdiction,” by “mak[ing] rules of practice and procedure for the exercise of the constitutionally vested jurisdiction of the Court.”²⁶⁷ The “exceptions clause,” on the other hand, “was at most an authority to delete a class of cases from the jurisdiction of the Supreme Court *in favor of exercise of power by an inferior federal court.*”²⁶⁸ This interpretation can hardly be supported by the text of the draft. “Such exceptions” must be read as a reference to “as the Legislature shall make.” It is quite unreasonable, as a grammatical matter, to suggest that “*such* exceptions” refers to the potential assignments in the *following sentence*, particularly when the immediately following “such”—“such Regulations”—clearly refers to “as the Legislature shall make.”

Moreover, the very next sentence of the Committee of Detail report authorizes Congress to assign cases to the inferior courts. As Professor Sager noted, “If the exceptions clause had been understood simply to authorize Congress to shift jurisdiction from the Supreme Court to lower courts, this language would have been superfluous.”²⁶⁹

265. Clinton, *Guided Quest*, *supra* note 1, at 777.

266. *Id.* at 781.

267. *Id.* at 778.

268. *Id.*

• 269. Sager, *supra* note 1, at 35 n.51. Professor Sager continued: “Indeed, because the assignment language was discretionary, the assignment clause itself was contrary to the view that Congress *must* vest jurisdiction in lower courts if Congress withholds jurisdiction from the Supreme Court.” *Id.*

It is not impossible to argue, as Professor Clinton does, that the two provisions are complementary, in that assignment language would enable Congress to grant jurisdiction to the inferior courts without removing it from the Supreme Court, while the Exceptions Clause would permit Congress to remove such cases from the Supreme Court. See Clinton, *Guided Quest*, *supra* note 1, at 792 n.167. Professor Clinton correctly noted that an Exceptions Clause alone would not have been adequate to accomplish the intended goal in this draft: “[t]he separate clause authorizing the assignment of Supreme Court jurisdiction to the inferior courts was necessary to delimit the scope of powers which constitutionally could be assigned to such courts,” because the jurisdictional menu in this draft was “only a description of ‘the jurisdiction of the supreme court,’” not of the judicial power. *Id.* However, he failed to realize that the assignments provision without an Exceptions Clause likely would have been adequate because Congress presumably would have been free to decide whether the assignment would be complete (*i.e.*, exclusive) or only partial (*i.e.*,

Professor Clinton's third factor suggesting a limited role for the Exceptions Clause "is that another potential construction exists for the word 'Exceptions.'"²⁷⁰ Under this "potential construction," the Exceptions Clause "would have served to set off original from appellate jurisdiction."²⁷¹ This "potential construction" is difficult to deduce from the text of the Constitution.²⁷² Furthermore, as Professor Clinton himself points out, "this . . . would have performed precisely the same function syntactically and been somewhat redundant of the phrase that begins the sentence in which it appears—'In all the other Cases beforementioned . . .'"²⁷³

Professor Clinton's final factor is that "the Committee report retained the mandatory phrase 'shall extend' when referring to the jurisdiction of the Supreme Court."²⁷⁴ This is Professor Clinton's strongest argument because the instant draft speaks in terms of jurisdiction rather than judicial power. However, it is much more reasonable to read the grant of jurisdiction as controlled by the exceptions clause than vice versa.²⁷⁵ After all, an exception by its nature defies some rule. Moreover, if "shall

concurrent). It is only because of other language—*e.g.*, the existence of a separate Exceptions Clause—that this reading is foreclosed. See Sager, *supra* note 1, at 50 n.95 ("The argument that the power to 'assign' the Court's jurisdiction entails the power to deprive the Court of jurisdiction is . . . undercut by the fact that the assignment provision . . . was accompanied by the exceptions clause, which *itself* apparently authorizes Congress to curtail the Court's jurisdiction." (citation omitted)). Since the assignments provision could have fully granted a distributive power to Congress, the Exceptions Clause likely was intended to serve a different function.

However, even if an assignment provision could not fairly be interpreted in this manner, the two provisions would remain independent of each other. Just as Congress could have assigned jurisdiction to the inferior courts without creating exceptions to the Supreme Court's jurisdiction, so, presumably, it could have made exceptions without making any assignments. Professor Clinton's only defense is presumed on a mandatory interpretation of "shall extend," and, therefore, fails. See *supra* Part II.C.

270. Clinton, *Guided Quest*, *supra* note 1, at 779.

271. *Id.* at 780.

272. See *id.* at 779. Professor Clinton argues that this interpretation "is consistent with Hamilton's original use of the phrase." *Id.* It is difficult to understand why Professor Clinton emphasizes this point. Although he acknowledges that "there is no evidence that the Hamilton plan was ever presented to the Convention," he speculates "that the document [may have been] made available to members of the Committee of Detail." *Id.* at 780. He then elaborates on the use of the Exceptions Clause in that document and argues that the same meaning may have been intended in the Committee draft.

The Hamilton Exceptions Clause, however, differed significantly: "such exceptions as are herein contained." 3 RECORDS, *supra* note 7, at 626. Had the Committee members modeled their Exceptions Clause after the one in Hamilton's draft, they likely would have incorporated the entire clause rather than only a misleading portion.

273. Clinton, *Guided Quest*, *supra* note 1, at 780.

274. *Id.* at 782.

275. See *infra* notes 286-87 and accompanying text.

extend” is better interpreted as “can include” rather than “must include,”²⁷⁶ there is no inconsistency with an ability to make exceptions. In any event, this language was not integrated into the final Constitution.

Thus, Professor Clinton’s “overwhelming case” is not so overwhelming after all. There is no reason to attribute new meaning to the Exceptions Clause.

As mentioned above, by simultaneously removing Congress’s power to assign Supreme Court jurisdiction and adding the Exceptions Clause, the Committee of Detail exchanged a regime in which Congress grants Supreme Court jurisdiction, for a regime in which Congress makes exceptions to Constitutionally granted jurisdiction. This seemingly minor change had a major consequence. In the resolution and the initial Committee draft, Congress’s control was limited to “cases involving the National peace and harmony.” In the Committee report, Congress’s control extended to *all cases* (other than those over which the Supreme Court has original jurisdiction). The Convention accepted this new formulation without objection, retaining it in each succeeding draft.

That the power was expanded without objection by the Federalists should not be surprising.²⁷⁷ Although in the context of an abstract debate it may seem like a major expansion of congressional power, in the context of the Convention it likely would not have been considered problematic. It must be remembered that the establishment of a Supreme Court was generally accepted by the Framers.²⁷⁸ Thus, there was little concern that Congress might use this power to eviscerate the Supreme Court—just as there was little concern that the Court would use judicial review to usurp power from the other branches. From the Framers’ perspective, there were too many attendant difficulties for either power to be abused.²⁷⁹ In fact, at least with respect to Congress, the Framers’ intuitions were correct, for Congress has rarely used its power under the Exceptions clause to restrain the Supreme Court.²⁸⁰

276. See *supra* notes 157-61 and accompanying text.

277. But see Sager, *supra* note 1, at 51 (“[I]t is hard to imagine that the framers were consciously adopting a provision that could completely unravel one of the most basic aspects of the constitutional scheme to which they had committed themselves.”).

278. See *supra* text accompanying notes 253.

279. The Framers saw the courts as “[the government’s] means of executing its own provisions by its own authority” THE FEDERALIST NO. 80, *supra* note 38, at 478. Thus, Congress would have to be hard pressed to want to eviscerate the federal judiciary. See *infra* notes 400-02 and accompanying text. The Framers also were not concerned with abuses by the judiciary because they believed that the judiciary lacked any “[]capacity to support its usurpations by force.” THE FEDERALIST NO. 81, *supra* note 38, at 485.

280. See, e.g., *supra* note 2 and accompanying text.

Professor Amar argues that “[c]areful analysis of various drafts of the Philadelphia Committee of Detail, which originated the two-tiered language, confirms [his] reading of the import of the word ‘all.’”²⁸¹ The Randolph/Rutledge draft clearly evidences a two-tiered model of jurisdiction: The Supreme Court’s jurisdiction automatically extends only to certain categories of cases (federal law and impeachments), and there is no congressional power to make exceptions.²⁸² However, that draft does not support Professor Amar’s interpretation of the word “all.” If “all” meant “each and every,” then one would certainly expect to see the Supreme Court’s jurisdiction extend to “*all* impeachments” rather than simply to “impeachments.” The absence of “all,” however, cannot be interpreted to indicate merely permissive jurisdiction. Structurally, it is highly improbable, given a two-tiered jurisdictional framework, that the Committee would have placed impeachments in the non-mandatory tier. Textually, there was no provision by which Congress could exclude any impeachments. Professor Amar himself agrees,²⁸³ but fails to realize that the single, rather than selective, use of the word “all” does not support his theory.²⁸⁴ On the other hand, if “all cases” simply meant “all types of cases,” then one would not expect to find the word “all” before impeachment because there is only one type of impeachment.²⁸⁵

Moreover, with the addition of the Exceptions Clause, the two-tiered structure disappeared entirely. In the Committee’s report, it was the Supreme Court’s *jurisdiction* that “shall extend” to the enumerated cases—not the *judicial power*. And Congress was clearly permitted to make exceptions to that jurisdiction. At least originally, then, the Exceptions Clause was permitted to modify “shall extend.”²⁸⁶ Moreover, since

281. Amar, *Judiciary Act*, *supra* note 1, at 1566.

282. *See supra* text accompanying note 258.

283. *See* Amar, *Two Tiers*, *supra* note 1, at 244 n.128.

284. Omission of the word “all” is a glaring departure from the Framers’ “selective use” of the word. Professor Amar is correct in pointing out that the omission of “all” from cases of admiralty jurisdiction should not be taken to mean much because Rutledge “scribbled [the additional] language on the bottom of the page” of Randolph’s draft. *See* Amar, *Reply*, *supra* note 1, at 1660; *supra* text accompanying note 258. The Committee of Detail cleaned up this carelessness by the time of its report. *See supra* text accompanying note 260. By contrast, the impeachments language that was originally part of Randolph’s draft was not cleaned up in the final report. That this was a mere mistake is much less plausible under the circumstances.

285. At first glance, one might be tempted to argue that in this draft there is no word “controversies” with which to juxtapose “all cases”—a fact that would not be very supportive of the purported distinction. However, there is the synonymous, and perhaps even more telling word, “dispute.” *See supra* text at note 258; *see also supra* note 175 and accompanying text.

286. Both Professors Amar and Clinton disagree with this conclusion. *See* Amar, *Two Tiers*, *supra* note 1, at 241 n.120; Clinton, *Guided Quest*, *supra* note 1, at 782. However,

there could be no argument that Congress had to distribute the judicial power among the various federal courts (because there was no mention of judicial power), Congress would have been able to remove some of the enumerated cases from federal judicial cognizance altogether.²⁸⁷ Thus, the two-tier theory is not very well supported by the various Committee of Detail drafts after all.

After the Committee of Detail made its report, debate at the Convention was focused on that draft and changes were made to it. One particular string of proposals warrants a detailed examination:

Mr. Govr. Morris wished to know what was meant by the words "In all the cases before mentioned it (jurisdiction) shall be appellate with such exceptions, &c" whether it extended to matters of fact as well as law—and to cases of Common law as well as Civil law.

Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.

