ABSTRACT

Constitutional Origins of the Federal Judiciary

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This dissertation examines the constitutional underpinnings of twentieth-century developments in the structure and function of the federal judicial system. In the half-century between 1891 and 1939, the federal judiciary underwent its first complete reorganization since the First Congress passed the Judiciary Act of 1789. The result was rapid growth in the independence, extent, and power of federal courts. Congress first furnished the federal judiciary with the institutional means to extend its jurisdiction by increasing the number of federal trial courts and establishing a full set of intermediate appellate courts in 1891 to handle the bulk of federal judicial business. In the ensuing decades, Congress gradually relinquished control over the Supreme Court's appellate jurisdiction, giving the Court nearly complete discretion over the composition of its own docket. Soon thereafter, Congress likewise turned over control of federal procedure to the Judicial Conference of the United States and in 1939 furnished the federal judiciary with its own administrative apparatus, the Administrative Office of the Federal Courts, to aid in the formulation and administration of judicial policy. The resulting institution looked far different than the judiciary that had administered federal law in the early republic.

Prevailing accounts of this development find the origins of the modern judiciary in its immediate political context and deny to the Constitution any role as a determinate of its forms, claiming that the Framers never envisioned the sort of judicial institution that now pervades the Union. Looking to the framing of Article III in the Federal Convention of 1787, debates in the First Congress on the Judiciary Act of 1789, and the exercise of judicial power in the early republic, I argue to the contrary that the modern judiciary is a fulfillment of, rather than a divergence from, the institutional design of the Constitution. This has important implications not only for the adjudication of interpretive controversies over the meaning and application of Article III, but also for broader debates about the complex interaction between constitutional forms and political practice. It suggests that the Constitution functions as a determinant as well as a product of American political development.

Constitutional Origins of the Federal Judiciary

by

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A Dissertation

Approved by the Department of Political Science

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Submitted to the Graduate Faculty of
Baylor University in Partial Fulfillment of the
Requirements for the Degree
of
Doctor of Philosophy

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December 2011

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TABLE OF CONTENTS

ACKNOWLEDGMENTS

Aristotle describes a friend as another self. This must resonate with every student that has the benefit of great teachers, for in our own work we see their insights and influence reflected back to us. And so there grows up a profound and durable kind of friendship with one's mentors. David Nichols' influence on this dissertation began with its conception in his American Founding seminar and the final product stands as a tangible reminder of our friendship.

The department of political science at Baylor has been a warm and collegial academic home, due in large part to the leadership of Mary Nichols and David Clinton during their respective terms as department chair. While writing this dissertation, I have simultaneously served as a full-time lecturer in the department and I am indebted to them both for their efforts to accommodate the demands of my research agenda and for the time they have taken to offer professional guidance to a young scholar very much in need of it. I am also grateful to Mary Nichols for her efforts as graduate director, a title that understates dramatically the wisdom and direction she provides for our graduate program.

Coming to the end of a work of this magnitude, I feel a tremendous sense of gratitude for my family. My parents encouraged me to follow my interests into the uncharted waters of an academic career, a world entirely foreign to us at the time, and showed remarkable confidence in me by doing so. My wife, Charree, has meantime filled our busy lives with grace and laughter, bearing patiently my long hours at my desk and my continual jabbering about constitutional politics. She has been a persistent voice encouraging me to press on when I was daunted by the road ahead.

To my wife, Charree

Her children rise up, and call her blessed;
her husband also, and he praiseth her. (Proverbs 31:28)

CHAPTER ONE

A Federalist Defense of Judicial Power

Between 1891 and 1939, the federal judicial system underwent its first major reorganization since the First Congress passed the Judiciary Act of 1789. This dissertation argues that the resulting growth in the independence, extent, and power of the federal judiciary was largely a fulfillment of, rather than a divergence from, the rationale of Article III. To that end, the ensuing chapters examine five periods in the development of the judicial system: the functions and defects of judicial power prior to 1787, the framing of Article III in the Federal Convention, its subsequent legislative construction by Congress, its interpretation by the Supreme Court in the early republic, and the reorganization of the federal system between 1891 and 1939. The institutional rationale of the Constitution prescribes for the courts a central role in the administration of federal law, the settlement of federal conflict, and the maintenance of constitutional supremacy over both state and national policy.[1] At the same time, Article III secures judicial independence in the performance of these functions by setting formal limits to congressional regulation of the judiciary's structure and jurisdiction. Federalists in the First Congress sought to give effect to these functions and forms, but only partially succeeded, constrained as they were by Anti-Federalist opposition. Federalists sought throughout the 1790s to overcome these

[1] Some elaboration with respect to the objects of the analysis is in order. First, the object of what follows is the role of "judicial power," a category that comprehends far more than the power of judicial review, which is but one species or manifestation of judicial power. Second, this investigation will provide little guidance as to the rules of decision employed by a court in deciding the controversies that come before it. Instead, it is intended to encompass only the scope and function of judicial power. It seeks to specify the extent of the power wielded by the Court, not to dictate how that power will then be used in deciding on the constitutionality of laws. Such an analysis will not answer the most controversial interpretive questions that come before the Court, but may help answer the fundamental questions of whether judicial power is a legitimate means of settling disputes over constitutional meaning.

constraints, even as the Anti-Federalist spirit coalesced into an opposition party with Jefferson at its head. The result was the faithful expression of the constitutional rationale in the Judiciary Act of 1801 and its subsequent repeal by the new Jeffersonian majority in 1802. The Jeffersonian hostility to judicial power that triumphed in the Revolution of 1800 proved resilient as a political construction of the constitutional order, while the judicial role embodied in Article III and advocated by its Federalist defenders was submerged. Modern reforms in the judicial system may therefore be defended as a return to the early Federalist, and ultimately constitutional, understanding of federal judicial power.

Recognizing the constitutional origin of the modern judiciary is an important object of this examination. Adopting the judicial functions envisioned by Article III but ignoring the constitutional rationale that underpins them tends to undermine constitutional limits. It puts a powerful argument in the hands of those who seek to divorce judicial power from constitutional authority. If an extensive and independent judicial power is necessary to cope with the developing needs of the nation, but the Constitution envisions a narrow and subordinate role for the courts, then we must admit that the Framers' design is inadequate. If this is true, then we must either abandon constitutional limits or accept some version of the living constitution as a basis for limits. In either case we would be forced to concede that the Framers' experiment in constitutional government is a failed one. Happily, a concession of this kind is unnecessary. The Federalists who framed the Constitution and administered the federal government in its first decade were acutely aware of the extensive role that the discretionary exercise of judgment would play in modern government and made

provision for it in Article III of the Constitution. What follows may therefore fairly be called a Federalist defense of judicial power.[2]

The Jeffersonian Assault on Judicial Power

A defense of this sort is warranted by growing hostility toward judicial power among constitutional scholars. In many cases, this hostility stems from a whiggish distrust of independent judicial discretion, which commonly finds articulation in conservative critiques of judicial activism. In others, it is driven by concerns over the so-called majoritarian difficulty, which commonly finds articulation in liberal and populist critiques. Both critiques, however, are grounded in a Jeffersonian understanding of the role played by separation of powers and constitutional law in a democracy, an understanding that diverges sharply from the design of the Framers.

The Dead Constitution

Traditionally, those defending the authority of the Constitution to constrain majorities have claimed that ratification is an authoritative act of popular sovereignty. Thus,

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[2] The reader may recognize the motif of Federalist revisionism from the writings of Professor Amar, whose work played a formative role in the development of the argument advanced in the following chapters despite our substantial disagreement over the role of the Supreme Court within the judicial hierarchy. See Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* 65, no. 2 (1985): 205-72.

A word on the interpretive approach employed in the argument is in order. This mode of constitutional interpretation does not simply rely on the opinions of particular Framers for interpretive authority. Nor does it rely on the sort of "clause bound interpretivism" deplored by many legal scholars. See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), chap. 2. It instead rests on the assumption that the Constitution manifests a discernable logic, that it forms a coherent whole that specifies its own objectives, and that it prescribes a system of government by which those objectives are to be pursued. Insofar as the argument draws on the statements of particular individuals (or political factions like the Federalists) it is "not because he is more typical or influential in a direct sense but because he sees farther or better. He can *explain* more." As Herbert Storing pointed out, "We are looking not for what is *common* so much as for what is *fundamental*." *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981), 6. This mode of interpretation has particular relevance for construction of the Constitution's structural features. See, for example, Stephen L. Carter, "Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle," *Yale Law Journal* 94, no. 4 (1985): 821-72.

when judges invalidate an unconstitutional law, they only prefer "the intention of the people to the intention of their agents."[3] But this account of constitutional authority was problematic for Jefferson, who expressed doubt about the democratic legitimacy of the claim that a constitution embodies popular will and is therefore subject only to formal amendment. Writing to Madison from France on the eve of the French Revolution, Jefferson argued that "the earth belongs in usufruct to the living" and that one generation may not, therefore, bind another. Once the majority that ratified the instrument has perished, the next generation must reaffirm the constitution it inherits by another positive act of ratification. Without a positive act of the living majority, the instrument becomes a dead letter. To hold otherwise, according to Jefferson, requires a doctrine of tacit consent, which lacks the moral force to withstand majority will.[4] Jefferson thereby all but erases the distinction between temporary majorities and constitutional majorities. If constitutional decisions cannot be placed beyond the reach of a living majority, then the role of judicial power in preserving the decisions of constitutional majorities from the caprices of temporary majorities is in serious doubt. Jefferson's doubts about the authority of bygone generations thus led him to profess, not a living constitution, but a dead one.

Writing a hundred years ago, Hannis Taylor accurately traced Jefferson's argument to its foundation in French revolutionary treatments of written constitutions, especially Rousseau's *Social Contract*.

> [T]he immense difference that divides a written constitution in the United States from a written constitution in France is embodied in the fact that in the former the supreme and final power to determine when its terms have been infringed is vested in the courts as a function purely judicial. The fundamental heresy embodied by

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[3] "Federalist, no. 78," in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown: Wesleyan University Press, 1961), 525.

[4] Thomas Jefferson to James Madison, September 6, 1789, in Phillip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Annapolis: Liberty Fund, 1987), 1.2.23.

> Jefferson…was that over a violation of a constitution, considered as a "compact," there is no common judge.[5]

There being no common judge, the parties themselves must do the business of constitutional construction, which for Jefferson seems sometimes to have been the states (as in the Virginia and Kentucky Resolutions) but more often to have been the people themselves. The lethal implications for judicial power are apparent in Jefferson's numerous letters on the subject. "When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society, but the people themselves."[6] In Jefferson's view, the Constitution's insulation of judicial power from temporary majorities rendered it an inappropriate guardian of constitutional meaning. The political branches, being subject to popular control, were better proxies for popular construction of the Constitution. Larry Kramer has therefore rightly divined the Jeffersonian spirit in his defense of "popular constitutionalism."[7] Writing to Judge William Johnson in 1823, Jefferson contrasted his populist conception of constitutionalism with Marshall's assertion that "there must be an ultimate arbiter somewhere." "True, there must;" Jefferson admitted, "but [the] ultimate arbiter is the people."[8] Thus, in Jefferson we find "an utter lack of appreciation of the importance of the judicial power, as a supreme arbitrating power."[9]

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[5] Hannis Taylor, *The Origin and Growth of the American Constitution* (Boston: Houghton Mifflin, 1911), 308-10.

[6] Jefferson to William Charles Jarvis, Sept. 28, 1820 in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York: Putnam, 1905), 12:163.

[7] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

[8] Jefferson to Judge William Johnson, March 4, 1823 in Ford, 12:279-80.

[9] Taylor, *Origin and Growth of the American Constitution*, 309.

This insistence on the interpretive authority of the people themselves was a consistent theme of Jefferson's thought. He had even attempted to institutionalize it in his draft of a constitution for Virginia, which provided for a popular convention to correct breaches of the constitution. Jefferson's ideas had apparently gained enough traction by the time of the ratification debates that Madison was prompted to challenge it directly in *Federalist 49*. Though he recognized the "great force" of Jefferson's reasons for having recourse to the people in constitutional controversies, Madison was quick to confine such direct involvement of the people to "great and extraordinary occasions."[10] On the one hand, "frequent appeals would in great measure deprive the government of that veneration, which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." On the other, such "experiments are of too ticklish a nature to be unnecessarily multiplied." The successes in constitution making that had marked the 1780s (and success was by no means a common outcome in the states) were products of an extraordinary context and the "future situations in which we must expect to be usually placed, do not present any equivalent security[.]" In any case, appeals to the people were likely to follow "the tendency of republican governments…to an aggrandizement of the legislative, at the expense of the other departments."[11]

Madison's rather forceful rejection of Jefferson's populist constitutionalism was but another rendition of the common Federalist argument that a stable republican order requires the exclusion of the people from all direct participation in the operation of the

[10] *The Federalist*, 339. The "constitutional road to the decision of the people" that Madison had in mind for such extraordinary occasions was evidently the Article V amendment process.

[11] Ibid., 340-41.

government.[12] The formal role of the people is therefore appropriately confined to constitution making and elections. We will find in chapter three that this rationale animated the work of the Federal Convention that framed the Constitution. Consequently, while "populist constitutionalism" may trace its pedigree to Jefferson, it faces powerful impediments to association with the design of the Framers.

Modern populists who, like Jefferson, question the possibility of a perpetual constitution with a fixed meaning have difficulty justifying a powerful and independent judiciary. As a result, a number of scholars have recommended subversive alterations in the scope and independence judicial power. Recent books by Mark Tushnet and Sanford Levinson are representative of this movement.[13] The title of Tushnet's book, *Taking the Constitution Away from the Courts*, speaks for itself. He denies that the judiciary has any special claim to responsibility for constitutional enforcement. There are, in his account, no appreciable gains to individual liberty in allowing the courts to invalidate legislation.[14] Levinson, in calling for a new constitutional convention to democratize the Constitution, suggests (with a tip of the hat to Tushnet) that judicial review might just as well be scrapped and that life tenure for Justices of the Supreme Court must certainly be discarded.[15]

Whig Distrust of Discretion

Jeffersonian hostility to judicial power stems from more than its anti-majoritarian characteristics. Judicial discretion also threatens the basic Jeffersonian faith in legislative

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[12] Whether and to what extent this view of constitutional politics is consistent with Madison's later views as Jefferson's lieutenant is too extensive and controversial a subject to take up here.

[13] Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton: Princeton University Press, 1999); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2006), chap. 4.

[14] Tushnet, *Taking the Constitution Away from the Courts*, chap. 6.

[15] Levinson, *Our Undemocratic Constitution*, chap. 4.

supremacy. This aversion to judicial discretion is perhaps best summarized in Jefferson's fear that the Constitution had become "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they may please."[16] On another occasion, he described the judiciary as "a subtle corps of sappers and miners constantly working underground to undermine our Constitution[.]"[17] It was the very sobriety and seeming moderation of legal processes that made the courts so dangerous, for this subtlety cloaked political discretion in the forms of judgment, rendering "its assaults…more sure and deadly, as from an agent seemingly passive and unassuming."[18] "[T]here is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court."[19]

Jefferson's antidote for this kind of judicial tyranny was a departmental view of constitutional construction that admits the power of courts to disregard unconstitutional laws in particular cases but denies that the judges' construction of the Constitution is in any way binding upon the other branches.[20] Senator John Breckenridge, giving voice to Jefferson's theory in 1802, explained that while the courts may "obstruct the operations of a law" in particular cases, "such a law is not the less obligatory because the organ through which it is to be executed has refused its aid."[21] The Jeffersonians challenged judicial finality,

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[16] Jefferson to Judge Spencer Roane, Sept. 6, 1819 in Ford, 12:137.

[17] Jefferson to Thomas Ritchie, Dec. 25, 1820 in ibid., 177.

[18] Jefferson to [Nelson] Nicholas, Dec. 11, 1821 in *The Writings of Thomas Jefferson*, ed. H.A. Washington (New York: Riker, Thorn, & Co., 1854), 7:230. There is some doubt about the addressee of Jefferson's letter; some have contended that it was in fact Joseph Cabell Breckinridge.

[19] Jefferson to Johnson, March 4, 1823 in Ford, 12:279.

[20] For a thorough discussion of Jefferson's departmental theory, see Kramer, *The People Themselves*, chap. 4.

[21] *Annals of the Congress of the United States*, 7th Cong., 1st sess., 1802, 11:179-80 [hereafter cited as *Annals*].

not judicial review itself. The alternative view of courts as "the ultimate arbiters of all constitutional questions [is] a very dangerous argument indeed, and one which would place us under the despotism of an oligarchy."[22]

Jefferson and his progeny also sought to limit judicial power by confining judicial review to clear cases of unconstitutionality, a standard that has received much play among critics of judicial activism. Kramer goes so far as to assert that judges defending the review power in the early republic "invariably illustrated their understanding of judicial review with blatantly unconstitutional laws," such as a complete denial of trial by jury. "The point was not rhetorical. These were, literally, the only kinds of laws they could imagine declaring void."[23] Keith E. Whittington, following the influential rationale of James Bradley Thayer, furnishes a characteristic modern example in his explanation of the limits of judicial interpretation of the Constitution. Whittington's argument begins with the premise that not all constitutional controversies are subject to judicial settlement. The text is subject to judicial interpretation when it admits of "faithful [and] exhaustive reduction to legal rules." When the text is insufficiently determinate, "the interpretive task [of judges] is to limit the possibilities of textual meaning even as some indeterminacies remain." Thus, the judicial role is to enforce the limitations imposed by the Constitution, insofar as the Constitution admits of determinate interpretation, thereby setting outer limits to the activities of the political branches.[24]

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[22] Jefferson to Jarvis, Sept. 28, 1820, in Ford, 12:163.

[23] Kramer, *The People Themselves*, 103.

[24] Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999), 5; James Bradley Thayer, "Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (1893): 129-56.

This constitutionally limited role for judicial interpretation, according to Whittington, leaves space for political construction of the Constitution. In absence of a determinate meaning in the text, the principles embodied by the Constitution may yet provide some guidance for political action. As Whittington puts it, "An act may be constitutionally permitted and still not be constitutionally appropriate." In these instances, political actors can invoke constitutional authority for a given position, without claiming that their construction of the Constitution is judicially enforceable.[25]

Whittington assumes that legislative determinations are due greater respect than judicial discretion in matters of constitutional construction. But why this ought to be the case is by no means clear. Nothing in the Constitution itself points to such deference. Indeed, every care seems to be taken to emphasize the enumerated character of Congress's powers, while the executive and judicial powers are vested without qualification in the president and the courts. No qualification is put upon the jurisdiction of the federal courts in cases "arising under the Constitution." As long as the constitutional question arises in a case properly before a court of law it is subject to judicial settlement.

This is not to suggest that judicial discretion is unlimited. Judges are not equipped to decide questions of mere policy and the Constitution itself has placed certain political questions exclusively within the discretion of the president or Congress. I am only suggesting that "determinate meaning" is an artificial boundary for judicial discretion. It is a misguided attempt to draw a bright line between determinate provisions that provide justiciable standards and indeterminate provisions that provide no standards. A more accurate view of judicial power would acknowledge that even where provisions are indeterminate, a justiciable standard can be applied; but its application requires the exercise

[25] Whittington, *Constitutional Construction*, 8.

of discretion by the judiciary in the same way that legislation and execution requires the exercise of discretion by Congress and the president.

The effort to confine judicial discretion to determinate provisions ultimately flows from an assumption of legislative supremacy, a theory of republican government foreign to the Constitution.[26] The first substantive provision adopted by the Federal Convention of 1787 emphatically rejected legislative supremacy. "Resolved…that a national Government ought to be established consisting of a *supreme* Legislative, Executive, and Judicial." While use of the term "national" drew considerable criticism in the ensuing debate, dissent was conspicuously lacking over the application of "supreme" to all three branches of the new government. Each branch was to be given unique functions with broad discretion in the exercise of those functions. Each branch can therefore make a claim to supremacy with respect to its own functions and no constitutional duty is laid on it to defer to the determinations of the others in the exercise of those functions. Relegating judgment to the narrow confines of determinate meaning robs the courts of their proper discretion in the administration of the law, including the law of the Constitution.

It is thus apparent that Jeffersonian hostility to judicial discretion is symptomatic of a deeper misunderstanding of separation of powers. If Jefferson saw any role for executive and judicial discretion, it was in maintaining some of the limits imposed by the Constitution; but this misses the crucial fact that executive and judicial discretion have a role to play in promoting the effective exercise of power. His opinion on the constitutionality of the national bank, drafted while serving as Secretary of State for President Washington, furnishes an apt example. Having determined that incorporation of the bank exceeds the

[26] For an intelligent contrary view of the status of legislative supremacy, see Martin Diamond, *The Founding of the Democratic Republic* (Belmont: Thomson Wadsworth, 1981), chap. 4.

authority of Congress under the Constitution, Jefferson closed with the following exhortation to the president.

> It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for cases where they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President.[27]

Two limitations on executive discretion are suggested by Jefferson's admonitions. First, it suggests that separation of powers is a device intended merely to prevent tyranny and that it functions primarily as an impediment to action. He implicitly denies that the president might wield his constitutional powers as a means of achieving positive policy objectives. Second, it suggests that executive discretion in the invalidation of laws is, like judicial discretion, limited to clear cases of constitutional violation.

While this negative and narrow view of separation of powers is certainly extant at the time of the Founding, there were many among the Constitution's Framers who envisioned a more positive and extensive role for the separation of powers. Contrast, for instance, Madison's insistence on the negative or preventive function of separation of powers in *Federalist 51* with Hamilton's emphasis on effective administration in *Federalist 70* and his insistence that a unitary and independent executive is essential to securing it.[28] Of course, even *Federalist 51* did not neglect entirely the positive functions of separation of powers. Take, for example, Madison's construction of the veto power.

> As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative, on the legislature, appears at first view to be the natural

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[27] Jefferson, "Opinion on the Constitutionality of a National Bank," Feb. 15, 1791, in Ford, 6:204.

[28] *The Federalist*, 347-53 and 471-80.

> defence with which to executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused.[29]

Madison prefers the qualified negative to the absolute negative as a measure intended to *encourage* executive activity, which presumably would be discretionary in character. This was a far cry from the narrow and negative view of executive and judicial discretion that pervades Jefferson's writings.

Jefferson's legacy as president captures even better his inadequate view of the constitutional order. To take but one example, as president he fostered the development of the congressional caucus as a means of presidential influence. The Jeffersonians had a strong enough hold on Congress following the "Revolution of 1800" that "conclaves of leaders from the executive and legislative branches formulated policy" and ensured party unity in the ensuing passage of legislation. Jefferson thus "quietly used the congressional caucus to enact the Democratic-Republican program."[30] Of course, while Jefferson remained in the driver's seat, the party caucus was a means of presidential influence and one that permitted him to control the formulation of policy without appearing to use the executive office independently of legislative will. Jefferson's personal influence and political acumen enabled him to maintain control, but Madison and Monroe struggled constantly to hold the reins of King Caucus. Jefferson had removed the barriers that prevented legislative dominance and the separation of powers ultimately paid the price. Most importantly, the sort of legislative supremacy that emerged crippled independent executive discretion.[31] Had

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[29] *The Federalist*, 350.

[30] Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Developments, 1776-2007*, 5th ed. (Washington, D.C.: CQ Press, 2007), 109 and 202.

[31] Particularly lethal to executive independence was the caucus's control over presidential nominations. In the essentially one-party system that emerged between 1800 and 1808, the Democratic-

it not been for the adept statesmanship of John Marshall, Jefferson's conquest might have comprehended the Court as well.

Breathing Life into the Dead Constitution

Most scholars who defend judicial discretion against the whiggish impulses of legislative supremacists utilize an extra-constitutional rationale for judicial power, forced to do so by a crisis of confidence in constitutional authority. These defenders of judicial discretion share Jefferson's doubts about the binding of generations but are unwilling to follow him all the way to a surrender of judicial power.[32] Consequently, they seek to find a rationale for the exercise of judicial power grounded in some non-constitutional source of authority. They seek a means of breathing life into the dead constitution. David A. Strauss articulates the motives driving much of this scholarship:

> There are settled principles of constitutional law that are difficult to square with the language of the [written Constitution], and many other settled principles that are plainly inconsistent with the original understandings. More important, when people interpret the Constitution, they rely not just on the text but also on the body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires.[33]

If the Constitution is not an adequate authority for adjudication of controversies, Strauss concludes, jurists need to find an alternative rationale for judicial power.

Republican caucus in effect chose the president, a situation the Framers had sought hard to avoid. A sharp critique of the caucus system may be found in the Tennessee General Assembly's protest message of 1823, which may be found in Michael Nelson, ed., *The Evolving Presidency*, 2nd ed., (Washington, D.C.: CQ Press, 2004), 69-72.

[32] The classic articulation of the difficulty faced by proponents of the living constitution who wish to preserve an energetic judiciary is Justice William Brennan's speech to the Text and Teaching Symposium at Georgetown University, October 12, 1985.

[33] David A. Strauss, "Common Law Constitutional Interpretation," *University of Chicago Law Review* 63, no. 3 (1996): 877.

Strauss suggests one such alternative in common law jurisprudence, which rests on a standard of "rational traditionalism." Rational traditionalism gives deference to "judgments made by people who were acting reflectively and in good faith, especially when those judgements have been reaffirmed or at least accepted over time." Ultimately, these judgments are reliable because they "reflect a kind of tough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough."[34] Thus, we are free to discard those constitutional limitations that we no longer find beneficial. Only, we must not do so precipitously, according to Strauss. Our innovations must be the product of reflection and rational self-interest.

Cass R. Sunstein has suggested a similar reliance on a common law type "judicial minimalism" by which judges seek to settle the case at hand by use of narrowly tailored arguments that avoid unnecessary recourse to fundamental principles. Minimalism allows the Court to apply established and generally recognized principles of justice to individual cases. It thus avoids a conflict between the Court's position and the sense of the community, allowing the broadest scope possible for the operation of democratic politics. Like common law, then, it is based in the shared sense of justice acknowledged by most members of the community.[35]

Other scholars have advocated a judicial role founded in a theory of liberalism. On the Left, this position is most prominently occupied by Ronald Dworkin. Dworkin unmoors the Constitution from original intent and original understanding. He instead suggests

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[34] Strauss, "Common Law Constitutional Interpretation," 891-92.

[35] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999). For similarities with common law jurisprudence, see chapter four. On the democracy promoting aspects of judicial minimalism, see chapter two.

adopting (some) textual elements as consonant with modern standards of social justice and individual autonomy, standards articulated most notably in the philosophy of John Rawls.

Democratic theory is likewise an increasingly popular source of defenses of judicial power. Echoing Jefferson's critique of constitutionalism, populist legal scholars are uneasy with the claim that the Constitution is perpetually imbued with the authority of popular sovereignty by virtue of its ratification, subject only to formal amendment. In response, Bruce Ackerman has developed an historical theory of constitutional change suggesting that, even in absence of formal amendments, extraordinarily popular political movements substantially alter the Constitution, even if this change does not result in formal amendment. These constitutional "moments" are as much a part of the Constitution as is the fourteenth amendment. The Constitution itself is more than its text; it is the sum of its historical developments, developments made manifest in both formal and informal amendment of the Constitution.[36]

John Hart Ely, in a more moderate populist vein, likewise based judicial review on fundamentally populist grounds. Seeking to justify the activism of the Warren Court as consistent with the Constitution, Ely develops a sharp distinction between the procedural elements of the Constitution, which are judicially enforceable, and its substantive provisions, which are best enforced through the political process. Thus, the role of the Court, as Ely sees it, is to reinforce and maintain the democratic integrity of the political process established by the Constitution, which includes applying the procedural principles that

[36] Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991).

underlie the text to the political systems of the states. A genuinely democratic political process, once secured, will protect substantive rights more effectively than the Court.[37]

Thus, common law, liberal, and democratic understandings have each produced a definition of judicial power and an institutional role for the courts that gives broad scope to judicial discretion. It is not clear, though, in what way these visions of judicial power are guided by the Constitution. It may, of course, be the case that the Constitution envisions a judicial function similar to what these approaches describe, but that conclusion must flow from an examination of the text and the institutional rationale imparted to it by its Framers. Reliance on an institutional logic foreign to the Constitution is not a stable basis for the exercise of power. The product is an endless diversity of explanations for judicial authority. In the resulting clamor among theorists, the only stable ground for jurists faced with the task of exercising power in concrete cases is the text and its underlying rationale.

Originalist Inadequacies

Originalist treatments of judicial power similarly suffer from a partial acceptance of Jefferson's hostility to judicial power. While originalists, by definition, do not share his doubts about the binding of generations, they are deeply influenced by his whiggish distrust of judicial discretion. Consequently, instead of defending judicial power, they have, for the most part, narrowly focused on rules of decision and the limits of judicial review. The few originalists that have taken up a defense of the judiciary have largely limited their focus to particular components of judicial independence (mandatory jurisdiction, for example). Thus, originalist scholars have failed to provide an account of judicial power that gives a full explanation of the role of courts in the constitutional order.

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[37] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

Preoccupied as they are with distilling rules of decision from the text of the Constitution, originalists have rarely paused to give an account of what judicial power is as an institution of government and what purposes it serves in the constitutional order. Whittington's account of judicial power provides a representative insight into the inadequacy of originalist scholarship in this respect. Using the distinction between determinate and indeterminate provisions, Whittington gives a skeletal account of the limits of judicial activism that is arguably based in the text of the Constitution.[38] However, his primary concern is to establish the legitimacy of constitutional politics outside the judiciary, so he does not provide a detailed examination of the actual scope of judicial power. He does not, therefore, address the claims of the Court's critics that the institutional power of the judiciary is too great. The assertion that the judiciary may only enforce the determinate meaning of the Constitution will not answer that purpose. In fact, the determinate meaning standard does not at all address the increasingly prominent argument that, while the Constitution sets authoritative and discernable limits to political action, the Court has no special responsibility for enforcing those limits.

This gap in originalist scholarship has a simple explanation. Originalists have rarely concerned themselves with defending judicial power. Like Whittington's book, most originalist scholarship aims at the vindication of political settlement of controversies contra judicial settlement. Indeed, another strain of originalist scholarship, combating the doctrine of "judicial supremacy" established by the Court in *Cooper v. Aaron*, has acquiesced in a moderated form of judicial review while rejecting judicial finality.[39] The key word here is

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[38] Whittington, *Constitutional Construction*, chap. 1.

[39] *Cooper v. Aaron*, 358 U.S. 1 (1958); Robert L. Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990); Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986). Clinton and Wolfe both argue that John

"acquiesced." These studies assumed that the rest of the legal world accepts—and exaggerates—the legitimacy of a powerful and energetic judiciary. As a result, they had no occasion to defend judicial power from critics even more hostile to it than themselves.

Thus, originalist scholarship has set outer limits to the legitimate exercise of judicial power, but it has not explained why judicial power should extend to those limits. It is one thing to say that everything outside of a certain boundary is outside the realm of judicial authority. It is entirely another thing to say that the judiciary may legitimately exercise all power falling within the boundary. Telling prisoners that they may not go outside the jailhouse does not imply that they may go anywhere they like within it. The needed remedy is an account grounded in the institutional rationale of the Constitution that can establish both the limits and the extent of judicial power.

Even those rare originalist treatments of judicial power that have established a basis for its exercise (and not simply its limits) have been confined to narrow consideration of a single aspect of judicial power, most often judicial review. Take, for example, Michael Zuckert's analysis of Article III's development in the Federal Convention of 1787. He argues that the expansive judicial power manifested in Article III is a substitute for other institutional mechanisms—a congressional veto on state laws and a council of revision—that Madison had intended to include in the Constitution to police the system of federalism, limited government, and separated powers. The provisions of Article III, Zuckert argues, when combined with the Supremacy Clause and limitations on state power create an

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Marshall had the correct view of judicial power in *Marbury* and that the Court has gradually drifted away from that version of judicial review. Snowiss differs insofar as she lays the blame for divergence from the constitutional design squarely on Marshall. Kramer's "populist constitutionalism" is in many ways another rendition of this strain of thought. Kramer, *We the People*, chap. 4 and 5.

institution that responds to institutional functions required by the logic of the constitutional design, albeit less perfectly than Madison's proposals would have done.[40]

Zuckert fills the gap in originalist scholarship in one respect. He endeavors to identify the institutional sources of judicial review in the rationale of the Constitution as a whole. On the other hand, his explanation is limited to judicial review and leaves the other important aspects of the role of courts untouched. More importantly, Zuckert's essay is at best a grudging defense of judicial review. It is in fact a vindication of Madison's unrealized vision for political institutions to settle constitutional controversies, which has a great deal in common with Jefferson's whiggish distrust of judicial discretion. The Framers' Constitution comes out of the contest as a second-best alternative. For all this, though, Zuckert's methodology is sound and worthy of emulation.

Examples of similarly narrow analyses of components of judicial power other than judicial review abound. The law reviews in recent decades have furnished insightful treatments of mandatory federal jurisdiction,[41] the supremacy of the Supreme Court in the judicial system,[42] and the constitutionality of so-called Article I tribunals.[43] Scholars have taken on these questions in piecemeal fashion for the understandable reason that each is

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[40] Michael Zuckert, "Judicial Review and the Incomplete Constitution: A Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism," in *The Supreme Court and the Idea of Constitutionalism*, Steven Kautz, et al., eds. (Philadelphia: University of Pennsylvania Press, 2009), 53-77.

[41] See, for example, Amar, "A Neo-Federalist View of Article III"; Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III," *University of Pennsylvania Law Review* 132, no. 4 (1984): 741-866.

[42] See, for example, Stephen G. Calabresi and Gary Lawson, "The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia," *Columbia Law Review* 107, no. 4 (2007): 1002-48; Stephen G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review* 105, no. 6 (1992): 1153-1216; Alex Glashausser, "A Return to Form for the Exceptions Clause," *Boston College Law Review* 51, no. 5 (2010).

[43] See, for example, Paul M. Bator, "The Constitution as Architecture: Legislative and Administrative Courts under Article III," *Indiana Law Journal* 65, no. 2 (1990): 223-76; Gary Lawson, "Territorial Governments and the Limits of Formalism," *California Law Review* 78, no. 4 (1990). 853-911; Martin H. Redish, "Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision," *Duke Law Journal* 1983, no. 2 (1983): 197-230.

complex enough when taken alone. Nonetheless, something is lost when the constitutional concept of judicial power is carved up in this way.

Chapter Outline

To fully grasp the role of judicial power in the constitutional order, it is necessary to take a comprehensive view that encompasses not only judicial review, but the jurisdiction, hierarchy, and institutional independence that characterize the federal judiciary envisioned by Article III. Moreover, an adequate treatment of judicial power must also comprehend the legislative creation and operation of the federal judiciary in the early republic, for these early efforts to give effect to Article III have necessarily influenced subsequent understandings of the constitutional design, sometimes in ways that diverged from the Constitution. Revisiting this early historical development will therefore aid in uncovering the sources of modern misunderstandings of judicial power as an institution.[44]

The following sequence of chapters is designed to provide a narrative of this development beginning, in chapter two, with a brief consideration of the role of national judicial power between the Revolution in 1776 and the framing of the Constitution in 1787. By identifying the defects in the Confederation generally and concerning the judicial power particularly, we gain insight into the remedies provided for these defects in the Constitution, remedies that were prefigured in important ways by conflicts in English constitutional history over the exercise of equity jurisdiction.

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[44] This broader historical perspective places this dissertation at the intersection of constitutional theory and American political development, a marriage that enriches both approaches to the study of the American regime. See, for example, Jeffrey Tulis, "On the State of Constitutional Theory," *Law and Social Inquiry* 16, no. 4 (1991): 711-16. As he points out, "it is an important task of constitutional theory to distinguish those developments that are constitutionally induced from those that are not" (714). For a general discussion of the need for a "constitutional perspective" in American political development, see George Thomas, "What Is Political Development? A Constitutional Perspective," *Review of Politics* 73, no. 2 (2011): 275-94.

This will set the stage for detailed analysis in chapters three and four of the framing of the Constitution in the Federal Convention of 1787. Since these chapters are the normative foundation for the rest of the analysis, they warrant a more extended explanation. Emphasis on the Convention debates as a normative guide to the meaning of Article III runs counter to the insistence of some originalists that we treat the ratification debates as the authoritative source for a concept of judicial power. Kramer, for instance, in his recent reassessment of the legitimacy of judicial review, gives short shrift to the Convention in favor of the ratification debates. "Thoughts expressed by the Framers behind closed doors in Philadelphia are ultimately of less interest than the public debate that took place over ratification," Kramer argues. "Understandings expressed during the discussions about whether to ratify…are what matter most."[45] Kramer thus adopts the public understanding of the meaning of Article III as his normative standard for describing judicial power under the Constitution.

While the legitimacy and utility of the "original understanding" approach to constitutional interpretation employed by Kramer is clear, I would nonetheless challenge the notion that it is a *conclusive* guide to constitutional meaning, particularly in the case of institutional powers. Just because the vast majority of those ratifying the Constitution did not foresee the potential of and need for an extensive administrative state or a powerful and independent executive—or, in this case, a powerful and independent judiciary coextensive with the law as the final arbiter of constitutional meaning—does not mean that those institutional developments are contrary to the design of the Constitution. Institutional developments may be contained in the "genetic code" of the Constitution, to borrow a metaphor from Jeffrey Tulis, and be occasioned by the changing attributes of the political

[45] Kramer, *The People Themselves*, 78.

context in which the Constitution operates.[46] The constitutionality of such developments should be determined by reference to the institutional logic of the constitutional order, by an evaluation of the purposes to which each institutional feature of that order is directed. Examining both the circumstances that occasioned the framing of the Constitution and the narrative of the debate that produced that instrument's language is, I would argue, the best means of discovering such an institutional logic. Both the Court and constitutional scholars have fruitfully employed such an approach in construing executive power under the Constitution; it is difficult to see why the approach will not be equally fruitful when applied to judicial power.