Mr. Dickinson moved to add after the word "appellate" the words "both as to law & fact which was agreed to nem: con:

Mr. Madison & Mr. Govr. Morris moved to strike out the beginning of the 3d sect. "The jurisdiction of the supreme Court" & to insert the words "the Judicial power" which was agreed to nem: con:

even Professor Amar's interpretation of this draft leads to the unlikely conclusion that Congress would have had no control over the Supreme Court's appellate jurisdiction at all with respect to cases in the mandatory tier. *See Amar, Two Tiers, supra* note 1, at 241 n. 120.

287. This strengthens the conclusion that the import of the words "shall extend" is closer to "can reach" than "must include." *See supra* notes 158-61 and accompanying text.

The presence of the word "all" does not advance the two-tier theory. Although the Framers specifically added the word "all" for two more categories, they failed to add it for impeachments. The omission was particularly conspicuous given that impeachments were placed amidst the other categories for which "all" was used, making it difficult to believe that the word "all" was intended to mean "each and every," but not at all difficult to believe that it was intended to mean "all types." *See supra* notes 284-85 and accompanying text.

Even assuming that "all" meant "each and every," and "shall extend" meant "must include," Professor Amar is forced to argue that the Exceptions Clause, as reported by the Committee of Detail, would not have permitted Congress to restrict the Supreme Court's appellate jurisdiction over the cases in the first tier. *See supra* note 286. In order to maintain that the Framers intended to establish *his* two-tiered theory, Professor Amar must argue that the subsequent change of the term jurisdiction to judicial power was a conscious decision to change the meaning of the exceptions clause as well (*i.e.*, so as to permit exceptions even in the first tier of cases, as long as jurisdiction is vested in the inferior courts). This is implausible given the summary fashion in which the change was proposed and adopted. *See infra* text accompanying note 288. By contrast, the change would have made no substantive difference based on the interpretation offered in this essay.

The following motion was disagreed to, to wit to insert "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct" . . . [Ayes—2; noes—6.]

On a question for striking out the last sentence of sect. 3: "The Legislature may assign &c—" . . . [Ayes—8; noes—0.]²⁸⁸

The first proposal above establishes that the Framers never intended the Exceptions Clause to modify the word "Fact." Quite to the contrary, the Committee specifically inserted the clause "both as to Law and Fact" to clarify the scope of the Supreme Court's appellate jurisdiction.²⁸⁹

Unfortunately, the second proposal passed without any recorded discussion. It seems safe to say that the Framers realized that the enumerated cases were no longer a description of the Supreme Court's jurisdiction. Rather, in light of the Exceptions Clause and the Assignment Clause, which made the list applicable to the inferior courts, the enumerated cases became a description of the judicial power which resides in both.

The third proposal was not adopted. It was a proposal to give Congress explicit plenary control over the judicial power. According to Professor Clinton, "[a] clearer rejection of congressional authority over judicial powers is hard to imagine."²⁹⁰ However, given Congress's control over the federal judiciary which, even according to Professor Clinton, includes the discretion to create inferior courts and to distribute the judicial power among Article III courts, it seems inappropriate to read this as a rejection of all congressional authority over the judiciary. Understood in context, the rejection of the proposal was insignificant. At this point in the Convention, the Framers were simply cleaning up the document. It is unlikely that this third proposal represented a radically new concept, particularly since the vote proceeded without recorded debate. Rather, in keeping with other proposals, it was probably a mere stylistic change.²⁹¹ Congress already had the authority to make exceptions and

288. 2 RECORDS, *supra* note 7, at 431 (footnotes omitted).

289. See *supra* Part II.G.3.

290. Clinton, *Guided Quest*, *supra* note 1, at 791.

291. See Redish, *Supreme Court*, *supra* note 1, at 910 (speculating that the proposed amendment could have been rejected for stylistic reasons). Redish writes:

[T]he Framers [probably] chose to leave the "inertia" of jurisdiction with the Supreme Court, requiring Congress to take affirmative steps (i.e. make exceptions) to limit it, rather than require Congress to set out the Court's jurisdiction in the first place and thus making exceptions merely by a failure to delineate, which would have been the result of the amendment . . . Indeed, for all we know, the amendment may have been rejected because the Framers simply preferred the style of the Committee on Detail, or because they believed there was no need to

regulations. Some delegates may have wished to be more explicit in granting Congress plenary authority, but others apparently felt that the existing language was adequate. After all, even as a stylistic matter, such strong language could have led to an unhealthy disrespect for a “co-equal” branch of government.

Furthermore, the language of the proposal was substantively problematic. Professor Sager notes, for example, that “[t]he delegates might have understood the rejected language to allow Congress to increase the original jurisdiction of the Supreme Court, and might have repudiated it on this ground.”²⁹² More importantly, the language of the proposal was dangerously susceptible to abuse, for it gave Congress plenary authority not only over *jurisdiction*, but over the *judicial power*.²⁹³ Taken literally, this provision might have empowered Congress to dictate to the courts how they should decide the cases before them. This possibility would have provided adequate cause for the provision’s demise.

The fourth proposal was another tightening of the text. Describing the enumerated cases as part of the jurisdiction of the Supreme Court required the addition of a separate clause permitting such cases to be assigned to the inferior courts. Now that the enumerated cases were part of the judicial power, which belonged equally to the inferior courts, it became unnecessary.

After this point in the Convention, there were only minor changes in what was to become Article III in the Committee on Style. The delegates signed the final version of the text and offered it to the Union for ratification.

B. The Ratification Process

Shifting attention from the Convention to the ratification process is a difficult endeavor. Where the Convention involved an intellectual process of devising a constitutional plan, the ratification process involved the politics of acceptance and rejection of the text. The only influence one could have on its meaning at this point was to convince others that the

adopt the amendment since the Committee’s proposal effectively did the same thing.

Id.; cf. Clinton, *Guided Quest*, *supra* note 1, at 797 n.177 (“[T]he fact that the proposal for a grant of legislative power over the Court’s jurisdiction was overwhelmingly rejected, while the other semantic changes proposed during the debate were unanimously accepted, suggests that the problem with the . . . proposal was substantive, not rhetorical.”).

292. Sager, *supra* note 1, at 50 n.95.

293. For a discussion of the difference between “judicial power” and “jurisdiction,” see *supra* Part II.E.

text meant more or less than it really did.²⁹⁴ If one desired that the Constitution be ratified, he might try to persuade others that the text meant what he desired; conversely, if one opposed the ratification, he might attempt to scare others into believing that the text meant what was feared most. In such a setting, it is difficult to come to any reliable understanding of the “original intent” of the ratifiers.²⁹⁵

Adding to the difficulty of the endeavor is the fact that the ratifiers paid little attention to the issue of congressional control over the federal judiciary.²⁹⁶ Therefore, one should not expect very much certainty in this area. At most, one can merely hope to see whether the pattern of debate supports or rejects the notion of broad congressional control.

Professor Clinton analyzed the ratification debates and concluded that they support his theory that under Article II, Congress was not intended to have any power over federal court jurisdiction, other than the limited authority to distribute the power among the Supreme Court and the inferior courts.²⁹⁷ Although a thorough examination of the ratification debates is beyond the scope of this Article, an examination of Professor Clinton’s presentation of the evidence shows that his conclusions are not irrefutable.

When confronted with language that contradicts his theory, Professor Clinton is dismissive. At times, he forces ambiguities,²⁹⁸ at other times,

294. “[T]he ratification process was less a deliberative procedure and more a political forum in which prominent state politicians could advance their own interests and hinder those of their opponents.” Clinton, *Guided Quest*, *supra* note 1, at 799.

295. Professor Clinton highlights the problem of determining the original intent of the framers: “Where . . . one finds a divergence of viewpoints [‘between the drafters at Philadelphia and the delegates to the state conventions’], the question emerges as to which original understanding is legally significant—the original intent of the delegates at Philadelphia or the understanding of the members of the state conventions that ratified the document.” *Id.* at 838. Resolution of this issue is beyond the scope of this Article. It will suffice to say that the intent of the ratifiers is relevant in an attempt to ascertain the “original intent” of the Framers of the Constitution.

296. *See id.* at 800 (“[T]he general issue of legislative control over the jurisdiction of the national judiciary received almost no direct attention. Rather, when the issue arose at all, it did so only in passing, during debates over other facets of the proposed judiciary article.”)

297. *See id.* at 797-840, 845.

298. For example, Professor Clinton finds Mr. Wilson’s comment, quoted at *infra* note 307, to be “vague and inconclusive.” *Id.* at 825. He also finds Randolph’s comment, quoted at *infra* note 304, to be “ambiguous.” *Id.* at 808. Professor Clinton suggests, without any support, that comments supporting congressional power to limit appeals in insignificant cases “may have been made against an unarticulated assumption that less significant cases could be relegated to the inferior federal courts—a position perfectly consistent with the original distributive purposes of the exceptions and regulations clause.” *Id.* at 827. While this is certainly not impossible in theory, Professor Clinton offers no reason to entertain the possibility.

he deems problematic comments “revisionist.”²⁹⁹ Yet he cannot deny the fact that it was widely understood and argued by both Federalists and Anti-Federalists alike, that the Exceptions Clause gave Congress some measure of control over the Supreme Court’s appellate jurisdiction beyond merely a distributive role.³⁰⁰ For example, when the Anti-Federalists raised concerns that the Supreme Court’s appellate review of facts could be used to overturn jury trials, the federalist response was that Congress could remedy this through the Exceptions Clause.³⁰¹ Similarly, when the Anti-Federalists raised concerns about onerous appeals and the possibility of being dragged to Washington to defend small cases, the Fed-

299. *Id.* at 806. Professor Clinton admits that many comments were made in the ratification debates which contradict his theory. *See id.* at 803-10. However, in light of his conclusion that the Framers intended a merely distributive Exceptions Clause, he concludes that the comments made by many of the Framers themselves must have been disingenuous:

The federalist response . . . also focused on the asserted congressional power to protect jury trials under the exceptions and regulations clause. Indeed, most of the important comments on the issue of congressional power over federal court powers emerged in the context of the concern over jury trials, particularly in the Virginia convention where the judiciary article was most thoroughly and heatedly debated. Since it is demonstrably clear that the exceptions and regulations clause was not drafted at the Philadelphia Convention to modify the review of law and fact language in article III, comments such as Wilson’s constitute post-Convention revisionism of the meaning and purpose of that clause. When made by federalists, like John Marshall, who had not attended the Philadelphia Convention and who apparently had no access to the then unpublished notes and documents from the Convention, such revisionism is understandable. Some of the comments came, however, from delegates like Wilson, Madison, and Randolph who had attended and even played major roles in the drafting of the judicial article. For them such revisionism is best explained by the political context in which the statements were made. Successful ratification of the document was more important than historical accuracy or intellectual consistency, and these framers seized upon all plausible constructions of clauses in the document which met their need to respond to antifederalist concerns.

Id. at 806 (footnote omitted).

Once it is established that the Framers did intend the Exceptions Clause to mean exactly what it has come to mean, see *supra* Part III.A, Professor Clinton’s position becomes untenable.

300. Although Professor Clinton pointed out that most comments can “be viewed merely as a corollary to the assumed congressional power to distribute federal jurisdiction among federal courts . . .,” he admitted that “[t]his interpretation is tenuous, . . . since the federalist proponents of such powers did not clearly discriminate between cases appealed to the Supreme Court from the inferior federal courts and those appealed from state courts.” Clinton, *Guided Quest*, *supra* note 1, at 839.

301. *See id.* at 806; *see also id.* at 803-10 (presenting arguments concerning the protection of the right to a jury trial in civil cases).

eralists responded that Congress could also alleviate this problem through the Exceptions Clause.³⁰²

Unable to deny these recognized powers of Congress, Professor Clinton interprets them as “a limited federalist willingness to concede a modicum of congressional power over the scope of jurisdiction of the federal courts in these two limited contexts.”³⁰³ In other words, Professor Clinton reads the Constitution as being constructively amended by two “concessions” by the Federalists. This explanation is unpersuasive.

The Federalists employed broader language during the debates than Professor Clinton will admit. The two explicit powers are never discussed as concessions or unique, but always as an ordinary exercise of the Exceptions Clause. In their response to the jury trial issues, the Federalists did not limit their “concession” to congressional control over issues of fact.³⁰⁴ Neither did they carefully limit Congress’s power to the prevention of onerous appeals.³⁰⁵ If the Federalists engrafted such concessions onto an

302. *See id.* at 826-28. “[A] few federalists ventured the view that Congress might limit appeals in insignificant cases by its power of making exceptions and regulations for the jurisdiction of the Supreme Court.” *Id.* at 827.

303. *Id.* at 839.

304. Madison, for example, argued as follows:

But if gentlemen should contend that appeals, as to fact, can be extended to jury cases, I contend that, by the word *regulations*, it is in the power of Congress to prevent it, or prescribe such a mode as will secure the privilege of jury trial. They may make a regulation to prevent such appeals entirely; or they may remand the fact, or send it to an inferior contiguous court, to be tried; or otherwise preserve that ancient and important trial.

3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 534 (J.B. Lippincott Co. 1937) (1836). Somehow Professor Clinton reads this quote as “saying nothing about issues of law.” Clinton, *Guided Quest*, *supra* note 1, at 806-07. On the contrary, Madison would permit Congress to prevent appeals to the Supreme Court altogether. *See* 3 ELLIOT, *supra*, at 534 (“They may make a regulation to prevent such appeals entirely . . .”).

Randolph was even more explicit, stating, “[Congress] may except generally both as to law and fact, or they may except as to the law only, or fact only.” *Id.* at 572; *see also* Clinton, *Guided Quest*, *supra* note 1, at 808.

Even Justice Marshall interpreted the Exceptions Clause broadly, stating that “Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.” 3 ELLIOT, *supra*, at 560. That Justice Marshall could take this position puzzles Professor Clinton. *See* Clinton, *Guided Quest*, *supra* note 1, at 810 (“It is difficult to understand how Marshall, who as Chief Justice was to become so instrumental in establishing a strong federal judiciary as a bulwark of constitutional government and federal supremacy, could support and argue for so sweeping a congressional control over the national judiciary.” (footnote omitted)). The fact that he did so strongly supports the traditional view that even the Federalists were not too concerned about the possible abuse of broad powers under the Exceptions Clause.

305. Pendleton, for example, stated that “Congress may make such regulations as they may think conducive to the public convenience The power of making *what regulations*

Exceptions Clause that was never intended to give Congress any power over the scope of federal jurisdiction, then one would expect them to have spoken very carefully.

Professor Clinton argues based on inferences. Rather than point to language which denies congressional power,³⁰⁶ he relies on language which is consistent with his position, but not inconsistent with the traditional view. For example, language about the desirability, even the necessity, of a federal judiciary is neutral in a debate about congressional authority to control jurisdiction. The need to provide for a federal judiciary capable of hearing every case which involves national interests does not repudiate the desirability of a provision to limit that broad jurisdiction from time to time.³⁰⁷

Given the widespread acceptance of a Supreme Court and the fact that the extent of federal jurisdiction was causing the problems, it is not surprising to find the debates focused on the specific jurisdictional issues rather than on the Exceptions Clause. Extensive reliance on that clause would have been neither particularly desirable for the Federalists nor sufficiently reliable for the Anti-Federalists. That in no way suggests, however, that the Exceptions Clause was understood to mean anything other than exactly what it says: Congress has plenary power to make exceptions to the Supreme Court's appellate jurisdiction.

Another important source of opinion in the ratification process was *The Federalist*.³⁰⁸ As the Supreme Court has explained,

and exceptions in appeals they may think proper may be so contrived as to render appeals, as to law and fact, proper, and perfectly inoffensive." 3 ELLIOT, *supra* note 304, at 519-20 (emphasis added); see Clinton, *Guided Quest*, *supra* note 1, at 827-28. This language seems to view the prevention of onerous appeals in insignificant cases as but one use of the Exceptions power rather than as an expansion of that power.

306. Professor Clinton does cite to Patrick Henry's argument that Congress possessed no such power in 3 ELLIOT, *supra* note 304, at 540-41. See Clinton, *Guided Quest*, *supra* note 1, at 804. However, given that Henry was an Anti-Federalist, it is likely that he either misunderstood the Constitution or was employing scare tactics to defeat it. *Cf. id.* (arguing that Henry was using such an interpretation to appeal to the fears of the Anti-Federalists). In any event, as Professor Clinton admits, the Federalists responded with vehement disagreement. See *id.* at 804-10 (providing various Federalist arguments countering the Anti-Federalist position that the Constitution infringed upon the right to a civil jury trial).

307. As Wilson argued:

There are . . . cases in which [regulation] will be necessary; and will not Congress better regulate them, as they rise from time to time, than could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But any thing done in Convention must remain unalterable but by the [amendment] power of the citizens of the United States at large.

2 ELLIOT, *supra* note 304, at 494.

308. See THE FEDERALIST NO. 82, *supra* note 38, at 495.

It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.³⁰⁹

Thus, it “has ever been regarded as entitled to weight in any discussion as to the true intent and meaning of the provisions of our fundamental law.”³¹⁰

Much like the ratification debates generally, *The Federalist* was concerned with defending the substantive Constitutional provisions and rarely addressed the issue of Congress’s authority to control the scope of federal jurisdiction. However, *The Federalist* did address the issue in passing in a number of important places.

The most notable example, and the one that most strongly supports the traditional view, is in *The Federalist* No. 80. There, Hamilton begins by discussing the sort of jurisdictional provisions that would be appropriate under the proposed constitutional scheme. He then proceeds to compare the actual Constitutional provisions to the ideal provisions. Not surprisingly, they compare favorably. In the conclusion to that discussion, Hamilton states:

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. *If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.* The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle which is calculated to avoid general mischiefs and to obtain general advantages.³¹¹

As important as this statement alone is, the setting of is even more important. *The Federalist* No. 80 deals with “the judicial authority of the Union”—*i.e.*, the judicial power. It discusses the scope of federal jurisdiction as a whole, not simply the Supreme Court’s appellate jurisdic-

309. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

310. *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878).

311. *THE FEDERALIST* No. 80, *supra* note 38, at 481 (emphasis added).

tion,³¹² and nowhere are jury trials or the review of facts raised. Therefore, the statement can be ascribed neither to a distributive congressional power nor to a limited role of preventing the review of facts. It is a stark and explicit statement that Congress can, under the Exceptions Clause, exclude entire categories of cases from the federal judicial purview altogether. Although it cannot be said to settle the matter, for it is simply one point of view (albeit one that has always been accorded much respect), this surely is a serious blow to those who would attack the traditional view of congressional authority.³¹³

Similar statements are repeated in *The Federalist* No. 81. For example, the middle of that essay provides a summary of the argument, that the Supreme Court shall have only limited original jurisdiction and appellate jurisdiction subject to Congressional control.³¹⁴ Later in the same essay, after a discussion of Supreme Court review of facts and of law, Hamilton further states that Congress's ability to control Supreme Court appellate jurisdiction serves the public interest.³¹⁵ Finally, in a summary two paragraphs later, Hamilton reiterates the fact that Congress has control over the Supreme Court's appellate jurisdiction.³¹⁶ None of these

312. See *id.* at 480. Technically, THE FEDERALIST is incorrect, for only the appellate jurisdiction of the Supreme Court is subject to the Exceptions Clause. However, the fact that Hamilton assigns it to the judicial power shows that it must have been understood to be a very broad provision. If the Exceptions Clause were limited to a distributive role, as argued by Professor Clinton and, in a modified form, by Professor Amar, such a mistake would never have been possible. However, given a broad understanding of the clause, the slip is a mere technicality: Congress can exclude cases from federal cognizance altogether by combining its discretion not to establish inferior courts with its authority to make exceptions to the Supreme Court's appellate jurisdiction.

313. Unfortunately, both Professor Amar and Clinton ignore this portion of *The Federalist*. See generally Amar, *Two Tiers*, *supra* note 1; Clinton, *Guided Quest*, *supra* note 1.

314. See THE FEDERALIST NO. 81, *supra* note 38, at 488. Hamilton stated that:

We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of cases, and those of a nature rarely to occur. In all other cases of federal cognizance the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction "with such *exceptions* and under such *regulations* as the Congress shall make."

Id.

315. See *id.* at 490. Hamilton asserted:

To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

Id.

316. See *id.* at 491. Hamilton stated:

[I]n the partition of [the judicial] authority a very small portion of original jurisdiction has been reserved to the Supreme Court and the rest consigned to the

passages, read in isolation, is as powerful as the first. A reader predisposed to do so could read each of them narrowly.³¹⁷ Read together, however, they make it clear that Hamilton believed that Congress had broad power to restrict the Supreme Court's appellate jurisdiction under the Exceptions Clause.

Two statements in *The Federalist* seem, at first glance, to contradict the traditional view and therefore deserve attention. The first states that "[t]he 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."³¹⁸ If the word "necessity" is interpreted to mean "constitutional requirement," then it would appear that distributive theory has found some solid support. However, "necessity" can fairly be interpreted far more loosely. It is often used in a qualified sense—*i.e.*, necessary for some specific good or end.³¹⁹ Under this view, Hamilton's sentence could be completed as follows: ". . . in order to have federal adjudication of the matter" (which, in Hamilton's opinion, was a decidedly good thing). In light of other statements made by Hamilton in *The Federalist*, this seems to be the proper reading.

The second statement asserts that "[t]he evident aim of the plan of the convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union."³²⁰ It is important to recognize that this statement was made in the context of a defense of Supreme Court jurisdiction over state court cases, and not in the context of a discussion of the Exceptions Clause. Read in this light, it merely affirms that Supreme Court appellate

subordinate tribunals; . . . the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any *exceptions* and *regulations* which may be thought advisable

Id.

317. For example, Professor Clinton reads the passage quoted at *supra* note 315 as consistent with a power to preserve jury trials. See Clinton, *Guided Quest*, *supra* note 1, at 834 n.316. He probably would read the passages quoted at *supra* notes 314 and 316 as consistent with a merely distributive Exceptions Clause. Cf. Clinton, *Guided Quest*, *supra* note 1, at 834-35. However, while these passages may be *consistent* with Clinton's view, they certainly are not *inconsistent* with the traditional view. Nowhere does THE FEDERALIST limit the Exceptions Clause to the tripartite role of distributing jurisdiction, preserving the jury trial and limiting appeals in insignificant cases.

318. THE FEDERALIST NO. 81, *supra* note 38, at 485.

319. In other parts of *The Federalist*, Hamilton himself uses the term "necessity" in the looser sense. For example, in arguing that the judicial power should be coextensive with the legislative power, he claims that "[t]he mere necessity of uniformity in the interpretation of the national laws decides the question." *Id.* at 476. As has already been seen, however, uniformity of decisions, while certainly a good thing, is not a constitutional requirement. See *supra* note 34 and accompanying text.

320. THE FEDERALIST NO. 82, *supra* note 38, at 494.

jurisdiction can reach all the enumerated cases regardless of whether they originate in a state court or a lower federal court. In any event, the “aim” of the Constitution is not necessarily a strict requirement for every case. It goes without saying that the power to make exceptions could interfere with the “aim of the plan” in certain cases.