Originalist efforts that do look to the convention debates for guidance in the exercise of judicial power have often met with frustration. As Max Farrand once observed, "many have looked in vain in the proceedings of the convention for the authority to exercise" judicial review over federal legislation. This frustration stems largely from the sparseness of the record with respect to the judicial provisions. Major exchanges on the judiciary rarely consume more than a few pages of Madison's notes and even then tend to focus on jurisdiction, mode of appointment, and the existence of inferior courts. Conspicuously missing is sustained debate on judicial review of federal legislation (though what there is suggests that the delegates assumed the existence of such a power). One common means of overcoming the poverty of the record is to opt for a superficial examination of the delegates' opinions on various matters. Charles Beard's analysis of the delegates' understanding of judicial review is but one in a host of such efforts. Beard approached the issue by detailing the statements of the 25 most influential delegates, drawing material from both the

[46] Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1988), 8.

Convention debates and the delegates' statements elsewhere.[47] While this certainly simplifies the task of analyzing the debates, such an approach falls far short of an adequate treatment of the delegates' work. An adequate treatment cannot restrict itself to an examination of what individual delegates said about judicial review, or even what they said about Article III more generally. Analyses of the Convention that attempt to segment its proceedings and consider the resulting parts in isolation or that examine the isolated statements of individuals out of context are inevitably shallow in scope and understanding. Resort to such narrow analysis is, moreover, unnecessary. The debates are rich with insight into the judicial function, at least for those willing to dig a bit deeper than explicit statements on the review power.[48] The institutional place of judicial power must instead be understood in the context of the whole system of government established by the Constitution.

Employing a more comprehensive approach to the debates, I identify three animating functions of "the judicial Power" vested in federal courts. First and foremost, the judiciary envisioned by Article III is intended to secure the effective administration of federal law. That is to say, judicial power plays an indispensible positive role in the direct enforcement of federal law. As noted above, this is the single most neglected aspect of the judicial function, for it understands the courts to be a spur to effective government and not simply an impediment to tyranny. Second, Article III seeks a legalization of conflict by pushing federal conflicts into a legal forum and settling those conflicts using the claims of individual litigants. This averts, as far as possible, direct collisions with states as political bodies and the resort to force that always threatens to attend such collisions. Third, Article

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[47] Charles A. Beard, *The Supreme Court and the Constitution* (New York: MacMillan, 1912), chap. 2.

[48] I am certainly not the first scholar to dig deeply into the convention debates for guidance in the construction of Article III, but other examples are relatively rare and tend to be narrowly concerned with particular aspects of judicial power. See notes 40-42 above for specific examples.

III gives federal courts a unique role in preserving the supremacy of the Constitution over both state and national politics. By extending federal jurisdiction to "all Cases arising under this Constitution" Article III goes beyond the familiar maxim that jurisdiction should be coextensive with the laws. Congress itself possessed no general authority to give effect to constitutional limits on the states, for Article I only vested authority in Congress to "carry into Execution the foregoing *Powers* and all other *Powers* vested by this Constitution in the Government of the United States or any Department or Officer thereof." In contrast, the Court was to have jurisdiction in "all Cases" arising under the Constitution as well as the laws of the United States.

Chapter five builds upon this analysis by identifying constitutional limits on congressional regulation of the federal judiciary. The orthodox reading of Article III generally gives Congress plenary authority over the structure and jurisdiction of the federal courts, but this reading cannot be squared with the text or its development in the convention. In order to secure the judiciary's capacity to perform the functions identified in chapters three and four, the Framers set in place firm formal barriers to legislative interference. These limits on congressional regulation are imposed by three inviolable characteristics of the federal judiciary. First, the Constitution secures the institutional integrity of the judiciary by vesting the "judicial Power" exclusively in Article III courts. Only judges holding an office created pursuant to Article III may exercise the judicial power of the United States. All such judges must, therefore, be appointed by the president with the advice and consent of the Senate, enjoy tenure during good behavior, and receive an irreducible salary. Second, Article III secures the jurisdictional integrity of the judicial power of the Union by making its jurisdiction mandatory. At minimum, an avenue to an Article III court must be open to "all Cases" arising under the Constitution, laws, or treaties of the

United States, "all Cases" affecting diplomatic officers of foreign governments, and "all Cases" of admiralty and maritime law. If state courts decline to hear such cases or lack jurisdiction to do so, Congress is under a constitutional obligation to provide an inferior court with original jurisdiction to hear the neglected cases. In the other six jurisdictional categories falling within the scope of federal judicial power—the party-based "Controversies"—Congress *may* provide a venue for the exercise of original jurisdiction, though it is not obliged to do so, even if state courts decline to exercise jurisdiction. Alternatively, one might plausibly argue that Article III mandates the exercise of *exclusive* federal jurisdiction over "all Cases" in the first three jurisdictional categories, but permits the exercise of *concurrent* jurisdiction by state courts in the other six. Either of these two readings gives effect to both the mandatory "shall extend" that precedes the jurisdictional menu and the selective use of "all" within it, though I will argue that the latter exclusive interpretation is the sounder of the two . Third, the Constitution secures the hierarchical character of the federal judiciary manifest in the Supreme Court's appellate jurisdiction. Congress may not regulate the Supreme Court in a manner that deprives it of jurisdiction over any case falling within the scope of federal jurisdiction described in Article III. Congress may control the *form* of jurisdiction exercised by the Supreme Court under its power to "make exceptions" to the appellate jurisdiction of the Court. Such exceptions, however, must operate by relocating the excepted cases to the original jurisdiction of the Court.

Having thus laid a normative foundation in the text of Article III and its development in the convention, chapters six and seven examine the early legislative and judicial implementation of Article III. Chapter six begins by looking to the deliberations of the First Congress on the Judiciary Act of 1789. While the constitutional forms and functions of federal judicial power received forceful articulation on the floor of the House,

the Federalists in the First Congress faced powerful political constraints in giving full scope to the provisions of Article III. The First Congress clearly sought to give effect to some of the judicial functions prescribed by the Constitution, especially the legalization of conflict and constitutional supremacy over state politics. But other important functions were neglected. In particular, Congress's unwillingness to leave federal jurisdiction intact or to create an adequate system of lower courts fell short of the mandates of Article III. Additionally, circuit riding severely impaired the Supreme Court's capacity to maintain genuine supremacy in the judicial hierarchy. Nonetheless, there were statesmen in the First Congress who understood the functions of judicial power and the limits of congressional regulation in a way more consistent with the constitutional design, some of whom, not surprisingly, had taken an active part in the framing of Article III.

Chapter seven examines early congressional efforts to reform and improve the judiciary act and judicial efforts to carry out the judicial function. Congressional reform efforts culminated in the Judiciary Act of 1801 passed by the lame duck Federalists of the Sixth Congress, which gave full scope to federal jurisdiction, expanded the geographical reach of the federal courts, and eliminated the circuit riding duties of the justices. This was followed immediately by the Jeffersonian assault on the judiciary, which began with the repeal of the Act of 1801 and threatened the institutional integrity of the judiciary in constitutionally problematic ways.

The second half of chapter seven then shifts the analysis to the activity of the Supreme Court, examining that institution's early decisions establishing its role in the constitutional order. The prestige and power that the Supreme Court now enjoys in American politics is due in no small part to the judicial statesmanship of John Marshall. Under Marshall, the Court weathered the Jeffersonian assault and, moreover, managed to

assert its custodianship of the Constitution and firmly establish its role as arbiter of federal conflict through its review of state laws. On the other hand, the long ascendancy of the orthodox view of plenary congressional power over the courts is also attributable to Marshall's influence. Before Marshall took the reins of the Court, dissenting views about the constitutionality of congressional regulations of the federal judiciary crept to the fore with some regularity.[49] As Marshall gained influence over the Court, however, his own expansive reading of congressional power over the judiciary found expression in the Court's opinions and displaced the dissenting views.[50] When later Courts looked back for guidance, they found a string of precedents affirming plenary legislative control of federal courts and were content to appease Congress by piling yet more precedents upon the wreckage of Article III.[51] Of course, Marshall's abdication of judicial independence is counterbalanced by his energetic assertions of constitutional supremacy and the long strides he made toward the legalization of federal conflict. Thus, under Marshall's leadership, the Court reaffirmed the practice of the early Congresses, which were selective in their acknowledgement of the functions and limits imposed by Article III. So it is that we find contemporary commentators drawing upon Marshall both to augment and to limit the scope of federal judicial power.

Chapter eight concludes the dissertation by looking at the institutional growth of the judiciary and judicial discretion since 1802. While policy makers and legal commentators continue to espouse the orthodox view of plenary congressional control, the history of

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[49] See, for example, *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Wiscart v. D'Auchy* 3 U.S. (3 Dall.) 321 (1796); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799).

[50] See, for example, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. More*, 7 U.S. (3 Cranch) 159 (1805); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810).

[51] See, especially, *Ex parte McCardle*, 74 U.S. 506 (1869).

judicial reform tells a different story. Increase in the extent, authority, and independence of federal courts has been the consistent theme of the judiciary's historical development. The twentieth century has witnessed an especially rapid increase in each of these respects. Congress first furnished the federal judiciary with the institutional means to extend its jurisdiction by increasing the number of federal trial courts and establishing a full set of intermediate appellate courts in 1891 to handle the bulk of federal judicial business. In the ensuing decades, Congress gradually relinquished control over the Supreme Court's appellate jurisdiction, giving the Court nearly complete discretion over the composition of its own docket through the writ of certiorari. Consequently, an ever-increasing proportion of constitutional questions in American politics are settled—with repeated claims of finality—by the Supreme Court. In the 1930s, Congress likewise turned over control of federal procedure to the Judicial Conference of the United States and furnished the federal judiciary with its own administrative apparatus, the Administrative Office of the Federal Courts, to aid in the formulation and administration of judicial policy. As expected, the Court together with the Judicial Conference, which is chaired by the chief justice, has taken primary responsibility for reforms in federal procedure and the management of judicial business. All of these developments have, at some point, occasioned criticism as divergences from the constitutional scheme. To the contrary, I will argue that these developments are largely fulfillments of Article III's rationale. That political practice has followed constitutional design stands as a testament to the wisdom of the Framers and the foresight of the Federalist defenders of judicial power. No recourse to the living constitution and no abdication of constitutional limits is necessary to defend the modern judiciary. At the same time, the remarkable adherence of these modern institutional reforms to the functions and forms of Article III testifies to the role of the Constitution as a determinant as well as a

product of political thought and institutional development. Thus, this dissertation has important implications not only for the adjudication of interpretive controversies over the meaning and application of Article III, but also for broader debates about the role of the Constitution in American political development.

CHAPTER TWO

Judicial Power before the Constitution

The Constitution was framed to meet the "exigencies of the Union." Any account of the institutional rationale of that instrument should begin with the defects of the system it was framed to remedy. This chapter will therefore examine the exercise of judicial power under the Articles of Confederation to set the stage for the analysis of the Convention's deliberations in chapters three and four.

At the same time, we must recognize that the functional inadequacies of state and federal judicial power during the Confederation period do not alone explain the institutional outcome of the Framers' efforts. The institutional rationale that produced Article III of the Constitution was in fact the Framers' contribution to a tradition of legal and political philosophy that reached back over two millennia to Aristotle's treatment of equity. Consequently, an adequate treatment of the institutional features of the constitutional order cannot neglect this philosophical tradition, but must treat the Convention's work as another chapter in the development of that tradition, albeit one with a more concrete manifestation than its predecessors.

We will turn first to this philosophical foundation for the revisionary function of courts, which originated in the concept of equity. This foundation is obviously important for its contribution to our understanding of the power of judicial review. Even more important for our purposes, though, is the contribution of English jurists to this philosophical tradition. The development of common law and equity courts in England occasioned a dispute over the separation of judicial from executive power that is

foundational for the American understanding of judicial independence and separation of powers.

We will then turn to consider the role of judicial power in the United States during the Confederation period. Looking to state practice, we find a nominal embrace of judicial independence, but in reality the state governments had exchanged royal prerogative for legislative supremacy. The resulting frustration helped foster a willingness to embrace judicial review as a response to legislative tyranny.

Finally, we will consider the role of judicial power in Congress's efforts to manage the nation's common concerns. This experience furnished two important lessons for the Framers. First, any expansion of national power depended upon development of an extensive judiciary that did not rely on state courts to administer federal law. Second, in order to function effectively, judicial (and executive) power had to be insulated from congressional control.

Equity and the Revisionary Function

Judicial review—defined as the power to declare a law unconstitutional and therefore void—was a rarely exercised power before the framing and implementation of the Constitution. Instead, the revisionary power of American courts before 1787 took the form of equity jurisdiction.[1] Equity jurisdiction enabled a judge to decline to apply the law in a particular case if its application would produce an absurd or unjust result in the circumstances. The court provided a remedy that extended only to the case at hand and did

[1] The following account of equity jurisdiction follows closely Gary L. McDowell's analysis in *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy* (Chicago: The University of Chicago Press, 1982), chapters 1 and 2.

not speak to the validity or constitutionality of the law itself. Thus Gordon Wood calls such exercises of judicial discretion "narrow" review.[2]

"As a juridical concept, equity's roots were firmly planted in the Western legal tradition; they went remarkably deep and straight, running through the English and Roman traditions all the way back to Aristotle."[3] Aristotle held that equity (*epieikeia*) supplies the defects of written law and "is not something different from the law" but "constitutes the corrective function of the law."[4] The defects of written law flow from the peculiarity of particular cases and the limited foresight of the legislator. Even given a wise legislator, which is not always the case, a well framed law cannot take into account all possible circumstances to which it might apply, thus peculiar circumstances may arise in which the application of the law produces a result inconsistent with its spirit. Gary McDowell provides an apt summary of Aristotle's rationale:

> In order to bring the positive law more closely into line with the demands of justice, it is necessary that there be a continuing opportunity for human reason to reassert itself in the realm of positive law. Both the rule of law and the rule of men are necessary components in man's attempt to achieve justice, but neither is sufficient. The rule of law lessens the possibility that discretion will be used arbitrarily and unjustly, while discretion lessens the severity of written law.[5]

Aristotle's construction of equity has remained influential throughout the development of Western law. Moving into Roman law, in fact, we find Cicero and the Stoics reviving it. But Cicero effects a subtle change in the function of equity. Whereas in Aristotle's account the judge wielding equity (*epieikeia*) sought merely to adhere to the spirit

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[2] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969),

[3] McDowell, *Equity and the Constitution*, 15.

[4] Max Hamburger, *Morals and Law: The Growth of Aritstotle's Legal Theory* (New York: Biblo & Tannen, 1965), 96, quoted in McDowell, *Equity and the Constitution*, 15.

[5] McDowell, *Equity and the Constitution*, 18.

of the law over its letter and thereby to administer the will of the legislator better, in Cicero's account equity (*aequetas*) became a means by which to conform positive law to the demands of natural justice (*ius naturale*).[6]

Both of these accounts later find articulation in English jurisprudence, first through the development of the common law and later in separate equity courts. McDowell points out that the common law and equity in fact "originated from the same procedure." However, as the common law began to take a more definite form, it took on the same defects common to all general laws. Thus the increasing rigidity of the common law occasioned the creation of separate equity courts in the mid-fourteenth century. Over the next three centuries, the common law gradually came to be associated with the rule of law contra the prerogative of the crown. Consequently, when England's highest equity court, the Court of Chancery, which was subordinate to the king, claimed the right to review the decisions of common law courts in the seventeenth century, a debate erupted over which court was the true home of equity. "When the eruption occurred, it found England's greatest jurist and student of the common law, Sir Edward Coke, pitted against England's greatest chancellor and student of equity, Sir Francis Bacon."[7]

As this debate over equity jurisprudence developed, it became clear that the fundamental dispute was not over the legitimacy of equity, but over the institutional means by which it was to be administered and its separation from executive power. Bacon, and later both Hobbes and Kames, held that equity flowed from the "king's conscience" and was a corrective to law. Coke, on the other hand, argued that equity was an emphatically judicial

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[6] Ibid., 19-20. McDowell says little on the distinction I draw between Aristotle's and Cicero's accounts of equity, though he seems to recognize it later when he speaks of fitting positive law "to natural law *or* justice", which may suggest such a distinction [italics mine].

[7] Ibid., 25.

power and that the judiciary must be independent of royal prerogative in exercising it. Wherever equity is vested, Coke and his opponents alike recognized it as an exercise of discretion that might "degenerate into arbitrary judicial discretion."[8] Thus, a fundamental tension arises from the exercise of equity jurisdiction: equity requires the exercise of discretion, but discretion always threatens to become arbitrary. Coke thought the common law courts were the safer repository of this discretion while Bacon, Hobbes, and Kames were dubious about dividing it from royal prerogative.[9]

In claiming equity jurisdiction as a constituent component of the judicial and not the executive function, Coke was more in line with the older Aristotelian and Ciceronian traditions. Like Aristotle, he recognized that equity is not something separate from the law, but is comprehended by the law. In the context of American law, Coke often draws attention as an early proponent of some form of judicial review, which in fact amounted to an exercise of equity jurisdiction.[10] But this view of Coke's legacy misses the forest for the trees. Coke's more important contribution is his insistence that judicial discretion is both theoretically and functionally distinct from executive discretion. The exercise of equity jurisdiction was itself neither controversial nor extraordinary; Coke's insistence that the equitable powers of courts are distinct from and therefore independent of both executive and legislative power is far more significant.

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[8] Ibid., 6.

[9] Ibid., 25-27.

[10] See, e.g., Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 3-5.

Legislative Supremacy and State Judicial Power

While the revolutionary American states embraced Coke's rationale in theory and insisted upon a partition between judicial power and the other powers of the government—especially executive discretion—they showed little respect for judicial independence in practice. The annals of state legislatures in the 1780s are riddled with meddlesome interferences in the proceedings of courts of law. As far as the post-revolutionary states were concerned, "legislative power" referred to "any power which the legislative organ may choose to exercise by resort to the ordinary parliamentary processes."[11] In effect, the American states had divorced equity jurisdiction from royal prerogative only to marry it with legislative supremacy.[12] The revolutionary state constitutions as well as the Articles of Confederation had likewise subordinated executive power to legislative supremacy. If we were to take practice as a manifestation of principle, we would conclude that the underlying assumption of American constitutionalism before the Constitution was that all meaningful discretion of any description ultimately resides in the legislature.

This subversion of judicial and executive independence was embarrassing and was marked by growing frustration with legislative meddling in the proceedings of courts of law.[13] Thus, the 1780s found American statesmen ready to elevate the judiciary to a genuinely equal station as an independent branch of government. Indeed, some began to claim for the judiciary a revisionary power beyond equity jurisdiction—the power of judicial review. As Wood points out, in addition to the growing distrust of legislative assemblies, the

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[11] Edward S. Corwin, "The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review* 30, no. 3 (1925), 514-17.

[12] See also, Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, vol. 1 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1971), 97.

[13] See Wood, *Creation of the American Republic*, 453-57; Corwin, "Progress of Constitutional Theory."

growing appreciation for the effective sovereignty of the people leant force to this new manifestation of the revisionary power of courts. The sovereignty of the people found expression through extraordinary constitutional acts from which government derived its powers. This shifting locus of legislative sovereignty to the people constituted "the questioning of legislative enactment as the foundation of law."[14] Thus written constitutions took on the character of fundamental law. It remained only to apply the logic of statutory construction and conflict of laws to justify the invalidation of legislative enactments that contravened the Constitution, which is what Hamilton eventually did in *Federalist 78*.

Federal Courts and National Power

While the meddling of state legislatures in judicial affairs settled the American mind against any admixture of judicial and legislative powers, the early efforts of the Continental Congress to establish a federal court of appeals in the 1780s instilled an equally firm conviction in the minds of many nationally-disposed American statesmen that federal courts dependent for the enforcement of their determinations upon the caprices of state governments were a waste of resources. The effective exercise of national power depended ultimately upon the institution of an extensive judiciary and an energetic executive "commensurate with the legislative authority." Without these, as Madison later put it in the Federal Convention of 1787, the federal government was "the mere trunk of a body without arms or legs to act or move."[15]

The military and civil authorities of the Union immediately sensed the absence of the appellate judicial authority that the imperial courts, particularly the Privy Council, had

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[14] Wood, *Creation*, 456.

[15] Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale University Press, 1911), June 5, 1:124 [hereafter cited as *RFC*].

provided. This was nowhere more evident than in the settlement of prize cases. Having no existing navy, Congress quickly outfitted merchant vessels to harass British shipping, offering the captured ships and their cargoes as prize. At George Washington's urging, Congress recommended that states create prize courts and claimed appellate jurisdiction over their decisions.[16] The states proceeded to curtail Congress' appellate jurisdiction even while they implemented its recommendation.[17] This they did despite the fact that the Articles of Confederation recognized no state regulatory control over federal institutions. Of course, a Congress dependent upon the will of state legislatures and unable to enforce its own laws lacked the backbone to buttress federal judicial power.

Nonetheless, Congress did effectively assert its appellate jurisdiction in some cases. Congress decided the first prize cases in 1776 through special ad hoc committees, which were displaced the following year by a standing committee. This committee-based system continued in operation until May of 1780 when Congress established the Court of Appeals in Cases of Capture. In all of these manifestations, Congress' prize court successfully settled most cases, but the exceptions proved embarrassing. In fact, the move from the committee system to a separate (if subordinate) judicial body began as an attempt to ameliorate these embarrassments of federal power.

The most frequently cited example of the institution's inadequacy is the case of the *Active*, which the Committee on Appeals first reviewed in 1778 and which was finally settled by the Supreme Court of the United States in 1809. In the course of its deliberations, the committee reviewed a determination of fact that had been settled by a Pennsylvania jury in

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[16] J.C. Bancroft Davis, "Federal Courts prior to the Adoption of the Constitution," in *U.S. Reports*, vol. 131, Appendix, xix-xx; *JCC* 3:357, 360, 371-75.

[17] Davis, "Federal Courts," 131 U.S. xx-xxii.

the state admiralty court and reversed the jury's verdict. In response the state judge refused to distribute the prize money as the Committee on Appeals had ordered and instead proceeded to enforce its original verdict. The state premised its refusal to comply with Congress' order on the inviolability of a jury's factual determinations.

Congress responded with the only device at its disposal: a special committee to investigate the issue and a resulting committee report. The committee's report, which Congress subsequently adopted, reasserted the right of Congress to exercise final appellate authority over cases of capture, deriving this right from the "supreme sovereign power of war and peace" with which Congress alone was invested.

> Resolved, That Congress, or such person or persons as they appoint to hear and determine appeals from the courts of admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon, and that no finding of a jury in any court of admiralty, or court for determining the legality of captures on the high seas can or ought to destroy the right of appeal and the re-examination of the facts reserved to Congress
>
> That no act of any one State can or ought to destroy the right of appeals to Congress in the sense above declared:
>
> That Congress is by these United States invested with the supreme sovereign power of war and peace:
>
> That the power of executing the law of nations is essential to the sovereign supreme power of war and peace:
>
> That the legality of all captures on the high seas must be determined by the law of nations:
>
> That the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace:
>
> That a controul by appeal is necessary, in order to compel a just and uniform execution of the law of nations:
>
> That the said controul must extend as well over the decisions of juries as judges in courts for determining the legality of captures on the sea; otherwise the juries would be possessed of the ultimate supreme power of executing the law of nations in all cases of captures, and might at any time exercise the same in such manner as to

> prevent a possibility of being controuled; a construction which involves many inconveniencies and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties or other breaches of the law of nations, and would enable a jury in any one State to involve the United States in hostilities; a construction which for these and many other reasons is inadmissible:
>
> That this power of controuling by appeal the several admiralty jurisdictions of the states, has hitherto been exercised by Congress by the medium of a committee of their own members:
>
> Resolved, That the committee before whom was determined the appeal from the court of admiralty for the State of Pensylvania, in the case of the sloop Active, was duly constituted and authorized to determine the same:
>
> Resolved, That the said committee had competent jurisdiction to make thereon a final decree, and therefore their decree ought to be carried into execution.[18]

"Brave words from Congress, but words only would they remain."[19] The special committee that reported the resolutions suggested that Congress pay the funds due to the appellant (as it had ordered the state admiralty court to do) and then call Pennsylvania to account for its resulting debt. This was the only effective means of enforcement available to Congress. It was ultimately rejected, though, because it would entail a direct confrontation between Congress and the state.

Congress found itself floundering because it lacked the fundamental character of a government: the power to execute and administer laws directly on individuals. General Washington understood the fundamental problem from the outset. When he wrote of the need for admiralty courts, he had actually urged that *Congress* create a court under its own

[18] *JCC*, 5 March 1779, 13:281-85.

[19] Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787*. (Philadelphia: American Philosophical Association, 1977), 108.

authority to hear prize cases arising out of the war, not foist the responsibility on the states.[20] Mere appellate jurisdiction would not secure observance of the nation's duties under its own laws and the law of nations. State tribunals, to which an appellate court would have to remand cases for rehearing or further proceedings, had no incentive to permit a reversal of their own decisions and Congress had no enforcement mechanism by which to compel compliance.[21] Had Congress reserved to itself original jurisdiction over captures at sea, federal judges would have heard the cases in the first instance, thereby avoiding direct confrontation between state and federal courts. As it was, the solely appellate character of the federal court practically invited state laws that defined the scope of federal appellate jurisdiction, often prohibiting appeals beyond the highest court in the state.[22]

Yet another example of the defects of judicial power under the Confederation was Congress' effort to create an institutional procedure for settling disputes between states. The Articles of Confederation laid out a process that proved utterly unworkable. Congress initiated the process only six times and issued a final judgment in only one case.[23]

> The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or

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[20] Washington to Congress, November 11, 1775, in *The Writings of George Washington*, 39 vols., ed. John C. Fitzpatrick (Washington, D.C.: Government Printing Office, 1931-1944), 4:81-84; Washington to Congress, December 4, 1775, in ibid., 141-45.

[21] It is telling that individual litigants seemed to expect federal judicial power to extend beyond an appellate to an original jurisdiction. The first two applications to the admiralty jurisdiction of Congress "prayed for the exercise of its original jurisdiction; but in each case, Congress referred the applicant to the Colonial courts" (Davis, "Federal Courts," 131 U.S. xxii).

[22] Goebel, *Antecedents and Beginnings*, 160-71.

[23] William F. Swindler, "Seedtime of an American Judiciary: From Independence to the Constitution," *William and Mary Law Review* 17 (1975-76): 515.

> executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgement and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgement, which shall in like manner be final and decisive, the judgement or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgement, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgement, without favor, affection or hope of reward': provided also, that no State shall be deprived of territory for the benefit of the United States.

The internal tensions jump off the page. Congress here attempts to create an institution that (it hopes) will be perceived by litigants as an independent and neutral arbiter with sufficient discretion to settle the case, but without actually making it independent, without giving it any real discretion, and without specifying an effective enforcement mechanism. Congress' efforts to exercise appellate jurisdiction over prize cases had already proved ineffectual. There were no grounds for greater optimism when it came to arbitrating disputes between states. If the Committee on Appeals (and its later manifestation in the Court of Appeals) had been unable to enforce its decrees with respect to the rights of individuals, how could this institution expect to do so with respect to the rights of whole political societies?

Separation of Powers and Federal Competence

From the foregoing discussion, it is apparent that the need for national uniformity and the need for genuine separation of powers are interrelated motives in the reform of judicial power at the Founding. Much like Congress' inept efforts to exercise executive discretion under the Confederation (largely through a committee system), its experience with the appellate prize court clearly demonstrated that an effective federal government and legislative supremacy were incompatible.[24] In other words, there could be no change in the federal character of the government of the Union without a change in the institutional character of that same government. A more extensive federal judiciary would do little to accomplish the effective administration of federal law unless the judiciary was at the same time rendered independent. The effective exercise of judicial discretion demanded an institution with certain characteristics quite different from that of a legislative body, just as the effective exercise of executive discretion required yet another set of institutional characteristics. Congress had attempted to remedy its own defects by creating subordinate institutions structured to exercise judicial and executive discretion, but this remedy was inadequate. As long as those institutions remained subordinate, Congress (like any other legislature) was unable to resist the temptation to meddle in their affairs.

[24] See Charles C. Thach, *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* (Indianapolis: Liberty Fund, 2007), 47-51. Modern parliamentary systems have combated legislative interference in the minutia of administration in other ways. The British system furnishes an instructive example. The prime minister exercises a more or less unitary control over executive functions, while ultimate parliamentary control is relegated to a no-confidence vote. In this way, the legislative body retains a means of control without being able to interfere in administrative details. This is why it is important that a no-confidence vote result in dissolution of the government. Were it otherwise, Parliament could dictate to the prime minister minute changes. By making the means of legislative control extreme, its use is made less likely and less frequent. Thach points out that some arrangement of this sort was the only viable option available to Congress under the Articles of Confederation, albeit one they hardly applied (ibid., 51-59). The relevant point is that legislative supremacy must be qualified in significant ways to accommodate effective administration through executive and judicial power.

We may therefore conclude that when the Framers divested Congress of its control over the executive and judicial functions of government, they were not doing so merely in order to create restraints on unchecked legislative power; they were actually enabling the effective implementation and enforcement of Congress' enactments. Thus, the primary rationale for independent judicial and executive powers was effectiveness, not restraint. This is not to say that separation of powers performs no restraining function. Indeed, the restraining function of the revisionary power of courts and the veto power of the executive is a prominent theme in the Convention and ratification debates. Nonetheless, restraint was neither the only nor the primary rationale for separation. And the restraining function of executive and judicial power seems to take center stage primarily when the excesses of *state* legislatures are at issue, not excesses of Congress. Even then, the Framers did not set up the executive and the judiciary as direct institutional checks on state legislatures, but instead bypassed the states altogether. In other words, it was the ability of the federal executive and the judiciary to effectively and directly enforce federal law—and thereby pre-empt rather than confront the state legislatures—that would prevent most abuses of state power.

CHAPTER THREE

The Judiciary in the Federal Convention: Direct Enforcement and Separated Powers

The Articles of Confederation withheld from the federal government the machinery to enforce its own laws. The effort to provide for direct enforcement forms the central plot of the debates in the Federal Convention of 1787. This fundamental change from an agent of the states to a government complete in itself compelled, among other things, the addition of executive and judicial powers coextensive with the legislative authority of the Union. Charles C. Thach drew the same conclusion nearly a century ago:

> The most far-reaching of [the] mechanistic changes [produced by the Convention] was the substitution of direct action of the national government on the individual for the existing method. It required no peculiar clairvoyance to perceive that this meant the substitution of national executive officers and national courts for those of the States in exactly the proportion that nationalism was achieved.[1]

Thus, direct enforcement compelled a number of changes relevant to the function and scope of judicial power. In the first place, several attributes were necessary merely to render the government of the Union capable of enforcing its own laws. The most important of these attributes were judicial independence from legislative and executive influence, federal jurisdiction coextensive with federal law, a system of federal courts geographically coextensive with the operation of federal law, and uniform construction of the laws by a supreme tribunal.

It was also necessary to secure the operations of the federal government against state encroachment. Indeed, the role of the judiciary in providing this security is the occasion for

[1] Charles C. Thach, Jr., *The Creation of the Presidency, 1775-1789: A study in constitutional history* (Baltimore: Johns Hopkins University Press, 1923, 1969; Indianapolis: Liberty Fund, 2007), 66. Citations are to the Liberty Fund edition.

most investigations of the convention's work as it relates to Article III.[2] With few exceptions, the delegates recognized that, despite the institutional separation of the state and federal authorities inherent in the new scheme, the laws of the two would often come into conflict. Some point of contact between the two levels of government was therefore necessary to resolve these conflicts. The convention considered only three serious alternatives (two more received attention but not serious consideration): a declaration of federal supremacy with an attendant power to compel states into compliance, a veto on state laws prior to their operation, or a declaration of federal supremacy with resolution in the courts of law. This amounted to a question whether conflicts over the extent of federal authority were to receive a forcible, a political, or a legal resolution. The forcible option was discarded with the New Jersey Plan very early in the convention, the primary reason being that it left the Union perpetually on the brink of civil war. Throughout the proceedings, many if not most of the delegates seemed to prefer legal resolution in the courts of law to a purely political means of resolving disputes, and it is this method that won out in the final draft. However, a number of influential delegates, most notably Madison and Wilson, continued throughout the proceedings to press for a congressional veto on state laws as an alternative to judicial review. This alternative view will demand considerable attention later. For now, it is enough to say that the legal resolution won the day. Indeed, the delegates' penchant for the legalization of conflict seems to grow in the course of their deliberations, translating into a gradual expansion of federal jurisdiction not only to all cases arising under the Constitution and laws of the United States, but even to many cases not involving federal law that may nonetheless threaten the stability of the Union.

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[2] For a recent example, see Michael Zuckert, "Judicial Review and the Incomplete Constitution: A Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism," in Richard Zinman et al., eds., *The Supreme Court and the Idea of Constitutionalism* (University of Pennsylvania Press, 2009).

State encroachment was not the only obstacle to the administration of federal law. As Congress's conduct under the Articles of Confederation had shown, the legislative vortex constantly threatened to undermine the effective enforcement of federal law, either by immersing itself in matters unrelated to its legislative business or by meddling in the affairs of the other branches.[3] To prevent legislative encroachment, the convention carried the legalization of conflict yet further very late in its deliberations by extending federal jurisdiction to "cases arising under the Constitution" as well as the laws, thereby making explicit the centrality of the judiciary in the resolution of disputes over constitutional meaning. Of course, long before federal jurisdiction was extended to constitutional cases, several delegates had already voiced an opinion that the construction of the Constitution belonged to the courts by implication. Bearing out this view, the doctrine of constitutional supremacy over both federal and state law had found increasingly explicit articulation in the various renditions of the Supremacy Clause; the subtle extension of federal jurisdiction to cases arising under the Constitution was merely an explicit extension of this doctrine to the realm of separation of powers.

In the next chapter, we will examine the ways in which Article III was framed to secure these latter two objects: a legal forum for resolution of federal conflict and constitutional supremacy over both the states and the federal government. In what remains of the present chapter, we will examine the ways in which direct enforcement of federal law guided the institutional design of Article III.

[3] Thach, *Creation of the Presidency*, chap. 3.

Judicial Independence and Direct Enforcement

Perhaps the strongest support for the claim that direct enforcement is the central plot of the convention is to be found in the fact that those institutional features prerequisite to its exercise are fleshed out within the first two weeks of the convention's deliberations. Between Edmund Randolph's presentation of the Virginia Plan on May 29 and the report of the Committee of the Whole on June 13, the delegates provided for basic institutional separation of the state and federal governments, separate executive and judicial branches, judicial independence from legislative and executive influence, federal jurisdiction and a system of federal courts potentially coextensive with the operation of federal law, and uniform construction of the laws by a supreme tribunal. In so doing, the report of the Committee of the Whole confronted the delegates with the implications of a complete federal government. The sectional conflicts that emerged over the questions of representation and taxation and that dominated the convention's business for nearly a month arose out of these early institutional developments. The extent of the change elicited from the small states an alternative, embodied in the New Jersey Plan, which may fairly be characterized as an effort to enlarge the powers of the federal government without giving to it the full machinery of direct enforcement.

Separated Powers and National Government

While the Virginia Plan laid the groundwork for the radical institutional reforms to follow, it shied away from the implications of its own design, resolving merely to correct and enlarge the Articles of Confederation. It required a push from Gouverneur Morris to force these implications upon the attention of the delegates. In his notes of May 30, Madison records that "on the suggestion of Mr. G[ouvernor] Morris," Randolph moved that the first of his propositions—"that the articles of Confederation ought to be so corrected &

enlarged, as to accomplish the objects proposed by their institution"—be postponed in order to consider the three following.

> 1. that a Union of the States merely federal will not accomplish the objects proposed by the articles of Confederation, namely common defence, security of liberty, & genl. welfare.
>
> 2. that no treaty or treaties among the whole or part of the States, as individual sovereignties, would be sufficient.
>
> 3. that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive, & Judiciary. (May 30, 1:33)[4]

The first resolution, by rejecting a "merely federal" Union, attacked the inadequacy of a system in which states served as intermediaries between the government of the Union and the objects of regulation; the only alternative was a system of direct enforcement. The second resolution bears out one of the most important implications of direct enforcement: ratification by the people themselves. Only the constituents of a government are proper objects of regulation. If the sovereign states are the parties to the federal compact, they are necessarily the proper objects of federal regulation. Thus, if the federal government is to enforce its laws directly on the people, it must derive its authority directly from them.[5] James Wilson would later illustrate the connection between direct enforcement and the democratic basis of the Union's authority in his famous "pyramid" speech.

> Mr. Wilson contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as

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[4] Unless otherwise noted, all parenthetical citations in this chapter refer to Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed., 4 vols. (New Haven: Yale University Press, 1937). Where it is not evident from the text, the date is provided to facilitate use of other editions of Madison's notes.

[5] As Madison points out in the debate on representation in Congress, a government serving as an agent of the states is appropriately comprised of representatives of those states, thus the states enjoyed an equality of suffrage in the Confederation Congress. However, "as the acts of the Genl Govt would take effect without the intervention of the State legislatures, a vote from a small State wd have the same efficacy & importance as a vote from a large one, and there was the same reason for different numbers of representatives from different States, as from Counties of different extents within particular States" (May 30, 1:37).