Finally, if these statements by Hamilton are construed strictly, they do not permit exceptions for any cases, including those which may be deemed “insignificant” or “neutral.” Moreover, while the former statement would sanction the practice of *certiorari*, since it only requires *re-course* to the federal judiciary, the latter would not permit it, since final *determination* by a federal court is required. These conclusions demonstrate that even if Hamilton meant exactly that, his opinion should be disregarded. However, since a strict interpretation of these ambiguous statements would be grossly inconsistent with more explicit statements to the contrary, it is safe to assume that they were not so intended.

This cursory investigation of the ratification process leads to a number of conclusions. First, there is little evidence to support a merely distributive Exceptions Clause, and much evidence to support broader congressional power. Second, Professor Clinton’s attempt to reduce the broader clause to two narrow concessions by the Federalists lacks credible textual and historical foundations. Finally, one of the most reliable sources of the “original understanding” of the Constitution, *The Federalist*, supports the traditional view.

C. Subsequent History

The Judiciary Act of 1789³²¹ first established the federal judiciary. It was enacted by the first Congress, whose members included many of the Framers from the Constitutional Convention and many of the ratifiers from the state conventions. Whether or not it was deserving of the honor, it has come to be generally accepted as “contemporaneous and weighty evidence of [the Constitution’s] true meaning.”³²² It has therefore become *de rigueur* to demonstrate how one’s theory of Article III is consistent with the Judiciary Act of 1789.

In this case, however, to demonstrate such consistency would be almost pointless.³²³ Because the traditional view espouses nearly plenary congressional authority, Congress could have done little to discredit it. Any

321. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

322. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *overruled in part on other grounds by Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

323. *But see supra* note 180 (discussing the consistency of the Judiciary Act of 1789 with the civil/criminal distinction of “cases” and “controversies”).

congressional action which would be problematic for the traditional view would be equally or more problematic for those theorists who hold a more limited view of congressional authority.³²⁴

The only potential problem stems from Congress's inability to restrict the original jurisdiction of the Supreme Court, which is granted by the Constitution and is not subject to the Exceptions clause. It is commonly said that Congress has no authority over the Supreme Court's original jurisdiction.³²⁵ Yet, in section 13 of the first Judiciary Act, the congressional "grant" of Supreme Court original jurisdiction seems to be less extensive than the constitutional grant. The Constitution grants jurisdiction over "all Cases *affecting* Ambassadors, other public Ministers and Consuls."³²⁶ The Act provided that:

[T]he Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.³²⁷

This is somewhat problematic. The constitutional term "affecting" is certainly broader than the specific grants in the Act. By what right can Congress restrict the Supreme Court's original jurisdiction?³²⁸

The answer to that question is the Necessary and Proper Clause.³²⁹ The constitutional term "affecting" is extremely broad and, taken to its limits, could swallow all distinctions. Almost anything can be said to "affect" ambassadors, etc., to some extent. Thus, the term absolutely *requires* qualification. Under the Necessary and Proper clause, Congress

324. For example, if Congress were to extend the Supreme Court's original jurisdiction, see 28 U.S.C. § 2241 (original habeas corpus applications in Supreme Court), this would violate virtually every theory of Congressional power since there is a strong consensus that Congress is forbidden from expanding the Supreme Court's original jurisdiction. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75 (1803); see also *infra* note 359.

325. See *supra* note 227 and accompanying text.

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

327. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. at 80-81.

328. See Amar, *Judiciary Act*, *supra* note 1, at 1523 (stating that there is no "obvious source of congressional authority to deprive the Supreme Court of jurisdiction over those [cases within its original jurisdiction].").

329. U.S. CONST. art. I, § 8, cl. 18. The clause states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* (emphasis added).

has the right to define “affecting” within reasonable limits, but without intentionally making any “exceptions.”³³⁰

The Act also gave inferior courts and state courts concurrent jurisdiction over certain cases within the Supreme Court’s original jurisdiction. This grant of concurrent jurisdiction is not problematic, however, because the Constitution does not grant the Supreme Court exclusive jurisdiction over those cases.³³¹ Finally, the issue of whether the Supreme Court could exercise appellate jurisdiction over those cases if they were tried in an inferior court was not raised because the Supreme Court was not given appellate jurisdiction over those cases.³³²

On the other hand, many alternative theories of Congress’s jurisdiction-stripping powers are demonstrably inconsistent with the Judiciary Act of 1789.³³³ It does not require much effort to establish that Congress made fairly healthy use of the Exceptions Clause in that Act.

Section 11 of the Act, for example, establishes a number of jurisdictional requirements.³³⁴ Under this provision, Congress excluded from

330. Under this view, Congress would only possess enough power to define “affecting” within “necessary and proper” limits. Of course, defining the term to mean less than the maximum would restrict the Supreme Court’s jurisdiction, but as long as the definition were reasonable, this would not be unnecessary or improper. As a practical matter, one bright line minimum suggests itself: cases involving an ambassador, etc., as a party. Surely Congress should not be able to go below this point, for any case “affects” the parties involved. This interpretation would not be wholly unreasonable either, for it would not be too far from the likely intent of the provision. Perhaps a more generous minimum, *e.g.*, including family members, would be more appropriate. The actual resolution of the issue is irrelevant; the point being made is simply that reasonably defining a broad and vague term in good faith would not be the same as making an exception.

A major distinction must be made between Congress’s authority over the Supreme Court’s original jurisdiction under this theory and under Professor Amar’s theory. See Amar, *Original Jurisdiction*, *supra* note 95, at 478-83. That Congress could have such authority under the Necessary and Proper Clause is not at all remarkable. But as Professor Amar himself admits, “the clause [does not] empower[] Congress to do anything it wants to the federal courts.” *Id.* at 482. In contrast to the minor power afforded to Congress under this theory, Professor Amar’s theory would extend congressional authority far beyond any “necessary and proper” limits. See *supra* note 95.

331. See *supra* notes 232-35 and accompanying text.

332. See *supra* notes 237-39 and accompanying text.

333. Of course, because there have always been some inferior courts, the theory that they are constitutionally required cannot be refuted by the acts of Congress. See *supra* notes 57-79 and accompanying text. However, since this position has no foundation or little support, it is not of great concern.

334. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78-79. This section stated:

Sec. 11. *And be it further enacted*, that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. . . . But no . . .

federal court cognizance certain civil cases in which the value in dispute did not exceed a minimum dollar amount. Since every subsequent judiciary act has retained the practice of establishing jurisdictional thresholds, it is clear that Congress has never felt that it "must vest" the entire judicial power in the federal judiciary. Of course, Professor Clinton maintains that Congress was ultimately authorized to make exceptions for insignificant cases, but whether a jurisdictional threshold of five hundred dollars over two hundred years ago could be considered "insignificant" is debatable.³³⁵

In any event, section 11 makes other exceptions. For example, it does not cover all controversies "between Citizens of different states,"³³⁶ but only those "between a citizen of the State where the suit is brought, and a citizen of another State."³³⁷ It also contains an "anti-assignment clause," which further limits federal jurisdiction.³³⁸ Not only are these exceptions more than merely distributive, they also exceed the authority to make exceptions for trivial or insignificant cases. They clearly reflect the use of an Exceptions Clause consistent with a broad congressional power.

While section 11 may be problematic for Professor Clinton's theory, it is perfectly consistent with the two-tier theory. According to Professor Amar, section 11 deals only with the second tier of non-mandatory cases. Thus, Congress is free perhaps even to exclude those cases from federal court cognizance altogether.³³⁹ In order to discredit the two-tier theory, an exception to the first tier of cases must be found.

Such an exception can be found in section 25, under which appeals to the Supreme Court from state courts in cases arising under federal law are permitted only if a federal law claim were denied, but not if it were upheld.³⁴⁰ Congress did not vest the federal courts with jurisdiction over

district or circuit court [shall] have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

Id.

335. See Amar, *Two Tiers*, *supra* note 1, at 260 (characterizing \$500 as "no small sum in the eighteenth century").

336. U.S. CONST. art. III, § 2, cl. 1.

337. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78-79 (quoted at *supra* note 334).

338. *Id.*

339. See *supra* note 165 and accompanying text (discussing the extreme view that the absence of "all" makes the requirement illusory).

340. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. at 85. Section 25 stated:

Sec. 25. *And be it further enacted*, that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, *and the decision is against their valid-*

“all Cases . . . arising under . . . the Laws of the United States” in these jurisdictional grants.³⁴¹ Professor Amar attempts to defend the two-tier theory by arguing that in order “to have one’s own case ‘arise under’ federal law, one must claim a right rooted in federal law.”³⁴² According to Amar, if a party did not have his federal claim denied, it would not matter that he could not appeal to the Supreme Court because that party’s case did not arise under federal law. However, this argument improperly turns on an ambiguity in the term “case.” Although the term can mean one party’s side of a lawsuit³⁴³—*e.g.*, “State your case!”—its more common meaning, and the meaning it clearly has in the Constitution, is the lawsuit itself.³⁴⁴ Thus, when the Constitution extends the judicial power to all cases arising under federal law, it means all suits involving federal law questions. Judicial power over such cases must have been granted regardless of how they were decided in state courts. Otherwise, as Professor Meltzer points out, the current scheme permitting Supreme Court review over state cases upholding federal law claims would “unconstitutionally extend[] the Supreme Court’s jurisdiction beyond the bounds of article III.”³⁴⁵

Professor Amar claims further that “the section 25 ‘gap’ is largely, and perhaps wholly, an optical illusion” because “[i]n virtually every case in which one party argues for a federal ‘right,’ the other side can argue that it has a federal ‘immunity.’”³⁴⁶ Accepting Professor Amar’s claim for the sake of argument, he still fails to show that Congress realized this fact. The fact that the limitation was included not once but three times in the

ity; or where is drawn question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. . . .

Id. at 85-86 (footnote omitted).

341. U.S. CONST. art. III, § 2, cl. 1.

342. Amar, *Judiciary Act*, *supra* note 1, at 1529.

343. See D. FENNING, *ROYAL ENGLISH DICTIONARY Case* (1775) (“In law, the representation of any fact, question, or the whole arguing of counsel on a particular point or circumstances of a trial.”).

344. See BLACK’S, *supra* note 131, at 215 (defining “case” as “[a] general term for an action, cause, suit, or controversy, at law or in equity”); NOAH WEBSTER, *supra* note 159 (defining “case” as “[a] cause or suit in court; as, the case was tried at the last term. In this sense, case is nearly synonymous with cause”).

345. Meltzer, *supra* note 1, at 1587.

346. Amar, *Judiciary Act*, *supra* note 1, at 1530.

same section strongly suggests that the first Congress intended it to be more than a mere formality.³⁴⁷ Thus, the first Congress apparently believed it had the power to restrict federal court jurisdiction even over cases arising under federal law. The early Supreme Court, which enforced this provision, apparently agreed.³⁴⁸

Although, ultimately, Professor Amar considers this a “relatively minor” deviation from the constitutional plan,³⁴⁹ it is clearly inconsistent with his theory. And although he may insist that “the *general structure* of the Judiciary Act strongly supports [his] interpretation of Article III,”³⁵⁰ the fact remains that the Act is perfectly consistent with the view espoused in this Article.

The “essential role” theories discussed earlier are demonstrably inconsistent with the Judiciary Act of 1789 as well. Under those theories, Congress is free to make exceptions to federal jurisdiction, but not to the point where they will “destroy the essential role of the Supreme Court in the constitutional plan.”³⁵¹ Under the Act, however, the Supreme Court had no appellate jurisdiction over federal criminal cases.³⁵² Surely any “essential role” for the Supreme Court necessarily includes appellate jurisdiction over federal crimes. The fact that there was none belies Professor Hart’s “essential role” theory.³⁵³ Furthermore, without appellate jurisdiction over federal crimes, the Supreme Court could not ensure the uniformity of federal criminal law. Thus, Professor Ratner’s theory also falters.³⁵⁴

Professor Sager’s version of the essential role,³⁵⁵ requiring federal court review of “state court decisions on constitutional challenges to governmental behavior,”³⁵⁶ is undermined by another omission—the failure of the Act to grant any federal court jurisdiction over habeas corpus claims by prisoners held under color of authority of state law regardless

347. See Meltzer, *supra* note 1, at 1589 (discussing how three separate clauses in section 25 limit the jurisdiction to cases where a state will not recognize the presence of a federal right).

348. See, e.g., *Gordon v. Caldwell*, 7 U.S. (3 Cranch) 268, 269-70 (1806) (following Congress’s restriction of jurisdiction).

349. Amar, *Two Tiers*, *supra* note 1, at 264. Compare *id.*, with Meltzer, *supra* note 1, at 1591-92 (“Amar fails to convince me that section 25 did not leave a very large gap in federal court ‘arising under’ jurisdiction.”).

350. Amar, *Two Tiers*, *supra* note 1, at 264.

351. Hart, *supra* note 1, at 1365; see *supra* Part I.B.

352. See Act of Sept. 24, 1789, ch. 20 §§ 9, 11, 22, 1 Stat. 73, 76-77, 78-79, 84-85.

353. See *supra* notes 24-30 and accompanying text.

354. See *supra* notes 31-49 and accompanying text.

355. See *supra* notes 50-56 and accompanying text.

356. Sager, *supra* note 1, at 65.

of the issues involved.³⁵⁷ Although it has been argued that this omission is not significant because direct review on appeal of the criminal case would still be available,³⁵⁸ a habeas corpus application is still a separate civil “case” involving the separate and final decision of a different court.³⁵⁹ If the first Congress understood the federal judiciary to have a constitutionally-required “essential role,” one would expect it to have been more respectful of that role. This is particularly true since, under Professor Sager’s theory, the “essential role” is fairly narrowly circumscribed.

Evaluating the competing theories against Supreme Court precedent is the final remaining historical inquiry. As its designation suggests, the traditional or orthodox view has done quite well. As discussed earlier, cases such as *Sheldon v. Sill*³⁶⁰ point to comprehensive congressional power over the inferior courts, while cases such as *Ex parte McCardle*³⁶¹ point to an expansive Exceptions Clause. Since the Supreme Court has assumed in at least one case that these powers can be combined,³⁶² the

357. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82; *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845) (holding that the Supreme Court could not issue a habeas corpus writ to bring up a prisoner who was in custody of a state for any purpose besides being a witness).

358. See Clinton, *Early Implementation*, *supra* note 1, at 1543 (noting that under Section 25 of the Act, the Supreme Court had jurisdiction “to review any appeal of a criminal conviction”); compare *id.* (expansive view of appellate habeas corpus jurisdiction), with *Ex parte Dorr*, 44 U.S. at 105 (narrow view of appellate habeas corpus jurisdiction).

359. In *Ex parte Bollman & Swartwout*, 8 U.S. (4 Cranch) 75 (1807), the Supreme Court held that its “original” habeas corpus jurisdiction is actually an exercise of appellate review. *Id.* at 100-01. This lends support to the view that a habeas corpus application is not a separate case. Even interpreted narrowly, however, that decision was problematic. See *id.* at 101-07 (Johnson, J., dissenting). It is far more difficult to read the case broadly. A habeas corpus application made in state trial court simply cannot be considered an exercise of appellate jurisdiction over a criminal case, particularly if that case has already been reviewed by the highest court of the state and especially the U.S. Supreme Court. Neither can a habeas corpus application made in federal district court be considered appellate review over a criminal case that has already been reviewed by the Circuit Court of Appeals and the Supreme Court. Thus, a habeas corpus application must be considered a separate case from the underlying criminal case.

360. 49 U.S. (8 How.) 441, 448-49 (1850) (upholding the constitutionality of section 11 of the Judiciary Act of 1789, which limited the jurisdiction of the lower federal courts); see also *supra* note 10 (citing cases holding that Congress may limit the jurisdiction of the lower federal courts).

361. 74 U.S. (7 Wall.) 506, 513-14 (1869) (holding that repeal of the Act of February 5th, 1867, which granted federal courts the authority to grant writs of habeas corpus, deprived federal courts of jurisdiction over such cases); see also *supra* note 15 (citing cases holding that appellate jurisdiction must be granted by Congress).

362. See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“Article III left Congress free to establish inferior courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.” (emphasis added)).

case for a broad view of congressional power over federal jurisdiction is compelling. In addition, there are many other cases which support, to varying degrees, a broad congressional power to restrict federal jurisdiction.³⁶³

By contrast, there are very few cases which would limit Congress's power to any significant degree. The strongest case against broad congressional power has already been considered at length; it is *Martin v. Hunter's Lessee*.³⁶⁴ It is important to note that in *Hunter's Lessee* Justice Story's analysis is flawed in a number of respects.³⁶⁵ Moreover, the relevant portions of his opinion are not only *dicta*, but *dicta* in the alternative.³⁶⁶ It is not even clear whether Justice Story was proposing Professor Amar's a two-tiered jurisdictional theory or a much less plausible two-tier theory distinguishing between one tier of necessarily exclusive federal court jurisdiction and a separate tier in which Congress could decide whether federal court jurisdiction should be exclusive of or concurrent with state court jurisdiction.³⁶⁷ Thus, *Martin's* authority as precedent on the instant issue is questionable.

More problematic is the case of *United States v. Klein*.³⁶⁸ Decided in 1872, less than three years after *McCardle*, *Klein* was the first and most significant case to limit Congress's power under the Exceptions Clause. Like *McCardle*, *Klein* arose during the Reconstruction period. The

363. See, e.g., *Yakus v. United States*, 321 U.S. 414, 443 (1944) (upholding Emergency Price Control Act's restriction of attacks on validity of price regulations in a criminal prosecution); *Falbo v. United States*, 320 U.S. 549, 554 (1944) (upholding Congress's power to restrain federal court review of Selective Service decisions); *Lockerty*, 319 U.S. at 188 (upholding Congress's power to restrict equity jurisdiction under the Emergency Price Control Act of 1942 to the Emergency Court of Appeals); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938) (upholding Congress's power to limit the federal courts' power to grant injunctions in labor disputes).

364. 14 U.S. (1 Wheat.) 304 (1816); see *supra* notes 57-68, 80-90 and accompanying text.

365. For example, Justice Story erroneously believed that certain of the enumerated cases could never be heard in state courts and that Congress was required to create inferior courts. See *supra* notes 60-68 and accompanying text.

366. See, e.g., *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 336-37; Amar, *Judiciary Act*, *supra* note 1, at 1503 n.9 (describing Justice Story's opinion as an "overall argumentative strategy of presenting a series of overlapping and concentric arguments in the alternative about the precise contours of the mandatory nature of federal jurisdiction").

367. See *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 336-37. Justice Story wrote: "At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress." *Id.*; see also *supra* notes 68 and 164 and accompanying text. Compare Amar, *Judiciary Act*, *supra* note 1, at 1502-03 (illustrating Justice Story's two-tiered theory of article III), with *supra* note 84 and accompanying text (asserting that it is not clear whether Justice Story actually espoused a two-tiered theory).

368. 80 U.S. (13 Wall.) 128 (1872).

claimant sought to recover the proceeds from the sale of property seized during the Civil War. A federal statute, the Abandoned Property Collection Act, authorized such recovery if the owner could prove "that he ha[d] never given any aid or comfort to the present rebellion."³⁶⁹ The claimant relied on a presidential pardon, which the Supreme Court had previously held fulfilled the statutory requirement.³⁷⁰ However, while the case was pending before the Supreme Court, Congress passed a new statute providing that a presidential pardon, accepted without an express disclaimer, should be deemed conclusive evidence that the person had given aid and comfort to the rebellion.³⁷¹ The statute further provided that "on proof of such pardon and acceptance . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."³⁷² Thus, the courts were denied jurisdiction if they found they would have to affirm because of a pardon.

The Supreme Court held the jurisdictional statute unconstitutional.³⁷³ Although the opinion "is not a model of clarity,"³⁷⁴ the Supreme Court apparently based its decision on the fact that Congress was attempting to "prescribe rules of decision to the Judicial Department of the government in cases pending before it."³⁷⁵ This was particularly problematic because the statute also attempted to "impair[] the effect of a pardon, and thus infring[e] [upon] the constitutional power of the Executive."³⁷⁶ This holding is not particularly embarrassing for the traditional view. The statute in *Klein* was a blatant attempt by Congress to attach unconstitutional strings to a jurisdictional grant. Essentially, the Court was told to agree with Congress or dismiss the case. Congress "passed the limit which separates the legislative from the judicial power,"³⁷⁷ by intruding upon the independence of the judiciary.

The most troubling aspects of the *Klein* opinion was the Court's statement that "the language of the proviso shows plainly that it does not in-

369. Act of Mar. 3, 1863, ch. 120, § 3, 12 Stat. 820, 820 (1863).

370. See *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1869) (holding that a Presidential pardon is adequate proof of non-participation in the rebellion, thus enabling a claimant to secure the return of his property under the Abandoned Property Collection Act).

371. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

372. *Id.*

373. *Klein*, 80 U.S. (13 Wall.) at 146.

374. HART AND WECHSLER, *supra* note 7, at 369.

375. *Klein*, 80 U.S. (13 Wall.) at 146.

376. *Id.* at 147. The Court reasoned that "the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration." *Id.* at 148.

377. *Id.* at 147.

tend to withhold appellate jurisdiction except as a means to an end.”³⁷⁸ This may suggest to some that Congress may never withhold jurisdiction as a means to an end, but only certain ends can be unconstitutional. The Court was clear that wholesale exclusion of a class of cases from the Supreme Court’s appellate jurisdiction was not unconstitutional.³⁷⁹ The concern of the Court in *Klein* was not the removal of jurisdiction, but the conditional nature of the grant that would have forced the Court to “rubber stamp” the will of Congress.

The Court has stood by the traditional view of congressional authority in subsequent cases. In *The “Francis Wright,”*³⁸⁰ the Court rendered one of its strongest statements on the matter:

[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.³⁸¹

McCardle thus survived *Klein*. Although in 1962³⁸² Justice Douglas questioned whether the *McCardle* case would command a majority view, the “brute force” or “count-the-votes” argument is questionable in the face of the considerably more conservative Rehnquist Court.³⁸³

378. *Id.* at 145.

379. *Id.* The Court stated that if the act “simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make ‘such exceptions from the appellate jurisdiction’ as should seem to it expedient.” *Id.*

380. 105 U.S. 381 (1881).

381. *Id.* at 385-86.

382. *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

383. For example, on May 3, 1996, the Supreme Court granted certiorari on an expedited basis in the case of *Felker v. Turpin* (No. 95-8836). The Court asked the parties to address whether the provision of the Antiterrorism and Effective Death Penalty Act of 1996, limiting the Supreme Court’s review of second and successive federal habeas corpus applications, was an unconstitutional restriction upon the Supreme Court’s appellate jurisdiction. Although the ultimate opinion of the Court disregarded the issue, see *Felker v. Turpin*, 116 S. Ct. 2333 (1996), there was media speculation that “the conservative majority” of the Supreme Court was “racing to validate” the law. See *Rush to Judgment*, N.Y. TIMES, May 9, 1996, at A26.