> possible. No government could long subsist without the confidence of the people. In a republican government this confidence was peculiarly essential. He also thought it wrong to increase the weight of the State Legislatures by making them the electors of the national Legislature. All interference between the general and local Governments should be obviated as much as possible. On examination it would be found that the opposition of States to federal measures had proceded [sic] much more from the Officers of the States, than from the people at large. (May 31, 1:49)

The Union must in principle draw its authority from the people if it is to apply its laws directly to them. The broader its basis in the confidence of the people the higher the federal pyramid might be raised. But this democratic foundation is not merely a matter of abstract principle; the political realities of a federal system demanded direct enforcement. The people would happily submit to a competent government, whatever its geographical extent, but the officers of the state governments were driven by their ambitions to oppose the exercise of federal authority. Wilson's experience with the Court of Appeals in Cases of Capture, especially cases like the *Active*, had probably formed the basis of his argument here.[6]

For the present investigation, though, the third resolution—to establish a "*national* government" consisting of "a *supreme* Legislative, Executive, & Judiciary"—is of greatest import and it is this one that the committee of the whole would soon adopt. After the first two resolutions, one might have expected Morris and Randolph to turn to the *extent* of federal legislative power. Instead, this resolution gives a more constructive direction to the proceedings by fixing the delegates' attention on the institutional form of federal institutions and diverting their attention from the extent of its powers. It both embodied its companion resolutions and extended the implications of direct enforcement to the internal structure of the federal government. As the previous chapter attempted to show, the confederation Congress had proved ineffective even in the administration of those few matters delegated to its care; this incompetence flowed largely from its ineptitude in the exercise of executive

[6] This court is discussed in greater detail in chapter two.

and judicial functions. Augmenting the powers of Congress under the Articles of Confederation would do nothing to remedy this institutional deficiency. The proper remedy was first to frame a competent government, then to address the question of federalism. Confirming the primacy of separated powers in the convention's proceedings, Pierce Butler remarked that "he had opposed the grant of powers to Congs heretofore, because the whole power was vested in one body. The proposed distribution of the powers into different bodies changed the case, and would induce him to go great lengths" (May 30, 1:34).[7]

It is important to emphasize at this point that framing a competent government answered in large part the federal question because it would enable the federal government to administer its own laws rather than relying on state enforcement, as Morris subsequently points out when explaining the difference between "a *federal* and *national, supreme* government; the former being a mere compact resting on the good faith of the parties; the latter having a compleat and *compulsive* operation" (May 30, 1:34). The latent assumption in Morris's argument is that a "compleat and compulsive operation" necessitates direct enforcement and, consequently, separate executive and judicial powers. As though on cue, George Mason follows Morris's comment with an explanation as to the necessary connection between coercive power and direct enforcement. "[Mason] argued very cogently that punishment could not in the nature of things be executed on the States collectively, and therefore that such a Govt was necessary as could directly operate on individuals, and would punish those only whose guilt required it" (May 30, 1:34).

[7] Butler's preference for separated powers is mitigated somewhat by his later comments on executive power. He first contends strongly for a unitary executive but then shrinks from it when the absolute veto is moved by Wilson and Hamilton: "[C]ould he have entertained an idea that a compleat negative on the laws was to be given [the executive] he certainly should have acted very differently" (June 4, 1:98-100). Thus, Butler makes clear that his enthusiasm for separation of powers stems from his belief that it serves primarily as a restraint on power rather than an aid to the vigor of the government.

The third resolution soon carried, Yates of New York and Sherman of Connecticut being the only dissenters (May 30, 1:35). Thus, "it was resolved in Committee of the whole that a national Governt. ought to be established consisting of a supreme Legislative, Executive & Judiciary." That this was the first resolution passed cut to the heart of the convention's task by connecting three institutional features that would eventually form the foundation of the new constitution: direct enforcement, popular ratification, and separated powers. Morris had established the momentum decidedly in favor of a national government.

The Council of Revision

The committee of the whole did not take up the judiciary provisions of the Virginia Plan until June 4, when the proposed "council of revision" came under consideration. The ensuing debate over this institution, as well as the mode of appointment, tenure, and salary of judges, gives shape to a robust conception of judicial independence.

The council of revision, composed of "the Executive and a convenient number of the National Judiciary" was to have "authority to examine every act of the National Legislature before it shall operate" (May 29, 1:29). Studies of judicial power usually give scant attention to the Federal Convention of 1787, but this provision of the Virginia Plan is the exception. Scholars have found in it (and in the convention's rejection of it) guidance about the difference between political and legal questions, the inherent limits of judicial review, and the importance of judicial independence from the political branches.[8] This

[8] See, e.g., Michael Zuckert, "Judicial Review and the Incomplete Constitution: a Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism," in Richard Zinman et al., eds., *The Supreme Court and the Idea of Constitutionalism* (Philadelphia: University of Pennsylvania Press, 2009):53-77 ; Jeffrey H. Anderson, "Learning from the Great Council of Revision Debate," *The Review of Politics* 68, no. 1 (2006): 79-100; James T. Barry III, "The Council of Revision and the Limits of Judicial Power," *The University of Chicago Law Review* 56, no. 1 (1989): 235-61. The Council of Revision has, of course, received attention elsewhere, but not for what it tells us about judicial power.

attention is in some measure appropriate. The council of revision can help shape our conception of the judicial role. Its importance, however, has been somewhat exaggerated.

The council of revision first comes under consideration by the Committee of the Whole on June 4. Elbridge Gerry is the first to express his doubts about the institution. "Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality…. It was quite foreign from the nature of ye office to make them judges of the policy of public measures." Having voiced his objections, Gerry proposes to postpone consideration of the council of revision and consider a qualified executive veto instead (1:97-98). Rufus King seconds the motion, adding his own objection that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation" (1:98). After a brief argument in support of the council from James Wilson to the effect that a qualified executive veto will prove a feeble impediment to legislative encroachment, Gerry's proposition is substituted by a vote of six states to four; after an extensive discussion of the merits and perils of the veto power, the qualified executive veto passes eight states to two (1:104).[9] As the reader will soon see, this initial exchange is suggestive of the variety of motives for the inclusion of the judiciary in the revisionary power and the equally diverse motives for excluding the judges from a share in the business.

Though the council of revision would not again win inclusion in the resolves of the convention, it would form the subject of debate on three subsequent occasions (June 6,

[9] Wilson proposes to give the executive and judiciary jointly an absolute negative on acts of the legislature, for "neither the original proposition nor the amendment go far enough…. The Executive ought to have an absolute negative. Without such a Self-defence the Legislature can at any moment sink it into non-existence" (June 4, 1:98).

1:138-40; July 21, 2:73-79; August 15, 2:298-300). The first comes only two days later on June 6 when Wilson moves to reconsider the "exclusion of the Judiciary from a share in the revision of the laws" and repeats his concerns about the infirmity of the executive, "remarking the expediency of reinforcing the Executive with the influence of [the judicial] Department" (June 6, 1:138).[10]

Madison seconds and gives a speech of considerable length in which he builds upon Wilson's rationale and attempts to answer the main objections to the involvement of the judges. Madison argues that a republican executive will lack the virtues of a hereditary monarch: namely, pre-eminence in the eyes of citizens and a personal interest against betraying the national interest. This deficit of firmness and responsibility posed a serious problem.

> In a Republic personal merit alone could be the ground of political exaltation, but it would rarely happen that this merit would be so pre-eminent as to produce universal acquiescence. The Executive Magistrate would be envied & assailed by disappointed competitors: His firmness therefore wd. need support. He would not possess those great emoluments from his station, nor that permanent stake in the public interest which wd. place him out of the reach of foreign corruption: He would stand in need therefore of being controuled as well as supported. An association of the Judges in his revisionary function wd both double the advantage and diminish the danger. (June 6, 1:138)

Almost as an afterthought, Madison notes that his council of revision would also afford the judiciary an opportunity of defending itself from legislative encroachments and then remarks, somewhat later in his speech, "How much good…wd. proceed from the perspicuity, the conciseness, and the systematic character wch. the Code of laws wd. receive from the Judiciary talents" (June 6, 1:138-39).

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[10] The stage for this debate had been set as soon as Gerry's motion passed on June 4. Immediately following the replacement of the council of revision with a qualified executive veto, Madison and Wilson had moved to reinsert the judiciary in the exercise of the revisionary power. Their effort was frustrated, however, by an objection of order from Hamilton. Madison and Wilson then declared their intention to move the same the following day, "whereupon Wednesday (the day after) was assigned to reconsider the amendment of Mr. Gerry" (June 4, 1:104).

Thus Madison articulates four motives for including the judges: 1) it would add firmness to the executive in the exercise of the veto, 2) it would insure against executive corruption in the exercise of that power, 3) it would improve the quality of legislation by lending "perspicuity," "conciseness," and a "systematic character" to the laws, and 4) it would furnish the judiciary with a means of defending itself against legislative encroachment. To these four reasons, Madison and Wilson will later add a fifth: 5) allowing judges a discretionary negative on the laws would afford protection to individual rights by enabling the judges to prevent the passage of laws that may be unjust but not unconstitutional (July 21, 2:73-76).[11] Notably, however, they will wait until the issue is revived in late July to raise this fifth point.[12]

Madison's rationale for the council of revision is instructive. His first two motives for involving judges in the legislative process flow from the defects of the other branches. The executive, constituted as it then was with legislative election and ineligibility for subsequent terms, would be neither sufficiently firm nor sufficiently responsible. This is fundamentally a problem of political responsibility. Were the president eligible for reelection and responsible to a body of electors distinct from the legislature, he would have a strong inducement to both firmness and integrity.[13]

Madison's expectation that judicial involvement in the revisionary power will supply the needed responsibility meets with a number of powerful criticisms. Elbridge Gerry "thought the Executive, whilst standing alone wd. be more impartial than when he cd. be

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[11] Madison and Wilson assumed that an unconstitutional law would be subject to judicial review even without involving judges in the exercise of the veto.

[12] The exception is Madison's brief, unelaborated comment at the end of his speech on June 6 (1:139).

[13] For further discussion of the role of responsibility in encouraging both firmness and integrity, see David K. Nichols, *The Myth of the Modern Presidency* (Philadelphia: Penn State Press, 1994), chap. 2.

covered by the sanction & seduced by the sophistry of the Judges." Thus, Gerry contends that the involvement of the judges in the business of legislation was as likely to undermine as to promote responsibility. Dickinson reinforces Gerry's point, arguing that "responsibility…can only be preserved; by leaving [the executive] singly to discharge its functions." If unity is calculated to ensure responsibility, it is, as Rufus King adds, "as applicable to the revisionary as to the Executive power" (June 6, 1:139-40).

Coming to Madison's aid, Wilson remarks that "the responsibility required belonged to [the president's] Executive duties. The revisionary duty was an extraneous one, calculated for collateral purposes" (June 6, 1:140). Wilson here attempts to head off the argument Gerry, Dickinson, and King are pushing by de-emphasizing the need for responsibility. As his comments on behalf of the council later in the convention indicate, Wilson sees the need for firmness in the exercise of the veto, rather than the need for responsibility, as the more important motive for including the judges in it (July 21, 2:73).

Though none of the delegates immediately challenge Wilson's claim that responsibility was not an important component of the revisionary power, it is vulnerable to serious criticism. One might observe, for instance, that the principal "collateral purpose" of the revisionary power is to supply the want of responsibility in Congress. Legislative bodies, especially those with district-based elections, are notoriously lacking in collective responsibility. Observe, for example, the modern phenomenon of Congressmen "running against Congress." Or—to invoke what has practically become a cliché—consider the maxim that constituents hate Congress, but love their Congressman. If the revisionary power is to supply this defect in the legislature, the power ought to be lodged in responsible hands. Wilson's insistence that the revisionary power is not properly a part of the executive function, but is instead an exceptional participation of the executive in the legislative

process, while true, fails to answer the concern expressed by the critics of the council that involving the judges would undermine the capacity of the revisionary power to ensure legislative responsibility.[14] Wilson and Madison, at any rate, seem to sense the weakness of their own arguments on this point and decline to raise it again.[15]

Madison's next two reasons for including judges in the council of revision—that the inclusion of the judges would improve the quality of legislation by lending "perspicuity," "conciseness," and a "systematic character" to the laws and would furnish the judiciary with a means of defending itself against legislative encroachment—prove somewhat stronger than that of ensuring responsibility. Judges are actually equipped to perform the tasks Madison here sets out for them, whereas they are ill-suited to ensure responsibility. Critics of the council of revision, however, worried that the participation of the judges in it, far from securing the judiciary, would undermine its integrity. Recall Rufus King's initial objection on June 4 that "the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation" and Gerry's complaint that "[i]t was quite foreign from the nature of ye office to make them judges of the policy of public measures" (June 4, 1:97-98). These two concerns were in fact species of a more general criticism that the cooperation of the executive and judiciary in the exercise of a revisionary

[14] In defense of Wilson's assertion here, one might cite the inclusion of the veto power in the description of the legislative process in Article I of the Constitution rather than in the description of executive functions in Article II. This suggests that the president's veto is an exceptional participation in a legislative function, just as the Senate's role in appointments (described in Article II) is an exceptional participation of the legislature in an executive function. This rule of construction finds articulation in a number of important constitutional debates. See, for example, Madison's arguments on the floor of the House in 1789 on behalf of the president's removal power, in *Annals*, 1:394, 481-82, 517-18; Hamilton's defense of Washington's Neutrality Proclamation in his *Pacificus* essays, in Morton J. Frisch, ed., *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding* (Indianapolis: Liberty Fund, 2007), 12-14; or, more recently, the Supreme Court's rejection of the line item veto in *Clinton v. City of New York*, 524 U.S. 417 (1998).

[15] Executive responsibility is, for example, conspicuously missing from Madison's summary of the advantages of the council of revision in his lengthy speech on July 21 (2:74). Similarly, Wilson later declines to challenge Ghorum's plea to "let the Executive alone be responsible" in the exercise of the veto power (July 21, 2:73).

power that was itself an intrusion into the legislative business was "an improper mixture of powers" that ought to be clearly divided.[16] Madison provides the most complete answer to this line of criticism.

> Two objections had been made 1st. that the Judges ought not to be subject to the bias which a participation in the making of laws might give in the exposition of them. 2dly. that the Judiciary Departmt. ought to be separate & distinct from the other great Departments. The 1st. objection had some weight; but it was much diminished by reflecting that a small proportion of the laws coming in question before a Judge wd. be such wherein he had been consulted; that a small part of this proportion wd. be so ambiguous as to leave room for his prepossessions; and that but a few cases wd. probably arise in the life of a Judge under such ambiguous passages. How much good on the other hand wd. proceed from the perspicuity, the conciseness, and the systematic character wch. the Code of laws wd. receive from the Judiciary talents. As to the 2d. objection, it either had no weight, or it applied with equal weight to the Executive & to the Judiciary revision of the laws. The maxim on which the objection was founded required a separation of the Executive as well as of the Judiciary from the Legislature & from each other. There wd. in truth however be no improper mixture of these distinct powers in the present case. In England, whence the maxim itself had been drawn, the Executive had an absolute negative on the laws; and the supreme tribunal of Justice (the House of Lords) formed one of the other branches of the Legislature. In short, whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable. (June 6, 1:138-39)

Thus Madison argues that the anticipated benefits of including the judges—affording the judiciary a means of defense against legislative encroachment and improving the quality of legislation—far outweigh the dangers of biasing and politicizing judicial proceedings. Madison's contention that only a small proportion of the laws would ever come under the sort of double review made possible by the council of revision is questionable. He must assume that the judges on the council will be drawn from courts other than the Supreme Court. For, if the judges of the Supreme Court are to be admitted into the business (and it was by no means clear at this point in the proceedings that there would be any other judges

[16] See, e.g., Dickinson's comment on June 6 (1:140).

to admit) then those laws they do see twice are sure to include the most important and controversial of the laws passed by Congress.

Whatever may be the accuracy of Madison's claims that the dangers to judicial integrity were innocuous, the critics insisted that the risk was an unnecessary one. Madison had not answered Gerry's assertion that the judges "will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality" (June 4, 1:97-98). It is not surprising, then, that when Wilson resurrects the issue of the judges' involvement in the revisionary power on July 21, he highlights the insufficiency of judicial review as a check on legislative excesses.

> The Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature. (July 21, 2:73)

Wilson's speech launches the longest of the debates over the council of revision and establishes the central focus on one of the most important questions before the convention: By what institutional means might rights be protected from Congress?[17] Mere bills of rights

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[17] Madison seconds Wilson's effort to reintroduce the judges into the revisionary power and gives another lengthy speech laying out the rationale for inclusion of the judges.

> It would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself agst: Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities. (July 21, *RFC* 2:74)

Note that Madison this time omits the need for executive responsibility and follows Wilson in emphasizing the protection afforded to rights by the participation of the judges. Some would argue that the order is somewhat deceptive here, that Madison was not following Wilson's lead, but had from the beginning understood the

were insufficient to the task; the previous decade had shown them to be mere parchment barriers in absence of an institutional means of enforcement. Only two alternatives seem to receive serious consideration in the debate. The first—and the one articulated by most critics of the council of revision—held that the judiciary, through its power to review laws for constitutionality, would be an adequate means by which to secure rights. The second—advocated by the friends of the council of revision—doubted the adequacy of a constitutional check on the legislature, as this would frustrate only those laws that were clearly unconstitutional. "But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description," George Mason complained, "they would be under the necessity as Judges to give it a free course" (July 21, 2:78). If, however, the judiciary were given a discretionary veto on the laws, it would form, as Madison put it, "an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities" (July 21, 2:74).

Most important for the present investigation is the remarkable *agreement* among the delegates over this matter of judicial review. There is of course the striking fact that the delegates seem to assume its legitimacy, a matter to which we will devote our full attention later, but there is something further of more immediate significance. Every delegate that addresses the topic takes it for granted that the judges, absent some express constitutional grant, can go no further in their review of the law than the plain import of its terms will carry them. Indeed, judging from their comments, it is precisely this assumption that impels Madison, Wilson, and Mason to press so emphatically for the participation of the judges in the revisionary power.

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purpose of the council of revision to be the protection of rights and the preservation of separated powers. Zuckert, "Judicial Review and the Incomplete Constitution," 57-64.

Critics of the council of revision also insist on the exclusion of the judges from it to protect the purity of mere judgment. Warnings about the excessive power that may result from a combination of the executive and judiciary are conspicuously missing from their arguments. It is therefore surprising to find Madison making such warnings the subject of his response to the critics.

> If any solid objection could be urged agst. the motion, it must be on the supposition that it tended to give too much strength either to the Executive or Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles. (July 21, 2:74)

Madison here echoes his earlier contention that the critics' objections to mixing the powers "either had no weight, or it applied with equal weight to the Executive & to the Judiciary revision of the laws" (June 6, 1:139). In both cases, Madison oversimplifies the critics' concerns. He implies that any objection to joining the judiciary in the making of the laws would likewise exclude the executive from the business of legislation. If the evil to be feared is an excessive concentration of power resulting from a combination between the two branches, Madison's argument holds true. If, on the other hand, the evil to be feared is the corruption of judicial integrity by "making Statesmen of the Judges," there is ample ground for distinguishing between the judiciary and the executive (July 21, 2:75). The executive is a *political branch* of the government. Daniel Webster's Whiggish opposition to the discretionary veto notwithstanding,[18] the chief executive was expected to exercise political discretion in the discharge of his functions, including the veto. Involving the judges in discretionary, rather

[18] See, for example, Webster's speech to the Senate on Jackson's veto of the bank bill, July 11, 1832, *Register of Debates*, 22nd Cong., 1st sess., 8:1221-58.

than constitutional, review of legislation, however, would tend to politicize them and undermine their integrity. Indeed, it would cripple the judiciary's ability to provide the "consistency, conciseness, perspicuity & technical propriety in the laws" that Madison sought from them. Judges were well fitted to provide such qualities precisely because their judgments were based on legal reasoning, not mere policy. Luther Martin provided the best summary of the argument. "It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature" (July 21, 2:76-77).

Martin's argument gets to the heart of the debate over the judicial role and the difficulty the delegates faced in framing it. As he had done on June 6 in response to Gerry and the other critics, Madison again appeals to the British Constitution to allay Martin's concerns about involving judges in the revisionary function of the executive.

> In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate. The most regular example of this theory was in the British Constitution. Yet it was not only the practice there to admit the Judges to a seat in the legislature, and in the Executive Councils, and to submit to their previous examination all laws of a certain description, but it was a part of their Constitution that the Executive might negative any law whatever; a part of their Constitution which had been universally regarded as calculated for the preservation of the whole. The objection agst. a union of the Judiciary & Executive branches in the revision of the laws, had either no foundation or was not carried far enough. If such a Union was an improper mixture of powers, or such a Judiciary check on the laws, was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether. (July 21, 2:77)[19]

Besides the objections already pointed out regarding Madison's failure to distinguish between the political character of the executive and the legal character of the judiciary, a serious objection also lies against his appeal to the British example. As he himself had earlier

[19] See also, Morris's use of the English example to rebut the claim that cooperation of the executive and judiciary in the exercise of the revisionary power violates the separation of powers (2:75-76).

argued with respect to the executive, republican statesmen could not rely on the prestige that formed the basis of aristocratic institutions. The House of Lords was permitted a participation in both the making and exposition of the laws because it was thought that their personal honor, education, and landed interest in the nation would ensure their integrity. Judges serving during good behavior in a republican government could not draw upon these sources of integrity to evoke the "confidence of the people." Their only claim to such confidence was their institutional commitment to the rule of law, or as Publius would later put it, the understanding that judges exercised "neither force nor will, but merely judgment."[20]

In this way, Martin's argument points to the distinctive challenge of establishing separated powers in a republican system as well as the limits of the English example as a guide to the American Founding. It is also another proof that the development of a system of separated powers is the fundamental plot of the convention's work. In the framing of the legislature it was manifest in the effort to place bicameralism on some foundation other than the mixed regime, which they did by varying the tenure and constituencies of the two chambers. Similarly, in the framing of the executive, the delegates needed a republican foundation of authority that would combine responsibility and firmness, which they ultimately found in popular election with moderate tenure and perpetual re-eligibility. The judiciary, however, confronted the delegates with an even greater challenge, for they needed a foundation for *independent* judicial power consistent with republican principles and without recourse to popular election. This they did by making the judges representatives of the law, and thereby representatives of the sovereign people acting through their laws.

[20] Hamilton, "Federalist, no. 78," in *The Federalist*, ed. Cooke, 523.

Mode of Appointment

The Virginia Plan proposed to vest the appointment of judges in the national legislature. The shift toward executive appointment did not coalesce until quite late in the convention's deliberations, but the move began early. The first step was a successful motion on June 1 to vest a general power in the executive to appoint all officers whose appointment was not otherwise provided for in the Constitution (June 1, 1:66-67). This provision had no immediate effect upon the judiciary since, by the terms of the Virginia Plan, all judges were to be appointed by the legislature, but that would soon change.

Wilson is the first of the delegates to recommend executive appointment of the judges. "A principal reason for unity in the executive was that officers might be appointed by a single, responsible person." Critics of executive appointment, on the other hand, worried that it militated too much toward monarchy and would, on that ground, be unacceptable to the people (June 5, 1:119). This reveals a failure to appreciate the fundamental change (away from legislative supremacy and toward meaningful separation of powers) that the new constitutional order was bringing about. The critics assumed that appointment is a means of maintaining control and accountability when in fact *appointment in a separated system is merely a means of securing competent judges*. Thus, as Wilson's comment suggests, the motive for vesting the appointment power in the executive is the institutional fitness of a unitary executive to make the choice. Never one to let pass an opportunity to display his wit, Benjamin Franklin chimed in with a novel suggestion that reinforced (perhaps inadvertently) Wilson's argument. Franklin suggested that the convention should imitate the "Scotch mode, in which nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among

themselves. It was here he said the interest of the electors to make the best choice, which should always be made the case if possible" (June 5, 1:120).

Wilson's view does not immediately prevail, but it is clear from this first discussion of the mode of appointment that the delegates are generally dissatisfied with legislative appointment. Madison's views are indicative of this ambivalence. On the one hand, he is certainly opposed to legislative appointment—a numerous body is neither responsible nor competent—but neither will he approve executive appointment. He instead favors appointment by the Senate, "as numerous eno' to be confided in—as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberate judgments." However, because his view is at this point merely an inclination, he does not move for Senatorial appointment, but instead moves to strike out the mode of appointment altogether (June 5, 1:120). Given his own ambivalence and that of the other delegates, leaving the mode of appointment open until other parts of the plan (especially the mode of election for the executive) were more fully developed seems to have been prudent. Of course, it is important to note that given the general appointment power of the executive that Madison himself had moved successfully the preceding day, this silence on the appointment of judges, if perpetuated, would effectively vest appointment in the president.

The Committee of the Whole did eventually return to the appointment of judges just before the close of its business on June 13 when Roger Sherman and Charles Pinkney moved to reinsert appointment by the legislature. Madison immediately responded, giving his objections to appointment by the whole legislature.

> Many of them were incompetent Judges of the requisite qualifications. They were too much influenced by their partialities. The candidate who was present, who had displayed a talent for business in the legislative field, who had perhaps assisted ignorant members in business of their own, or of their Constituents, or used other

> winning means, would without any of the essential qualifications for an expositor of the laws prevail over a competitor not having these recommendations but possessed of every necessary accomplishment. (June 13, 1:232-33)

Repeating his earlier observations on the fitness of the Senate to make the selection, Madison recommended vesting appointment there, whereupon Sherman and Pinkney withdrew their motion and appointment by the Senate was agreed to without dissent (June 13, 1:232-33). It was in this form that the judiciary provisions were reported from the Committee of the Whole that same afternoon.

Importantly, this outcome did not leave the judiciary entirely in the hands of the Senate. Since the provision for inferior tribunals had been previously withdrawn from the ninth resolution of the Virginia Plan and a discretionary power to create them inserted as a separate resolution, Madison's motion on June 13 in effect gave the appt of the Supreme Court alone to the Senate, leaving inferior tribunals to be created by Congress and their occupants appointed by the executive.[21]

The issue of appointments would not again come before the convention until July 18, when a number of delegates pressed to settle the power in the hands of the executive. Nathaniel Ghorum broached the subject and, drawing on the example of Massachusetts, suggested appointment by the executive with the advice and consent of the Senate. Wilson immediately followed with his own motion to vest the appointment in the executive alone and was seconded by Gouverneur Morris. This sparked objections from several members and a number of the objections actually had some basis other than a Whiggish distrust of executive discretion. Roger Sherman and Luther Martin contended that the Senate would

[21] See the report of the Committee of the Whole, resolutions 9, 11, and 12 (1:236-37). See also, Appendix A herein for the development of the language of these provisions in the Committee of the Whole. The provision for inferior tribunals was withdrawn and replaced with a discretionary power of creation on June 5 (1:125). See below for a more extensive discussion of the implications of this substitution.

have a more "diffusive knowledge" of characters and thereby be better fitted to make a choice, an argument to which Randolph added his assent. Mason added to this his concern that the judges were to try impeachments. "If the Judges were to form a tribunal for that purpose, they surely ought not to be appointed by the Executive."[22] Into this mix of criticism, Gunning Bedford interjected his doubts about the very foundation of executive appointment. "The responsibility of the Executive so much talked of was chimerical. He [being ineligible to serve subsequent terms] could not be punished for mistakes" (July 18, 2:42-43).

What is most remarkable about these objections to executive appointment is their reliance on defects in the constitution of the executive and not any inherent virtue of legislative appointment. Indeed, the Senate seems to be preferred only insofar as it possesses some of the virtues of the executive. Thus, the reasonable course of action would be to vest appointment in the executive and then set about remedying the defects of that institution. Were the executive made re-eligible and thereby responsible, Bedford's objection would be groundless and the executive would have a further inducement to be more "diffusive" in his appointments. Even absent re-eligibility, or any other fundamental alteration of the executive, Ghorum makes a reasonable case that the executive is still better fitted to exercise the power of appointment. "[T]he Senate could have no better information than the Executive. They must like him, trust to information from the members belonging to the particular State where the Candidate resided." And against Bedford's claim that ineligibility defeats all responsibility in appointments, Ghorum propounds the political truth

[22] In response to Mason's concern about impeachments, Morris points out that trying impeachments before the judges is improper regardless of where their appointment lay because it would tend to encourage cabal between the judges and the legislature; in such an arrangement, the judges "would be drawn into intrigues with the Legislature and an impartial trial would be frustrated" (July 18, 2:42).

that the love of honor is as great an inducement as money and power. "The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone. He did not mean that [the executive] would be answerable under any other penalty than that of public censure, which with honorable [dare we say, ambitious?] minds was a sufficient one" (July 18, *RFC* 2:43).

Let us take the connection thus suggested between the independence of the executive and the independence of the judiciary one step further. It is not too much to say that an independent judiciary is impossible without an independent executive. Only two means exist of rendering the executive genuinely independent of the legislature: appointment (with lengthy tenure and ineligibility) or popular election. The former mode of election, while maintaining some degree of institutional independence, yet leaves the executive appearing to be the creature of the legislature and thus strips him of credibility and energy. An executive both vigorous and independent must therefore draw his credibility from some mode of popular election. From what source might the judiciary derive a like independence? It cannot come from popular election as that would undermine its integrity as an expositor of the laws. On a number of occasions, delegates note that an *elective* monarchy is the most dangerous kind.[23] Presumably, the reason is that popular election buttresses demagoguery and arbitrary discretion (the executive must, of course, pay homage to the prejudices of the people). It is thus apparent that the judiciary cannot derive its appointment from popular election and retain its integrity; legislative election would appear to share the same defects since the legislature cannot be held to account for its judgment or its motives. An elective unitary executive, on the other hand, may be readily held accountable for both and is

[23] See, e.g., Pinkney's objections to popular election of the executive (June 1, 1:65) and Mason's objection to the combination of the appointment and veto powers in the same hands (June 4, 1:101).

consequently more likely to make appointments based upon qualifications rather than mere favor or prejudice. Thus, a unitary republican executive is prerequisite to an independent republican judiciary.

The final disposition of judicial appointment bears out this connection between an independent, republican executive and an independent judiciary. The switch to executive appointment did not come until the report of the Committee of Eleven (or the Brearly Committee as it is sometimes called) on September 4. The committee vested appointment in the president with confirmation by the Senate (2:498-99). The new provision met with considerable criticism when the delegates finally came around to debating it on September 7 (2:539). This time, however, the critics were most concerned about the continued involvement of the Senate undermining executive discretion. Wilson worried that "Responsibility is in a manner destroyed by such an agency of the Senate." Pinkney, who had so vigorously argued for legislative appointment in the past, now set himself "against joining the Senate in these appointments…."[24] What changed? Notably, the Committee of Eleven had altered the method by which the president was to be chosen from legislative appointment to popular election mediated by an Electoral College. A perpetually re-eligible executive chosen at substantial intervals by electors unconnected with the national or state legislatures would have more and stronger incentives than any other institution to make a competent choice of judges. Executive appointment ultimately succeeds here because the executive is better constituted.

[24] Morris defended confirmation by the Senate against Wilson's charge that it undermined responsibility. "[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security" (2:539). Madison would later echo Morris' rationale in his defense of the president's removal power in the First Congress (*Annals of Congress*, 1:394, 481-82, 517-18) as would Chief Justice Taft in *Myers v. United States*, 272 U.S. 52 (1926).

Tenure and Salary

Tenure during good behavior and an irreducible salary are widely recognized to be the foundations of an independent judiciary. The most notable attribute of the convention's proceedings in this regard is that no one seriously challenges tenure during good behavior at any point and the debate over pay is so short as to be almost insignificant. With respect to judicial salaries, no one disputes the need for them to be irreducible, but there is a short debate over whether or not Congress ought to have the option to increase the salaries of sitting judges. Morris moves on July 18 to amend the relevant provision so as to allow an increase in salary but not a diminution. Madison opposes as potential salary increases may still form a dependence (if a less perfidious one) on the legislature. Morris' motion passes by a considerable majority and that is the end of the business (2:44-45).

Structure of the Judiciary

At the close of business on June 4, having just settled the "revisionary check" firmly in the hands of the executive—thus excluding the federal judiciary from the business—the delegates took up the first part of Randolph's ninth resolution, "that a National Judiciary be established, to consist of one or more supreme tribunals, and of inferior tribunals…" (1:104-105). That there would be a national judiciary institutionally distinct from the political branches and from the state judiciaries was assumed; that federal judicial questions (wherever they may originate) would terminate in one or more supreme tribunals was likewise undisputed. The most serious dispute arose over the extent and structure of this judiciary.

One Supreme Court

The first question to present itself, then, is whether there are to be one or multiple supreme tribunals. Thus, an amendment is immediately introduced "to add these words to

the first clause of the ninth resolution namely – 'to consist of one supreme tribunal, and of one or more inferior tribunals'" (June 4, 1:104-5).[25]

Madison's record of the proceedings at this point presents us with a clear error, for it would make no sense "to add these words to the first clause of the ninth resolution" if, as Madison's draft of the Virginia Plan records, the ninth resolution already included a provision regarding supreme and inferior tribunals, namely "that a National Judiciary be established, to consist of one or more supreme tribunals, and of inferior tribunals." If this language—"to add"—is accurate, it suggests one of two possibilities: 1) the original resolution contained no provision at all on the subject, but read, "Resd. that a National Judiciary be established to be chosen by the National Legislature," in which case the clause reflected in Madison's draft of the Virginia Plan is an invention; 2) the language of Madison's draft was in fact present in Randolph's proposition but had been eliminated prior to the amendment in question, in which case the initial elimination to make room for the new provision was not recorded in the journal or in Madison's notes. A third scenario would also resolve the conflict: 3) "to add" may be a mere careless slip of the pen and "to substitute" was in fact meant.

Whichever of the three is the correct explanation, it is clear that an error lies somewhere in the record and the answer to the difficulty is of some significance. If, in fact, the original wording of the Virginia Plan left open the possibility of multiple supreme tribunals, the clause substituted here constitutes a decision of great significance. For, by establishing a single supreme tribunal, the delegates were (quite consciously, we may reasonably suppose) weighing in on that old debate between Lord Chief Justice Coke and Sir

[25] The substitution is moved and seconded without attribution and with no indication of a vote.

Francis Bacon.[26] A single institution was to have the last word on all judicial questions submitted to the federal authority, both in equity and in law. The convention would, of course, eventually make this unity of jurisdictions explicit, but it was in fact already settled by this substitution of language on June 4. If, on the other hand, the original wording of the Virginia Plan was silent on the issue of a supreme tribunal, we cannot know whether this old debate over the unity of legal and equitable jurisdiction was at all controversial for the delegates.

How then are we to resolve this difficulty? The second scenario is highly unlikely; that Madison and the three other delegates keeping notes that day as well as the secretary of the convention would all miss an important alteration of the language is not impossible, but it is hard to believe. The two remaining possibilities each face serious challenges insofar as the manuscripts on which both rely are possibly unreliable. On the one hand, Madison's account of the end of business on June 4 is taken verbatim from the journal, which has so often been criticized as unreliable that to repeat the charges against it here would be a waste of the reader's time as well as the author's energy (1:xi-xv). On the other hand, we are confronted with the unfortunate fact that no original draft of the Virginia Plan is presently extant. Those now available were all private copies produced by individual delegates. As Farrand notes, at this early stage of the Convention, the delegates were not being furnished with printed copies of important documents as would be true later in the business, but many delegates, realizing at some point that the Virginia Plan would prove important in the narrative of the convention, made their own copies. Several copied drafts are now extant, but not the draft from which Randolph gave his speech. It is likely that the private copies were each drawn up by their respective authors at different points in the proceedings of the

[26] See chapter 2.

Committee of the Whole. Alterations already made by the committee may well have been incorporated inadvertently into each draft.

Given this spotty documentary history, the two remaining plausible scenarios have been evaluated by Max Farrand and by John Franklin Jameson, each of whom draw a different conclusion. Jameson argues that Madison's notes and the journal, on which Madison relies, are in this case the more reliable source, therefore concluding that the original draft of the Virginia Plan was silent on the structure of the federal judiciary. This is proved, he says, by the language of the motion on June 4. Had the resolution then moved been a substitution for existing language, the phrasing would have reflected that fact. Farrand, on the other hand, favors the third scenario, that the journal mistakenly recorded "to add" where something else was meant, pointing out that Jameson's explanation does not explain the origin of the language in Madison's draft of the Virginia Plan. Jameson explains away that language as "closely resembling" the language of the motion on June 4. While it is true that the words contained in the two phrases are similar, the sense of them is entirely distinct; "to consist of one or more supreme tribunals, and of inferior tribunals" (Virginia Plan) does not resemble "to consist of one supreme tribunal, and of one or more inferior tribunals" (motion of June 4) closely enough to permit a thinking observer to mistake one for the other, especially when the unity or plurality of the supreme tribunal would have been a question of great significance to any man with legal training in 1787. Farrand also cites the fact that those copies that have in other respects proved reliable all agree with Madison's phrasing of the ninth resolution (3: 593-94); while there are other copies that come closer to Jameson's rendering of the ninth resolution, Jameson himself admits that they suffer from

egregious errors that make them unreliable.[27] Farrand has the better argument here, though the certainty with which he pronounces his verdict is only slightly more warranted than Jameson's recurring use of the term "undoubtedly." The secretary of the convention very likely entered "to add to the end of the first clause of the ninth resolution" where he ought to have entered "to substitute at the end of the first clause of the ninth resolution" or "to substitute for the second clause of the ninth resolution." The substitution of "one supreme tribunal" on June 4 was therefore a significant first step in the direction of a judiciary in which the equitable and legal jurisdictions were to be united.

Inferior Courts

Having thus settled on a single supreme tribunal, the Committee of the Whole moved on to the most significant structural feature of the federal judiciary: whether the plan was to include a system of inferior courts (and thus equip the federal judiciary to decide federal questions in the first instance) or vest the whole of federal jurisdiction in the supreme tribunal (and thus limit federal jurisdiction in most cases to appellate proceedings).

The following day, June 5, the committee struck out "one or more" before "inferior tribunals" (1:119).[28] Though no debate over the change is recorded in Madison's notes, only one motive could have underlain the amendment. The delegates were leaving a blank to be filled in subsequent debate. For some reason, though, they apparently postponed the matter, for there is no immediate discussion of it. Instead the committee moves on to consider the mode of appointment for judges.

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[27] John Franklin Jameson, *Studies in the History of the Federal Convention of 1787* (Washington, D.C.: Government Printing Office, 1903), 103-11, originally published in *Annual Report of the American Historical Association for 1902*, vol. 1.

[28] If the journal is to be believed (and Madison relies on it here) Wilson finds the elimination objectionable, though there is some reason to doubt the placement of Wilson's remark (1:120).

Rutlidge revives the question of inferior tribunals later the same day and suggests their elimination altogether. This opposition to inferior courts may suggest a motive for having postponed it. Sensing the opposition to an extensive judicial system, the nationalists quit while they were ahead. If in fact this was the rationale for postponing the issue, Rutlidge's motion confirms their fears. Rutlidge argues that the Supreme tribunal, acting as an appellate tribunal to the state courts, would be sufficient to ensure uniformity and to defend "national rights" from state encroachment (June 5, 1:124). Rutlidge is thinking of separation of powers merely in negative terms, emphasizing its role in preventing encroachments, but disregarding its indispensible role in fostering effective enforcement.