D. Conclusion

The records of the Constitutional Convention and the ratification process, as well as congressional and judicial practice since the ratification of the Constitution, all support a broad (if not an explicitly unlimited) congressional power to control the jurisdiction of the federal courts. Thus, while the mandatory theories of jurisdiction are difficult to reconcile with the historical evidence, the traditional view is fully vindicated thereby.

IV. STRUCTURAL ISSUES

As has been demonstrated, the text and the history of Article III support the traditional view. The structure of Article III provides additional support. Various structural arguments have already been presented. One example is the fact that the term “cases” clearly refers to both civil and criminal cases, while the term “controversies” seems to refer only to civil cases.³⁸⁴ Another example is the distinction between judicial power and jurisdiction, and Congress’s ability to control the latter but not the former, which makes more sense from a structural point of view. Some additional structural issues involved in the debate over congressional power over federal court jurisdiction will now be addressed.³⁸⁵ Together, the textual, historical, and structural arguments should paint a comprehensive picture of federal court jurisdiction.

Critics of Congress’s jurisdiction-stripping powers ignore the fact that Congress’s control over federal court jurisdiction is one of the few “checks and balances” which the Constitution provides to prevent the judiciary from exceeding the bounds of its legitimate authority. Moreover, even without the power to exclude cases from federal court cognizance, Congress still possesses ample authority to circumvent Supreme Court opinions if it is inclined to do so. Thus, attempts to limit Congress’s jurisdiction-stripping powers are not only misguided, but also futile. Only the traditional view adequately reconciles the richness of the American constitutional system.

A. Checks and Balances

The Framers sought to establish a system of government consisting of three independent and coordinate branches of government. The system developed, however, does not entail a complete “separation of powers.” Rather, that principle is tempered by the inclusion of “checks and bal-

384. See *supra* note 176 and accompanying text.

385. See *supra* notes 191-95 and accompanying text; see also *infra* note 404 and accompanying text.

ances." Each branch of government has power to police the others. For example, although the Constitution vested all the legislative power in Congress, the President has a veto power. In addition, the judiciary can review the acts of Congress for their constitutionality. Checks and balances are no less important than separation of powers; indeed, the two are complementary principles.

Concentration on the independence of the federal judiciary, to the exclusion of explicit constitutional provisions that might limit that independence, exaggerates the importance of separation of powers and improperly ignores the significance of checks and balances. This approach does not comport with the overall design of the American constitutional system. Integral to that system is the notion that each branch of government should use any or all of its legitimate powers to prevent perceived instances of overreaching by the other branches.³⁸⁶ Since the Exceptions Clause is a legitimate grant of power to Congress, Congress must be permitted to use that power to prevent perceived instances of judicial overreaching.

To be sure, there are other means by which Congress may prevent excesses by the judiciary. The power of impeachment is one potential weapon. However, history has proven impeachment to be a rather insignificant power,³⁸⁷ and impeachment for this purpose arguably abuses the impeachment process.³⁸⁸ Perhaps the power not to increase the salaries of the judiciary is a potential weapon to constrain the judiciary. The salary provision is clearly framed, however, to maintain judicial independence and minimize Congress's influence.³⁸⁹ Many point to the availability of constitutional amendments to overturn Supreme Court decisions. However, the "availability" is extremely limited given the strict

386. See *supra* notes 125-28 and accompanying text.

387. For example, the Jeffersonians attempted to use the Impeachment power to remove "Federalist" judges from office, but were unable to do so. This led Jefferson to conclude that "[t]he impeachment weapon . . . was a 'farce,' 'not even a scare-crow.'" GERALD GUNTHER, *CONSTITUTIONAL LAW* 11 (12th ed. 1991).

388. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 50 (1980). Choper writes, "The use of [the Impeachment] power simply because Congress disapproves of a Justice's votes or opinions cannot be seriously defended." *Id.*; see also Van Alstyne, *supra* note 1, at 230. Van Alstyne writes, "Nor was the impeachment power ever intended to be employed to subject judges to trial for the 'high crime' or 'misdemeanor' of disagreeing with Congress as to the constitutionality of its acts." *Id.* (footnote omitted). But see *infra* notes 426-33 and accompanying text.

389. See *THE FEDERALIST* NO. 79, *supra* note 38, at 472-75. Hamilton noted that the provision was intended to reflect the need for judicial salaries to keep up with "fluctuations in the value of money and in the state of society," not "to change the condition of the individual [judge] for the worse." *Id.* at 473.

requirements of Article V.³⁹⁰ Moreover, the amendment process is not a power of Congress, but belongs to the people.³⁹¹ The amendment process is therefore not an interbranch check on the judiciary at all. The only generally accepted “true” power of the other branches to “check” the judiciary is the power to appoint judges.³⁹² Unlike other constitutional “checks,” however, the appointment power does not allow for immediate or focused responses to the offending action.

Arguably, the Framers may have felt no need for “checks” on the judiciary because the judiciary was perceived, in Hamilton’s words, as “the least dangerous” branch of government, and “beyond comparison the weakest of the three.”³⁹³ However, this tells only half the story. It is clear that an expansive federal judiciary was feared by many, which is why Congress was only empowered to create the inferior courts.

Hamilton’s statements proved inaccurate.³⁹⁴ The Warren and Burger Courts were arguably dangerous and certainly powerful. The Supreme

390. Because of the difficulties inherent in the amendment process, see *infra* note 419 and accompanying text, it only has been used successfully to override Supreme Court decisions on five occasions. See U.S. CONST. amend. XXVI (setting the voting age; superseding *Oregon v. Mitchell*, 400 U.S. 112 (1970)); *id.* amend. XIX (granting suffrage to women; nullifying *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874)); *id.* amend. XVI (allowing income taxes; superseding *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988)); *id.* amend. XIV (granting citizenship to blacks; superseding *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); *id.* amend. XI (restricting judicial power over suits against a State by foreigners; superseding *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

391. See U.S. CONST. art. V. Congress may only “propose Amendments to [the] Constitution,” which must be ratified by the States. *Id.*

392. One question yet to be answered satisfactorily is why the President and Congress are permitted to use this power in any fashion whatsoever. No one has argued seriously that the Appointment power cannot be used as a hostile reaction to the Supreme Court’s decisions; or as a means to impose impermissible burdens on Constitutional rights; or even to “amend” the Constitution outside of Article V. In fact, it would probably be conceded that the appointment power can be used in a racially discriminatory manner—despite Equal Protection. If the appointment power is immune to such scrutiny, then perhaps the arguments are not as powerful as their proponents claim—and perhaps the Exceptions power should be similarly immune.

393. THE FEDERALIST NO. 78, *supra* note 38, at 465.

394. See Thomas Jefferson, Letter to Monsieur A. Coray (Oct. 31, 1823), in 15 ANDREW A. LIPSCOMB, THE WRITINGS OF THOMAS JEFFERSON 331-32 (1903):

At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction, before any one has perceived the invisible and helpless worm has been busily employed in consuming its

Court even declared itself the “ultimate interpreter of the Constitution.”³⁹⁵ With such assertions, the judiciary transformed itself from the least dangerous branch which could “never attack with success either of the other two,”³⁹⁶ into the dominant branch which never could be attacked with success by either of the other two. Surely some sort of checks and balances would have been intended by the Framers to curtail the judiciary had they foreseen such potential. It could perhaps be argued that the Framers did not foresee such a possibility and, therefore, should not be deemed to have guarded against it. This argument is unsatisfying and could hardly be advanced by the Supreme Court, for without the respect of the other branches, the Court would be unable to maintain its authority.³⁹⁷ If indeed the Framers did not foresee such a powerful court, neither did they foresee the possibility of Congress using the Exceptions Clause to eviscerate the judiciary.³⁹⁸ If the Framers cannot be deemed to have guarded against unforeseen dangers, then Congress’s power is at least as legitimate as the Court’s.³⁹⁹

To be sure, the Exceptions Clause is an imperfect weapon. Congress cannot dictate to any court the answer to a constitutional question. Therefore, if Congress were to remove jurisdiction over an issue from the federal judiciary, the result would be not an overruling of their decisions, but simply a transfer of the matter to state courts for resolution. This is the “balance” to Congress’s “check.” State courts are in no way controlled by Congress. They are, however, governed by the Supremacy Clause.⁴⁰⁰ Some state courts would inevitably consider themselves bound by the federal precedents; others, no longer subject to review, might

substance. In truth, man is not made to be trusted for life, if secured against all liability to account.

Id.

395. *Baker v. Carr*, 369 U.S. 186, 211 (1962); *see also Powell v. McCormack*, 395 U.S. 486, 549 (1969) (“[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.”). *But see supra* note 119 and accompanying text.

396. THE FEDERALIST NO. 78, *supra* note 38, at 466.

397. *See id.* at 465. Hamilton wrote:

The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Id. (emphasis omitted).

398. *See supra* notes 278-80 and accompanying text.

399. Congress’s power is actually more legitimate, for it is grounded in the explicit text of the Exceptions Clause.

400. *See supra* notes 116-17 and accompanying text.

not.⁴⁰¹ The best that Congress could hope for would be lack of uniformity. This is a far cry from amending the Constitution or even overruling a case. While it may seem preferable to some to lack uniformity on a particular issue rather than to have a repugnant uniform rule, the government could not easily bear many such cases and certainly could not long endure a complete lack of uniformity in federal law.⁴⁰² Thus there are practical limitations on excessive use of the Exceptions Clause.

Strangely enough, there are those who argue that these practical limitations suggest the impropriety of jurisdiction-stripping as a check on the judiciary.⁴⁰³ Far from being “utterly wretched” or even “odd,” however, the Exceptions Clause is virtually paradigmatic of checks and balances. A check on one branch of government by another should neither transfer power from the former to the latter, nor be too easily exercisable. Otherwise, one branch could annihilate, rather than merely restrain, another

401. See *supra* notes 119-21 and accompanying text.

402. See Wechsler, *Courts and Constitution*, *supra* note 1, at 1006-07. As Professor Wechsler pointed out long ago:

[G]overnment cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. Within that area, the opportunity for litigating constitutional defenses is built in and cannot be foreclosed. The same necessity for federal tribunals will be felt in many situations that do not involve proceedings for enforcement; it has led Congress . . . to expand remedial jurisdiction by such measures as the Federal Declaratory Judgment Act, the Tucker Act, the Administrative Procedure Act and others I could name. The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed. Beyond this, if the jurisdiction of the Supreme Court alone is withdrawn in a given field, as happened in *McCardle*, issues are left to final resolution in the lower courts, which may, of course, reach contrary results in different sections of the country. If, in addition, all federal jurisdiction is withdrawn, the resolution is perforce left to courts of fifty states, with even greater probability in contrariety in their decisions. How long would you expect such inconsistency in the interpretation of the law of the United States to be regarded as a tolerable situation? There is, moreover, still another difficulty. The lower courts or the state courts would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain. The jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment, placing an intolerable moral burden on the lower courts.

These are the reasons why congressional control of jurisdiction has so rarely been exerted as a method of expressing dissidence to constitutional decisions, even when such dissidence has won the sympathy of Congress.

Id.