Madison and Wilson immediately point out the difficulties posed by such a scheme and redirect attention to the positive functions of separation of powers. "An effective Judiciary establishment commensurate to the legislative authority," Madison argued, "was essential. A government without a proper Executive & Judiciary would be the mere trunk of a body, without arms or legs to act or move" (June 5, 1:124). Many federal cases would terminate in the lower courts because of the limited workload of the Supreme Court. Forcing the Supreme Court to bear the full burden of ensuring the uniformity of law would reduce it to insignificance. Furthermore, as the Confederation Congress learned in its experience with the Federal Appellate Prize Court, it would be senseless to remand a case to a state judge who has already declined to apply the law. Reinforcing the argument, Wilson—who had served more extensively than any other person in the thankless role of a judge on the federal prize court—points out the imperative need for courts of first instance to hear admiralty cases (June 5, 1:124).

Sherman endorses Rutlidge's motion, "dwel[ling] chiefly on the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer

the same purpose." In reply, Rufus King quipped that "the establishment of inferior tribunals wd. cost infinitely less than the appeals that would be prevented by them." Dickenson has the last word and points to the eventual settlement, arguing that "if there was to be a National Legislature, there ought to be a national Judiciary, and that the former ought to have authority to institute the latter" (June 5, 1:125).

Rutlidge's motion passes with a mere plurality of five states in its favor, but Wilson and Madison pick up on Dickenson suggestion and propose "that the national Legislature be empowered to institute inferior tribunals" observing "that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them" (June 5, 1:125). Butler immediately chimes in with what would become a favorite argument among opponents of a national government. "The people will not bear such innovations. The states will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon who gave the Athenians not the best Govt. he could devise; but the best they wd. receive." Reading Madison's notes, one half expects Wilson to jump in with a reiteration of his pyramid speech to remind Butler that "the opposition of States to federal measures had proceded much more from the Officers of the States, than from the people at large" (May 31, 1:49). Instead, the committee moves to a vote on Madison and Wilson's amendment, approving it by a solid majority of eight states. The Committee of the Whole thereby settled the responsibility of structuring the federal judiciary on Congress and there it would remain. It was not, however, the last time that the matter of inferior tribunals would occupy the attention of the delegates.

When this provision of the report of the Committee of the Whole finally came before the convention on July 18, Butler announced that he "could see no necessity for

[inferior] tribunals. The State Tribunals might do the business." Luther Martin added his apprehension that lower federal courts "would create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere." In reply, Ghorum points out that there were in fact already federal courts in the states "with jurisdiction for trial of piracies &c. committed on the Seas. No complaints have been made by the States or the Courts of the States. Inferior tribunals are essential to render the authority of the Natl. Legislature effectual" (July 18, 2:45-46). Ghorum's observation is somewhat misleading. Congress had indeed passed an act to "constitute" courts of first instance in each of the states to prosecute "piracies and felonies on the high seas," but the judges appointed to them were state judges.

> [A]ll and every person…who…shall commit any piracy or felony on the high seas…shall be…tried and judged by grand and petit juries, according to the course of the common law, in like manner as if the piracy or felony were committed upon the land, and within some county, district or precinct in one of these United States. And the justices of the supreme or superior courts of judicature, and judge of the Court of Admiralty of the several and respective states, or any two or more of them, are hereby constituted and appointed judges for hearing and trying such offenders.[29]

These were federal courts in name only, for the tribunals had no existence independent of state power. Congress had done no more than commission state judges to handle federal business. And the laws under which these "piracies and felonies" were to be prosecuted were not uniform, but as variable and numerous as the codes of law subsisting in the innumerable counties, districts and precincts of the United States. Congress might just as well have delegated to the states the entirety of its power over the subject and charged the state legislatures with the responsibility of providing the tribunals.

Spurious as the facts underlying it may be, Ghorum's point is well taken. Federal judicial power under the Confederation had struggled most in the exercise of appellate

[29] *JCC* 19:354-56.

jurisdiction over the state judiciaries. If, on the other hand, causes were brought into federal court in the first instance, there would be fewer occasions for collision of federal and state authority. As Wilson had warned at the outset of the convention, "All interference between the general and local Governments should be obviated as much as possible" (May 31, 1:49).

Pursuing the same line of argument, Randolph avers "that the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance." Sherman and Mason, while both ambivalent about the immediate need for inferior tribunals, nonetheless recognize the salience of Randolph's observation and give their support to the provision leaving discretion in Congress to create them. Sherman, ever the prophet of frugality (and legislative supremacy), "was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done with safety to the general interest." Mason, somewhat more cognizant of the potential problems arising from intergovernmental disputes, "thought many circumstances might arise not now to be foreseen, which might render such a power absolutely necessary." This time, the provision for legislative discretion in the creation of inferior tribunals passed without a dissenting vote; if indeed Butler and Martin persisted in their objections to inferior tribunals, they were unable to persuade their own state delegations (July 18, 2:46).

The provisions relating to inferior tribunals would undergo some changes before the convention finished its business, but none of these altered the basic settlement that Madison and Wilson had hammered out on June 5. The provision adopted on that day and submitted eventually to the Committee of Detail on July 26 resolved "That the national Legislature be empowered to appoint inferior Tribunals" (1:125).

When the Committee of Detail reported its draft on August 6, this provision had been placed among the enumeration of legislative powers that eventually would become the eighth section of Article I. "The Legislature of the United States shall have power…to constitute tribunals inferior to the Supreme Court" (2:181-82). This relocation of the provision had no apparent effect upon the nature of the power, but merely reflected the fact that prior to the report of the Committee of Detail there was no enumeration of legislative powers.[30]

The substitution of "constitute" for "appoint" may, on the other hand, be of some consequence. Whereas "appoint" might have permitted Congress merely to identify a state tribunal and imbue it with federal judicial authority, "constitute" suggests that Congress must in fact create its own tribunals,[31] though admittedly this had not stopped the Continental Congress from establishing federal admiralty courts comprised of state judges. This precedent notwithstanding, the implication of using "constitute" here would be consistent with the concerns we have seen expressed by the delegates that state judges could not be trusted with federal jurisdiction.[32]

The significance of the substitution likewise draws support from the fact that the change was quite deliberate. A number of working drafts produced by the Committee of Detail are now available to scholars. The earliest of these is a draft in Randolph's

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[30] The resolutions submitted to the Committee of Detail contained the following description of federal legislative power in place of an enumeration: "Resolved That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation" (2:131-32).

[31] The language of the vesting clause of Article III, discussed below, lends additional support to this view since it recognizes Congress' power only to "ordain and establish" inferior tribunals.

[32] Such an institutional entanglement with the state governments would also violate the principle of institutional separation between the two that seems increasingly to have guided the convention's work. For more on this, see the section on the legalization of conflict in chapter four.

handwriting with emendations in the hand of Rutlidge (2:137-50). In the Randolph-Rutlidge draft, Randolph used the term "appoint" in the grant of power to Congress, which was to become the eight section of Article I, and also in the first section of the judiciary article, which was to become the vesting clause of Article III. In making his emendations on Randolph's draft, Rutlidge left the grant of power to Congress untouched, but lined out "appoint" in the first clause of the judiciary article and replaced it with "establish" (2:146). In a later draft—much closer in arrangement and content to the eventual report of the Committee of Detail—written in Wilson's handwriting with emendations by Rutlidge, both clauses are altered, the term "constitute" being substituted for "appoint" in one instance and for "establish" in the other (2:168, 172).

It is in this Wilson-Rutlidge draft that one of the most important contributions of the Committee of Detail is first manifest: the inclusion of vesting clauses for each of the three branches. The vesting clause for the judiciary read, "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, from time to time, be constituted by the Legislature of the United States" (2:172).[33] This language would later be amended slightly in the Committee of Style to read, "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 the Congress may from time to time ordain and establish." The inclusion of inferior courts in the vesting clause made clear that inferior courts were just as much independent of Congress as the Supreme Court, with one difference only: Congress was to have discretion in their creation.[34] This independence was also suggested by the fact that

[33] Only one insignificant change would appear in the eventual report of the Committee of Detail: the insertion of the phrase "when necessary" before "from Time to Time" (August 6, 2:186).

[34] As we will see in subsequent chapters this discretion may not be complete. In the Senate debate over the Judiciary Act of 1789, for example, some proponents of an extensive judiciary argued that since

Article I authorized Congress "to constitute tribunals *inferior to the supreme court*."[35] Had Article I merely said "inferior tribunals" and had the vesting clause not encompassed inferior tribunals, Congress might have believed itself authorized to constitute judicial tribunals inferior to itself rather than to the Supreme Court. Indeed, the apparent exclusivity of the Article III vesting clause has produced considerable controversy over the constitutionality of so-called Article I courts.[36] These courts serve as agents of Congress and supposedly do not wield "the judicial power," thus Congress has declined to grant them tenure during good behavior or protect the judges' salaries. The Committee of Detail seems to have been cognizant of the danger. The provision submitted to them by the convention had merely "empowered" Congress "to appoint inferior tribunals" (2:133). Whilst this provision was connected with the other judiciary provisions, it was clear by implication that "inferior" meant "inferior to the Supreme Court." When the provision was later placed among the enumeration of legislative powers in the Randolph-Rutlidge draft—or in some earlier draft not presently extant—the qualifying reference to the Supreme Court had to be added to reinforce the institutional independence of the *entire* judiciary.

Federal Jurisdiction

The foregoing discussion of the provisions for inferior courts is still incomplete, for in order to appreciate fully the significance of these provisions in the new constitutional order, we must view their development alongside that of the provisions for federal

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federal jurisdiction must be vested in a federal court and the Supreme Court's original jurisdiction was limited, Congress must institute a system of inferior tribunals. Without them, federal laws could not be fully enforced.

[35] U.S. Constitution, Art. I, sec. 8.

[36] See, for example, Stephen G. Calabresi and Gary Lawson, "The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia," *Columbia Law Review* 107, no. 4 (2007): 1002-48; Stephen G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review* 105, no. 6 (1992): 1153-1216; Alex Glashausser, "A Return to Form for the Exceptions Clause," *Boston College Law Review* 51, no. 5 (2010).

jurisdiction. Indeed, these two components of the judiciary article are highly interdependent. An extensive system of inferior courts would mean little without an equally extensive jurisdiction. In like manner, to set out an extensive federal jurisdiction, but leave it to be administered entirely by a single appellate tribunal—as we have seen some delegates suggest—would grant the power but withhold the means of its execution.

The definition of federal jurisdiction in the Virginia Plan was an adequate starting point, but fell short in fundamental ways.

> Resold. …that 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. (1:21-22)

Jurisdiction is not necessarily coextensive with the laws, much less with the Constitution. Indeed, the categories of jurisdiction here enumerated seem primarily concerned with preserving the foreign policy of the Union and the "national peace and harmony." Thus, the judiciary first emerges, not as an institution charged with preserving constitutional forms and administering the federal laws uniformly, but as an impediment to state encroachment. This evinces a hesitance in the delegates to take seriously the co-equal status of the judiciary and highlights how far the delegates progressed in their understanding of separation of powers between the feeble institution suggested by the Virginia Plan and the powerful one embodied in Article III.

The report of the Committee of the Whole displayed no significant changes. "Resold. that the jurisdiction of the national Judiciary shall extend to [all][37] cases, which

[37] The report of the committee of the whole reads "to all cases" (June 13, 1:237) whereas Madison's record of the original motion in debate (June 13, *RFC* 1:232) as well as the report in the Journal (June 13, 1:231) and Luther Martin's transcription in *Genuine Information* (3:176) read "to cases," excluding "all" from the

respect the collection of the National revenue, impeachments of any national officers, and questions which involve the national peace and harmony." However, when the delegates finally take up the judiciary provisions of the report a month later, they make two changes to this definition of federal jurisdiction, one of which is of tremendous importance. The delegates first unanimously eliminate impeachments from the jurisdictional menu. Then on a motion from Madison, the delegates replace the "collection of revenue" with a more general jurisdiction over federal questions.

> Several criticisms having been made on the definition [of federal jurisdiction]; it was proposed by Mr. Madison so to alter as to read thus—'that the jurisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony.'" (July 18, 2:46)

This is a critical step, one might even say a climax, in the development of federal jurisdiction. The convention had finally reduced the collection of questions with which they had begun in the Virginia plan to two general categories: questions arising under national laws and questions involving the national peace and harmony. It was important to distill the host of possible questions into these two categories because they exist for distinct reasons. Questions arising under national laws should be settled in federal courts—that is to say, the judicial power should be coextensive with the legislative[38]—both to defend federal authority from encroachment by the states and to ensure uniformity in the construction and administration of the laws. Questions involving the national peace and harmony, on the

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formulation. This may be of significance since Story makes a great deal out of the inclusion of that word in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and Story's argument has in turn formed the basis for an extensive debate over the extent of Congress's discretion in regulating the jurisdiction of federal courts. For a complete discussion of this debate, see Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* 65, no. 2 (1985): 205-72; Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III," *University of Pennsylvania Law Review* 132, no. 4 (1984): 741-866.

[38] Madison was not the only delegate troubled by the lack of coextensive jurisdiction. Wilson, for one, had inserted a marginal not in his copy of the report of the Committee of the Whole that read, "the judicial should be commensurate to the legislative and executive Authority" (June 13, 1:237).

other hand, should be settled in federal court, regardless of the source of the laws governing the case, in order to furnish the Union with a means of defending itself from the destructive influence of foreign and federal conflict.

This important step prepared the way for the work of the Committee of Detail, which would flesh out these two basic categories of judicial questions. The provisions submitted to the Committee of Detail on July 23 included the following resolution. "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." It is not clear whether this wording is altogether accurate. Madison, who moved the alteration, recorded it somewhat differently. Madison includes the important qualifier "all," and he uses the more general phrase "national laws" rather than "laws passed by the general legislature," both textual features that will eventually find their way into Article III (July 18, 2:46).

Either Madison used the language he recorded in his notes and these were recorded inaccurately by the secretary of the convention in the journal, or the secretary recorded the motion correctly and Madison merely jotted down the sense of his motion. To muddy the waters further, both sources may suffer from partial errors. While it is impossible to determine which of these scenarios is true, it is at least unlikely that Madison's notes are a perfect record of the motion. It is apparent that Madison was not recording his motion verbatim, for he records "the jurisdiction shall extend" where he clearly meant "the jurisdiction of the National judiciary." He was recording the sense of his own motion, not its exact words. This means that Madison saw the qualifier "all" as implied. It was enough to mandate that the jurisdiction of the federal judiciary "shall extend to cases arising under the national laws." Such jurisdiction was mandatory in the sense that the judiciary could not

be stripped of it, though the courts could decline to exercise it just as Congress could decline to exercise any of its legislative powers. At this point, Madison's assumption is reasonable, but a number of changes effected by the Committee of Detail would give this term "all" a renewed significance.

The Committee of Detail revised the judiciary provisions extensively, fleshing out the jurisdictional menu.[39]

> 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 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. (2:186-87)

Though the list is more exhaustive, it still exhibits the basic distinction between cases arising under federal laws and those that involve the peace and harmony of the Union. The committee's report seems also to address the possibility that Congress may decline to create inferior courts, in which case a few categories of cases are placed within the original jurisdiction of the Supreme Court. However, the more plausible motive for carving out these cases for original decision in the Supreme Court was to provide the litigants with an expedited resolution, not provide for the absence of inferior courts. In the remainder of cases within federal jurisdiction, the Court is given appellate jurisdiction, "with such

[39] For a side by side comparison of these provisions with those submitted to the Committee of Detail, see Appendix A.

exception and under such regulations as the Legislature shall make." Thus Congress is given some discretion in the composition of the Court's appellate jurisdiction. Read in isolation from the rest of the judicial article, Congress's authority to make "exceptions" to the appellate jurisdiction of the Supreme Court would perhaps allow it to simply remove certain questions from federal jurisdiction altogether. If Congress excised a question without at the same time giving an inferior federal court jurisdiction over it, the state courts would necessarily become the final arbiter of the question. We will see in chapter five that this reading of the Exceptions Clause is questionable.

But such a reading fails when the exceptions clause is read in conjunction with the mandatory language of the jurisdictional menu. The selective use of the term "all" in the jurisdictional menu places a limitation on Congress's power to regulate the Court's appellate jurisdiction. The jurisdiction of the Supreme Court must reach "to *all* cases arising under laws passed by the Legislature of the United States; to *all* cases affecting Ambassadors, other Public Ministers and Consuls [and] to *all* cases of Admiralty and maritime jurisdiction." Congress is thereby prohibited from regulating the Court in a manner that would prevent it from hearing any case fitting within one of these three categories. The jurisdiction of the Court must reach to every such case, at least potentially. With respect to the other types of judicial questions (those to which "all" is not joined) Congress's discretion still has limits. While Congress may regulate the Court in a way that makes it impossible for the Court to hear some of these cases, the use of the mandatory language "shall extend" requires that at least some cases in each category be left within the Court's appellate jurisdiction.

Congress's power to "assign any part of the jurisdiction above mentioned…to such Inferior Courts, as it shall constitute from time to time" does form an exception to this mandatory language, but importantly it only authorizes Congress to relocate the jurisdiction

to another federal court. The mandatory character of that jurisdiction would still apply, though that is left largely to inference. Thus, Congress is given a free hand in distributing federal jurisdiction, but in order to exercise the full extent of this discretion, Congress must create lower federal courts.

The judiciary provisions reported by the Committee of Detail on August 6 would undergo several important alterations before their final manifestation in Article III of the Constitution. The alterations had the general effect of increasing the scope of independent judicial power while further constraining the scope of Congress's discretion in framing the judiciary. Most of these changes merely affirmed or strengthened existing features of the judicial article.

One alteration, however, represented a substantive augmentation of federal judicial power. On August 27, the delegates voted to extend federal jurisdiction "to all cases arising under this Constitution…and treaties" in addition to "laws of the United States" (2:430-31). This extension of jurisdiction to constitutional questions has obvious implications for the exercise of judicial review, but more importantly it gave the judiciary a field of jurisdiction independent of congressional action. Without this extension, federal jurisdiction would reach only as far as federal legislation. Many provisions of the Constitution, however, would require no legislative action. The most obvious example is the list of prohibitions on states now embodied in the tenth section of Article I.[40] Had the convention not extended the judicial power to all cases arising under the Constitution, such limitations would be judicially unenforceable until Congress passed enacting legislation to make the limitations effective. Congress could thereby effectively nullify important constitutional provisions merely by its

[40] The judiciary would likewise lack the jurisdiction to hear cases arising from executive actions, from the interstate comity provisions of Article IV, and from any portions of the Civil War and voting rights amendments not backed up by congressional enactments.

inaction. By extending federal jurisdiction in this way, the convention provided a means of enforcement for every provision of the Constitution and effectively empowered the federal judiciary as the guarantor of constitutional limitations on the states.

This observation raises two important points. First, this is an important step in the legalization of conflict. Without a provision of this sort, direct confrontation between the political branches of the federal government and the states governments would attend every effort to enforce limits on state power. By throwing the matter into federal court, the conflict takes the more sedate form of legal arguments.

Second, it is not clear whether the Court's role here is exclusive or coordinate. Take, for instance, the enforcement clauses of the Civil War and voting rights amendments, which explicitly authorize Congress to pass enacting legislation.[41] That the framers of those amendments went to the trouble of including explicit legislative authorizations suggests that Congress has no implied power to enforce limits on the states. The extension of federal jurisdiction to all constitutional questions makes similar enforcement clauses for the judiciary unnecessary.[42] At the same time, the extension of federal jurisdiction to "*all* cases arising under this Constitution…and treaties" significantly altered legislative discretion under the Constitution. It substantially diminished the scope of congressional power to make exceptions to federal jurisdiction. *Every* case arising under a provision of the Constitution or of a treaty must, under this provision, be a potential object of federal jurisdiction.

We might also note that the extension of federal jurisdiction to constitutional questions is a powerful impediment to the claim, propagated by Judge Gibson in *Eakin v.*

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[41] See, e.g., U.S. Constitution, Amend. XIII §2, XIV §5, XV §2.

[42] Alternatively, one might argue that the enforcement clauses are themselves superfluous and that even in their absence Congress would possess an enforcement power.

Raub, that judges may not consult the Constitution as a justiciable source of law. Gibson's argument is complex, but the relevant part can be stated somewhat succinctly. The Federalist argument in behalf of judicial review, most famously articulated in *Federalist 78* and in *Marbury v. Madison*, rests on an analogy between constitutional construction and statutory construction. The Constitution, the argument goes, is a law like any other and may be consulted by judges when relevant to the decision of a case appropriately before them. The Constitution is, of course, a *fundamental* law, but a law nonetheless. Gibson does not challenge the claim that the Constitution is a fundamental law; he instead challenges the analogy between it and statutory law. Only the latter, he argues, is an appropriate basis for the adjudication of disputes. "It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution…." Judges must be blind to the law of the Constitution; their task is merely to give effect to the will of the legislature. Unless, of course, the Constitution itself contains some explicit grant of power to the judges to look into the Constitution and determine the agreement between it and acts of the legislature. Such, for instance, is the mandate in Article VI that "the judges…shall be bound [by the Constitution of the United States] anything in the Constitution or laws of any state to the contrary notwithstanding." This, Gibson says, "is an express grant of a political power" and authorizes the judges to look into the Constitution as a source of law.[43]

If Gibson is correct, it is certainly the death knell of the Federalist argument, for Marshall and Hamilton both had argued that the Constitution is a fit subject of adjudication apart from any express grant of authority. Assuming for a moment, without conceding, that

[43] *Eakin v. Raub*, 12 Sargeant & Rawle 330 (Pa. 1825). Gibson recognized one exception to this constitution-blindness of the judges. They may, he conceded, look into the "form of enactment" of legislation. Beyond this, however, they may not go without explicit authorization.

Gibson is correct, he utterly neglects the quite explicit grant of jurisdiction over constitutional questions in Article III. It is inconceivable that a court might settle a question arising under the Constitution without adjudicating the *meaning* of that instrument.

Even given this explicit language, however, those who would limit the scope of the judicial power are not entirely without documentary support. When Dr. Johnson moved to insert "this Constitution" in the jurisdictional menu, Madison immediately raised a powerful objection. "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." As it is usually read, Madison's argument is strikingly similar to Gibson's insofar as he denies that the Constitution is a justiciable source of law. The judges would therefore be deaf and blind to the provisions of the Constitution except that they may look into provisions "of a judiciary nature." It would seem that Madison's view lost, for Dr. Johnson's motion carried unanimously without any sort of qualification. Madison, however, would not accept defeat. "The motion of Docr. Johnson was agreed to nem:con," he recorded, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature" (August 27, 2:430). Madison does not indicate whether this constructive limitation received the verbal assent of the delegates or was merely adduced from their silence following his remark. He certainly receives no support from the plain meaning of the language used. No one would argue that, under this clause, the judiciary may construe only those federal laws and treaties that are "of a judiciary nature." So why should the Constitution, which is not distinguished

in any obvious way from these other sources of law, be only partially accessible to adjudication? Neither Madison nor Gibson provides a satisfactory answer to this question.[44]

But this assumes that Madison is actually making the same argument that Gibson later employs, which is not necessarily the case. The common reading of Madison's limitation of judicial review jumps too quickly to the conclusion that by "cases of a judiciary nature" he means cases arising under a judicial provision of the Constitution. But he does not refer to constitutional provisions of a judiciary nature; he refers instead to *cases* of a judiciary nature. He more likely means simply that the judiciary may apply the Constitution in justiciable cases properly before a court of law and may not presume to settle hypothetical or general constitutional controversies not arising in a concrete legal case. Given this reading, Madison's qualification on judicial review is roughly equivalent to the modern political questions and cases and controversies doctrines.

After Dr. Johnson's motion to extend jurisdiction to constitutional questions passed, the delegates proceeded to make a number of less significant alterations to the jurisdictional menu. Taken collectively, these minor alterations further diminished the discretion of Congress and leant greater force to the federal judiciary's claims to independence.

Prompted by a question from Gouverneur Morris, the convention clarified the scope of appellate jurisdiction, extending it to "law and fact."[45] Morris "wished to know what was

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[44] It is important to keep in mind that the foregoing discussion does not comprehend the *finality* of the Court's interpretation of the Constitution. It merely addresses the right of the federal judiciary to look into the Constitution as a source of justiciable law to settle any case properly before it and to hear any case that arises under any provision of the Constitution. The further question of the finality of judicial construction will receive further consideration at the end of this chapter.

[45] See also, Luther Martin's reply to the Landholder, March 21, 1788: "[A]s the clause now stands, an appeal being given in general terms from the inferior courts, both as to law and fact, it not only doth, but is avowedly intended, to give a power very different from what our court of appeals, or any court of appeals in the United States or in England enjoys, a power of the most dangerous and alarming nature, that of setting at naugh the verdict of a jury, and having the same facts which they had determined, without any regard or respect to their determination, examined and ultimately decided by the judges themselves" (3:287-88).

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." Wilson replied that the "Committee [of Detail] he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals [in Cases of Capture] had he said been so construed." Dickinson immediately moved to add after the word "appellate" the words "both as to law & fact" to avoid confusion. Wilson's response, of course, points to the source of Morris's concern. The Court of Appeals in Cases of Capture, which the reader will remember from the previous chapter, had been plagued by the refusal of state courts to comply with its orders. The most vexing source of these refusals was the states' claim that determinations of fact made by juries were not subject to appellate review; only questions of law were open to reversal. The insertion of the language here places the question beyond dispute.

Madison and Morris then moved to substitute "The judicial power" in place of "The Jurisdiction of the Supreme Court" at the beginning of the jurisdictional menu. This was immediately followed by three more alterations that together made the mandatory character of federal jurisdiction even more explicit than it already was and leant greater clarity to the jurisdictional menu. The alterations are summarized below; the underlined phrases indicate the substitutions; those struck through indicate deletions.

> Sect. 3. ~~The Jurisdiction of the Supreme Court~~The Judicial Power shall extend to all cases…[etc.] In…cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a party, ~~this jurisdiction shall be original~~the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, ~~it shall be appellate~~ the Supreme Court shall have appellate jurisdiction (August 28, 2:437), both as to law and fact with such exceptions and under such regulations as the Legislature shall make. ~~The Legislature may assign any part of the jurisdiction above mentioned (except for 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.~~ (August 27, 2:431)

Three purposes are apparent in these alterations. First, the new language seems almost to assume that there will be inferior federal courts. The original language had suggested that the default structure of the judiciary was a supreme appellate court relying on the state judiciaries as courts of first instance. Congress was, of course, given discretion to create a more extensive federal judiciary. Indeed, this brings us to our second purpose, which is a curtailment of legislative discretion. The discretion conferred on Congress by that final clause, "to assign any part of the jurisdiction above mentioned…in the manner, and under the limitations which *it shall think proper*, to…Inferior Courts," was broad in scope. It would in effect give Congress complete control (with the exception of presidential impeachments) over both the original and appellate jurisdictions of the Supreme Court, and permit the legislature to regulate federal jurisdiction in the manner that *it shall think proper*. This language would seem to make Congress the sole judge of the extent of its power over federal jurisdiction. It is certainly in tension with the mandatory "shall extend" and "all cases" language of the jurisdictional menu. Its deletion, therefore, eliminates any language that suggests a complete discretion in Congress. Third, when Congress did create inferior courts, the new language would automatically vest jurisdiction in them. Whereas under the original provision Congress would, by some positive act, have to "assign" jurisdiction to these courts, under the new language Congress would need only to create an inferior court and it would of right possess jurisdiction over every case "both in law and equity" except perhaps those encompassed by the original jurisdiction of the Supreme Court. Thus, Congress is merely left with the authority to make exceptions and regulations with respect to federal jurisdiction. Absent some such positive act of Congress, every federal court would possess the full extent of the "judicial power," subject to review by the Supreme Court.

The only other changes of significance were a number of deletions and additions in the content of federal jurisdiction. As we shall see, these alterations had little impact on the extent of judicial authority, but they do tell us something about the character and role of the judiciary vis-à-vis the political branches.

The most important of these alterations was the removal of its jurisdiction over "the trial of impeachments of Officers of the United States." This was the second time, in fact, that the convention had eliminated such a provision. It was first deleted on July 18 (2:46), but was then reinserted by the committee of detail (2:186-87). The confusion seems to have stemmed fundamentally from the mode of election of the executive. As long as the executive was to be chosen by the legislature—as was the case in the report of the Committee of Detail—it would be inappropriate to vest the power of impeachment in that same body. On the other hand, the delegates had come to recognize the political, rather than legal, character of impeachment and were therefore loath to leave it in the hands of the judges.[46] Unable to resolve the difficulty, the convention postponed the provision concerning impeachments on August 27 (2:431). This matter, along with the mode of election of the executive, was submitted on August 31 to a Committee of Eleven, in which Gouverneur Morris apparently played a leading role. This committee reported its recommendations on September 4, recommending that the president be chosen by an electoral college (thereby rendering him independent of the legislature) and that the House be given authority to initiate and the Senate the authority to try all impeachments. Defending this recommendation, Morris observed that in addition to vesting the political power of impeachment in a more "proper" body, this arrangement also freed the judiciary

[46] See, e.g., Morris' defense of the electoral college following the report of the Committee of Eleven on September 4 (2:500).

from any bias in case the impeached officer was subsequently indicted on criminal charges. "A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment" (September 4, 2:500). This whole progression manifests a decided aversion to drawing the judiciary into the settlement of political questions and impeachments are necessarily political, often involving considerations of competence and political responsibility rather than legal culpability.

The delegates also deleted an important parenthetical qualification from the jurisdictional menu. The report of the Committee of Detail had extended federal jurisdiction "to controversies between two or more states, (except such as shall regard Territory or Jurisdiction)," leaving the settlement of such disputes to a special tribunal connected with the Senate, an institution borrowed from the Articles of Confederation. As we observed in the previous chapter, this method of settling interstate disputes, which was hopelessly complex, had proved a great disappointment during the confederation period. Predictably, after a brief discussion on August 24, the provision was struck out. "Mr. Rutlidge said this provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established." The only objection raised, by both Ghorum and Williamson, was that the particular judges hearing such a case "might be connected with the States being parties." This concern was largely mitigated by the fact that "cases…in which a State shall be a party" was placed within the original jurisdiction of the Supreme Court, the least likely tribunal to cave to local prejudice.[47] The motion carried and the institution was eliminated (August 24,

[47] Of course, it is also important to note the discretionary power held by Congress under the Committee of Detail's report to assign the jurisdiction of the Supreme Court to inferior courts.

2:400-401). The obvious intent was to leave the resolution of such disputes to the judiciary.[48]

Conclusion

As the convention set about framing the basic institutional features of the judicial power, the developments were all in the direction of greater judicial independence and less legislative discretion. Even the one clear concession to legislative control, the compromise over the existence of inferior courts, works as much to the advantage of the judiciary as to its detriment. Had the delegates attempted to establish a system of inferior tribunals, they might have left Congress without adequate means of extension and furnished opponents of such extensions with a powerful argument in favor of the status quo. Congress, of course, retained control over many aspects of judicial administration, but even here the discretion with which Congress is invested is narrower than is conventionally assumed. Chapter five will attempt to set more definite limits to this discretion. For the present, we must turn to consider further the role envisioned for the courts in the resolution of federal conflict and the maintenance of constitutional supremacy.

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[48] The parenthetical exception included in the jurisdictional menu, however, remained until the Committee of Style eliminated it. So long as it remained, it left an apparently unintended void in federal jurisdiction where no institution (legislative or judicial) existed to resolve such disputes.

CHAPTER FOUR

The Judiciary in the Federal Convention: Federal Conflict and Constitutional Supremacy

In addition to furnishing the machinery for direct enforcement, Article III was designed to provide a legal means of resolving intergovernmental conflict and an institutional means of maintaining constitutional limits on both the federal and state governments. Judicial review of state and federal legislation was the preferred means of securing these two objects. We will first examine the role of the federal courts as a legal forum for the resolution of federal conflict and the alternatives to it that the convention rejected. We will then turn our attention to the power of judicial review itself in an attempt to establish its legitimacy based on both the institutional rationale and the text of the Constitution. The chapter concludes with a brief consideration of the reason independent judges are especially fit arbiters of constitutional controversies.

Legalization of Federal Conflict

Though rendering the federal government institutionally independent of the states through direct enforcement was the fundamental task of the convention, this was not by itself sufficient to secure federal authority from state encroachment. No serious proposal—save perhaps Hamilton's—stripped the states of their reserved powers and so long as the states were left free to regulate their own citizens, conflicts over the extent of federal authority would arise. It would often happen that the federal and state governments would attempt to regulate the same individuals and lay on them conflicting obligations. It did no good merely to declare the laws of the Union supreme; some resolution would have to be

given to the conflict. At least five alternatives surface in the course of the debates: 1) a declaration of federal supremacy with an attendant power to forcibly compel states into compliance, 2) a discretionary congressional veto on state laws prior to their operation, 3) a discretionary veto wielded by the executive of each state who was in turn to be appointed by Congress, 4) a constitutional veto wielded by Congress, and 5) a declaration of federal supremacy with resolution in the courts of law and ultimately in the Supreme Court of the United States.

These five mechanisms fall along a spectrum with a forcible resolution at one end and a legal resolution at the other. In between range a number of political resolutions. The convention's deliberations move from the forcible resolution to the legal one. The forcible resolution fades from view early with the demise of the New Jersey Plan and, while Madison frequently revives the congressional veto on state laws, the deliberations move gradually in the direction of a legal resolution. It would be more precise to say that the delegates opt decisively for the legal resolution quite early, but make that determination incrementally more explicit in the language of the document, primarily through the provision establishing the supremacy of federal laws.

Ellsworth would later summarize the framers' strategy in the Connecticut ratifying convention. After asserting the power of judicial review as a barrier to encroachments of the federal government on state authority and *vice versa*, Ellsworth concedes that

> if the United States and the individual states will quarrel, if they want to fight, they may do it, and no frame of government can possibly prevent it. It is sufficient for this Constitution, that, so far from laying them under a necessity of contending, it provides every reasonable check against it…. Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the states one against the other. I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to

> coerce sovereign bodies, states, in their political capacity. No coercion is applicable to such bodies, but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent state, it would involve the good and bad, the innocent and guilty, in the same calamity. (3:241)[1]

We will proceed by looking at the various alternatives as they developed in the Convention, beginning with the Virginia Plan and ending with the eventual solution embodied in the Article VI Supremacy Clause.

The Virginia Plan: Veto on State Laws

The Virginia Plan proposed to vest in Congress the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof" (May 29, 1:21). This provision exhibits forcible, political, and legal means of resolution. The political character of the veto power derives from the fact that it is to be wielded by the legislature. But this same provision also lends a legal character to the veto power, for Congress is not given a discretionary veto on state laws, but only a constitutional veto. Laws may be struck down only for "contravening…the articles of Union." This power is augmented slightly on May 31 to permit Congress a veto on states contravening treaties as well, but this still preserves the semi-legal character of the power (May 31, 1:54). The forcible character of the power, of course, flows from the last line of the passage, whereby the legislature is empowered "call forth the force of the Union" against delinquent states. This forcible component of the plan will be the first to fall.

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[1] Unless otherwise noted, all parenthetical citations in this chapter refer to Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed., 4 vols. (New Haven: Yale University Press, 1937). Where it is not evident from the text, the date is provided to facilitate use of other editions of Madison's notes.

The first and most important step toward the legalization of federal disputes was the growing conviction that direct contact, especially in the form of military force, between the state and federal governments must be avoided as far as possible. Early on, Mason emphasized the institutional separation of state and federal governments that attended direct enforcement. Mason "argued very cogently that punishment could not in the nature of things be executed on the States collectively, and therefore that such a Govt was necessary as could directly operate on individuals, and would punish those only whose guilt required it" (May 30, 1:34). "Under the existing Confederacy," Mason later added, "Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals" (June 6, 1:133; see also, Madison, May 30, 1:37). Reinforcing Mason's point, Wilson argued that defiance of federal laws issued primarily from the state governments, not the people: "All interference between the general and local Governments should be obviated as much as possible. On examination it would be found that the opposition of States to federal measures had proceeded much more from the officers of the States, than from the people at large" (May 31, 1:49; see also, June 5, 1:132-33). Wilson's insight derives at least in part from his extensive experience with the appellate prize court. In fact, this would later move Wilson to urge the creation of federal courts of first instance, especially with respect to admiralty jurisdiction (June 5, 1:124). Vesting both original and appellate jurisdiction over federal causes would avoid interaction with the state judiciaries.[2]

This whole line of reasoning is sufficiently compelling to alter Madison's position on coercive remedies for states. The last order of business on May 31 is the powers of

[2] It was no accident that one of the first actions of the South Carolina nullifiers in 1832 was to remove cases regarding collection of revenues from the federal courts. This would force the federal government to deal directly with the state rather than with its citizens individually. South Carolina Ordinance of Nullification, November 24, 1832, in the Avalon Project: Documents in Law, History, and Diplomacy, http://avalon.law.yale.edu/19th_century/ordnull.asp (accessed October 3, 2011).

Congress. The Convention passed (almost unanimously) Madison's ambiguous definition of federal powers as "all cases to which the State Legislatures were individually incompetent." Then they passed the veto on state laws without dissent. Finally, though, they came to the use of force against delinquent states. Here Madison, heeding the advice of Mason and Wilson, recognizes the self-destructive potential of such a direct contact between the states and the federal government.

> Mr. Madison observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. A Union of the States containing such an ingredient seemed to provide for its own destruction. The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. (May 31, 1:54)[3]

For the remainder of the convention, the delegates would periodically return to this problem, searching out means of resolving intergovernmental conflict that would keep the Union from the brink of war. This object pushed the delegates toward legalization of disputes and efforts to eliminate institutional contact between the state and federal governments. Madison, however, sought throughout the Convention to retain the political character of federal conflicts through the veto on state laws (1:318, 319, 447; 2:440, 589).[4] The Committee of the Whole was the last major stage of the convention through which the veto would survive.

The elimination of the forcible remedy from the Virginia Plan did not leave the federal government bereft of remedies for state encroachment. The most basic remedy was inherent in direct enforcement and a vigorous executive, as Madison had learned from

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[3] Then, on June 2, when Dickenson moves to involve the state legislatures in the impeachment of the executive, Madison joins Wilson in declaring it "bad policy to introduce such a mixture of the State authorities, where their agency could be otherwise supplied" (1:86).

[4] See also, Michael Zuckert, "Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention." *Review of Politics* 48, no. 2 (1986),: 189.

Mason and Wilson. Direct enforcement, in turn, means judicial proceedings. The Virginia Plan had anticipated this need, providing a national judiciary with jurisdiction over "questions which involve the national peace and harmony" and over a number of more particular questions prone to incite intergovernmental conflict. The prevention of such conflicts in fact seemed to be the primary purpose of judicial power under the Virginia Plan, while the principle of coextensiveness was utterly neglected. National jurisdiction consisted almost entirely of questions that either could not be safely settled by state courts or might be particularly prone to create conflict.

The New Jersey Plan: Advent of the Supremacy Clause

The Committee of the Whole reported the amended provisions of the Virginia Plan on June 13. The following day, James Paterson of New Jersey announced the intention of several small state delegations to form a "purely federal" alternative to the Virginia Plan; the convention adjourned for the day "that leisure might be given for the purpose" (June 14, 1:240).[5] As promised, the plan that Paterson read the following day was an attempt to retain the "purely federal" structure of authority established by the Articles of Confederation—a Union of equal states—while augmenting the federal government with more extensive power and the means to enforce compliance with its determinations. The implications of this are readily apparent in the plan. The mode of ratification specified in the Articles was to be retained, and the states were to enjoy an equality of suffrage in the legislature. The executive was given authority to execute the laws, but it is not clear what this meant in a government exercised over states rather than individuals. The federal judiciary was to consist of one supreme tribunal and its original jurisdiction was to reach to no more than the

[5] Paterson's name is correctly spelled with one "t"; Madison consistently misspells it with two.

impeachment of national officers, leaving the whole of original jurisdiction over federal questions in the hands of the state judges. Federal appellate jurisdiction was limited to admiralty cases, the construction of treaties, cases involving foreign interests, and cases involving trade regulations or the collection of federal revenue.

It is not clear how a federal government thus constituted could prevent encroachments on its authority without recourse to military force. The appellate jurisdiction of the federal court was no answer, for it was not coextensive with the laws or the Constitution. The answer to the difficulty lay in the sixth resolution of the plan.

> 6. Resd. That all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the *supreme law of the respective States* so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the *Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding*; and that if any State, or any body of men in any State shall oppose or prevent ye. Carrying into execution such acts or treaties, *the federal Executive shall be authorized to call forth ye power of the Confederated States*, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties. (June 15, 1:245, emphasis added)

It is ironic that the Supremacy Clause, the cornerstone of federal supremacy, is first proposed by those seeking to limit the extent of national power. It makes sense, however, when we recognize that a declaration of federal supremacy is a small price to pay for the institutional enfeeblement of the government of the Union. A government truly capable of direct enforcement with an extensive federal judiciary, an energetic executive, and a national legislature, would put teeth in a supremacy clause. This provision, however, is ultimately a parchment barrier. True enough, it permits the executive to enforce compliance through military action, but a resort to military force was always an ultimate remedy whether it received explicit recognition or not. Furthermore, the fact that all cases arising under this provision were to be decided in the state judiciaries and rely on the state executive for

enforcement left little hope that national judicial power would be an adequate means of preventing state encroachment. Nonetheless, by introducing the supremacy clause Paterson and his compatriots had conceded an important principle, one that would eventually bear much fruit.

The Hamilton Plan

Finding both the Virginia and New Jersey plans inadequate, Hamilton rose on Monday, June 18 to suggest an alternative to both. Central to Hamilton's alternative is an effort to implant in the state governments themselves adequate safeguards against encroachment on federal power. The tenth provision of Hamilton's plan illustrates the approach.

> X All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governour or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is Governour or President. (June 18, 1:293)

Hamilton recognized the inadequacy of a supremacy clause without an institutional means of enforcement short of military force. He understood that the point was to stave off a forcible resolution of disputes. Here he provides a political resolution by vesting a discretionary veto in the governors of the states and in turn making the governors accountable for their office to the federal government. To prevent forcible resolution, Hamilton proposes that states be forbidden to maintain "any forces land or Naval" and that the state militias be placed under the "sole and exclusive direction of the United States" (1:293). He also suggests that Congress be empowered "to institute Courts in each State for the determination of all matters of general concern" thereby providing a forum for legal resolution as well (1:292).

Resurrection of the Supremacy Clause

Hamilton's proposal is simply too nationalistic to garner support in the convention. It does, however, serve to highlight the moderate character of the Virginia Plan.[6] It is no wonder, then, that on June 19 the convention adopts the Virginia Plan (as reported by the Committee of the Whole) as the basis for its deliberations. As they then stood, the resolutions included a constitutional veto on state laws, a power of direct enforcement vested in the executive, and federal courts with jurisdiction over questions involving the national peace and harmony (June 13, 1:236-37).

On July 17, the convention took up the veto on state laws, which was met with a number of objections. Morris "opposed this power as likely to be terrible to the States, and not necessary, if sufficient Legislative authority should be given to the Genl. Government." "A law that ought to be negatived," he later observed, "will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a National law." Sherman "thought [the veto] unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union" while Martin "considered the power as improper & inadmissible. Shall all the laws of the States be sent up to the Genl. Legislature before they shall be permitted to operate?" Thus, it was argued, the veto on state laws is an impediment to ratification, impracticable, and unnecessary. Madison attempts a defense, arguing that the federal judiciary will be too slow in reviewing state laws, the state judges were not reliable, and repeal by Congress would take too long to pass. Madison is not able to persuade his fellow delegates and the convention eliminated the veto on state laws from the plan, in effect opting for a legal resolution to federal disputes (July 17, 2:27-28).

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[6] Herbert J. Storing, "The Constitutional Convention: Toward a More Perfect Union," in Joseph M. Bessette, ed., *Toward a More Perfect Union*, 25-26.

As a substitution for this power, Martin proposes to reinsert a version of the supremacy clause and make explicit the legal character of intergovernmental disputes.

> [T]he Legislative acts of the U. S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants – & that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding. (July 17, 2:28-29)

Martin had very carefully framed this language to limit its implications. As he later explained in the ratification debates, federal jurisdiction had not yet been extended to all cases arising under national laws and treaties. Martin therefore expected that "every question of that kind would have been determined in the first instance in the courts of the respective states; had this been the case" the state judiciaries would be primarily responsible for deciding both the constitutionality of federal laws and treaties and the degree to which state laws conflicted with these. Martin also pointed out that his rendition of the supremacy clause only recognized the power of state judges to invalidate provisions of state law, not provisions of state constitutions. If national "treaties or laws were inconsistent with our [state] constitution and bill of rights, the judiciaries of this state would be bound to reject the first and abide by the last, since in the form I introduced the clause" federal laws and treaties "were not proposed nor meant to be superior to our constitution and bill of rights" (Reply to the Landholder, March 19, 1788, 3:287).

Martin's insertion of the supremacy clause was the decisive moment at which the convention made explicit the legal character of intergovernmental disputes. What remained to be decided (or, at least, explicitly recognized) was the important question whether these disputes would be settled primarily by state courts or by federal courts. Martin had carefully embodied limits in the supremacy clause to ensure that federal institutions would not dominate the resolution of intergovernmental disputes, but these fell in quick succession.

The expansion of the supremacy clause in fact began the next day, when Madison proposed to extend federal jurisdiction "to all cases arising under the national laws" and thereby put the decision of any case arising under the supremacy clause potentially within the jurisdiction of a federal court (July 18, 2:46). Another of Martin's limits would die by the hand of the Committee of Detail. The committee's report amended the last part of the supremacy clause to read, "anything in the *Constitutions* or laws of the several States to the contrary notwithstanding" (August 6, 2:183, emphasis added). A final defeat came on August 23, when Rutlidge proposed an amendment that would alter the first line of the supremacy clause. The new language read, "This Constitution and the laws of the U.S. made in pursuance thereof, and all treaties made under the authority of the U.S. shall be the supreme law" of the land. Under the original clause, only federal legislative enactments and treaties would form a basis for striking down provisions of state laws and constitutions. By making the Constitution part of the supreme law of the land, the convention rendered the provisions of the Constitution self-enforcing. A federal court could then enforce constitutional limits on states, such as those contained in the tenth section of Article I, even in absence of federal legislative action.

Constitutional Supremacy and Judicial Review

The rationale for employing federal courts as a legal forum for the settlement of federal conflict extended to the settlement of constitutional questions generally. The judicial power vested in federal courts included the power to set aside both federal and state actions that transgressed constitutional limits. Not only was judicial review presumed to exist as an inherent function of independent judicial power as both Marshall and Hamilton would later argue, it was enshrined in the text of Article III late in the convention's proceedings.

Presumption of the Review Power

Most accounts of judicial review do not rely on the text of the Constitution for its legitimacy. Indeed, the two most famous apologia for the power, *Federalist 78* and *Marbury v. Madison*, rely on the inherent functions of judicial power. This is in keeping with the views of those who framed the Constitution. By 1787, American statesmen had come to view the power to invalidate a legislative enactment in conflict with constitutional law as one that inhered in an independent judiciary. The evidence to this effect from the debates in the Federal Convention of 1787 is exceedingly strong as a brief review of Madison's notes will demonstrate.

Judicial review is first mentioned in the debate over the Council of Revision on June 4, when Gerry raises doubts about whether the Judiciary ought to have a share in it and moves to confine it to the executive. To include the judges in it, he argues, would be redundant, "as they will have a sufficient check agnst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation." As though to emphasize that this is to be a non-political power, he also notes, "It was quite foreign from the nature of ye. office to make them judges of the policy of public measures…" (June 4, 1:97-98). Rufus King seconds the motion, "observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation" (June 4, 1:98). Butler Pierce's notes record King's further comment that "they will no doubt stop the operation of such as shall appear repugnant to the constitution" (June 4, 1:109). Before moving on, we ought to note that the comments recorded here refer to judicial review of

federal laws, as these were the laws to be reviewed by the Council of Revision. No dissent from the opinions here expressed by Gerry and King is recorded.

Judicial review again surfaces on July 17 in the midst of the debate over the proposed veto on state laws to be wielded by the national legislature. "Mr. Sherman thought it unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived" (July 17, 2:27). Defending the veto on state laws, Madison does not dispute the existence of the review power, but its practicability. "[The states] can pass laws which will accomplish their injurious objects before thay can be repealed by the Genl Legislre. or be set aside by the National Tribunals…. A power of negativing the improper laws of the States is at once the most mild & certain means of preserving the harmony of the system." Madison is also loath to rely on state judges to ensure conformity with constitutional standards. "Confidence cannot be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures." Gouverneur Morris responds that he "was more & more opposed to the negative. The proposal of it would disgust all the States. A law that ought to be negatived will be set aside in the Judiciary depatmt. and if that security should fail; may be repealed by a Nationl. law" (July 17, 2:28).

On July 21, Wilson moves to reinsert the judiciary in the revisionary power of the executive and revive the Council of Revision. His reasons for desiring the inclusion of the judiciary are instructive.

> The Judiciary ought to have an opportunity of remonstrating agst projected encroachments on the people as well as themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. (2:73).

Wilson here points to both the extent and limits of the judicial role. The review power takes the form of legal construction, not political discretion. Gerry reinforces Wilson's view. "It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people." He warned, "It was making the Expositors of the Laws, the Legislators which ought never to be done" (2:75). Martin likewise disapproved of involving judges in the exercise of political discretion.

> A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature. (2:77)

Mason responds to Martin:

> It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences. (2:78)

The first objection to judicial review is not voiced until August 15 when Madison again attempts to involve the judges in the revision of federal laws, this time giving them a concurrent veto with the executive. Mercer approved the motion and "disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be uncontroulable" (2:298). Dickenson "was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist.

He was at the same time at a loss what expedient to substitute. The Justiciary of Aragon he observed became by degrees the lawgiver" (2:299). In reply to them both, Morris said that "he could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law" (2:299).

The foregoing demonstrates that the Framers recognized the legitimacy of judicial review as a means of preserving constitutional limits on both the federal and state governments.[7] There is considerable disagreement over the fitness of judges to participate in the revision of laws. Will they add some unique competency to deliberations on the wisdom of legislative enactments? On this the delegates are divided. But on the matter more fundamental there is no apparent dispute. Judges, when acting as judges in courts of law, may set aside a law that conflicts with the Constitution, but this decision is an exercise of legal, not political, judgment. The manifest motive for involving judges in the Council of Revision is that they cannot in their normal capacity consider the wisdom or justice of a law apart from promulgated constitutional standards. In order to employ such standards, the judges would need some sort of express authorization in the Constitution. Madison's proposal to give a panel of judges a concurrent veto was one such authorization, though this would not have enabled all federal judges, acting as judges, to veto laws on the basis of policy, but only those composing the council convened for that purpose. A similar authorization was contained in a document submitted by Randolph on July 10 that apparently contained provisions meant to mitigate the concerns of small states. Among them was the following: "that any individual conceiving himself injured or oppressed by the

[7] As Oliver Ellsworth told the Connecticut Ratifying Convention: "If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void; and upright, independent judges will declare it to be so" (January 7, 1788, 3:56).

partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice" (3:56).

Textual Basis for the Review Power

The review power of federal courts, already presumed by the delegates to exist, was enshrined in the text late in the convention's proceedings. The textual support for the power of judicial review is easy to summarize; judicial review arises from the interaction of Article III and the Supremacy Clause of Article VI. The latter reads thus:

> 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. (2:603)

Article III extends the judicial power "to all cases arising under the Constitution and laws of the United States." Daniel Webster would later argue that the text had thereby settled on the Supreme Court the power ultimately to decide controversies over whether a law was "made in pursuance" of the Constitution. "These two provisions…cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a Constitution; without them, it is a Confederation."[8]

Webster's argument is substantiated by the proceedings of the convention. On August 23, Rutlidge moved to alter the first part of the supremacy clause, adding the Constitution to laws and treaties as the constituent parts of the "supreme law." This made explicit the status of the Constitution as a justiciable source of law in settling legal controversies in court. Then, on August 27, the convention voted to add "all cases arising

[8] "Speech of Daniel Webster," January 26-27, 1830, in *The Webster-Hayne Debate on the Nature of the Union*, ed. Herman Belz (Indianapolis: Liberty Fund, 2000), 137.

under the Constitution" to federal jurisdiction. Any dispute arising under a provision of the Constitution was now a justiciable federal question. And, since only laws "made in pursuance of" the Constitution were to be considered "the supreme law of the land," it would fall to federal courts ultimately to decide upon the constitutionality of federal laws in cases before them. The remainder of the supremacy clause, of course, reaffirmed the judicial power to set aside unconstitutional state laws (as well as those conflicting with duly enacted federal laws and treaties).

The notion that judicial review is an "invention" of the Federalists simply ignores the evidence promulgated above. Even in absence of any textual support, a host of proponents for judicial review express their approbation of the power while only two dissenting voices are heard, one of which professes to be "at a loss for what expedient to substitute." Even if one does not find this evidence compelling, the convergence of Article III and the Supremacy Clause amounts almost to an explicit recognition of judicial review.

Finality and Judicial Supremacy

Of course, judicial review itself is not the most common object of criticism. This is reserved for the so-called doctrine of judicial supremacy, the idea that the Supreme Court's construction of the Constitution is not only binding on the parties to a suit, but upon the political branches in all their subsequent actions. The foregoing examination does give us some basis for addressing this controversy.

The judicial power of the United States is vested in the federal courts, ultimately in the Supreme Court. Any justiciable question over which the federal judiciary possesses jurisdiction may only be decided by it. Any such decision is final once it has been decided by the highest federal court with jurisdiction to hear it. There may be no further appeal. As we have seen, *all* cases arising under the Constitution, laws, and treaties of the United States

must ultimately come within the jurisdiction of a federal court. Every such case must potentially be an object of federal jurisdiction. In practice, this means that every justiciable case requiring a construction of the Constitution may only be decided finally by a federal court. In this sense, the federal judiciary is the final arbiter of constitutional meaning.

The requirement that the question arise in a *justiciable* case forms the only exception to this finality. In other words, if the executive performs an action that requires no concurrent judicial action for its performance and that, having been performed, elicits no justiciable case, then with respect to such a question the judiciary will not be final. In fact, in such a case, the executive would be the final arbiter of constitutional meaning. Many of the procedures by which the executive and legislative branches conduct their internal business are of this description. Likewise, most instances in which the political branches *decline* to exercise their powers are of such a description. The executive, for example, may refuse to make an appointment to a post created by Congress. It may be an abrogation of the duty to make appointments, but it is not a justiciable controversy. It is, as the reader will already know, a political question.

Every branch of the federal government possesses such finality in some instances. Congress may refuse to make appropriations or to create inferior federal courts. The executive may refuse to give effect to a law or to spend appropriated monies or to prosecute a war after its declaration by Congress. The Court may refuse to give effect to an unconstitutional law or decline to hear a case falling within its jurisdiction. In this sense, each branch of the government is supreme *and yet* they are all co-equal. Recall the first resolution of the Committee of the Whole: "That a national government ought to be established consisting of a *supreme* Legislative, Executive and *Judiciary*." Each branch is to be supreme in the exercise of its own functions. To make each branch supreme and co-equal is

in fact the manifest purpose of the vesting clauses. That the judiciary possesses this supremacy in so many cases flows from the fact that in many cases the judiciary is the last to act and is therefore most often in the position of refusing its assent to an act already assented to by the political branches. This is, of course, true in all criminal prosecutions and in any civil case in which a person is deprived of life, liberty, or property.

Conclusion: Why Judges?

The present chapter and the one preceding it set out to understand the rationale of the federal convention in framing Article III. That rationale, it seems, is driven by three institutional needs: empowering the federal government to enforce its own laws directly on citizens, providing a legal means of resolving intergovernmental conflicts so as to avoid a resort to force, and giving efficacy to constitutional limits on both the federal and state governments. These needs all urged the Framers toward the same institution: an independent and extensive judiciary. The judiciary, it seems, was most valued for its detachment from the politics of the moment. Only such a detachment would permit it to consider the law of the Constitution and the preservation of constitutional forms as the object of its deliberations.

Why, though, would the Framers assume that the judiciary would actually employ its powers in preserving the law of the Constitution? The answer is two-fold. First, an independent judiciary is less likely than the other branches to abandon the Constitution for other aims because it is subject to fewer of the momentary political influences that woo political actors into the betrayal. This, in part, is what Hamilton meant when he called the Judiciary the "least dangerous branch."[9] Second, and more important, the ambitions of

[9] *The Federalist*, no. 78, 522. Hamilton was also referring to the fact that the judiciary possessed neither the purse nor the sword of the state and could therefore do no positive injury to political rights.

judges are tied inseparably to the maintenance of the rule of law. Possessing neither the purse nor the sword the judiciary is bereft of real political power. The ambitious judge must therefore look for some other source of authority. Tenure during good behavior has stripped the judge of that most formidable source of authority in a democracy, a popular mandate. The most powerful claim to authority, and a ready vehicle for the ambition of the federal judge, is the perception in the minds of the people that the judges speak for the Constitution. At the very least, the judges must make a persuasive case that their powers are exercised in preserving the Constitution established by the people. Inflexible adherence to constitutional standards is the most fruitful ground in which to sow judicial ambitions. This, of course, is no guarantee that the judges will in fact adhere to the Constitution and the laws, but there is no getting around the fact that only in the case of the judiciary is ambition concerned primarily with preserving constitutional standards.

Perhaps the most surprising thing about Article III is the lack of debate over its provisions. Only in a few isolated cases did an exchange over one of its provisions elicit more than a few comments from the delegates before going to a vote. This flows in part from the fact that there seems to have been widespread agreement on principles when it came to judicial power. The key principles—that direct enforcement demanded an independent judiciary, that judges should be insulated by tenure and irreducible salaries from political influence, that the exposition of the laws should be clearly distinguished from the making of them, that the judiciary must be geographically and jurisdictionally coextensive with the laws, that federal disputes ought to be resolved by legal means whenever possible, that a limited constitution implied the power of judicial review—met with little or no resistance in the convention. Perhaps, though, the most powerful reason for the lack of debate over the judiciary is its novelty. Executive power, even independent executive power,

was an institution familiar to the Framers; the novelty of the executive lay in uniting independent executive power to republican principles. The judiciary embodied in the text of Article III, however, was a creature altogether novel. American jurists had only begun to consider the implications of popular sovereignty and written constitutions for the exercise of independent judicial power. The Framers had produced the genetic code for a formidable judicial institution that many of them could envision only in fetal form and would see only in infancy.

CHAPTER FIVE

Legislative Discretion and Judicial Independence

Having surveyed at this point the development of the various provisions relevant to judicial power in the Constitution of 1787, it is appropriate that we draw together these components to construct a coherent account of congressional discretion in structuring and regulating the judiciary. This account will be a helpful prelude to chapters six and seven in which we will examine the development of federal judicial power in the early republic through legislative and judicial construction of Article III. In those chapters we will see that both Congress and the Supreme Court acted for the most part in accordance with the rationale of the Constitution regarding the scope and functions of federal judicial power. There were, however, important divergences from the design of the Framers, especially with respect to the extent of federal jurisdiction, over which Congress claimed plenary control. Since this divergence from the constitutional design is to figure so prominently in the chapters to follow, it will be helpful to set out with a clear statement of what I take to be the constitutional extent of Congress's power to structure and regulate the judiciary.

Applying the insights garnered from the foregoing analysis of the convention to the text of Article III, we can distill three limits to Congress's control of the judiciary. The first limit is the institutional integrity of federal judicial power. Only judges holding an office created pursuant to Article III may exercise the judicial power of the United States. All such judges must, therefore, be appointed by the President with the advice and consent of the Senate and enjoy tenure during good behavior and an irreducible salary.

The second limit is the jurisdictional integrity of the judicial power. At minimum, an avenue to an Article III court must be open to "all Cases" arising under the Constitution, laws, or treaties of the United States, "all Cases" affecting diplomatic officers of foreign governments, and "all Cases" of admiralty and maritime law. If state courts decline to hear such cases or lack jurisdiction to do so, Congress is under an obligation to provide an inferior court with original jurisdiction to hear the neglected cases. In the other six jurisdictional categories falling within the scope of federal judicial power, Congress *may* provide a venue for the exercise of original jurisdiction, though it is not obliged to do so even if state courts decline to exercise jurisdiction. Alternatively, one might plausibly argue that Article III mandates the exercise of *exclusive* federal jurisdiction over "all Cases" in the first three jurisdictional categories, but permits the exercise of *concurrent* jurisdiction by state courts in the other six. Either of these two readings gives effect to both the mandatory "shall extend" that precedes the jurisdictional menu and the selective use of "all" within it.

The third limit is the hierarchical structure of the federal judiciary. Congress may not regulate the Supreme Court in a manner that deprives it of jurisdiction over any case falling within the scope of federal jurisdiction described in Article III. Congress may control the *form* of jurisdiction exercised by the Supreme Court under its power to "make exceptions" to the appellate jurisdiction of the Court. Such exceptions, however, must operate by relocating the excepted cases to the original jurisdiction of the Court, though cases may not be moved from the original to the appellate jurisdiction of the Court.

This constrained view of congressional control over the federal judiciary is radically divergent from the orthodox view. The extent of Congress's power over the federal judiciary was a hotly debated topic in the early years of the Republic (with Federalists arguing for strict limits on legislative discretion) and has, in the last half century, again become the

occasion for much debate among jurists and constitutional scholars. The long intervening period was characterized by a general consensus in favor of broad congressional discretion. The basis for this consensus was a series of judicial opinions authored by John Marshall. The Marshall Court thereby furnished subsequent generations with a powerful precedent in favor of congressional discretion over the extent of federal jurisdiction and thus surrendered a fundamental component of judicial independence. Succeeding justices consistently affirmed and extended Marshall's permissive construction of congressional power. Eventually, the weight of precedent, strengthened by the passage of time, buried the alternative constructions of Marshall's Federalist allies in obscurity.

Conversely, the consistent theme of the judiciary's institutional development over the last two centuries has been growth in extent (geographic and jurisdictional), authority, and independence. The twentieth century has witnessed an especially rapid increase in each of these respects. The Supreme Court now exercises plenary control over its own docket. The Court, together with the Judicial Conference of the United States (chaired by the Chief Justice) and the Administrative Office of the United States Courts, has taken primary responsibility for reforms in federal procedure and the management of judicial business. An ever-increasing portion of constitutional questions in American politics are settled—with repeated claims of finality—by the Supreme Court. Equally significant, if often unnoticed, federal courts now oversee a great many of the administrative tasks of the federal government, ensuring not only the compliance of administrative decisions and processes with legislative acts and constitutional provisions but also the fundamental fairness of rules and procedures.

All of these developments have occasioned loud criticism, much of it aimed at demonstrating the novelty of such extensive independence and authority in the judiciary.

Surely, the Founders did not, indeed could not, envision a judiciary so vast and so independent of legislative control. Many critics go on to recommend the use of congressional regulation to curb the courts and restore the judiciary to its properly limited (and subordinate) role in American politics. The present chapter challenges the critics on both counts. The Constitution of 1787 envisioned precisely the kind of independent and extensive judiciary that now prevails and Congress possesses very little authority to do anything about it.

The remainder of the chapter is divided into five sections. The first three deal in turn with the three limits on congressional power outlined above in an attempt to demonstrate their superiority to alternative constructions. The fourth and fifth sections will consider briefly the most important alternatives to my construction of Article III: Marshall's plenary view of congressional control, which serves as the foundation for the orthodox view, and recent neo-Federalist attempts to recover judicial independence, which do not go far enough in repudiating the orthodox account of congressional power.

I will argue that my construction of Article III is superior to the alternatives for three reasons. First, it gives full effect to every provision of the text and avoids placing any one provision at odds with another. We may safely assume that those who frame and ratify a Constitution intend it to possess internal consistency and integrity. If a plausible interpretation gives full effect to the provisions of the instrument while avoiding conflicts between them, it is to be preferred over an interpretation that renders provisions superfluous or void or that sets one provision in direct conflict with another. Second, the construction proposed herein comports with the rationale evinced in the deliberations of the Federal Convention that framed the Constitution. Where the purpose or meaning of a provision is ambiguous, recourse may legitimately be made to its origins in the convention's

deliberations. If the Constitution evinces internal consistency, as we assume it does, then that consistency must flow from a unifying rationale imparted to it by its Framers. Third, this construction is borne out by the history of congressional efforts to regulate and structure the federal judiciary. It is no accident that the judiciary as a whole and the Supreme Court in particular has gradually assumed responsibility for the administration of its own powers and the composition of its own jurisdiction. It is a testament to the wisdom and foresight of the Framers that the institutions they conceived have developed in ways consonant with their intentions.[1]

The appropriate starting point for an analysis of this sort is the text itself, so let us begin by recalling the relevant constitutional provisions.

Article I

> Section 8. The Congress shall have Power…to constitute Tribunals inferior to the supreme Court…and to 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.

Article III

> 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

[1] This is not to suggest that the federal government operates in every respect consistently with the Constitution. It is only to say that the powers now wielded and functions performed by the executive and judicial branches, independently of Congress, are logical fulfillments of the rationale of the Framers'framers' Constitution. It is no wonder that congressional resistance to these developments is rarely met with success. For an account of the presidency that bears out this argument, see David K. Nichols, *The Myth of the Modern Presidency* (College Park: Penn State University Press, 1994). Regrettably, the point will not receive a defense in the present chapter, and will receive only a partial one in the chapters that follow. A full defense will be reserved for some future work.

> public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or 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….
>
> Article VI
>
> …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….

Institutional Integrity of the Judicial Power

Congress is empowered by the eighth section of Article I "to constitute tribunals inferior to the Supreme Court" and "to make all laws which shall be necessary and proper for carrying into execution [this power], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Article III recognizes the existence of this power when it vests the judicial power "in such inferior Courts as Congress may from time to time ordain and establish." These three provisions contain certain limits that must be respected. Congress is hereby empowered to constitute only such tribunals as are "inferior to the Supreme Court." Thus it is clear that inferior tribunals may not exercise any power other than those vested in them by Article III; Congress may not imbue them with additional, non-judicial powers. And any tribunal instituted under the auspices of this power must enjoy all those privileges secured to federal judges under Articles II and III: tenure during good behavior, an irreducible salary, and appointment by the executive with the advice and consent of the Senate. In short, while

Congress is given power to "constitute" inferior tribunals, it is Article III that "vest[s]" them with authority.

Furthermore, the Necessary and Proper Clause does not authorize Congress to make any law it pleases respecting the judiciary or judicial power. It may only make laws "proper" for carrying that power into execution. Congress receives no power to *frustrate* the exercise of judicial power but only to *further* it.

Perhaps more importantly, Congress is not by this clause empowered to exercise any judicial power itself, but only to enable and equip the judiciary, which alone is vested with the judicial power of the United States, to exercise its powers. Congress may, for example, create an inferior tribunal and vest it with jurisdiction over admiralty cases. Congress may even make rules for "carrying into execution" this jurisdiction, but no such regulation may amount to a legislative exercise of the judicial power or prevent the tribunal thus regulated from exercising the full extent of the judicial power within its jurisdiction.

Finally, Congress is empowered merely to "constitute" or "ordain and establish" inferior, Article III tribunals. Congress is not thereby empowered to commission some existing state tribunal or any other institution to wield the judicial power of the United States. As we have seen, the verbs here employed to describe Congress' power were chosen with some deliberation to distinguish the creation of inferior courts from the mere commissioning of them.[2] Why else use the terms "ordain *and* establish" in the vesting clause of Article III? The terms "constitute" and "establish" carry a connotation quite distinct from "ordain" or "commission" or "authorize."

This construction of Congress' power to constitute inferior tribunals is virtually undisputed as a matter of original meaning. It has, however, drawn considerable criticism on

[2] See chapter three above at 76-79.

the ground that it is unworkable in practice and in fact would overturn the settled practice of the government. The most obvious collision with practice is the creation of so-called Article I tribunals, sometimes referred to as legislative courts. These institutions utilize judicial proceedings to settle certain disputes that Congress wishes to keep out of Article III courts. The judges presiding over these proceedings are not afforded the tenure and salary protections guaranteed to Article III judges. Examples include the U.S. Court of Federal Claims, the U.S. Tax Court, the U.S. Court of Appeals for the Armed Forces, U.S. bankruptcy courts, and U.S. territorial courts. Administrative law judges arguably fall in the same category.

The only serious attempts to find warrant for the creation of non-Article III courts in the text of the Constitution make a false distinction between the inferior "Courts" that Congress may "from time to time ordain and establish" (Article III) and the inferior "Tribunals" that Congress may "constitute" (Article I). But even those who argue for such a construction of the text admit that it is entirely fabricated to justify practice.[3]

Of course, the categorical nature of these comments is not as decisive as it may seem. The present examination has no pretensions of settling the constitutionality of Article I tribunals. The question has been highly resistant to settlement by the Court and is equally contentious among legal scholars, the reason being that the question is far more complex than a simple matter of textual construction.[4] What constitutes an exercise of judicial

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[3] See James E. Pfander, "Article I Tribunals, Article III Courts, and the Judicial Power of the United States," *Harvard Law Review* 118, no. 2 (2004): 643-776.

[4] The Supreme Court has fluctuated considerably in its approach to the problem, beginning with Marshall's initial treatment in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). The law reviews are likewise filled with attempts at a solution. See, e.g., Gary Lawson, "Territorial Governments and the Limits of Formalism," *California Law Review* 78, no. 4 (1990). 853-911; David Currie, "The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835," *University of Chicago Law Review* 49, no. 3 (1982):646-724; Pfander, "Article I Tribunals."

power? An answer to this question is prerequisite to any attempt to address the constitutionality of Article I tribunals. For Article III vests the whole of "the judicial Power" in the supreme and inferior courts of the United States. As we have already seen, this is an exclusive grant of power.

The resolution of the problem would be quite simple if one answered that any decision rendered by a judicial process is an exercise of judicial power. But the answer is not as simple as this. If, for example, the president delegated to his chief of staff the task of adjudicating disputes between his speech writers and in doing so the chief of staff selected a jury and held hearings to make the determination, no reasonable observer would classify the resolution as an exercise of judicial power. Indeed, this ad hoc tribunal would no more exercise judicial power than does Congress when it holds hearings to aid in the formation of laws. This is not to say that congressional hearings never take on the character of a judicial act; they very well might. But the determination of the question would not be settled by the mere fact that methods resembling a judicial proceeding were employed. It would instead require an investigation into the nature of the dispute being adjudicated and the type of remedy being granted or withheld.

Thus, it is not necessarily the case that administrative law judges are performing judicial functions; they may very well be performing executive or legislative functions. In any case, the relevant inquiries are 1) whether, in the exercise of the function they perform, they are subject to the proper authority (i.e., Congress, the president, or the courts) and 2) whether they perform functions appropriate to more than one of the branches. Given the exclusivity of the vesting clauses, legislative, executive, and judicial powers (or any two of them) cannot be wielded by the same hand. It makes no difference to object that the Constitution itself gives the President and Senate a share in the exercise of one another's

functions, for the Framers were careful to enumerate those exceptions to the otherwise exclusive grants of authority contained in the vesting clauses.[5]

Jurisdictional Integrity of the Judicial Power

The repeated use of the mandatory term "shall" at the beginning of sections one and two places outer boundaries to Congress' power to structure the federal judiciary and to distribute jurisdiction among the courts thus created. The judicial power of the United States, in its entirety, is vested in one Supreme Court and in any inferior court that Congress may ordain and establish. As we have already seen, any exercise of the judicial power of the United States must proceed from one of these courts. Therefore, to say that the judicial power "shall extend" to the enumerated cases prohibits any distribution of federal jurisdiction that deprives the federal judiciary of jurisdiction over those cases.[6]

One problem that arises from this mandatory reading of jurisdiction is occasioned by the selective use of the term "all" in the jurisdictional menu. Recall the language of Article III, 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 between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

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[5] The rule of construction here implied—that exceptions to the exclusive grants of authority in the vesting clauses were to receive a narrow construction—was firmly established very early in American constitutional history. James Madison's and Fisher Ames's arguments on behalf of the presidential removal power are excellent examples of its application (*Annals of Congress* 1:394, 492-93 and 518) as is Alexander Hamilton's pseudonymous defense of President Washington's Neutrality Proclamation. "Pacificus no. 1," in *The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding*, ed. Morton J. Frisch (Indianapolis: Liberty Fund, 2007), 19-25.

[6] This mandatory reading of federal jurisdiction is by no means novel. See, for example, Robert N. Clinton, "A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III," *University of Pennsylvania Law Review* 132, no. 4 (1984): 741-866.

In the first three categories—federal questions, admiralty cases, and cases involving ambassadors—the judicial power extends to "all Cases." In the other six categories of jurisdiction the modifier "all" is omitted and the judicial power extends merely to "Controversies." If "shall extend" renders jurisdiction mandatory, why does Article III then proceed to extend the judicial power to "all Cases" in some instances and merely to "Controversies" in others. We should not adopt a reading that renders this distinction irrelevant or superfluous if there is some alternative.

Amar's Two-Tiered Thesis

Akhil Reed Amar, drawing on Justice Story's opinion in *Martin v. Hunter's Lessee*, proposes a "two-tiered" reading to account for the selective use of "all." Federal jurisdiction, he argues, either original or appellate, must extend to "all Cases" falling in the first tier. Cases falling in the other categories, denoted "Controversies" and lacking the modifier "all," are placed by the Constitution within federal jurisdiction and may be heard in some form by the federal courts.[7] Congress, however, may, at its discretion, exclude most of these latter cases from federal jurisdiction altogether using a combination of its powers to establish inferior courts (including the bounds of their jurisdiction) and to make exceptions to the appellate jurisdiction of the Supreme Court. Amar does qualify this power in light of the fact that the "shall extend" language applies to all of the enumerated jurisdictional categories. This, he says, merely means that *some* cases (more than one) falling within each category must be within the jurisdiction of a federal court.[8]

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[7] Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* 65, no. 2 (1985): 205-72. See also, "The Two-Tiered Structure of the Judiciary Act of 1789," *University of Pennsylvania Law Review* 138, no. 6 (1990): 1499-1567.

[8] Amar, "A Neo-Federalist View," 240-46.

A Modified Account of Amar's Two-Tiered Thesis

Amar's basic insight, that the two tiers of federal jurisdiction in Article III must be treated differently, is indispensible to a sound construction of Article III. The selective use of "all" must mean something. And yet, it cannot mean that second-tier jurisdiction can be eliminated altogether, for the mandatory "shall extend" attaches to the whole of federal jurisdiction. So, it appears that second tier jurisdiction is still mandatory, but less so than cases in the first tier. Amar contends that all cases falling within the first tier must be cognizable in a federal court, supreme or inferior, while only some cases (more than one) falling within each category of the second tier must be cognizable in a federal court. As Amar claims, this reading does indeed give effect to both "shall extend" and the selective use of "all" in the jurisdictional menu.

However, it also suffers from serious flaws. In order to uncover these flaws, let us assume for a moment that Amar's interpretation of the two-tiered structure is correct. Each and every case that falls within the mandatory first tier must receive its final resolution in a federal court, though it may originate in any court, state or federal. That is, jurisdiction is mandatory in the first tier, but not exclusive. If Congress declined to create inferior courts and left the Supreme Court to handle the judicial business of the Union, this would simply mean that every case falling within the mandatory tier must be appealable to the Supreme Court.

What happens, though, if a state court refuses to hear an admiralty case or a case arising under the Constitution or laws of the United States? There is, then, no original disposition of the case to appeal to the Supreme Court. One might argue that, in such a situation, the refusal to hear the case would constitute an original action by the state court and the aggrieved party could appeal the refusal to the Supreme Court and seek relief there.