403. See, e.g., Baucus & Kay, *supra* note 1, at 1000 (“Thus, the exceptions clause would be an odd creation—a legislative check on the judicial branch that does not return power to Congress.”); Sager, *supra* note 1, at 39 (“If we grant for the sake of argument that a majoritarian check on the Court would be desirable, it must still be recognized that the control of jurisdiction by Congress is an utterly wretched device to serve that end.”).

coordinate branch. When the President vetoes a congressional bill he dislikes, he does not gain the legislative power to pass a bill that he does like. At best, he gains a position from which to force a compromise; at worst, either his veto is overridden or no law at all is passed. Similarly, if Congress withholds jurisdiction from the federal courts, it is not permitted to decide the outcome of cases.⁴⁰⁴ That is always the role of the judiciary, whether state or federal.

Debate on the issue generally proceeds under the implicit assumption that Congress is “bad” and the courts are “good.” However, the reliability and trustworthiness of the federal judiciary has its limits. As Lord Acton brilliantly stated, “Power tends to corrupt and absolute power corrupts absolutely.”⁴⁰⁵ No entity can be trusted with absolute power—especially not one that is tenured for life, such as the Supreme Court. That the Supreme Court’s authority is limited to “judicial power” means little if, as the ultimate interpreter of the Constitution, it can define the limits of that power. Surely, this could not have been the intent of the Framers, who understood very well that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”⁴⁰⁶

Unless checked by Congress, the Supreme Court theoretically could render any act or omission of Congress or the President unconstitutional, regardless of the plausibility of its reasoning. Admittedly, this is only a theoretical possibility; in practice, the Court probably is limited to plausible interpretations of the Constitution—or at least popular ones. However, this provides little comfort. Most people, liberal or conservative, can point to some egregious abuse of power by the Court. If it is not *Roe v. Wade*,⁴⁰⁷ it may be *Lochner v. New York*.⁴⁰⁸ *Scott v. Sandford*⁴⁰⁹ and *Plessy v. Ferguson*⁴¹⁰ are probably universal examples of judicial failure.

Any decision-maker—Congress, the President, or the Supreme Court—can abuse its power or simply be wrong. But that is no reason to nullify

404. See *supra* note 293 and accompanying text.

405. Letter to Mendell Creighton (Apr. 5, 1887), in ACTON, *ESSAYS ON FREEDOM AND POWER* 335-36 (Gertrude Himmelfarb ed. 1972).

406. THE FEDERALIST NO. 10, *supra* note 38, at 79 (James Madison). It continues: “With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.” *Id.* This is a strong argument against the Supreme Court’s ability to decide that a jurisdictional act is unconstitutional because it was motivated by hostility to their own decisions.

407. 410 U.S. 113 (1973) (invalidating state anti-abortion laws).

408. 198 U.S. 45 (1905) (invalidating state maximum hour legislation).

409. 60 U.S. (19 How.) 393 (1857) (invalidating congressional act freeing slaves in certain territories) (superseded by Constitutional Amendment).

410. 163 U.S. 537 (1896) (upholding state “equal but separate” laws).

such power. Justice Story recognized this principle long ago in *Martin v. Hunter's Lessee*,⁴¹¹ where, in defending Supreme Court review over state court judgments, he stated:

It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse.⁴¹²

The Supreme Court is neither perfect nor infallible.⁴¹³ There is no reason to suppose that the Supreme Court should have the final say in every matter. It has no right to violate the prerogatives of the other branches, and its transgressions should be no less feared than those by the other branches.

Since the Constitution grants Congress the power to make exceptions to the Supreme Court's appellate jurisdiction, this power must be respected by that Court—even when Congress is using that power as a check on the federal judiciary. Of course, if Congress violates some concrete provision of the Constitution in the jurisdictional statute, then the Supreme Court should declare the law unconstitutional. But the Court should not fashion some vague “essential role” for itself or otherwise interpret the Constitution loosely in order to aggrandize itself at the expense of Congress.

It has been noted that the power of judicial review, which is highly anti-majoritarian and nowhere explicitly provided for in the Constitution,⁴¹⁴ is of questionable legitimacy in a democracy.⁴¹⁵ Congress's authority to control federal court jurisdiction has been said to add legitimacy to that

411. 14 U.S. (1 Wheat.) 304 (1816).

412. *Id.* at 344-45; see also THE FEDERALIST NO. 80, *supra* note 38, at 481 (“The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle which is calculated to avoid general mischiefs and to obtain general advantages.”).

413. *Cf.* *Brown v. Allen*, 344 U.S. 443, 540 (1953) (“We are not final because we are infallible, but we are infallible only because we are final.”).

414. See THE FEDERALIST NO. 81, *supra* note 38, at 482 (“[T]here is not a syllable in the [Constitution] which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution.”).

415. See Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846-49 (1975) (arguing that Congress has broad power over the federal judiciary in part because “a system which really did put nine men with life tenure, in an absolutely invulnerable position” would be undemocratic).

power.⁴¹⁶ If the Court has been granted jurisdiction by Congress, then the Court's decisions, even if unpopular, have at least been suffered to exist by the democratically-elected legislature. On the other hand, if Congress withdraws jurisdiction, then judicial review is not only anti-majoritarian, but arguably a nullity altogether, since a court without jurisdiction is no court at all.⁴¹⁷ For the Court to attempt to force its opinions on Congress and the nation under these circumstances would be highly improper. It would also be highly imprudent, for the courts neither have nor were intended to have any means to actually enforce their decrees.⁴¹⁸

In short, despite the independence of the federal judiciary—or perhaps even because of it—congressional control over federal court jurisdiction is an integral part of the American constitutional system.

B. "Amending" the Constitution by Act of Congress

One final issue that needs to be addressed concerns amending the Constitution. The amendment process is a difficult one, requiring two supermajority votes.⁴¹⁹ It is often said that because Congress is not authorized to amend the Constitution directly by a mere statute, it should not be able to amend the Constitution indirectly by means of a jurisdictional act. This argument is unsound because an act that may be outside the realm of one of Congress's enumerated powers may nevertheless be perfectly appropriate under another independent power.⁴²⁰ In any event, a withdrawal of federal jurisdiction would only move the matter to the state courts for resolution; it would not enact Congress's interpretation.⁴²¹

416. See Black, *supra* note 415, at 846 (arguing that the fact that "every assumption of jurisdiction by every federal court since 1789 has been on the basis of an Act of Congress giving jurisdiction to that court. . . . That is the rock on which rests the legitimacy of the judicial work in a democracy."); Wechsler, *supra* note 1, at 1048 (agreeing with Black).

In what can only be described as a tongue-in-cheek argument, Professor Tribe has maintained that it is the existence of judicial review that adds legitimacy to majority rule, see TRIBE, *supra* note 1, at 131-32—as if in a democracy it were majority rule that needed justification! If a life-tenured body of sages is somehow to represent "principle," then perhaps the United States would do well to rid itself of democracy altogether and surrender to a benevolent dictatorship by the Supreme Court.

417. See Black, *supra* note 415, at 846-47.

418. See *supra* note 397 and accompanying text (discussing the Supreme Court's lack of power to enforce its decision).

419. See U.S. CONST. art. V.

420. One pertinent example will illustrate this principle poignantly. Even if Congress cannot "amend" the Constitution by means of its control over federal court jurisdiction, it can do so by means of the Appointment power. See *supra* note 392 and accompanying text (discussing the Appointment power as a means to check the judicial branch).

421. See *supra* notes 400-01 and accompanying text (discussing the theoretical removal of certain issues from federal to state jurisdiction).

Thus, Congress would *not* be indirectly “amending” the Constitution; it would only be regulating jurisdiction.

The fact that the federal judiciary does not have the power to amend the Constitution is often conveniently overlooked. There can be no denying, however, that when the Supreme Court overrules a prior constitutional decision, it is in effect amending the Constitution. If the courts cannot amend the Constitution directly, perhaps they should not be able to do so indirectly, either. Unlike a mere jurisdictional statute, moreover, such “amendment” by the Supreme Court provides a substantive rule of law which must be adhered to by other courts and presumably by the other branches of government.⁴²² If it is problematic to allow Congress indirectly to “amend” the Constitution on the vote of hundreds of elected representatives, then it must be equally or more problematic to allow the Supreme Court to amend the Constitution on the vote of a mere handful of people who are politically unaccountable. Conversely, if the Court can do indirectly what it has no power to do directly, then the Congress can do so as well, provided it is acting under one of its enumerated powers.

Since these arguments will not be persuasive to everyone, one final point must be made to contradict those who seek to prevent Congress from indirectly “amending” the Constitution. That point is that there are plenty of other avenues for the other branches to “amend” the Constitution outside of Article V.

The simplest way to indirectly “amend” the Constitution is to appoint sympathetic justices.⁴²³ This was done by Presidents Franklin D. Roosevelt, Ronald Reagan, and George Bush, among others. Through attrition and appointment, President Roosevelt transformed a staunchly conservative court that was blocking New Deal legislation under the guise of “substantive due process” into a liberal court that not only discarded the concept of “substantive due process,” but also retreated from attempting to place any limits on Congress’s power to regulate interstate commerce. Similarly, Presidents Reagan and Bush transformed the activist and liberal Warren and Burger Courts into the more conservative Rehnquist Court of today. Few would argue that these personnel changes were not of great constitutional significance.

A quicker way to accomplish the same objective would be to “pack” the Supreme Court with agreeable justices. Rather than waiting for attri-

422. *But see supra* note 119 and accompanying text (discussing differing theories of what constitutes the supreme law of the United States).

423. Of course, filling vacancies on the federal courts of appeals and even the federal district courts can have a significant impact on the ideological direction of jurisprudence as well.

tion to create vacancies, the size of the Court could be expanded to turn a minority of sympathetic votes into an instant majority. This strategy was pursued by President Roosevelt who believed that, because of the dire circumstances of the Great Depression, he could not wait for the sitting justices adverse to the New Deal legislation to retire from the Court. President Roosevelt's plan failed, but on a political level rather than a constitutional level.⁴²⁴ It would have been a perfectly legitimate exercise of Congress's power to constitute the Supreme Court, for there is no constitutional restriction on either the size of the Court or the appointment of ideologues. Indeed, it would be difficult to imagine how the Supreme Court could possibly rule such legislation unconstitutional.⁴²⁵

A third way to indirectly "amend" the Constitution is somewhat similar but significantly more difficult and perhaps even underhanded: impeaching Supreme Court justices with "offending" views. Since appointment of new justices would probably be unnecessary to create the desired majority, this could be accomplished by Congress alone, without the aid or approval of the President.⁴²⁶ This is a difficult process, however, because it would require a two-thirds vote of the Senate for each impeachment conviction.⁴²⁷ It is also underhanded because removal on impeachment requires a conviction of "Treason, Bribery, or other high Crimes and Misdemeanors."⁴²⁸ Of course, because the Senate has "the sole Power to try all Impeachments,"⁴²⁹ its decision would not be reviewable by the Supreme Court or any other court.⁴³⁰ However, the Senators would be

424. See Gunther, *supra* note 1, at 908 (stating that court-packing is "a technique widely recognized as constitutionally authorized albeit criticizable in the strongest terms as a matter of policy").

425. Even assuming the matter to be justiciable, which is by no means clear, see *supra* note 28 and accompanying text (listing factors relevant to political question analysis), the matter could hardly be litigated in the Supreme Court before the new Justices took their positions on the bench. Even if it could be, the Supreme Court would have a difficult time getting its opinion to be taken seriously by Congress and the President. Both would presumably harbor hostility to the Court since their cooperation, through legislation and appointment, would have been necessary to "pack the Court" in the first place.

426. For example, if the Supreme Court were split 5-4 against Congress's point of view, the impeachment of two of the offending Justices would create a new 4-3 majority without the appointment of new Justices by the President.