The Court, however, in order to settle the dispute that occasioned the case, would be forced to hear the case in essentially original form. Alternatively, if the appeal is from a refusal, then the remedy would be an order directing the state court to hear the case.[9]

But where in the Constitution would the Court find a ground for ordering a state court to hear a case under federal jurisdiction and what means exist by which to force the state court to do so? The only conceivable provision to have such an effect would be the Supremacy Clause, which provides that "the Judges in every State shall be bound" by the Constitution, laws, and treaties of the United States. However, as we will demonstrate shortly, a sound construction of the Supremacy Clause will not support this reading, but understands it simply to make federal law a rule of decision in cases otherwise within the jurisdiction of a state court; it does not confer jurisdiction to hear federal cases on state courts.

Let us consider another scenario that in fact presented itself following ratification of the Constitution. What if state law forbade a state's courts from hearing cases "arising under" the federal Constitution or laws?[10] There would, in such a case, be no means by which to bring cases supposed to be within the mandatory jurisdiction of federal courts into a federal court. This would admit a power in state legislatures to frustrate the operation of the federal judicial power. Such an impediment to the enforcement of federal law is, as the last chapter demonstrated, the primary evil against which Articles II and III were directed. Ironically, the only possible rival for this distinction was the ability of the national legislature to frustrate the performance of judicial and executive functions. Whichever evil we may

[9] Amar approvingly cites a line of precedents permitting and even obliging state courts to hear federal causes. "A Neo-Federalist View," 212-14 and 234.

[10] Virginia and Massachusetts, anticipating an assertion of federal authority over state judges, both passed such laws, unwittingly lending weight to arguments in favor of an extensive system of inferior federal courts. *DHSC* 4:27-28.

choose to emphasize, these scenarios militate against any reading of Article III that would permit such interference with federal jurisdiction.

Only two solutions to this problem, consistent with a mandatory reading of Article III, are possible. First, we may conclude that, while Congress is under no express obligation to create inferior courts, the failure or refusal of state courts to hear federal cases in effect obliges Congress to provide inferior courts with original jurisdiction to hear such cases. Of course this leaves us in the position of asserting a constitutional obligation on Congress to create inferior courts, which would tend to overcome objections to the exclusive reading of "all Cases." Second, we may conclude that, while Congress is under no obligation whatsoever to create inferior courts, the Supreme Court may hear any case as an original matter that a state court refuses to hear. That is to say, the refusal of both the states and Congress to provide a venue for the trial of federal cases, in effect empowers the Supreme Court to hear them under its original jurisdiction. The Constitution makes no express provision for either of these solutions, but neither does it forbid them.[11]

One might reply that Congress could confer jurisdiction on the recalcitrant state courts, displacing the action of the state legislature. But this remedy is open to a host of objections. First, Congress is empowered to establish Article III courts only, a category that could not be expanded to encompass existing state courts without a tortured reading of the text. Second, farming out federal functions to state governments is precisely the sort of thing Articles II and III were framed to render unnecessary.

We must also extend this rationale to the cases falling in the second tier, the party-based "Controversies." If Congress declined to establish inferior courts with jurisdiction

[11] Objections relying on the permissive "may" employed in Article III with respect to the creation of inferior courts or on the supposedly fixed nature of the Supreme Court's original jurisdiction are addressed below.

over such cases, it would be left to state courts to hear them as an original matter. Indeed, one may easily see that any case falling in the second tier, but not the first, will necessarily arise under state law. Assuming the absence of an alternative original venue in the federal courts, it would fall to state courts and state legislatures to decide which controversies will be heard as an original matter in the courts of law. This presents no problem since the Constitution omits "all" with respect to second-tier controversies. Article III thereby contemplates the possibility that such controversies may never find their way to a federal venue. Thus, Congress is entirely free to decline to provide for jurisdiction over such cases in the inferior federal courts, though this does not mean Congress may deprive the Supreme Court of appellate jurisdiction in these cases.

Like Amar's two-tiered analysis, this alternative reading of Article III ascribes significance to "all Cases" and to "shall extend" without rendering them redundant. Unlike Amar's reading, though, the theory propounded here does no violence to the integrity of the Supreme Court's appellate jurisdiction, which is arguably the one "shall" that Amar ignores.[12]

The Exclusive Reading of the Two Tiers

Another plausible reading of the two-tiered structure of Article III interprets "all" to denote exclusive federal jurisdiction. The selective use of the term "all" merely distinguishes cases in which federal courts have exclusive jurisdiction from those in which their jurisdiction is concurrent with state tribunals. Whereas the reading offered above considered the two tiered structure to reflect the different degrees of congressional discretion enjoyed

[12] Amar, like most other legal scholars, assumes that the mandatory language respecting the Court's appellate jurisdiction is offset by the Exceptions Clause, an assumption challenged below. "A Neo-Federalist View," 214.

with respect to each tier, this exclusive reading understands the two-tiered structure to reflect the different degrees of state judicial power enjoyed with respect to each tier.

In all the second tier categories of jurisdiction—the party-based "Controversies"—the Constitution omits the term "all" in recognition that such cases often, if not always, arise under state and local laws. State courts would therefore commonly be the courts of first instance. At the same time, the Constitution vests jurisdiction over these cases in federal courts. "All" is omitted to make clear that this jurisdiction is concurrent, not exclusive. The determination of which cases falling into this category will make their way to a federal court, as either an original or appellate matter, is left in the discretion of the parties to the suit and the federal judges to which those parties may take their suit. Congress may make federal jurisdiction mandatory in any of these cases, either as an appellate or original matter, and it may specify which, if any, inferior federal courts may hear such cases, but it must at minimum leave all such cases within the appellate jurisdiction of the Supreme Court.

Construing "all Cases" to denote exclusive federal jurisdiction raises two significant concerns. In the first place, it will be objected that Article VI grants to state courts concurrent jurisdiction in such cases when it states that "the judges in every state shall be bound [by the Constitution, laws, and treaties of the United States], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." But this misunderstands the effect of the Supremacy Clause. As Fisher Ames pointed out to his colleagues in the First Congress, Article VI merely makes federal laws (including treaties and constitutional provisions) a "rule of decision" in state courts; it does not vest them with additional jurisdiction. Thus, state judges are to consider federal law as binding in all cases already falling within their jurisdiction as a state judge. A state judge could not take cognizance of a case simply because it implicated federal law (August 29, 1789, *Annals* 1:838-

39). Ames' reasoning applies equally to the exclusive jurisdiction of federal courts in maritime cases. The state courts can exercise no jurisdiction because the states lack the external sovereignty competent to govern relations upon the high seas. Similarly, cases involving ambassadors and consuls are given over to exclusive federal jurisdiction because they implicate so intimately the foreign policy interests of the nation, interests committed entirely to the care of the national government.

Critics may raise the further objection that the grant of exclusive jurisdiction to the federal judiciary in effect requires Congress to create inferior federal courts, which contradicts the discretionary language used in Article III, "Congress *may*, from time to time, ordain and establish" inferior courts. To sharpen the critique, there is the so-called Madisonian compromise over the creation of inferior courts very early in the Federal Convention's proceedings. When the provision of the Virginia Plan referring to the existence of federal courts met with opposition, Madison and Wilson proposed "that the national Legislature be empowered to institute inferior tribunals" observing "that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them" (June 5, *RFC* 1:125).[13] Scholars have generally considered this the more decisive of the two arguments. "The conclusion that Congress was obligated to create inferior courts is demonstrably false in light of the Madisonian Compromise, which was probably unknown to Justice Story because reports of the Constitutional Convention had not then been published."[14] These two pieces of evidence are all that stands in opposition to Justice Story's dictum in *Martin v. Hunter's Lessee* that

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[13] Max Farrand, ed., *Records of the Federal Convention of 1787*, rev. ed., 4 vols. (Yale University Press, 1937).

[14] Clinton, "A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan," 1584 [hereafter cited as "Early Implementation and Departures"].

Congress is under a constitutional obligation to create a system of inferior federal courts.[15] Without attempting to settle the question absolutely, let us examine a few possible responses.

First, the compromise measure passed by the Convention on June 5 is not necessarily the final word on the subject of inferior courts. When the motion passed, the rest of the judicial article had hardly been conceived. The Virginia Plan, both in its original form and as it was reported by the Committee of the Whole, contained only the barest outline of the judicial power. No one would deny that the subsequent development of the Constitution's provisions might have mitigated or altered the import of this early compromise. And there is the compelling fact that Madison himself argues on the House floor in 1789 that inferior courts are a necessity, seemingly on the basis of constitutional principle and not mere expediency.[16] On the other hand, many of the Framers do seem to assume that Congress could avoid creating inferior tribunals altogether, which lends some weight to the compromise.

Second, the discretionary language of the clause relating to inferior courts is not robbed of all meaning simply because Congress is obliged to create them. It serves other important functions. For one thing, it makes clear that any "Tribunals" subsequently created by Congress derive their authority, not from a legislative grant, but from the vesting clause of Article III and that these tribunals are to exercise "the judicial Power" and only that power over any cases within their jurisdiction.

Third, the discretionary language of Article III is not itself a grant of power to Congress, but a recognition of the powers granted in Article I "to constitute Tribunals inferior to the supreme Court" and "to make all laws…necessary and proper…for carrying

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[15] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), 330-37.

[16] See chapter six at 186-87.

[their] powers into execution." To say that it is *necessary* for Congress to pass certain implementing legislation does no violence to congressional discretion. Congress *may* go about creating inferior courts by any means consistent with Article III, just as it *may* go about forming executive departments by any means consistent with Article II. That Congress *must* pass some laws to give effect to the Constitution is simply beyond dispute. There is no affirmative language commanding Congress to create executive departments or to appropriate funds for the support of the executive or even to establish the size and salaries of the Supreme Court. The Constitution says only that Congress "shall have Power" to do these things. That it must do them for the Constitution to have effect is clear and indeed the employment of the term "necessary" in the Necessary and Proper Clause recognizes that such obligations are laid upon Congress. It is no objection to point out that Congress *can* decline to perform its duties and thereby cripple the other departments of the government. The point is that it *should not* decline to do so.

Hierarchical Structure of the Judiciary

Congress may not regulate the Supreme Court in a manner that deprives it of jurisdiction over any case falling within the scope of federal jurisdiction described in Article III. While Congress does draw some measure of discretion from its power to impose "regulations" and "exceptions" on the appellate jurisdiction of the Supreme Court, this discretion, when read with the rest of Article III, is limited in significant ways. Congress may control the *form* of jurisdiction exercised by the Supreme Court under its power to "make exceptions" to the appellate jurisdiction of the Court. Such exceptions, however, must operate by relocating the excepted cases to the original jurisdiction of the Court. This transformative power works in only one direction; cases may not be moved from the original to the appellate jurisdiction of the Court.

This transformative interpretation defies the orthodox view of the Exceptions Clause. It is traditionally assumed that Congress may, under this clause, exclude cases from the appellate jurisdiction of the Supreme Court. When coupled with Chief Justice Marshall's holding in *Marbury v. Madison* that nothing may be added to the original jurisdiction of the Supreme Court but by way of constitutional amendment, we are led to the conclusion that Congress may, at its discretion, prevent altogether the Supreme Court from hearing any case outside the scope of its original jurisdiction. This is commonly called jurisdiction stripping and is widely assumed to be within Congress's power. When we add to this Congress's plenary authority over inferior federal courts we reach the further conclusion that Congress may exclude all cases but those comprehended by the original jurisdiction of the Supreme Court from federal jurisdiction. Ralph Rossum captured this orthodox view quite concisely. After quoting the Exceptions Clause (without so much as taking note of the mandatory language that precedes it), Rossum concludes that, "For many students of constitutional law [including himself], the simple reading of these words ends the matter."[17] "Although, further consideration of the clear and conclusive words of article III is unnecessary," he proceeds to consider them further anyway in an effort to "challenge the spirited objections of those who seek to protect the Court's power…by ignoring the Constitution."[18]

Of course, Rossum's dismissive treatment of objections to the orthodox view is occasioned by the objectors' lack of attention to the Constitution itself. Instead of challenging the meaning of the Exceptions Clause, these dissenting scholars have appealed to the importance and sanctity of the Supreme Court's review power. They have therefore

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[17] Ralph Rossum, "Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause," *William and Mary Law Review* 24 (1982-1983), 387.

[18] Rossum, "Letter and Spirit of the Exceptions Clause," 391.

been "forced to deny an explicit power of Congress, expressly granted by the Constitution, in order to protect the Court's implicit power of judicial review, a power which has no textual basis."[19]

But objections to the orthodox interpretation of the Exceptions Clause are not so easily dismissed, even on textual or originalist grounds. While it is true that most scholarly challenges to it were based on some sort of claim about the "essential functions" of the Supreme Court,[20] there is a much older interpretive approach to the exceptions power that takes issue with the textual basis of the orthodox view. If the orthodox view of the Exceptions Clause is correct, we have a provision of the Constitution that would seem to nullify the mandatory language that pervades the rest of Article III. The Constitution says,

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[19] Ibid., 389.

[20] See, e.g., Henry M. Hart, Jr., "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," *Harvard Law Review* 66 (1953): 1362-1402; Leonard G. Ratner, "Congressional Power ever the Appellate Jurisdiction of the Supreme Court," *University of Pennsylvania Law Review* 109 (1960): 157-202.

The "essential functions" view has the virtue of appreciating the importance of maintaining the Supreme Court's preeminence within the judiciary. Arguably, it reflects the practice of Congress in the early Republic. As we shall see in the next chapter, the first judiciary act was very much concerned with distinguishing between significant cases that warranted a federal appeal and insignificant ones that did not. Congress's solution to the problem was an amount-in-controversy requirement that measured the significance of cases by the economic implications of the outcome. The inadequacy of such measures is the primary explanation for Congress' gradual surrender of power over the Court's docket. This trend is simply a recognition that it is impossible, by general legislation, to establish criteria for deciding which cases are of great significance and which are not. Congress might have saved itself the trouble and left the matter to the Court's discretion from the outset as the text of Article III suggests.

There were those among the Founders who foresaw such problems. While the Judiciary Act of 1789 was still pending before the Senate, Edmund Randolph, who had penned the predecessor to the Exceptions Clause in the Committee of Detail, wrote to James Madison suggesting a more hands-off approach to federal jurisdiction and procedure.

> Would it not have been sufficient to have left [the matter of jurisdiction] upon the constitution itself? Will the courts be bound by any definition of authority, which the constitution does not in their opinion warrant?
>
> …The minute detail [as to both procedure and jurisdiction] ought to be consigned to the judges. Every attempt towards it must be imperfect, and being so may become a topic of ridicule to technical men. I wish this idea had been thought worthy of attention; thus the bill would have been less criticized. I wish even now, that the judges of the supreme court were first to be called upon, before a definitive step shall be taken. A temporary provision, until their report can be had, surely is not impossible. Randolph to Madison, June 30, 1789, in *DHSC* 4:432-33.

in the clearest terms possible, that the "judicial power [of the United States] *shall extend*" to the enumerated classes of cases and that the judicial power "shall be vested" in the Supreme Court and inferior federal courts. No other institutions, state or federal, may exercise this power but those in which it is vested. If the power "shall extend" to certain cases and may be exercised by federal courts alone, those courts must possess jurisdiction over those cases, unless it is to be believed that a court of law can exercise judicial power without possessing jurisdiction. To say that Congress may strip the federal judiciary of jurisdiction over these cases is to overthrow the plain meaning of the language.

Two provisions of the Constitution are thereby set at naught by the conventional construction of a single subordinate clause. In light of this, we must evaluate possible alternative meanings of the Exceptions and Regulations Clauses. If they may reasonably be given a construction that does no violence to the mandatory language of Article III, that construction should be adopted as preferable to the conventional one. It would make little sense to construe a vague clause in a way that contradicts the plain meaning of more explicit provisions, especially when the clearer provisions in question are central to the independent character of the federal judiciary.

> If at all possible, the exceptions clause must be read in a way that will harmonize with, and not contradict, the earlier commands of Article III. Thus, the power to make exceptions must be read in a way that does not conflict with the mandate that the judicial power "shall be vested" in a federal judiciary and "shall extend" to all cases in certain categories.[21]

The Transformative Reading of the Exceptions Clause

In a recent article, Alex Glashausser concludes from a close examination of the convention debates that the Exceptions Clause merely permits Congress to relocate cases

[21] Amar, "A Neo-Federalist View," 255.

ordinarily within the appellate jurisdiction of the Supreme Court to its original jurisdiction. In other words, Congress has power merely to alter "the form, not the existence, of jurisdiction." "In short, the clause was designed not to eliminate cases, but to expedite them."[22] Glashausser's argument, and indeed the entire debate over the issue, turns on the term to which the subordinate Exceptions Clause attaches. "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." The question is whether the clause modifies "appellate" or "jurisdiction."[23] In the conventional account, it modifies "jurisdiction" and it is thus assumed that by making the exception Congress is eliminating jurisdiction. But Glashausser argues that the clause was intended to modify "appellate" and that it thus allows Congress to modify the *form* of jurisdiction rather than the *existence* of jurisdiction.[24]

The Committee of Detail

This transformative interpretation draws its strongest support from the development of the provision in the Committee of Detail. Since the committee's work received a relatively brief treatment in chapter three, we will sift it more thoroughly here. The committee's work is fairly well-documented. This documentation primarily takes the form

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[22] Alex Glashausser, "A Return to Form for the Exceptions Clause," *Boston College Law Review* 51, no. 5 (2010), 1383. See also, Clinton's admission that this is a plausible construction of the Exceptions Clause, though he eventually opts for a somewhat more permissive construction ("A Mandatory View of Federal Court Jurisdiction," 778) and Calabresi and Lawson's partial acceptance of the transformative interpretation (Steven G. Clabresi and Gary Lawson, "The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia," *Columbia Law Review* 107 (2007), 1002, 1006, 1013, and 1037).

[23] It was at one time proposed as an alternative to the orthodox view that "exceptions" attached to the phrase, "both as to Law and Fact." This reading, however, is rendered null on account of the simple fact that the Exceptions Clause was inserted in the judicial article long before the phrase referring to review of "Law and Fact" was inserted (August 27, *RFC* 2:431).

[24] Glashausser, "Return to Form," 1383.

of successive drafts by Edmund Randolph and James Wilson. Wilson seems to have borne the bulk of the responsibility for drafting the constitution that the committee reported to the convention, though, as we shall see, Randolph's early efforts played a formative role in the development of the provisions as well. In the committee's initial draft, written in Randolph's hand, the clause that would eventually expand into the two sentences governing Supreme Court jurisdiction read, "[T]his supreme jurisdiction shall be appellate only, except in those instances, in which the legislature shall make it original…." The Exceptions Clause subsequently evolved from this clear language into a more complicated formulation "susceptible to the misconception that it was confiscatory" rather than "transformative."[25]

The Committee of Detail was commissioned by the convention to produce a draft constitution. For this purpose, the committee was furnished with the resolutions passed by the convention as well as the Pinkney Plan and the New Jersey Plan. That the committee was thus authorized to draw upon proposals that had been rejected points to the nature of its task. The committee was not merely to compile and rearrange the resolutions of the convention. It was to frame a coherent constitution, which in some cases may require drawing upon neglected sources. The committee's proceedings are therefore of some importance and its rationale for including or altering certain provisions is a helpful guide to meaning. Given the divergent constructions assigned to the Exceptions Clause, it certainly seems to qualify as sufficiently ambiguous to seek this type of interpretive guidance.

The Randolph-Rutledge Draft.

The first attempt at a condensation of the convention's work takes the form of an extended outline in Randolph's hand with emendations in the hand of Rutledge. That it was

[25] See Glashausser, "A Return to Form," 1383.

a first attempt is clear from its form and language. Not only does it suggest provisions, but interlines in some places a rationale for its approach, apparently for the benefit of the other committee members. The judiciary provisions were gathered in the following form.

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>
   ~~4. the judges of which shall be also appointed by the senate~~
   5. all the judges shall hold their offices during good behaviour;
   6. and shall receive punctually,
      at stated times
      a ~~fixed~~ compensation for their services,
      to be settled by the legislature
      in which no diminution shall be made, so as to affect the persons actually in office at the time of such diminution.
   and shall swear fidelity to the union.
   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 citizens of different states
         <in disputes between a State & a Citizen or Citizens of another State>
         in disputes between different states; and
         in disputes, in which subjects or citizens of other countries are concerned
         <& in Cases of Admiralty Jurisdn>

   But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & ~~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. (*RFC* 4:37)[26]

The structure that will eventually characterize Article III of the Constitution is already evident in Randolph's draft. The institutional integrity of the judiciary is first secured by the confinement of the judicial power to "one supreme court" and "inferior courts" that

[26] Passages that were lined out in the original are lined out here; parentheses represent emendations in the hand of Randolph; angled brackets represent emendations in the hand of Rutledge. For a transcription of the entire Randolph-Rutledge Draft, see *RFC* 2:137-50 and 4:37-51.

Congress may "establish."[27] Likewise, the independence of the judges is secured by tenure during good behavior and irreducible salaries. The provisions then turn to the content of federal jurisdiction. Assuming the possibility that the Supreme Court may constitute the whole of the federal judicial power, Randolph frames the jurisdictional menu in terms of "the jurisdiction of the supreme tribunal." In "all cases arising under laws passed by the general legislature" and impeachments of federal officers, the Court is given jurisdiction without qualification. In other cases "involving the national peace and harmony" that fall within the enumerated categories, Congress is given power to "assign" jurisdiction to the Supreme Court. Besides being an obvious grant of discretion to Congress, this provision also constitutes the emergence of two tiers in the jurisdictional menu, one fixed and the other possessing some flexibility. Furthermore, Congress would determine the extent of federal jurisdiction in the second tier through its power to "assign" jurisdiction or, by implication, withhold it from the Supreme Court.

Randolph's draft then takes up the matter of jurisdictional form about which there were a number of ambiguities. Is the Supreme Court to exercise federal jurisdiction in original or appellate form? May the inferior courts Congress creates operate as intermediate appellate courts or merely as original tribunals? May an inferior federal court function as the court of last resort on a federal question or must an avenue remain open to the Supreme Court in all cases? All of these questions find an answer in Randolph's draft.

Randolph first specifies that "this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & ~~in~~> those instances, in which the legislature shall make it

[27] Rutledge substitutes "establish" for Randolph's "appoint" apparently to avoid any confusion about the mode of appointing judges of inferior courts. This deletion combined with the subsequent deletion of the clause regarding appointment by the Senate in effect left appointment of inferior judges to the executive as Randolph's draft, following the resolutions of the convention, vested power in the executive to appoint all officers not otherwise provided for in the Constitution (*RFC* 2:145; 1:66-67).

original: and the legislature shall organize it[.]" Two distinct areas of legislative discretion are hereby recognized. First, Congress may transform the Supreme Court's jurisdiction in any case from appellate to original. The Court's appellate jurisdiction, of course, is conferred by the Constitution itself and requires no enacting legislation. It is merely a transformative power that Congress wields. Furthermore, it is a power that operates only within the jurisdiction of the Supreme Court. It is not a power to eliminate the Court's jurisdiction, even if the jurisdiction is transferred to another federal court. Randolph's draft establishes a clearly hierarchical structure in the federal judiciary, one that is buttressed by the subsequent provisions we have yet to discuss. Moreover, Rutledge's emendation does no violence to this basic structure. He simply enumerates one specific case in which the Court is to exercise original jurisdiction and leaves other "except[ions]" to the appellate jurisdiction of the Court to be made by Congress. Second, Congress is obliged to "organize" the jurisdiction of the Supreme Court. This is functionally equivalent to the "Regulations…Congress shall make" in the eventual language of Article III. This will occasion some discussion below. For now it is enough to point out that it stands independently of the exceptions power and therefore should not be conflated with it.

Randolph then takes up the implications of Congress's power to constitute inferior courts. "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." Two implications of this passage are worthy of note. First, inferior tribunals are hereby confined to the exercise of original jurisdiction. Thus, the possibility of intermediate appellate courts in the federal system is ruled out. Second, this clause grants no additional power to Congress over the jurisdiction of the Supreme Court. Congress is hereby authorized to "assign" jurisdiction to the inferior courts, even the "whole" of federal jurisdiction. This power to distribute

jurisdiction among inferior courts grants no authority to confiscate that same jurisdiction from the Supreme Court. "Otherwise, assignment would have been…a back-door method of eliminating the one court that was constitutionally guaranteed."[28]

The Randolph-Rutledge draft therefore establishes a hierarchical principle in the federal judiciary. All cases falling within federal jurisdiction must terminate in the Supreme Court. What discretion Congress does possess with respect to the Supreme Court's jurisdiction is merely transformative, not confiscatory. This principle, however, leaves room for the exercise of discretion in the organization of inferior courts and the distribution of jurisdiction among them, as long as Congress does not violence to the integrity of the Supreme Court's jurisdiction. Subsequent changes to the judicial provisions of the Constitution may have altered legislative discretion in some respects, but this hierarchical principle was left intact.[29]

The Wilson-Rutledge Draft.

The remainder of the documentary evidence respecting the work of the Committee of Detail consists of drafts in Wilson's hand. The most complete of these drafts, a predecessor to the report of the committee, was heavily influenced by Randolph's draft. It is in Wilson's hand with emendations by Rutledge. The relevant provisions of the Wilson-Rutledge draft are as follows.

> The Judicial Power of the United States shall be vested in one Supreme ~~National~~ Court, and in such ~~other~~ <inferior> Courts as shall, from Time to Time, be constituted by the Legislature of the United States.

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[28] Glashausser, "Return to Form for the Exceptions Clause," 1416-17n163.

[29] See Laurence Claus, "The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III," *Georgetown Law Journal* 96, no. 1 (2007): 59-122.

> The Judges of the Supreme ~~National~~ Court shall ~~be chosen by the Senate by Ballott. They shall~~ hold their Offices during good Behaviour. They shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> The Jurisdiction of the Supreme ~~National~~ Court shall extend to all Cases arising under Laws passed by the Legislature of the United States; to all Cases affecting Ambassadors ~~and other~~ <other> public Ministers <& Consuls>, and to the Trial of Impeachments of Officers of the United States; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies between…a State and a Citizen or Citizens of another State, between Citizens of different States and between <a State or the> Citizens ~~of any of the States~~ <thereof> and foreign States, Citizens or Subjects. In Cases of Impeachment, ~~those~~ <Cases> affecting Ambassadors ~~and~~ other pubic Ministers <& Consuls>, and those in which a State shall be ~~one of the~~ <a> Par~~ties~~<y>, this Jurisdiction shall be original. In all the other Cases beforementioned, it shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make. The Legislature may ~~distribute~~ <assign any part of> th~~is~~(e) Jurisdiction <above mntd.,---except the Trial of the Executive---->, in the Manner and under the Limitations which it shall think proper ~~among~~ <to> such ~~other~~ <inferior> Courts as it shall constitute from Time to Time. (*RFC* 2:172-73)[30]

Wilson preserves the basic structure that Randolph had given to the judicial article: institutional integrity, independence, content of jurisdiction, and form of jurisdiction. The most significant changes involve the extent of congressional discretion under the judicial article. First, Wilson develops a detailed enumeration of jurisdictional categories and eliminates Congress's discretionary power to "assign" (or withhold) jurisdiction over second tier cases. As explained above, this does not erase the distinction between the two tiers; the selective use of "all" in the jurisdictional menu is still relevant. But Wilson's deletion does undermine the assertion that the difference rested on the power of Congress to excise cases falling within the second tier from federal jurisdiction. Second, Wilson expands legislative discretion somewhat in structuring a system of inferior courts. Whereas Randolph had limited inferior courts to the exercise of original jurisdiction, Wilson eliminates this barrier,

[30] Passages struck through were lined out in the original; those in parentheses are emendations in Wilson's hand; those in angle brackets are emendations in Rutledge's hand.

permitting Congress to "assign any part of the jurisdiction above mentioned…to such inferior courts as it shall constitute…." This opens the possibility of intermediate appellate courts in the federal system. It is difficult to imagine how different the federal judiciary would be had Randolph's limitation remained.

More to the point, Wilson substantially alters the passage dealing with the form of jurisdiction to be exercised by the Supreme Court. Randolph's initial draft had been quite straightforward, explicitly recognizing congressional power to transform the Court's jurisdiction from appellate to original. Rutledge's emendation to Randolph's draft had done nothing to alter this basic reading. Rutledge had merely singled out a particular category of cases, impeachments, for exclusive determination by the Supreme Court under its original jurisdiction. To put it another way, Rutledge had included an exception to the appellate jurisdiction of the Court while leaving to Congress the discretion to make additional exceptions. Wilson added two more exceptions: cases "affecting Ambassadors…and those in which a State shall be a party." But Wilson goes further and reconfigures the whole passage, splitting it into to two sentences. This was, as Glashausser argues, almost necessitated by the increasing complexity of the statement. Rutledge's insertion of the impeachments exception into Randolph's draft had already rendered the sentence unwieldy. The sentence was already doing double duty before Rutledge's emendation. It established appellate jurisdiction as the default form of the Court's power and recognized congressional power to make exceptions to the default form. Rutledge's emendation "wedged in" a third component: establishing "the constitutional floor of original jurisdiction. Wilson simply extracted (and supplemented with two new categories) Rutledge's addition, making it the lead sentence and reuniting Randolph's two components in the next sentence."[31]

[31] Glashausser, "Return to Form for the Exceptions Clause," 1406-12.

Trying to keep all three components in the same sentence certainly would have created a syntactical problem. It might have looked something like the following: "But this supreme jurisdiction shall be appellate only, except in cases of Impeachment, cases affecting Ambassadors, other public Ministers and Consuls, cases in which a state shall be a party, and in those instances in which the legislature shall make it original: and the legislature shall organize it." An attempt to work in the congressional power to "organize" the Court's jurisdiction would throw the formulation into complete disarray. It is easy to see why Wilson divided the statements in two. As Glashausser points out, one would hardly have blamed him for splitting the passage into three sentences.[32]

Proponents of the orthodox interpretation of the Exceptions Clause, at least those that have addressed the development of the committee's drafts, deny that Wilson's Exceptions Clause is a reformulation of Randolph's and instead argue that Wilson's provision is an entirely novel creation. In Amar's account, the legislative power to "make [jurisdiction] original" "disappeared" and was replaced in Wilson's draft by a power to excise cases from the Court's jurisdiction altogether.[33] That reading is without foundation. There is no evidence in the documentary sources that suggests a change in direction between the Randolph and Wilson drafts. The only apparent motive for Wilson's alteration of the passage was the syntactical difficulty of keeping Randolph's original formulation. And it is worth noting that while a justice of the Supreme Court, Wilson argued that Congress was without power to contract the jurisdiction of the Court. "Even…if a positive restriction [on the appellate jurisdiction of the Court] existed by law, it would, in my judgment, be

[32] Ibid.

[33] Amar, "Neo-Federalist View," 214-15, n.39.

superseded by the superior authority of the constitutional provision."[34] That Randolph expressed a similar opinion during the formation of the Judiciary Act of 1789 lends additional weight to the transformative reading.[35]

But recourse to later statements of the Framers is, at this point, unnecessary. Even a cursory examination of Wilson's reformulation establishes the continuity with Randolph's provision.

> In Cases of Impeachment, those affecting Ambassadors and other public Ministers, and those in which a State shall be one of the Parties, 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 clear implication of an exception here is that it takes the form of an addition to original jurisdiction. We are told that the "Jurisdiction of the Supreme Court shall extend" to a host of cases. We are subsequently told that this jurisdiction "shall be" exercised in either original or appellate form. Giving full weight to the mandatory language involved, we must assume that absent some express qualification, the Supreme Court will exercise jurisdiction over all of the enumerated cases in one form or the other. In this context, we are told that in all but a few enumerated cases, this jurisdiction "shall be appellate, with such Exceptions…as the Legislature shall make." As a matter of textual construction, is it reasonable to assume, that the power to make exceptions is a power to eliminate jurisdiction altogether? I think it is not. In the first place, the subordinate clause, "with such Exceptions," attaches not to "jurisdiction," but to "appellate." That is, it is a power to alter the *form* of jurisdiction, not its *existence*. It is true that Wilson drops Randolph's more explicit language, "make it original," but as Glashausser points out, the reference to original jurisdiction is unnecessary given the

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[34] *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796), 325.

[35] Randolph to Madison, June 30, 1789 in *DHSC* 4:431-32.

mandatory extension of the Court's jurisdiction at the beginning of the section and the clear reference to original jurisdiction as the alternative form in the preceding sentence. Wilson could very reasonably assume that an addition to original jurisdiction was implied by the exception to appellate jurisdiction. In the same way, Rutledge assumed that by excising impeachments from the appellate jurisdiction of the Court in Randolph's draft, he was in effect adding them to the original jurisdiction. No reasonable observer would argue that he understood himself to be eliminating impeachments from the jurisdiction of the Supreme Court altogether.[36]

The Final Form of the Exceptions Clause.

Randolph's provision as altered by Rutledge clearly contemplated a transformative and not a confiscatory power. Wilson's provision was an attempt to extend and reformulate the provision, not fundamentally alter its meaning. Subsequent alterations of the provision by the convention are likewise explainable as mere grammatical alterations. First, let us compare the provision reported by the Committee of Detail with the passage that eventually found its way into Article III, section 2 of the Constitution. The relevant alterations are underlined.

[Report of the Committee of Detail]

> The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States [etc.]
>
> In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be 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…. (*RFC* 2:186-87)

[36] Glashausser, "Return to Form," 1406-12.

Article III [of the Constitution]

> Section 2. The judicial Power shall extend to all Cases arising under this Constitution, the Laws of the United States [etc.]
>
> 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.

The Exceptions Clause itself undergoes no change whatsoever. If any alteration in meaning occurred between the report of the committee of Detail and the conclusion of the Convention's business, it must have been a result of alterations in other passages. There are two such changes closely connected with the Exceptions Clause. First, "this jurisdiction shall be original" became "the supreme Court shall have original Jurisdiction." Second, "it [i.e., this jurisdiction] shall be appellate" became "the supreme Court shall have appellate Jurisdiction." As an historical matter, these alterations have been the primary source of confusion over the meaning of the Exceptions Clause. The committee's wording clearly attached "with such exceptions" to "appellate," that is, it qualified the form of jurisdiction not its existence. In the final version, "with such exceptions" could, grammatically, be taken to qualify "jurisdiction" only, having no grammatical relation to "appellate." This is the prevailing assumption of the orthodox reading and is used to justify the confiscatory interpretation of the clause. However, the clause could also be read, even absent any knowledge of its development in the committee, as a qualification of "*appellate* jurisdiction," that is, as a qualification of jurisdiction as already modified by the adjective "appellate."

To establish the reasonableness of this construction, let us consider an illustration proffered by Glashausser. Imagine leaving your children in the care of a babysitter for the day, to whom you provide the following instructions. "The children shall eat breakfast, lunch, and dinner. At dinner, they shall have hot food. At all other mealtimes, they shall

have cold food, with such exceptions and under such regulations as you shall make." Would any person of sound mind assume that you had thereby empowered the babysitter to deprive the children of lunch or breakfast? The "exceptions" she is permitted to make are clearly to the temperature (or the form, if you will) of the meal, not the existence of the meal itself. The illustration likewise demonstrates the limitations of the Regulations Clause. "Procedural housekeeping rules, such as that one must wash hands before a meal and refrain from yelling during it, would be legitimate…. Appeals may be dismissed for lateness and children for loudness. Doing away with a case or meal *ab initio*, though, under the guise of 'regulation,' would mangle the word beyond recognition."[37]

But we are not left to rely solely upon the text for this reading. The changes in the wording of the clauses governing original and appellate jurisdiction are clearly attributable to concerns unrelated to the scope of congressional regulation. In fact, the explanation is probably apparent to the reader from the text of the provisions quoted above. When the delegates finally got around to debating the judicial provisions of the committee's report on August 27, one of the significant changes they made was to the so-called extension clause. "The Jurisdiction of the Supreme Court shall extend…" was altered to read, "The Judicial Power shall extend…" (August 27, *RFC* 2:431). The evident purpose was to vest jurisdiction in inferior courts by default, even absent an assignment of jurisdiction to them. Thus, Congress's role with respect to inferior courts would be to narrow rather than assign their jurisdiction or simply to leave the question upon the Constitution as Randolph would later recommend[38]. Accordingly, the delegates followed up this substitution by deleting a provision that empowered Congress to "assign any part of the jurisdiction above

[37] Glashausser, "Return to Form for the Exceptions Clause," 1436.

[38] Randolph to Madison, June 30, 1789 in *DHSC* 4:431-32.

mentioned…in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time" (*RFC* 2:186-87 and 431). The convention adjourned soon thereafter.

When the delegates resumed debate on August 28, they confronted the disparity between the previous day's alterations and the language respecting the form of Supreme Court jurisdiction. The section now read, "The Judicial Power shall extend to all Cases arising under this Constitution…. In [three categories of] cases…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 language was nonsensical. "This jurisdiction" now had no antecedent subject since the jurisdictional menu now attached to the whole "judicial power." The simplest solution, without reconfiguring the whole paragraph respecting the Court's jurisdiction, was to somehow name the Supreme Court in each of the existing sentences. But the delegates could not simply substitute "the Supreme Court" for "this jurisdiction," for then the clause would read, "In [three] Cases, the Supreme Court shall be original." "Supreme Court," not "jurisdiction," was now the subject of the sentence. The delegates' solution was to substitute, "the Supreme Court shall have original Jurisdiction" for "this jurisdiction shall be original." The motion was so uncontroversial that Madison does not even record the change. He does, however, record the alteration in the clause regarding appellate jurisdiction, which (we may assume) followed immediately on the heels of the first alteration. "It was moved to strike out the words 'it shall be appellate' & to insert the words "the supreme Court shall have appellate jurisdiction', — in order to prevent uncertainty whether 'it' referred to the *supreme Court*, or to the *Judicial power*" (August 28, *RFC* 2:437). Madison's entry emphasizes that the motive for alteration had no connection to an alteration in meaning, but was merely a clarification

necessitated by the switch to "the Judicial Power" at the start of the section on the previous day.

Taken together, the evidence in favor of a transformative interpretation of the Exceptions Clause is strong. It comports with the hierarchical and mandatory language of Article III, with the function and meaning of the clause as it developed in the convention, and with the grammatical sense of the clause itself. Admittedly, this last piece of evidence is inconclusive; the clause can just as well be given a confiscatory interpretation without torturing the syntax. But the confiscatory reading runs up against the mandatory and hierarchical language of Article III as well as the clear connection between the Exceptions Clause and the transformative provision introduced by Randolph in the Committee of Detail.[39]

[39] One relevant question remains respecting the text of Article III. Why do the Exceptions and Regulations Clauses employ the mandatory term "shall" rather than "may" as is the case with other grants of power to Congress in Article III? Congress' regulatory power over the Supreme Court's appellate jurisdiction stands apart from its power to make exceptions. It went without saying that Congress would regulate, to some extent, the means of appealing cases from inferior federal courts to the Supreme Court. Had this been the only source of appeals, a simple "may" or even silence on the matter (given Congress's power "to constitute tribunals inferior to the supreme Court") would have been adequate. But the Framersframers clearly anticipated the frequency with which state cases raising federal questions would be appealed to the Supreme Court. One can easily imagine state legislatures attempting to frustrate or manipulate this process by specifying the procedures of such appeals. The Regulations Clause, however, makes clear that Congress *shall* be the source of such regulations. Cases would be appealed to the Supreme Court using procedures and rules determined by the federal government, not the states. No concurrent state power may be exercised over appeals to the Supreme Court.

We must be careful, though, not to read too much into this power. The purposes of the clause are, on the one hand, to preclude state legislatures from interfering with federal appeals and the rights of appellants and, on the other, to recognize Congress's power to make rules governing the procedures of such appeals, not to inhibit the ability of the Supreme Court to hear cases falling within its jurisdiction. Indeed, the mandatory character of federal jurisdiction limits congressional power under the Regulations Clause, just as it limits congressional power under the Exceptions Clause. Congress may not employ its power under these clauses to prevent federal courts from hearing and disposing of cases properly within their constitutionally vested jurisdiction.

Throughout this chapter, we have confronted the "orthodox" reading of Article III. That the orthodox view has remained ascendant and seemingly unassailable for so long is attributable largely to the influence of John Marshall. Before Marshall took the reins of the Court, dissenting views about the constitutionality of congressional regulations of the federal judiciary crept to the fore with some regularity.[40] As Marshall gained influence over the Court, however, his own expansive reading of congressional power over the judiciary found expression in the Court's opinions and displaced the dissenting views. When later Courts looked back for guidance, they found a string of precedents affirming plenary legislative control of federal courts and were content to appease Congress by piling yet more precedents upon the wreckage of Article III. This claim about Marshall's place in nineteenth century constitutional development will receive a more thorough treatment in chapter seven. At present, it is enough to contrast the views set forth above with those advanced in Marshall's most important precedents on the matter of legislative control of the Courts.

The most glaring contrast, as the reader will have noticed by now, is with Marshall's holding in *Marbury v. Madison* to the effect that the original jurisdiction of the Supreme Court is unalterable by legislative enactment because it is fixed by the Constitution.[41] The corollary to this rule is a confiscatory reading of the Exceptions Clause. Marshall's argument is quite familiar to students of the Court and stands in direct opposition to the transformative reading set forth in the last section. It is important to note at the outset that Marshall's

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[40] See *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Wiscart v. D'Auchy* (1796); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799). The diversity of opinion extant in these early cases is at least in part attributable to the number of opinions in the reports. *Hayburn's Case* was actually a collection of opinions by the justices sitting on circuit, while the other cases were decided *seriatim*. In fact, Marshall's success in erecting a precedent on the issue of congressional control over federal jurisdiction may be a testament to his foresight in substituting an "opinion of the Court" for seriatim opinions.

[41] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 174.

opinion "merely echoed an argument he had previously made during the Virginia ratification convention that even then was not embraced by other federalist supporters of the document."[42] Responding to Patrick Henry in the ratifying convention, Marshall made the following remarks on the nature of the exceptions power.

> What is the meaning of the term *exception*? Does it not mean an alteration and diminution? 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. Who can understand this word, *exception*, to extend to one case as well another? I am persuaded that a reconsideration of this case will convince the gentleman that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.

This remark was intended to allay the fears of Anti-Federalists, Patrick Henry foremost among them, that the Supreme Court would possess unrestrained power to overturn the factual findings of juries. As Clinton puts it, Marshall "may…have overstated his case to pound the last nail into the [Anti-Federalists'] coffin."[43] Nonetheless, it is not for his remarks in the ratifying debates that Marshall is so often cited in favor of the confiscatory reading. Let us, then, move on to consider his *Marbury* opinion.

At issue in *Marbury* was section 13 of the Judiciary Act of 1789, authorizing the Supreme Court to issue a writ of mandamus pursuant to a hearing. Marshall argued that a hearing for mandamus constituted an exercise of original jurisdiction. Since the case at bar did not fall within one of the two categories of cases set apart for original decision by the Supreme Court, Marshall held that the Court was without jurisdiction to hear the case and directed Marbury to press his suit in the federal district court.

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[42] Clinton, "A Mandatory View of Federal Court Jurisdiction," 848, n. 353.

[43] Ibid., 810.

Marshall proceeded upon a widely accepted rule of statutory construction. "It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it." Taking this as his major premise, Marshall set out to demonstrate that any admission of a legislative power to augment the original jurisdiction of the Court rendered portions of Article III meaningless. In the first place, the fact that the Framers took care to make a distribution of the Supreme Court's jurisdiction into original and appellate forms suggests that the division was intended to be beyond the reach of legislative alteration.

> If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage — is entirely without meaning — if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.[44]

Marshall's first point is well taken. The distribution of jurisdiction must mean something. However, he goes on to insist that any admission of the congressional power to transform appellate jurisdiction into original necessarily admits the power to transform original jurisdiction into appellate. On the contrary, the language of the Exceptions Clause could very well be said to permit the transformation of jurisdiction from appellate to original form without admitting the converse to be true. And such a reading avoids just as well as Marshall's the error of making the Exceptions Clause "mere surplusage." For one thing, the constitutional specification of cases affecting ambassadors and those in which a state is a party would ensure that these cases can have a speedy and final resolution in urgent cases

[44] 5 U.S. 137, 174.

that endanger the peace of the Union, a rationale that Marshall recognizes. At the same time, the Exceptions Clause, if given a transformative reading, permits Congress to identify other cases of similar import and expedite them by transferring them to the original jurisdiction of the Court, a rationale that Marshall rejects.

Of course, it is not altogether accurate to say that Marshall rejected the transformative reading, at least not explicitly. His summary of Marbury's argument defending section 13 suggests that the argument he rejected was not based on the Exceptions Clause at all.

> It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

Marbury's counsel, it seems, simply argued that the lack of a prohibition on congressional regulation of original jurisdiction was in essence a grant of power. Or, at least, that Congress's general power to organize the federal courts and make laws necessary and proper for carrying the judicial power into execution was a grant that met no prohibition with respect to the original jurisdiction of the Court. Marshall put this argument to rest quite succinctly.

> Affirmative words are often, in their operation, negative of other objects than those affirmed, and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.
>
> …If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

In fine, had the Framers intended to permit congressional regulation of the Court's original jurisdiction, they would have made the power explicit. By appending an authorization to make exceptions and regulations to the Court's appellate jurisdiction while withholding a similar authorization with respect to original jurisdiction, the Framers imparted a "negative or exclusive sense" to the Exceptions and Regulations Clauses. Its inclusion in the one instance is meaningless if Congress is presumed to possess the power in the other, rendering the clause "mere surplusage" as Marshall puts it. Conversely, Marshall's argument suggests that had there been no constitutional distribution of the Court's jurisdiction, Congress would have possessed plenary power to organize it. Even given Marshall's confiscatory reading of the Exceptions Clause and all his other assumptions, it is not clear why he equates augmentation of original jurisdiction with reduction of it. Unless, of course, he were to argue that the Exceptions Clause is dispositive in this respect as well, for it merely authorizes exceptions to appellate jurisdiction and all other exercises of power over the jurisdiction of the Supreme Court are thereby in effect forbidden.

Marshall elsewhere applies the same mode of construction to congressional statutes, producing an even broader view of Congress' power under the Exceptions and Regulations Clauses. In *Durousseau v. United States*, for example, Marshall argued that Congress had in effect excluded cases from the Court's appellate jurisdiction, not by making express exceptions, but by enumerating the classes of cases the Court could hear on appeal.

> When the first legislature of the union proceeded to carry the third article of the Constitution into effect, it must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. It has not, indeed, made these exceptions in express terms. It has not declared that the appellate power of the Court shall not extend to certain cases, but it has described affirmatively its jurisdiction, and this affirmative description has been

> understood to imply a negative on the exercise of such appellate power as is not comprehended within it.[45]

Marshall was not denying that federal jurisdiction was vested in the Court by Article III. Absent a congressional statement on the matter of jurisdiction, the Supreme Court as well as any inferior courts would enjoy the full scope of federal jurisdiction. But the moment that Congress affirmatively specified certain cases as belonging to the jurisdiction of the Court, all cases not specified in the grant would be presumed by the Court to have been excised, just as if Congress had stripped the Court of jurisdiction by affirmative language. A partial grant was to be construed as a prohibition.

Marshall may not have denied that the Court derived its jurisdiction from the Constitution rather than a legislative grant, but he might as well have done so. For it is difficult to discern the difference between such a denial and the rule he established in *Durousseau*, though at least one scholar has argued that Marshall's opinion has been misinterpreted.[46] The surrender of judicial independence in *Durousseau* was merely an extension of the Court's abdication of its supremacy over the judicial branch. As the next chapter will attempt to show, not even Congress claimed for itself a power this complete and unlimited. Indeed, if we look further into the development of judicial power in the twentieth-century, I suspect we will find that the independence of the Court and its control over the judicial business has grown in spite of its decisions and not because of them.

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[45] *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), 314. Chief Justice Chase's much touted opinion in *Ex parte McCardle*, 74 U.S. 506 (1869), relied heavily on Marshall's precedents. Indeed, as Clinton observes, the Court's later affirmations of a confiscatory power relied almost entirely on precedent, taking little notice either of the original sources from the Founding or of the considerable diversity of opinion on the early Court. Clinton, "A Mandatory View of Federal Court Jurisdiction," 846-47, n. 351.

[46] Clinton defends Marshall at length on this point, arguing that Marshall implied in *Durousseau* and made explicit elsewhere, a requirement that contractions of the Supreme Court's appellate jurisdiction were only permissible if the excluded cases could potentially be heard in another federal court. This, in essence, attributes to Marshall the aggregate vesting view favored by Clinton. See Clinton, "Early Implementation," 1563-88.

Revival of Mandatory Jurisdiction

Despite the unchallenged ascendency of Marshall's plenary view of congressional power, a more limited view of congressional regulation has enjoyed a revival among scholars in recent decades. Robert N. Clinton, for example, while not going as far as I do in limiting the exceptions power, has nonetheless persuasively argued for significant limits.

> The framers, by providing that [the judicial power] *shall be vested*…intended to mandate that Congress allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial power of the United States by section 2, clause 1 of article III, excluding, possibly, only those cases that Congress deemed to be so trivial that they would pose an unnecessary burden on both the federal judiciary and on the parties forced to litigate in federal court.[47]
>
> [T]he so-called exceptions and regulations clause and those clauses dealing with the congressional power to create inferior federal courts were intended by the framers to be construed in conformity with the overriding objective of the judicial article—to ensure that some federal court would have at least a discretionary opportunity to review each class of case enumerated in section 2 of article III, in order to ensure the supremacy of federal law and the national peace and harmony. That jurisdictional opportunity might involve either original or appellate determination in the federal courts. The power to make exceptions was at most an allocative authority designed to facilitate the creation of inferior federal courts.[48]

Thus far, Clinton affirms the propositions of the present chapter. Federal jurisdiction must potentially reach every case falling within its constitutional bounds. Where his account diverges, however, is in his confiscatory reading of the Exceptions Clause.

> Important to this jurisdiction scheme was the notion that the final appellate determination made by a federal court, even for a case originally tried in state court, could be made by an inferior federal court, rather than the Supreme Court…. This structure…suggests that the objective of ensuring uniformity of interpretation of federal law, while desired by the framers as a matter of policy, was left substantially to congressional discretion and therefore was not a matter of constitutional imperative.[49]

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[47] Clinton, "A Mandatory View of Federal Court Jurisdiction," 749-50. Presumably, these trivial cases would be excised from the party-based categories of jurisdiction that arose under state rather than federal law.

[48] Ibid., 753.

[49] Ibid., 753-54.

Clinton resolves any tension with the mandatory language of Article III that may arise from a confiscatory reading of the Exceptions Clause by laying on Congress the duty to vest the jurisdiction thus confiscated in an inferior court. "So understood, the congressional power to make 'exceptions' to the appellate jurisdiction of the Supreme Court, granted by the exceptions and regulations clause, 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*."[50]

He goes on to note, however, that given the similarity between the transformative language of the Randolph-Rutlidge draft and the eventual Exceptions Clause, the transformative reading propounded above is a plausible interpretation of the language. "This authority [to make exceptions] may also have been intended to include congressional power to reallocate the constitutionally structured appellate jurisdiction by authorizing the Supreme Court to exercise that jurisdiction in original form."[51] As Clinton's remarks suggest, the two readings are not mutually exclusive. The Exceptions Clause might authorize a relocation of a class of cases *either* to the Court's original jurisdiction *or* to an inferior court. But this is no more than a nod to the hierarchical structure of Article III. It leaves the supremacy of the Court in the hands of Congress.

Amar's two-tiered reading of Article III (discussed at some length above) shares a great deal with Clinton's mandatory view. Congress's power to make exceptions to the Court's appellate jurisdiction does not empower it to remove such cases from federal jurisdiction altogether. The jurisdiction of the federal judiciary, in some form, must extend to every category of case described in the jurisdictional menu. In three categories—federal questions, cases involving ambassadors, and admiralty cases—this jurisdiction must extend

[50] Ibid., 778.

[51] Ibid., 778.

to *all* cases. While the judiciary itself may decline to hear a particular case within one of these categories, just as Congress may decline to exercise one of its legislative powers, the judiciary may not be prevented from doing so by any legislative enactment or executive action. In the six remaining "party-based" categories of federal jurisdiction, Congress possesses a somewhat more extensive, though not unlimited, discretion. Such cases are not preceded by the qualifier "all." It is, therefore, not necessary that every particular case falling within one of these categories come within the jurisdiction of a federal court. It is, however, necessary that an Article III court enjoy jurisdiction over at least some (two or more) cases from each category, for Article III declares that the judicial power "shall extend" to every category in the jurisdictional menu.[52]

In practice, then, Congress may exclude cases from the appellate jurisdiction of the Supreme Court. If, however, the excluded cases fall within one of the three "all cases" categories, Congress must vest final jurisdiction over them in some other Article III court, thereby necessitating the creation of at least one inferior tribunal. Even with respect to the other six categories of jurisdictions, Congress must leave at least some cases from each category within the Court's jurisdiction in order to avoid creating inferior courts. Thus, while Article III recognizes the possibility that Congress may decline to create inferior tribunals, its provisions clearly mandate that Congress must in that case leave the appellate jurisdiction of the Supreme Court substantially intact.[53]

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[52] Amar, "A Neo-Federalist View."

[53] Unlike Clinton, Amar denies outright the transformative interpretation of the Exceptions Clause. In his estimation, the Exceptions Clause merely grants power to alter the appellate jurisdiction of the Supreme Court and nothing more. As Chief Justice Marshall held in Marbury v. Madison, the absence of a parallel authorization with respect to the original jurisdiction of the Supreme Court leaves Congress powerless to alter it in any way. Amar, "A Neo-Federalist View," 214-15, n. 39.

It is worth pointing out what may already be clear from the foregoing discussion. The Exceptions Clause is the central ground of dispute in debates over congressional regulation of the judiciary. Admission of a confiscatory interpretation is the major wrinkle in arguments for mandatory jurisdiction. If the Exceptions Clause is confiscatory, then "shall extend" is not the guarantee of judicial independence that it seems at first. Clinton and Amar provide apt examples of honest efforts to give real meaning to the mandatory language of Article III, but their acceptance of the confiscatory interpretation, especially in Amar's case, threatens to derail their efforts. They, like all other advocates of mandatory jurisdiction from 1787 to the present, lay their foundation on the mandatory language of the text itself. "Shall be vested" and "shall extend" are commands, not permissive grants of power. The confiscatory interpretation of the Exceptions Clause, however, forces them to ignore their own textualist instincts when it comes to the hierarchical language of Article III. "One supreme Court" means little unless it means court of last resort in all cases. What supremacy remains if the Court's appellate jurisdiction can be whittled down to nothing?

CHAPTER SIX

The Judicial Power in the First Congress: The Judiciary Act of 1789

The foregoing chapters have suggested that the independence and power that characterize the modern judiciary are in keeping with the institutional rationale of the Constitution. The judicial branch, we found, is designed to perform three functions: the administration of federal law directly upon individuals, the legal settlement of intergovernmental federal conflict, and the maintenance of constitutional supremacy over the federal and state governments. To secure these functions, the Framers endowed the federal judicial branch with three inviolable formal characteristics upon which Congress may not encroach in its regulation of the judiciary: the institutional integrity protected by the Vesting Clause, jurisdictional integrity secured by a mandatory two-tiered jurisdictional menu, and a hierarchical structure embodied by the Supreme Court. These forms are the constitutionally selected means of carrying out the judiciary's functions. Congress is not at liberty to substitute other forms. Where the Constitution has specified a formal means of discharging an institutional function, the formal means is constitutionally necessary. We must therefore evaluate the acts of Congress by asking whether they have given full operation to the institutional means selected by the Framers and ratified by the people.

The remaining chapters will trace the development of the federal judicial system from its genesis in the Judiciary Act of 1789 to its maturation in the reforms of the late nineteenth and early twentieth century. The present chapter examines the framing of the Judiciary Act of 1789, while chapter seven examines its implementation by the early Court and a number of failed legislative efforts throughout the 1790s to remedy the defects of the

first judiciary act. These reform efforts reached their zenith with the framing of the Judiciary Act of 1801, which was passed by the lame duck Federalists of the Sixth Congress and quickly repealed by the incoming Jeffersonians of the Seventh. In practice, these early constructive efforts inculcated a restrained and subordinate vision of federal judicial power that stands in tension with the expansive and independent judiciary suggested by the institutional rationale of the Constitution. On closer examination, however, the legislative debates surrounding these acts and proposals, as well as the decisions of the early Court, provide strong support for the constitutional rationale mapped out in the preceding chapters. We will conclude in chapter eight by showing that it is this original constitutional rationale that comes to fruition in the emergence of the modern judiciary between 1891 and 1939.

The First Congress and Constitutional Interpretation

Let us turn, then, to the Judiciary Act of 1789. The first judiciary act created a three tiered system of federal courts that, at least in name, persists to the present day. The act set the membership of the Supreme Court at six, with a chief justice and five associate justices. Significantly, Congress did not simply enact the constitutional language of the jurisdictional menu but instead enumerated the cases to which federal jurisdiction would reach. Section 13 gave the Court original jurisdiction of a number of cases involving states and representatives of foreign governments, though Congress also excluded a number of cases, and appellate jurisdiction over inferior federal courts in suits involving at least two thousand dollars. Section 25 provided for Supreme Court review of state cases. A district judge was to be appointed for each state to preside over a district court having exclusive jurisdiction of all admiralty and maritime cases as well as minor criminal prosecutions. The act also established three judicial circuits—Southern, Middle, and Eastern—each of which

encompassed several states. Circuit courts were to be held twice a year in each state and would be composed of two Supreme Court justices and the district judge of the state wherein the court convened. The circuit courts were given a substantial trial jurisdiction and were also empowered to hear appeals in certain cases from the district courts. Additionally, the act allowed certain state cases falling within federal jurisdiction to be removed from the state court into the circuit court. In many instances, Congress had imposed amount-in-controversy limitations to prevent cases of small importance from coming into the federal courts or advancing to the Supreme Court.

The First Congress's constitutional understanding of its own powers is generally, though sometimes ambiguously, supportive of the constitutional rationale I have identified. Strong support is to be found for the institutional and jurisdictional integrity of the judicial power, particularly in the speeches of James Madison and Fisher Ames on the floor of the House. Madison and Ames understood the text of Article III to vest exclusive jurisdiction over federal questions in the federal judiciary and believed themselves to be without authority to vest that jurisdiction elsewhere. This construction left state courts without jurisdiction to hear certain cases to which Article III extended the judicial power of the Union. For this reason, they believed the creation of inferior federal courts to hear cases of exclusive federal jurisdiction to be a constitutional necessity.[1] Nonetheless, Ames and Madison did not carry their reading of Article III to its logical conclusion but left the bill reported by the Senate largely intact. If applied consistently, though, their reading of the

[1] Madison and Ames were responding to a motion to eliminate the district courts from the bill, which would leave the federal judiciary without a system of trial courts. Defenders of the motion, clearly a minority of the House, responded to Madison and Ames by articulating the now familiar orthodox account of plenary congressional power to structure the judiciary. The orthodox view lost.

constitutional language—a reading apparently supported by a majority of the House—would yield all of the limitations on legislative discretion laid out in the last chapter.

The judiciary act reflected this partial recognition of the demands of Article III, generally observing the limits of the Constitution, but also diverging from it in significant ways. Chief among these divergences was Congress's failure to respect the hierarchical structure of the federal judiciary. Though some recognition of the essential hierarchy of the judicial power emerges from the floor debate in the House, the act itself exhibits little appreciation for the supremacy of the Supreme Court, giving its appellate jurisdiction over inferior federal courts extremely narrow scope.

The failure of the judiciary act to comply with the formal requirements of the Constitution flowed from the political constraints faced by the First Congress. The record of the House debate reveals both the deep influence of constitutional considerations on the bill and the limited efficacy of constitutional considerations when faced with conflicting political determinants. As Marcus and Wexler observe, "those engaged in the drafting of the Judiciary Act paid less attention to the constitutional language, ambiguous as it was, than to contemporary political necessities."[2] While this may go too far in minimizing the constitutional aspects of the debate, Marcus and Wexler are certainly right to emphasize the extent to which the actual content of the bill was a product of political rather than constitutional determinants. Thus, while the deliberations of the First Congress may act as a guide to understanding the provisions of the Constitution, their acts cannot be taken as authoritative embodiments of original meaning. Prevailing treatments of congressional power in this area, according to which the First Congress and its successors advocated

[2] Maeva Marcus and Natalie Wexler, "The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?" in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, ed. Maeva Marcus (New York: Oxford University Press, 1992), 13-14.

plenary congressional control of judicial structure and jurisdiction, have failed to see the political rather than constitutional origins of their expansive construction of congressional power because they too readily conflate the content of the judiciary act with the constitutional understanding of the First Congress.[3] We should hesitate to treat the First Congress as an authoritative expositor of constitutional meaning, at least without looking beyond its acts to its reasoning, for the divergences of the judiciary act from the forms of judicial independence grew out of temporary political constraints, the novelty of the system, and (oddly enough) the foresight of the Framers.

Before turning to the legislative history of the judiciary act, we should pause to say something more regarding the status of the First Congress as a guide to constitutional meaning. Given its pivotal role in implementing the new Constitution, it is not altogether unwarranted to characterize the First Congress as a sort of "second constitutional convention."[4] The First Congress's claim to this elevated status is just in two respects: many of its members participated in the making of the Constitution as delegates to either the Federal Convention or the state ratifying conventions and its construction of the Constitution would of necessity operate as a powerful precedent as it was the first legislative body to construe the Constitution. Neither of these facts, however, elevates the determinations of the first Congress to constitutional status. In no sense was the Judiciary

[3] See, e.g., Ralph A. Rossum, "Congress, the Constitution, and the Appelate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause," *William and Mary Law Review* 24, no. _ (1983): 385-428; Charles Rice, "Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today," *Judicature* 65, no. 4 (1981): 195.

[4] Charles Thach, *Creation of the Presidency*, 124-26.

Act of 1789 an authoritative act of "We the People" in the same way that the Bill of Rights was.[5]

Efforts to Eliminate Inferior Courts

On April 7, the day after a quorum had been convened, the Senate formed a committee "to bring in a bill for organizing the Judiciary of the United States," consisting of eight members, one from each state then represented. These were Oliver Ellsworth of Connecticut, William Paterson of New Jersey, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, Richard Bassett of Delaware, William Maclay of Pennsylvania, William Few of Georgia, and Paine Wingate of New Hampshire. Two additional members, Charles Carroll of Maryland and Ralph Izard of South Carolina, were added on April 13 after taking their seats (*SLJ* 1:10-11).[6]

The committee's work is divisible into two main phases. Between its formation and the end of April, the committee set about forming the general outlines of the plan. It is apparent from the correspondence of the committee members that the general outlines had

[5] This has not prevented legal scholars from treating the Judiciary Act of 1789 as holy writ, some going so far as to consider a conflict with the act as a conclusive argument against certain constructions of Article III. For instance, one critic of Robert Clinton's mandatory construction of federal jurisdiction rejects it on the ground that it "is hard to square with the First Judiciary Act and subsequent legislation." Daniel J. Meltzer, "The History and Structure of Article III," *University of Pennsylvania Law Review* 138, no. 6 (1990), 1570. As I will attempt to demonstrate, even a brief perusal of the legislative history renders this sort of unquestioning reverence for the actions of the First Congress indefensible, for they were heavily constrained by the immediate political context.

[6] Parenthetical citations refer to the legislative records of the First Congress. *Annals* refers to the *Annals of Congress*; *SLJ* refers to the Senate Legislative Journal; *DHSC* refers to the *Documentary History of the Supreme Court*.

The composition of this committee is of some interest. Six members—Ellsworth, Few, Carroll, Izard, Wingate, and Lee—had served in the Continental Congress. Five members—Ellsworth, Strong, Paterson, Bassett, and Few—had been delegates to the Federal Convention of 1787 and five—Ellsworth, Strong, Few, Bassett, and Izard—had been delegates to their respective state ratifying conventions. All but two members of the committee—Lee and Maclay—were Federalists. Izard and Wingate were the only two without legal training while only Ellsworth, Strong, and Paterson had "extensive" legal experience (*DHSC* 4:22-23).

been established by the end of April.[7] On May 11, a subcommittee was appointed to transform the outline into a bill, which the subcommittee presented on June 12, first to the full committee then to the Senate (*SLJ* 1:34). Ellsworth, Paterson, and Strong, being the only three members with extensive legal experience, took a leading role in drafting the bill.

Relatively little is known of the floor debate on the bill in the Senate. William Maclay of Pennsylvania kept a diary, but most of Maclay's diary entries indicate concerns with questions of procedure and other important but peripheral matters, such as exemptions from oath-taking for Quakers and the use of equity procedures in federal courts. Aside from the scribbling of Maclay and the sparse notes of individual Senators, we have only a few letters that passed between the Senators and their correspondents outside Congress. Even then, the commentary is generally one-sided in the form of advice from the correspondent to the member.[8] If these letters are any indication, we may be certain that the constitutional questions involved in the framing of the judiciary act were treated at length by members but by no means did it dominate the discussion.[9]

The one constitutional issue that does seem to occasion considerable debate was an amendment moved by Richard Henry Lee upon instructions from his home state of Virginia.

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[7] See Ralph Izard to Edward Rutledge, 24 April 1789; Paine Wingate to Timothy Pickering, 29 April 1789; Oliver Ellsworth to Richard Law, 30 April 1789 (*DHSC* 4:377-82).

[8] This one-sidedness stems from the nature of the correspondence. Much of it arose from draft copies of the judiciary bill that members sent out to eminent judges and lawyers in their respective states. These drafts were often circulated among numerous individuals, who would respond with comments and suggestions. The responses were characterized by brevity, often taking the form of hastily jotted bullet points or marginal notes on the draft bill. Most problematic for the researcher is the fact that members rarely responded with comments of their own, but usually confined themselves to thanking the correspondent for their suggestions. We may safely assume that many members instead employed the wisdom garnered from their correspondence in debate on the Senate floor. Unfortunately, though, we have no way to know which arguments they employed or to what effect.

[9] Madison, for example, received a letter from Edmund Randolph while the judiciary bill was still pending before the Senate in which Randolph sharply criticized Congress's effort to closely regulate the jurisdiction and procedure of the courts. The letter was penned before Randolph had been appointed attorney general and therefore represents, we may assume, his own sense of the constitutional text and not administration policy as would his later official reports to Congress (June 30, 1789, *DHSC* 4:432-33).

The amendment required "That no subordinate federal jurisdiction be established in any State, other than for Admiralty and Maritime causes but that federal interference shall be limited to Appeal only from the State Courts to the supreme federal Court of the U. States" (*DHSC* 4:44).[10] Maclay records his own objections to the elimination of federal trial courts and the consequent reliance on state tribunals, which indicate that constitutional concerns had some salience in the framing of the bill.

> The Effect of the Motion was to exclude the Federal Jurisdiction, from each of the States, except in cases of admiralty and maritime Cases. But the Constitution expressly extended it to all cases ~~of~~ in law and equity under the Constitution the Laws of the united States, Treaties made or to be made. &c[a] we already had existing Treaties and were about making many laws. These must be executed by the federal Judiciary. the Arguments which had been used would apply well, if amendments to the Constitution were under Consideration. but certainly were inapplicable here. (June 22, 1789, *DHSC* 4:409)

Maclay thus briefly states the argument that will later receive full treatment on the floor of the House: at least some part of federal jurisdiction is vested exclusively in the federal courts and Congress must therefore furnish trial courts in which such cases may be instituted. Lee's motion clearly did not carry the day, but we have no indication whether the Senate was moved by Maclay's constitutional concerns or whether they were moved by mere expediency. In any case, having survived Lee's opposition, the bill to establish the judicial courts of the United States passed the Senate upon the taking of yeas and nays on July 17 by a vote of 14 to 6.[11]

The House finally took up the bill over a month later on August 24, resolving itself into the committee of the whole. The record of the House debate that ensued is far more

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[10] A similar provision may be found among the amendments to the Constitution proposed by the Virginia ratifying convention.

[11] Yeas: Bassett, Carroll, Dalton, Ellsworth, Elmer, Few, Gunn, Henry, Johnson, Izard, Morris, Paterson, Read, Strong

Nays: Butler, Grayson, Langdon, Lee, Maclay, Wingate

robust than that of the Senate. House proceedings were well attended by journalists and other observers and many of the speeches were recorded in outlets such as Fenno's *Gazette of the United States* and later compiled in Gales and Seaton's *Annals of Congress*.[12] Thus we have a rich record of the members' views on the constitution of the judiciary.

Most of the debate centered around a motion by Samuel Livermore of New Hampshire to strike out the section creating district courts with the declared intent of replacing them with an admiralty court in each state, a reiteration of Lee's amendment in the Senate. This ultimately resolved into a question of how much discretion Congress enjoyed in the creation of inferior courts. As we will see, the majority of members seem to have believed that Congress was under a constitutional duty to create some sort of inferior federal courts independent of the state courts and that these must be sufficiently extensive to hear all cases falling exclusively within federal jurisdiction. This exclusivity reached, at minimum, to all cases of admiralty and maritime jurisdiction and to all cases arising under federal law, whether deriving from a statute, a treaty, or the Constitution. The majority of the House seems at the same time to have believed that the state courts are disabled from hearing these cases. The debate over this issue became for the judiciary what the removal debate was for the presidency and involved momentous questions about the meaning of separated powers, the limits of legislative discretion, and the effect of the new Constitution on the extent of state power.

Livermore's Motion to Eliminate the District Courts

Livermore's initial defense of his motion to eliminate the district courts from the system skirted the constitutional issue, merely dismissing any limit on Congress's discretion

[12] Members of the press found the House a more fruitful source of printable material and accordingly focused their attention there, neglecting the Senate.

in their creation. Substantively, his argument reiterated much of the Anti-Federalist objection to Article III. The expense of maintaining a separate federal judiciary was unnecessary when state institutions might be employed. "There is already in each State a system of jurisprudence, congenial to the wishes of its citizens. I never heard it complained that justice was not distributed with an equal hand in all of them; I believe it is so, and the people think it so. We had better then continue them than introduce a system replete with expense, and altogether unnecessary." He then makes an even more surprising claim. "The State courts have hitherto decided all cases of a national or local import; and it was never heard that they determined with any degree of partiality." Knowing that this is pure hyperbole given the experience with the federal appellate prize court under the confederation, Livermore backtracks. "Perhaps a maritime case, that was carried by appeal before the court for final determination in cases of capture, where the judgment was reversed, may be thought an exception; but whether this case was decided rightly or wrongly at last, I shall not pretend to say at present" (August 24, *Annals* 1:813-14).

The "exception" to which Livermore refers is the case of the *Active*. There, the Pennsylvania court and the federal appellate prize court were at variance in their determinations of who should receive the prize. The federal tribunal was predictably unable to secure compliance from the state court. Livermore attempts to pass over it as though it were an exceptional instance of state encroachment. It is somewhat incredible that Livermore can make this argument to the House straight-faced. As we saw in chapter two, cases of capture were the *only* matter entrusted to a federal judicial body under the confederation. No wonder then that it furnishes the clearest instance of states frustrating the exercise of federal judicial authority. Even more audacious is his apology for the obstructionist conduct of the Pennsylvania court. He dismissed its importance on the

ground that there remained some dispute over whether the federal court had decided rightly or wrongly. But there will always be a dispute over the proper outcome in the controversial cases a federal appellate court will be called upon to decide. Livermore's supporters in the House would repeatedly argue for reliance on federal appeals from state courts as the appropriate control, but the case of the *Betsy* illustrated that appellate proceedings would be least effective in precisely the cases where they were most needed. Though he might try to dismiss it, Livermore was faced with the undeniable fact that in the one category of jurisdiction over which the federal government had actually attempted to assert appellate control under the confederation, it failed miserably.

Moreover, Livermore argued that the people would find the propagation of courts burdensome, for it would multiply the venues in which they might be sued and demand of them more frequent service as jurors and witnesses. He paints the institution of inferior federal courts as an *imperium in imperio*, subjecting citizens to the dictates of two concurrent tribunals, "lead[ing] to an entire new system of jurisprudence, and fill[ing] every State in the Union with two kinds of courts for the trial of many causes. A thing so heterogeneous must give great disgust. Sir, it will be establishing a Government within a Government, and one must prevail upon the ruin of the other. Nothing, in my opinion, can irritate the inhabitants so generally, as to see their neighbors dragged before two tribunals for the same offence." No Anti-Federalist remonstrance would be complete without the obligatory warning that the extension of federal authority would displace and destroy state institutions, in this case the courts of law. In any case, the people would not look favorably on the propagation of courts of law, for "they look upon laws rather as intended for punishment than protection; they will think we are endeavoring to irritate them, rather than to establish a Government to sit easy upon them" (August 24, *Annals* 1:813).

Knowing that he could not avoid the constitutional issues altogether, Livermore questioned whether the creation of inferior courts is a constitutional necessity. "Will any gentleman say that the constitution cannot be administered without this establishment? I am clearly of a different opinion; I think that it can be administered better without than with it" (August 24, *Annals* 1:813). And thus begins the central controversy of the House debate. Are federal trial courts a mere means at the disposal of Congress for executing the constitutional design or are they an integral and indispensible component of the constitutional order that Congress may structure and regulate, but not omit? With a final warning from Livermore about the burdensome expense for an unnecessary institution, the House adjourned.

When the House resumed debate on the bill on August 29, Livermore rose again to defend his motion, again attempting to show that there existed neither a constitutional duty nor a practical need to create inferior courts beyond admiralty courts. This time, he clarified his object to be the replacement of the district courts with courts of admiralty in each state.[13] All other federal matters would be left to settlement in state courts with the possibility of an appeal to the Supreme Court in cases of error. Such a sparse system was all that was needed. "We have supported the Union for thirteen or fourteen years without such courts, from which I infer that they are not necessary, or we should have discovered the inconvenience of being without them; yet I believe Congress have always had ample justice done in all their claims; at least, as I said before, I never heard any complaint, except the case of an appeal on a capture." Amazingly, Livermore again relies upon Congress's experience under the

[13] There has been some controversy whether Livermore meant a federal court of admiralty, or some arrangement whereby state judges would be appointed by Congress to handle the business.

confederation to support his claims. Were this all that Livermore had said, one might almost think he saw no defect of judicial power in the Articles of Confederation at all.

Smith and Jackson Sharpen the Debate

William Smith of South Carolina is the first to rise in opposition to Livermore's motion and does so by recourse to the language of Article III. "The constitution, indeed, recognizes such a court, because it speaks of 'such inferior courts as the Congress shall establish;' and because it gives to the Supreme Court only appellate jurisdiction in most cases of a federal nature." This is the first effort in the House to give the necessity of inferior courts a foundation in the text of the Constitution. Importantly, though, Smith does not seem to think inferior courts are absolutely required by the Constitution. He instead points to the pernicious consequences of Livermore's alternative reliance on appellate review of state courts. "If the State courts are to take cognizance of those causes which, by the constitution, are declared to belong to the judicial courts of the United States, an appeal must lie in every case to the latter, otherwise the judicial authority of the Union might be altogether eluded" (August 29, *Annals* 1:828-29).

Here, Smith seems to embrace the aggregate vesting view of Article III advocated by Amar and Clinton. According to this reading of Article III, the mandatory language of the jurisdictional menu merely requires that the final arbiter of cases falling in federal jurisdiction be a federal court. So, if Congress were to decline to create inferior federal courts, an avenue of appeal must remain open to the Supreme Court in all federal cases. "For to deny such an appeal, would be to frustrate the most important objects of the Federal Government, and would obstruct its operations. The necessity of uniformity in the decision of the federal courts is obvious; to assimilate the principles of national decisions, and collect them, as it were, into one focus, appeals from all the State courts to the Supreme Court

would be indispensible." The result of this would be fatal to the state judiciaries. "It is, however, much to be apprehended that this constant control of the Supreme Federal Court over the adjudication of the State courts, would dissatisfy the people, and weaken the importance and authority of the State judges. Nay, more, it would lessen their respectability in the eyes of the people, even in causes which properly appertain to the State jurisdictions; because the people, being accustomed to see their decrees overhauled and annulled by a superior tribunal, would soon learn to form an irreverent opinion of their importance and abilities." Smith argues that it is therefore ultimately in the interest of the states to provide the federal government with a complete judicial apparatus, both because it would reduce the number of appeals from state decisions and because it would reduce the number of appeals to the Supreme Court overall. "By restricting the State courts to few causes of federal jurisdiction, the number of appeals will be diminished, because every cause tried in those courts will, for the reasons before mentioned, be subject to appeal; whereas the jurisdiction of the district court will be final in many cases" (August 29, *Annals* 1:829-30). Thus far, Smith's whole argument seems to support the aggregate vesting view.