427. See *supra* note 387 and accompanying text (discussing the relative insignificance of the power to impeach).

428. U.S. CONST. art. II, § 4. *The Federalist* went so far as to defend the lack of any provision for removing such judges on account of "inability," *i.e.*, senility, on the grounds that "such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose." THE FEDERALIST NO. 79, *supra* note 38, at 474.

429. U.S. CONST. art. I, § 3, cl. 6.

430. See *Nixon v. United States*, 506 U.S. 224, 226 (1993) (holding that Congress's exercise of Impeachment power was not justiciable).

“sitting . . . on Oath or Affirmation,”⁴³¹ and at least *ought* not to convict for purely political reasons.⁴³² Nevertheless, impeachment is arguably legitimate if the Members of Congress believe that, by repeated usurpations of power under the guise of constitutional decision-making, the Justices in question were guilty of “Treason, . . . or other high Crimes [or] Misdemeanors” against the Constitution.⁴³³

Another approach would be to manipulate jurisdiction. Rather than remove jurisdiction from the federal judiciary, Congress could vest it in a newly-created specialty Article III court with no right of appeal to the Supreme Court. For example, Congress might create an “Abortion Court” to have exclusive jurisdiction over all cases involving abortion issues. The newly-created Abortion Court might be filled with pro-life judges and could quite possibly—and legitimately—overrule *Roe v. Wade*.⁴³⁴ *Stare decisis* is not a constitutional requirement,⁴³⁵ and since the Abortion Court would be the highest court on the matter, it would be authorized to revisit *Roe v. Wade* when “appropriate.”

Such a plan would be constitutionally unassailable, and would be perfectly acceptable under the mandatory theories of jurisdiction because the judicial power over the constitutional issue in question remains vested in an Article III court. There would be no due process claim because there is no right to an appeal to the Supreme Court.⁴³⁶ Nor would there

431. U.S. CONST. art. I, § 3, cl. 6.

432. See *supra* note 388 and accompanying text (discussing potential abuse of the power to impeach).

433. U.S. CONST. art. II, § 4. According to *The Federalist*, “[t]here 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.” THE FEDERALIST NO. 81, *supra* note 38, at 485. Apparently, this was considered by the Federalists themselves to be a legitimate cause for impeachment. See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, J.). Justice Marshall stated that the Supreme Court “ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” *Id.*

434. 410 U.S. 113, 166 (1973) (invalidating state anti-abortion laws).

435. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (maintaining that “*stare decisis* is not an ‘inexorable command’”); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) (“The rule of *stare decisis* . . . is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.”).

436. See *supra* notes 103-04 and accompanying text (maintaining that the Supreme Court has long held that due process does not require appellate review).

be any equal protection claim because no class of litigants would be discriminated against.⁴³⁷

These are just four means by which Congress can legitimately “amend” the Constitution; others could be imagined.⁴³⁸ In each of the methods discussed above, the “amendment” occurs without meeting the requirements of Article V and yet is perfectly legitimate—or at least unreviewable. Thus, the argument that Congress cannot do indirectly what it is not authorized to do directly fails. Moreover, the “amendments” affected by those proposals are far more complete than any “amendment” that could be accomplished by means of mere jurisdictional exceptions because they would directly result in a new body of constitutional law. In addition, they do not share the inherent limitations of the exceptions method which serve as a practical check on congressional excess.⁴³⁹ Thus, the argument

437. See *supra* notes 105-06 and accompanying text (arguing that Congress may not discriminate against a particular class of litigants since no person may be denied equal protection under the law).

438. For example, Congress could use its power under the Exceptions Clause to prevent the Supreme Court from reviewing facts in any case, see *supra* Part II.G.3. This would severely cripple the Court’s power of judicial review. By carefully finding the appropriate facts, state courts or juries could shield their judgments from any legal review. Cf. HART & WECHSLER, *supra* note 7, at 661 (“Judicial review, to be effective, must include some control over the fact finding function; if the fact finder (jury, agency, lower court) is free to act at will, control over the lawfulness of decisions is lost.”).

Perhaps the most extreme power, possessed by both Congress and the President, is the ability to simply refuse to appoint any new justices to the Supreme Court. Over time, this would permit either branch to annihilate the Court altogether; the President can only appoint with the consent of the Senate, and Congress cannot take away the President’s power to nominate Supreme Court justices. See U.S. CONST. art. II, § 2, cl. 2. Admittedly, this would require a great deal of time and the concurrence of many Presidents or Congresses, but the very possibility is remarkable.

Moreover, there are a number of actions that a vindictive Congress could take to limit or simply punish the judiciary, each of which could have a less dramatic but nonetheless real effect on constitutional adjudication. For example, rather than make exceptions, Congress could vest the Supreme Court with exclusive jurisdiction over cases within its original jurisdiction. This could tie up the Court’s time with cases affecting Ambassadors and those in which a State is a party, leaving much less time for other matters. Congress could conceivably “regulate” the Supreme Court’s appellate jurisdiction by requiring it to hear every criminal appeal before it is permitted to hear any civil case in any given term. In addition to punishing the court with tedium, this would prevent the Supreme Court from hearing many controversial civil issues. Yet it would be perfectly defensible on the ground that criminal cases are more important. Congress could also resurrect the practice of requiring the Justices to ride circuit. While not a very effective limitation on the Supreme Court’s power, it would certainly be a form of punishment. Ultimately, Congress could abolish the inferior courts altogether, thereby severely punishing and drastically limiting the federal judiciary, if not the Supreme Court itself.

439. See *supra* notes 400-02 and accompanying text (discussing intrinsic limits on congressional use of its power under the Exceptions Clause).

that jurisdictional exception-making is a particularly egregious means also fails.

Congress's powers over the judiciary are susceptible to abuse, just as all of its enumerated powers are susceptible to abuse. But its control over jurisdiction can no more be prevented from "indirectly amending" the Constitution than can its control over the Supreme Court personnel. Those who fear for the judiciary under the traditional view need not be too concerned; the courts have managed to maintain their independence for over 200 years. Critics can take comfort in the fact that few of the various methods for "amending" the Constitution described in this Article have actually been employed. Although Congress has often considered doing so, it has rarely acted to remove jurisdiction from the federal courts out of hostility to their decisions.

Perhaps, then, congressional authority over federal court jurisdiction is not so regrettable after all. It provides a check on the judiciary and yet is no more dangerous than other congressional powers. In fact, because of its inherent limitations, it is less dangerous. Thus, attempts to rewrite the Constitution to limit this power are misguided and efforts to prevent indirect "amendment" of the Constitution by acts of Congress are ultimately futile.

V. CONCLUSION

This Article began with the orthodox position that Congress possesses nearly plenary authority to regulate the jurisdiction of the federal courts. A survey of a number of theories limiting Congress's jurisdiction-stripping powers followed, suggesting various weaknesses inherent in each. Despite their shortcomings, the theories proposed by Professors Clinton and Amar are significant because, rather than focusing primarily on policy arguments (which are always a matter of personal preference), they relied heavily on the actual text, history, and structure of Article III. Keeping their insights in mind, this Article carefully examined the text of Article III, finding that a truly comprehensive interpretation is perfectly consistent with the traditional view. Next, evaluation of the historical evidence illustrated the validity of the traditional view, and the illegitimacy of competing theories. Finally, this Article turned to the structure of the American constitutional scheme and showed how the traditional view aptly reconciles the competing yet complementary principles of "separation of powers" and "checks and balances." In addition, this Article illustrated that attempts to prevent Congress from indirectly amending the Constitution by jurisdictional means are both misguided and ultimately futile. In light of all the above, this Article now concludes that the tradi-

tional view provides the best account of Congress's power to restrict federal court jurisdiction.

Professor Amar has framed the debate over the interpretation of Article III as a comparative one. He argues that the appropriate question in assessing the various theories is "which reading of article III is *more* plausible, under a preponderance-of-the-evidence standard,"⁴⁴⁰ and insists that a "complete, coherent and convincing account of congressional power to limit federal jurisdiction"⁴⁴¹ is the appropriate standard. Accepting the implicit challenge issued by Professor Amar, this Article has presented "a careful and integrated counternarrative of the 'traditional' position that [hopefully approaches] the required level of coherence and plausibility."⁴⁴²

This interpretation of the text of Article III is certainly more comprehensive than any competing interpretation. Professor Amar relies primarily on "shall" and "all" to support the two-tier theory, but this Article has shown that these words, properly understood, do not mean exactly what he thinks they mean. When the entire text of Article III is considered, the two-tiered theory fares poorly while the traditional view is vindicated. This interpretation may, in certain respects, lack the support of judicial precedent, but it does not ignore any of the language of Article III and is well-supported by the context and structure of Article III. Moreover, considering the language one would use to implement each of the competing theories, it is clear that Article III most strongly supports the traditional view. A draftsman of the Constitution, aware of Professor Amar's theory, might have employed "all types of cases" and "civil cases" in lieu of "all cases" and "controversies," and "hereby" in lieu of "shall." However, unaware of Professor Amar's theory, the original draftsman would not have been so troubled. On the other hand, Professor Amar himself admits that the language is a rather awkward implementation of his two-tiered theory.⁴⁴³

The traditional view is also supported by the weight of history. At the very least, the evidence has been shown not to support any competing theory. Professor Amar relies primarily on dictum from *Martin v. Hunter's Lessee* and on the various drafts of the Constitutional Convention's Committee of Detail. As he admits, however, *Hunter's Lessee* is

440. Amar, *Judiciary Act*, *supra* note 1, at 1566.

441. Amar, *Two Tiers*, *supra* note 1, at 206; *see also* Amar, *Reply*, *supra* note 1, at 1671 (noting that he has "always explicitly framed the issue as a *comparative* question").

442. Amar, *Reply*, *supra* note 1, at 1671.

443. *See, e.g.*, Amar, *Reply*, *supra* note 1, at 1654 ("[T]he language of article III is considerably more awkward in expressing the meaning I attribute to it than alternative language would be.").

demonstrably wrong in many respects;⁴⁴⁴ as has been demonstrated, it is also wrong with respect to “shall” and “all.” Moreover, the Committee of Detail drafts do not support Professor Amar’s theory after all. Admittedly, among the Framers there was no one who zealously advocated plenary congressional authority over federal court jurisdiction. However, there was a wide-spread recognition that Congress had broad powers under the Exceptions clause, and there is little evidence to show that this was intended to be limited in any way.

Finally, while not quite as ambitious as others interpretations, the structural arguments presented here are on much more solid ground. Professor Amar can establish only that some categories of cases are more important than others—a fact which few would care to dispute. He cannot establish that his two-tier structure corresponds exactly to the order of importance, much less that federal court jurisdiction over the important categories of cases should be required in every instance. As for the independence-of-the-judiciary arguments, only the theory espoused in this Article adequately addresses the fact that “separation of powers” is constitutionally tempered by “checks and balances.”

But the ultimate factor, the one that cannot be over-emphasized, is the plausibility factor. This Article’s view is the traditional view. This Article does not seek to prove that for approximately 200 years everyone else has missed the boat; nor does it attempt to erect a fanciful, convoluted structure from the sparse text. It merely claims that things really are as simple as we believed them to be.

Along the way, this Article endeavored to show that a continuance of the traditional view is all for the best. But that is really beside the point. We may not like the choices made by the Framers, but we are stuck with the Constitution they left us—at least until we choose to amend it. Ours is a government of laws, among which the Constitution is paramount. The judiciary is no more above the law than is the President or Congress. Like it or not, the courts must respect the fact that the Constitution has granted Congress nearly plenary authority to restrict federal court jurisdiction.

444. See, e.g., Amar, *Two Tiers*, *supra* note 1, at 212 (rejecting some of Justice Story’s positions).