Later, though, Smith seems to turn toward a more exclusive reading of the jurisdictional menu and away from the aggregate vesting account. "It is very proper that a court of the United States should try offences committed against the United States. Every nation upon earth punishes by its own courts offences against its own laws." Smith adduces revenue laws as an instance of federal laws necessitating a federal tribunal. "From this view it appears that the district court is not clothed with any authority of which the State courts are stripped, but is barely provided with that authority which arises out of the establishment of a National Government, and which is indispensably necessary for its support. Can the State courts at this moment take cognizance of offences committed on the high seas? If

they do, it is under an act of Congress, giving them jurisdiction; and, in such cases, the Judge of the Admiralty is associated with two common law Judges; this tribunal becomes then a federal court for the particular occasion, because it is established by Congress" (August 29, *Annals* 1:830).

This latter point about Congress vesting state judges with admiralty jurisdiction is illustrative of the import of the Vesting Clauses. Under the confederation, Congress was unbounded by any requirement to vest federal power in federal officers and could therefore vest jurisdiction in any person. The vesting clause of Article III, however, places an important limit to that authority. Congress may, under the Constitution, vest federal judicial power in a federal judicial officer fitting the description of a federal judge. Or, to put it more accurately, Congress may ordain an office to be filled by a constitutional procedure and to receive its power directly from the Constitution. This consideration apparently awakens Smith to the implications of the Vesting Clause; having wandered all about the field of debate, he finally closes with a coherent reading of Article III.

> There is another important consideration; that is, how far the constitution stands in the way of this motion. It is declared by that instrument that the judicial power of the United States shall be vested in one supreme, and in such inferior courts as Congress shall from time to time establish. Here is no discretion, then, in Congress to vest the judicial power of the United States in any other tribunal than in the Supreme Court and the inferior courts of the United States. It is further declared that the judicial power of the United States shall extend to all cases of a particular description. How is that power to be administered? Undoubtedly by the tribunals of the United States; if the judicial power of the United States extends to those specified cases, it follows indisputably that the tribunals of the United States must likewise extend to them. What is the object to the motion? To assign the jurisdiction of some of those very cases to the State courts, to judges, who, in many instances, hold their places for a limited period; whereas, the constitution, for the greater security of the citizen, and to insure the independence of the federal judges, has expressly declared that they shall hold their commissions during good behavior. To judges who are exposed every year to a diminution of salary by the State Legislatures; whereas, the constitution, to remove from the federal judges all dependence on the Legislative or Executive, has protected them from any diminution of their compensation. (August 29, *Annals* 1:831-32)

James Jackson of Georgia rises in defense of Livermore's motion to respond to Smith's argument. Smith's constitutional argument, he says, "fell to the ground on referring to the constitution; the constitution, he said, did not absolutely require inferior jurisdictions;" it says that the judicial power shall be vested in "such inferior courts as Congress may…ordain and establish." The word "may," Jackson argues, "is not positive, and it remains with Congress to determine what inferior jurisdictions may be necessary, and what they will ordain and establish; for if they choose or think that no inferior jurisdiction as are necessary, there is no obligation to establish them. It then remains with the Legislature of the Union to examine the necessity or expediency of those courts only" (August 29, *Annals* 1:833).

Answering Smith's claim that avoidance of appeals was a virtue of the proposed system, Jackson follows Anti-Federalist orthodoxy in arguing not only for the propriety of appeals to the Supreme Court, but for a positive reliance upon such appeals for the administration of federal justice.[14] To Smith's suggestion that a nation must rely on its own tribunals for the enforcement of its own laws, Jackson answers that the Constitution itself relies upon state enforcement of the supreme law of the land. "But we are told, he said, it is necessary that every Government should have the power of executing its own laws. This argument would likewise fail, when we find that the constitution, treaties, and laws of the United States are, by the constitution itself, made the supreme law of the land. Are not the

[14] Jackson also argued for the expediency of relying on appeal to the Supreme Court. "The system before the House has a round of courts appellate from one to the other; and the poor man that is engaged with a rich opponent will be harassed in the most cruel manner…. He was clearly of opinion that the people would much rather have but one appeal…from the State courts immediately to the Supreme Court of the continent." Jackson foresees the oppressive potential of numerous appeals (*Annals* 1:833-34). William Howard Taft would later make an argument for limiting litigants to a single appeal in most cases. Jackson of course refers to an appeal from the state to the Supreme Court while Taft refers to an appeal from the district to the circuit court. Ironically, Taft's plan furnishes a more effective remedy for the problem, the circuit courts being closer and more accessible than the Supreme Court. See chapter eight, notes 12-22 and accompanying text.

judges of the different States bound by oath to support the supreme law? Will they not recollect those oaths, and be liable to punishment by your act, which has obliged them to take that oath, if they do not respect it as such? Assuredly they will; it is part of the compact formed with the States. But does there not remain the appellate jurisdiction of the Supreme Court to control them, and bring them to their reason? Can they not reverse or confirm the State decrees, as they may find them right or wrong?" He later declares that he could not, "for his part, consider human nature so depraved, as to suppose that, with an oath to observe the supreme law of the land, the State judges would not obey it" (August 29, *Annals* 1:834).

With this, Jackson summarizes the whole of the opposition argument. The entire edifice rests on three premises: 1) the permissive "may" in the Article III vesting clause gives Congress plenary discretion in structuring the federal judiciary, 2) the Article VI supremacy clause vests jurisdiction over federal questions in the state courts, and 3) the appellate oversight of the Supreme Court is sufficient to ensure the faithful administration of federal law in the state courts. In substance, this reliance on the supremacy clause and appellate review is a resurrection of Paterson's New Jersey Plan.

The immediate responses to Jackson do little more than repeat Smith's original critique. Benson warns that "if the House decided in favor of [Livermore's motion], it would involve a total abandonment of the judicial power, excepting those cases the honorable gentlemen mean to provide for, namely, the Courts of Admiralty and Supreme Courts." Even if some inconvenience arose from the concurrent operation of state and federal courts, Congress could not decline to provide inferior courts. "It is not left to the election of the Legislature of the United States whether we adopt or not a judicial system like the one before us; the words in the constitution are plain and full, and must be carried into

operation." Continuing the reiteration of Smith's argument, Sedgwick rises to declare that Livermore's motion "goes to divest the Government of one of its most essential branches; if this is destroyed, your constitution is but the shadow of a Government" (August 29, *Annals* 1:835-36).[15]

Constitutional Necessity of Inferior Tribunals

Ames and Madison both give lengthy speeches on August 29 that provided a more sophisticated account of the interrelation of the relevant constitutional provisions. An effective response to Livermore's faction required an elaboration of three such interrelations: 1) the analogy between the vesting clauses of Articles I, II, and III, 2) the compatibility of the exclusivity of the Article III vesting clause with the binding of state judges in the Article VI supremacy clause, and 3) the compatibility between the mandatory language of Article III respecting jurisdiction and its permissive language respecting congressional discretion.

Ames began by drawing the analogy between the vesting clauses. "We live in a time of innovation; but…he should think it a wonderful felicity of invention to propose the expedient of hiring out our judicial power, and employing courts not amenable to our laws, instead of instituting them ourselves as the constitution requires. We might with as great propriety negotiate and assign over our legislative as our judicial power; and it would not be more strange to get the laws made for this body, than after their passage to get them interpreted and executed by those whom we do not appoint, and cannot control" (August 29, *Annals* 1:837-38). Smith had merely asserted the effect of the Article III vesting clause, but Ames here employs the analogy with the other vesting clauses to demonstrate the

[15] Sedwick continues: "Is it not essential that a Government possess within itself the power necessary to carry its laws into execution? But the honorable gentleman proposes to leave this business to a foreign authority, totally independent of this Legislature, whether our ordinances shall have efficacy or not. Would this be prudent, even if it were in our power?"

impropriety of delegating federal functions to state officers. Madison will subsequently elaborate on this point, but Ames summarizes it well.

Ames's most important contribution to the debate, however, is his distinction between a source of jurisdiction and a rule of decision, for it answers the most compelling textual argument available to Livermore's faction. Ames had begun considering the complex relationship between federal law and state courts long before the judiciary bill came before the House. On April 8, the day after the Senate committee was appointed to draw up a bill, Ames writes to John Lowell.

> May we refer to the state Courts, the suing for the penalties and forfeitures? All judges are bound by our laws [under Article VI.] But will our act give them jurisdiction? Will it be expedient to give it to them? If they have it, will it be as state judges, or will they, *eo instante*, become federal Judges, and be entitled, by the Constitution, to permanent seats and salaries? Will it do, in point of expediency or legality, to make penalties &c and to give the trials of them, to the Fed. Ct. hereafter to be erected?[16]

Ames again wrote in July, "But questions arising under the Laws of the Union are purely federal. I have doubts whet[her] they may be transfer'd to the state courts[.] Excuse me the levity of calling it, endorsing authority over to them."[17]

These initial ideas received mature expression in his comments on the House floor. Responding to Jackson's claim that, by declaring state judges "bound" by federal law, the Article VI supremacy clause vested jurisdiction over federal questions in state courts, Ames pointed out that a judge may be bound by a law as a rule of decision without the law functioning as the source of the court's jurisdiction. "The law of the United States is a rule to [state judges], but no authority for them. It control[s] their decisions, but could not enlarge their powers" (August 29, *Annals* 1:839). In other words, state judges must consult

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[16] Fisher Ames to John Lowell, April 8, 1789 in *DHSC* 4:373.

[17] Fisher Ames to John Lowell, July [10-16], 1789 in *DHSC* 4:457.

federal law as an authority in any case within their jurisdiction. So, for example, a case may arise under a state bankruptcy law in which an aggrieved creditor complains that the law violates the Contracts Clause of the ninth section of Article I. The state court may hear the case only because it arises under state law, but once having jurisdiction must give effect to all applicable laws, including those of the United States. Here, the Contracts Clause functions as rule of decision in the case, but is not the source of the state court's jurisdiction. This is manifestly the reason the Constitution uses the phrase "arising under" so as to avoid a situation in which any case to which a federal law might apply is of necessity thrown into federal court. It is only where the case arises upon a question of federal law that the jurisdiction over it is exclusively federal. In such a case, the state court would find itself with no jurisdictional handle with which to take cognizance of the case. Only a federal court could exercise jurisdiction in a case arising entirely out of federal law. "Causes of exclusive federal cognizance cannot be tried otherwise, nor can the judicial power of the United States be otherwise exercised."

Of course, Ames also admits a range of cases in which the state and federal courts might exercise concurrent jurisdiction. "The State courts were not supposed to be deprived by the constitution of the jurisdiction that they exercised before, over many causes that may be tried now in the national courts. The suitors would have their choice of courts." Nonetheless, this concurrence does not contradict the existence of exclusive federal jurisdiction, for "who shall try a crime against a law of the United States, or a new created action? Here jurisdiction is made *de novo*. A trust is to be exercised, and this can be done only by persons appointed as judges in the manner before mentioned" (August 29, *Annals* 1:838).

Ames made clear that this exclusion of the state judges from the exercise of federal judicial power was not merely on account of some deficiency in their form.

> He did not mean any disrespect to the State courts. In some of the States, he knew the judges were highly worthy of trust; that they were safeguards to Government, and ornaments to human nature. But whence should they get the power of trying the supposed action? The States under whom they act, and to whom they are amenable, never had such power to give, and this Government never gave them any. (August 29, *Annals* 1:839)

But may not Congress give it to them? Is that not what Livermore proposes? Sounding a note that will be more fully explored by Madison, Ames points out that Congress could not remedy this defect in state power by vesting jurisdiction in state judges. For, the judges would then become federal judges entitled to all of the privileges of Article III. Ames points out the ironically nationalizing tendency of such a system. "Individuals may be commanded [by federal law], but are we authorized to require the servants of the States to serve us?" (August 29, *Annals* 1:839). He drew out the implications the following week in a letter to John Lowell:

> For if the servants of the states are of course, or can be made by law, the servants of the U. S. it will produce a strange confusion of offices & ideas_ We may as properly assume the services & claim the duties of the state treasurer to keep & pay out our money_ or the sheriff to keep our rogues, & declare their bonds valid to secure their doing it_ If Judicial officers are not bound to execute our laws, as our servants, we cannot trust them_ and if they are, why are ministerial officers less our servants?[18]

Ames was attempting to show the absurd consequences that would follow upon the delegation of federal power to state officers. He insisted, however, that such a policy was not merely deficient on account of its consequences, but was a constitutional impropriety. "It was not only true, he said, that [the state courts] could not decide [a federal] cause, if a provision was neglected to be made, by creating proper tribunals for the decision, but they would not be authorized to do it, even if an act was passed declaring that they should be

[18] Ames to John Lowell, Sept. 3, 1789, in *DHSC* 4:506.

vested with power; for they must be individually commissioned and salaried to have it constitutionally, and then they would not have it as the State judges" (August 29, *Annals* 1:839). The president might appoint a state judge to a federal court, but that the judge would then become a federal office holder, receiving his salary from the federal treasury and entitled to tenure during good behavior.

> His wish was to establish this conclusion, that offences against statutes of the United States, and actions, the cognizance whereof is created *de novo*, are exclusively of federal jurisdiction; that no persons should act as judges to try them, except such as may be commissioned agreeably to the constitution; that for the trial of such offences and causes, tribunals must be created. These, with the admiralty jurisdiction, which it is agreed must be provided for, constitute the principal powers of the district courts. (August 29, *Annals* 1:839)

Following Ames's speech, the *Annals* records that the "question [was] now called for from several parts of the House." Feeling the tide in their favor and knowing they possessed a majority, the Federalists were pushing to conclude debate. In this context, Stone takes the floor and calls for further debate, professing his earnest desire "to be convinced that my ideas are founded on misconception, in order to go with the majority." Livermore's motion clearly had not garnered much support, and Stone here attempts to continue debate on the outside chance that a few may be swayed to its support and inaugurates the effort to do so with a speech of his own.

Stone attempts to refute Ames by arguing that, under his rationale, "Congress must institute courts for taking exclusive cognizance of all cases pointed out in the constitution; but this would be contrary to the principle of the bill, which proposes to establish the inferior courts with concurrent jurisdiction with the State courts." But this fails to grasp Ames's (and the Constitution's) distinction between pre-existing sources of state jurisdiction and *de novo* sources of jurisdiction growing out of the creation and operation of the federal government. Ames later complained to two separate correspondents following this debate

that he had been misunderstood in the House and expressed his concern that he would be likewise misunderstood by the public reading Fenno's *Gazette of the United States*. "I calculate upon it's being termed heresy by some who will understand it, & worse names by many who cannot or will not take the pains so to understand it[.]"[19] The opposition in the House seems to have fallen in the latter category, as Stone vividly illustrates.

Stone's whole speech is aimed to demonstrate, as is much of the opposition rhetoric, that the question before the House is merely one of expediency and not constitutional propriety. And for Stone, as for the Jeffersonian Republicans he prefigures, expediency with respect to expansions of federal power boiled down to a question of necessity. "It appears to me that the present Government originated in *necessity*, and it ought not to be carried farther than *necessity* will justify." This disposition was an early specimen of the "republicanism" that would soon blossom in the 1790s. Ames had complained of it to a correspondent a month before, ascribing it to "violent republicans…who would have a government all checks[.]"[20] Stone presses for the institution of inferior courts upon the principle of necessity only, and necessity dictates no other courts but admiralty, and these not upon principle but upon the fact of their absence from many states. Following Jackson, Stone rests the whole case on the premise that the permissive language of the Article III vesting clause creates plenary legislative discretion.

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[19] Ames to John Lowell, September 3, 1789, in *DHSC* 4:506. See also, Ames to George Richards Minot, September 3, 1789, in *DHSC* 4:507. Why his contemporaries found the notion of a rule of decision as distinct from a source of jurisdiction so hard to grasp is puzzling, for section 34 of the Judiciary Act of 1789 declared that the laws of the states "shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply" (*DHSC* 4:105). No one argued that this would permit a federal court to assume jurisdiction over any case arising under state law. It merely meant, as every member of Congress understood, that if a state law applied to a case properly before a federal court and the law did not conflict with federal law, it was to be applied to the case.

[20] Ames to Minot, July 9, 1789 in *Works of Fisher Ames with a Selection from His Speeches and Correspondence*, ed. Seth Ames (Boston: Little, Brown, 1854), 1:62.

It is here that Madison finally enters the debate, arguing that "some Judiciary system was necessary to accomplish the objects of the Government, and that it ought to be commensurate with the other branches of the Government." What precisely he means by "necessary" is unclear. Does he simply mean that, while Congress may under some circumstances rely on the state judiciaries, they should not do so as a matter of policy? This would comport with the orthodox reliance on the Madisonian compromise regarding inferior courts at the Convention. Or does he mean that there is a constitutional bar of some sort to relying on the state judiciaries and that Congress must therefore create a system of inferior courts to administer federal law? Madison's subsequent comments seem to favor the latter position and therefore call into question the orthodox interpretation of the Madisonian compromise.

First, Madison argues that the judicial authority ought to be coextensive with the legislative and executive powers of the government. The new government was complete within itself and adequate to the execution of its own powers. The import of this comes into focus when the constitution is contrasted with the Articles of Confederation.

> Under the late confederation, it could scarcely be said, that there was any real Legislative power, there was no Executive branch, and the Judicial was so confined as to be of little consequence; in the new constitution a regular system is provided; the Legislative power is made effective for its objects; the Executive is co-extensive with the Legislative, and it is equally proper that this should be the case with the Judiciary. (August 29, *Annals* 1:843)

The fundamental institutional change between the confederation and the Constitution was the power of the federal government to enforce its own laws, and to do so by means of its own officers. Reliance on state officers for the performance of federal functions was among the relics of the confederation left lying on the cutting room floor in the Federal Convention. Just as Ames had objected to the delegation of judicial authority by drawing an analogy to legislative power, Madison adds weight to his argument by connecting the judicial

with the executive function. One could hardly argue that the Constitution permits Congress to charge state executives with the execution of federal law. The investiture of federal jurisdiction in state judges was just as absurd.

This may help clarify Madison's understanding of the Madisonian compromise on the creation of inferior courts. When he and Wilson noted that there was a difference between establishing inferior courts in the Constitution and leaving their creation to the discretion of the legislature (June 5, *RFC* 1:125), he evidently did not mean (or did not consider himself to have meant) that Congress could decline to create courts altogether. Instead, the discretion he recognized extended only to the question of the number and arrangement of the courts to be created. There was no question that some must exist and that these must at minimum be adequate to the exercise of exclusive federal jurisdiction. Legislative discretion is bounded as much by Articles II and III of the Constitution as it is by the First Amendment.

Second, Madison draws out at greater length the implications of the vesting clause of Article III for judicial appointments. Were state judges vested with federal jurisdiction, they would necessarily become federal judges and be entitled to the protections of tenure during good behavior and an irreducible salary. Madison evidently understood the vesting clause to mean that Congress could only vest the "judicial power of the United States" in a federal judge, and that these necessarily enjoy the tenure and salary protections of Article III. Since many states fell short of these standards in the constitution of their judiciaries, their judges would be disqualified from wielding the federal judicial power.

Moreover, the president's appointment power presented an ever greater impediment to investiture of state judges. Under the provisions of Article II, the president, "by and with the Advice and Consent of the Senate, 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;"[21] to vest a state officer with federal power would "violate the constitution by usurping a prerogative of the Supreme Executive of the United States" (August 29, *Annals* 1:844). To do so, Congress would have to transfer the appointment of state judges so vested out of the hands of the state and into the hands of the president.

Finally, "laying these difficulties aside," Madison notes that, even if Congress possessed the discretion to decline to create inferior courts, the deficient qualities of the state judiciaries stood as a constitutional bar to their exercise of federal judicial function. "On the whole," Madison concluded, "he did not see how it could be made compatible with the constitution, or safe to the Federal interests, to make a transfer of the Federal jurisdiction to the State courts, as contended for by the gentlemen who oppose the clause in question" (August 29, *Annals* 1:844).

The Debate Concludes

When Madison had concluded, Burke rose and declared that "he had turned himself about to find some way to extricate himself from this measure; but which ever way he turned, the constitution still stared him in the face, and he confessed he saw no way to avoid the evil. He made this candid confession, to let them know why he should be a silent spectator of the progress of the bill; and he had not the most distant hope that the opposition would succeed. If any substitute could be devised that was not contrary to the constitution, it should have his support, but he absolutely despaired of finding any" (August 29, *Annals* 1:844). Others were not as discouraged as Burke. Livermore, Jackson, and Stone

[21] U.S. Constitution, Art. II, sec. 2.

all rise to defend reliance on state courts from Ames, Smith, and Madison, though none are successful in doing so.

Jackson is the first to respond, again relying on appellate review to secure compliance with federal law, "for the Supreme Court will interfere and keep the State Judiciaries within their bounds: That authority will tell them, thus far ye shall go, and no further; and will bring them back when they exceed their bounds, to the principles of their institution" (*Annals* 1:845). Jackson's response reveals a fundamental flaw in the argument for reliance on state courts. Jackson and the others believe that appellate oversight by the Supreme Court is adequate only because they see federal judicial power entirely in terms of restraint. As long as the object of federal judicial power is merely to keep the state judges and state legislatures within their bounds, appellate review appears sufficient. If, however, one appreciates the key role that courts are to play in the administration of federal law, one immediately sees that appellate review is deficient. It is simply impractical for the Supreme Court to command a state judge to administer federal law. It is infinitely more difficult to compel action than to restrain it.

Jackson then turns his attention to Ames's treatment of the supremacy clause. "He has said, that the State courts will not, nor cannot, take cognizance of laws of the Union, as it would be taking up matters out of the bounds of their jurisdiction, and interfering with what was not left to them. Sir, I answer that gentleman with the words of the constitution," at which point Jackson recites the supremacy clause. "This surpasses in power any State laws; the Judges are bound to notice them as the supreme law, and I call upon the gentleman to know, as a professional man, if a criminal was tried for a capital offense under a State law, and could justify himself under the laws of the Union, if the State Judges could condemn him? Sir, they would forfeit their oaths if he was not acquitted;" Jackson rightly points out

that Ames had admitted as much in his argument, but he wrongly concludes that this admission is lethal to Ames' argument. "If there was no jurisdiction, neither could they notice the law" (*Annals* 1:845). Like Stone, Jackson simply fails to grasp Ames's distinction between a rule of decision and a source of jurisdiction. Jackson is correct to say that Ames would accept the hypothetical he poses, but the scenario presented is a prime illustration of Ames' argument. The offense for which the man is on trial is against a state law, but a federal law or treaty or constitutional provision exonerates him. Here, the jurisdiction derives from state law, but the supreme law applies as a rule of decision.

Having done what he could to answer Ames, Jackson next turns to address Madison's contention that investing state judges with federal jurisdiction would necessarily convert them into inferior federal courts. If this is the case, he argues, then the eleventh and twenty-fifth sections of the act, respectively establishing concurrent federal jurisdiction in diversity cases and appellate review of state cases in the Supreme Court, must be considered investitures of federal jurisdiction (*Annals* 1:845-46). But again, Jackson misunderstands the constitutional argument. Madison and Ames never claimed that state courts were deprived by the Constitution of jurisdiction in diversity cases. As we have had occasion to note already, any case falling in the second tier of the jurisdictional menu, but not the first, must necessarily arise under state law. Jurisdiction is therefore presumptively concurrent in these cases and so it is that the Judiciary Act merely provided for the removal of such cases into federal court at the option of the parties. There was no need for Congress positively to vest state courts with jurisdiction in such cases, for it possessed it by default unless positively deprived of it.

At this point, it becomes clear that Livermore's faction is attempting to redefine the extent and import of the new Constitution. The Judiciary Act wore the prospect that Anti-

Federalists like Brutus had foreseen and they were seeking earnestly to interpret its provisions in a way that would mitigate the nationalizing force of the instrument. Recognizing this, Smith rises in answer.

> [T]hese objections come too late, a National Government is established. The Judicial power is a component part of this Government, and must be commensurate to it. If we have a Government pervading the Union, we must have a Judicial power of similar magnitude; we must establish courts in different parts of the Union…. This double system of jurisprudence is unavoidable; it is as much a part of the constitution as the double system of Legislation; each State has a Legislative power, both operating on the same persons, and in many cases on the same objects; it is infinitely more difficult to mark with precision the limits of the Legislative than the Judicial power; no one, however, disputed the propriety of vesting Congress with a Legislative power over the Union, and yet that power is perhaps more liable to abuse than the Judicial. (August 29, *Annals* 1:847-48)[22]

With a few parting comments, the House adjourned. When they resumed debate on Monday, August 31, Livermore rose again to mount a defense of his motion, this time appealing to the silence of the text on the question of state jurisdiction in federal cases. "If the constitution had taken from State courts all cognizance of Federal causes, something

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[22] Pressing his point home, Smith rehashes the exclusive reading of Article III tendered by Ames and Madison. Responding to the permissive reading of Congressional power to establish inferior courts, Smith argues that the discretion recognized

> appl[ies] to the number and quality of the inferior Federal courts, and not to the possibility of excluding them altogether; it is a latitude of expression empowering Congress to institute such a number of inferior courts, of such particular construction, and at such particular places, as shall be found expedient; in short, in the words of the constitution, Congress may establish such inferior courts as may appear requisite. But that Congress must establish some inferior courts is beyond a doubt; in the first place, the constitution declares that the judicial power of the United States shall be vested in a Supreme and inferior courts. The[se] words, "shall be vested," have great energy, they are words of command; they leave no discretion to Congress to parcel out the Judicial powers of the Union to State judicatures[.] Again, the Supreme Court, in two cases only, has original jurisdiction; in all others it has appellate jurisdiction; but where is the appeal to come from? Certainly not from the State courts; it must come from a Federal tribunal….
>
> Does not, then, the constitution, in the plainest and most unequivocal language, preclude us from allotting any part of the Judicial authority of the Union to the State judicature? The bill, it is said, is then unconstitutional, for it recognizes the authority of the Federal court to overturn the decisions of the State courts, when those decisions are repugnant to the laws or constitution of the United States. This is no recognition of any such authority; it is a necessary provision to guard the rights of the Union against the invasion of the States. If a State court should usurp the jurisdiction of Federal causes, and by its adjudications, attempt the strip the Federal Government of its constitutional rights, it is necessary that the National tribunal shall possess the power of protecting those rights from such invasion. (*Annals* 1:850)

might be said; but this is not the case. The State courts are allowed jurisdiction in these cases" (*Annals* 1:852).[23] Livermore is partly right, for the Constitution had not stripped the states of their jurisdiction in all cases where federal jurisdiction was permitted. It left them with concurrent jurisdiction in cases arising under state law but falling in the second tier of federal jurisdiction. However, in cases arising out of the law of nations or federal law, the Constitution simply vested jurisdiction over "all" such cases in the federal courts and declined to grant the state concurrent jurisdiction. No explicit stripping of state jurisdiction in these cases was necessary because the states had never possessed it.

The remainder of the debate presents little that is new. Stone and Jackson each fire parting shots, both relying entirely on slender support afforded by the permissive language in the Article III Vesting Clause (August 31, *Annals* 1:854). Jackson again attempts to buttress this contention by analogizing congressional discretion under the Constitution with the discretion of Congress with respect to inferior courts of admiralty under the Confederation. The Continental Congress had assigned original jurisdiction to state officers and confined itself to appellate review of state decisions. Of course, he neglects to say that the appellate review thus employed did not work and that Washington among others had urged the necessity even then of creating inferior federal courts to handle the business. Livermore concludes by making his last stand on the supremacy clause, arguing again that it vests jurisdiction over all federal causes in the state courts but neglecting (again) to address Ames' insistence that it merely made federal law a rule of decision in state cases (August 31, *Annals* 1:863).

Recognizing that Livermore's faction was engaged in a last ditch effort, the most articulate of the bill's defenders do not even rise to speak, with the exception of one brief

[23] See also, Stone's comments to the same effect at *Annals* 1:852, 854.

conciliatory comment from Madison.[24] Ames and Smith remain utterly silent. Gerry professes his own reservations about the inconveniences of federal trial courts, but admits the necessity of creating them and directs the opposition to the source of the evil. "Do they believe that these disadvantages can be remedied by Congress? I think they cannot; they result from the constitution itself, and therefore must be borne until the constitution is altered, or until the several States shall modify their courts of judicature so as to comport with our system" (*Annals* 1:859).[25] In an oft quoted speech, Vining reiterates Madison's insistence that execution and judgment be coextensive with the law, saying that "the power of making laws, of executing them, and a judicial administration of such laws, is in its nature inseparable and indivisible." Separate them and "justice might be said to be lame as well as blind among us" (*Annals* 1:853).[26]

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[24] "Mr. Madison said, that he was inclined to amend every part of the bill, so as to remove gentlemen's jealousy, provided it should be done consistently with the constitution" (*Annals* 1:851).

[25] Gerry continues:

> We are to administer this constitution, and therefore we are bound to establish these courts, let what will be the consequence. Gentlemen say they are willing to establish Courts of Admiralty; but what is to become of the other cases to which the continental jurisdiction is extended by the constitution? When we have establish the courts as they propose, have fixed the salaries, and the Supreme Executive has appointed the Judges, they will be independent, and no power can remove them; they will be beyond the reach of the Executive or Legislative powers of this Government; they will be unassailable by the State Legislatures; nothing can affect them but the united voice of America, and that only be a change of Government. They will, in this elevated and independent station attend to their duty—their honor and every sacred tie oblige them. Will they not attend to the constitution as well as your laws? The constitution will undoubtedly be their first rule; and so far as your laws conform to that, they will attend to them, but no further. Would they then be confined by your laws within a less jurisdiction than they were authorized to take by the constitution? You must admit them to be inferior courts; and the constitution positively says, that the Judicial powers of the United States shall be so vested. They would then inquire what were the Judicial powers of the Union, and undertake the exercise thereof, notwithstanding any Legislative declaration to the contrary; consequently their system would be a nullity, at least, which attempted to restrict the jurisdiction of the inferior courts. (*Annals* 1:860-61)

[26] In the latter passage, Vining (mis)quotes Pierre from Thomas Otway's *Venice Preserv'd.*

Separated Powers, the Vesting Clauses, and Exclusive Jurisdiction

Use of the Vesting Clauses in the debate over inferior courts mirrors their use in the debate over the removal power. Whereas the removal debate drew out the implications of the Vesting Clauses for separation of powers, the debate over the judiciary act drew out the implication of the Vesting Clauses for federalism. In both cases, they establish a presumption in favor of separation and independence. The president is presumed to control executive functions except where the Constitution provides otherwise. The exceptions to presidential control are the Senate's role in confirmation of officers and ratification of treaties. In the same way, federal judges are presumed to control the exercise of federal judicial functions unless the Constitution provides otherwise.

Moreover, the general nature of the Article II and III vesting clauses strengthens the independence of those institutions in contrast to the limited nature of the Article I vesting clause with its restriction to legislative powers "herein granted." The implication of the general grants in Articles II and III is that exceptions to them are to be construed narrowly. Adjudication of federal cases by the state courts is to be permitted a narrow operation just as the confirmation of officers and ratification of treaties by the Senate are to be permitted a narrow operation.

Of course, in the case of Article II, the exceptions to the general grant of executive power are enumerated clearly. In the text of Article III, however, the enumeration is less clear. In fact, many observers from 1789 to the present find no enumerated exceptions and therefore conclude that Congress is free to create any it pleases. According to this conventional view of Article III, Congress may decline to vest whole categories of federal jurisdiction in federal courts, and moreover to exclude them from the appellate jurisdiction of the Supreme Court, in which case the settlement of such cases would fall entirely into the

hands of state judges or go unsettled. As we saw in chapter five, however, the text does give us guidance with respect to areas where state courts have a role to play in the administration of federal law. The first and most explicit provision is the Supremacy Clause, where state judges are declared to be "bound" by federal law. As Ames explained, this clause does not vest state judges with jurisdiction over federal questions; it merely declares that in the exercise of their own pre-existing jurisdiction state judges are to administer state law in compliance with all applicable federal laws, treaties, or constitutional provisions. The second provision is the jurisdictional menu in Article III, section two, where the text makes selective use of the modifier "all," which distinguishes cases of exclusive federal jurisdiction from cases of concurrent federal and state jurisdiction. In the final six categories of federal jurisdiction—the party-based controversies—the text omits "all" in recognition of the fact that every case falling in one of these categories but not in one of first three categories will necessarily arise under state law and would be decided in a state court unless removed into federal court by one of the parties or by a mandate of Congress.[27] These two provisions are the only ones to be found in the Constitution that acknowledge a concurrent jurisdiction of any sort in the state courts. Given the presumption established by the exclusivity of the Vesting Clause, these provisions are to receive a narrow construction, for the presumption is against their extension to any unenumerated object. Beyond these exceptional provisions, Congress may no more vest jurisdiction over federal cases in a state court than it could vest jurisdiction in a House committee.[28]

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[27] Were it to arise under federal law or international maritime law it would be a federal question regardless of the identity of the parties.

[28] For a general discussion of the importance of interpreting Articles II and III in light of one another, see Steven G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review* 105, no. 6 (1992): 1153-1216; Calabresi and Gary Lawson, "The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia," *Columbia Law Review* 107, no. 4 (2007): 1002-47.

There is one problem with this reliance on the selective use of "all" in the jurisdictional menu: the defenders of the judiciary act do not rely on it. One might therefore object that if such importance were attached to this one word, the defenders of the constitutional necessity of inferior courts in the First Congress would have seized upon it. There are two responses to this objection. First, Ames, Madison, and Smith would have been hard pressed to found exclusive federal jurisdiction on the selective use of "all," because the judiciary bill itself made suits brought by—rather than against—consuls and ambassadors a matter of concurrent jurisdiction, while Article III extended the judicial power to "*all* cases *affecting* Ambassadors, other public Ministers, and Consuls." Thus, the bill before the House transgressed federal exclusivity in these cases. To make the textual argument, then, would have been to furnish Livermore's faction with a club. Second, reliance on the natural limits of state jurisdiction led the delegates to essentially the same conclusion and thereby strengthens the import here attributed to "all" in the jurisdictional menu. The disability of state courts to hear cases arising under federal law and cases of admiralty jurisdiction was an inherent limitation. The states simply possessed no authority when it came to the law of nations and *de novo* federal laws. The delegates never actually take up the question of consuls and ambassadors, but if they had, the argument might have been extended. Such persons are the representatives of foreign governments with which a state may have no intercourse that is not mediated by the external sovereignty of the United States. Thus, any legal actions implicating such persons are properly cognizable only in federal courts. It might then be argued that there was no harm done this principle by permitting foreign emissaries to bring suit against someone else in a state court, for then they have initiated the suit and cannot complain of an injury as long as an avenue to the federal courts was open and they opted not to take it.

Evaluating the Work of the First Congress

We come then to the central question. To what extent do the deliberations and acts of the First Congress support the construction of Article III advocated in the foregoing chapters? As we said at the outset, this question must be answered by reference to Congress's observance of the formal constitutional characteristics mandated by Article III: jurisdictional integrity, institutional integrity, and hierarchy. Before examining each of these, a couple of general observations are in order.

First, it is important to note that the professed opinions expressed in floor debate provide more complete support than the actual content of the bill. That is to say, Congress's deeds do not perfectly correspond to their words. A whole host of political and practical considerations constrain the translation of constitutional principles into law. It is therefore hazardous to assume that the features of the first judiciary act comport entirely with the First Congress's understanding of Article III.

Second, the novelty of the institution envisioned by Article III may have strained the imagination of many congressmen. This will receive more attention below, but for now it is enough to observe that no judiciary within the experience of the framers of the judiciary act had ever operated within the context of a truly federal system, one in which the central and state governments concurrently and directly governed the same citizens. Moreover, no judiciary within their experience had ever combined the geographic reach of the federal judiciary with the hierarchical structure of the federal judiciary.

Jurisdictional Integrity

Let us then proceed to consider the extent to which the Act of 1789 respected the jurisdictional integrity of the federal judiciary. If we consider the judicial power as a whole, leaving aside for the moment the question of the jurisdiction of the Supreme Court, the

judiciary act left relatively small gaps in federal jurisdiction. In examining these gaps, it may perhaps lend some clarity to the discussion to consider the first and second tiers of the jurisdictional menu separately.

Recall that in the first tier, the judicial power extends to "all Cases…arising under this Constitution, the Laws of the United States, and Treaties made…under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction…" In this first tier of federal jurisdiction, we have argued federal courts have exclusive jurisdiction and have received ample confirmation of that claim from the floor debates in the House. That the floor debates support this claim seems to be confirmed by the fact that without exception every defender of the bill (and some of its opponents) who rose to speak in some way acknowledged, sometimes grudgingly, that states possessed no concurrent jurisdiction in these cases and that Congress lacked authority to confer it on them. The judiciary act is generally in keeping with this principle, leaving only two relatively small gaps.

First, states were left with concurrent jurisdiction in suits brought *by* an ambassador, other public minister or consul, though in all of these cases the foreign officer bringing the suit was given the option of filing in federal court. The Constitution, however, does not make this distinction. It provides that the "judicial Power shall extend to all cases…affecting Ambassadors, other public Ministers or Consuls," making no distinction between suits brought by or against them. Indeed, the term "affecting" seems not even to require that these individuals be named *parties* to the suit, only that they be *affected* by it. Congress's rationale for permitting concurrent jurisdiction in these cases is, of course, readily apparent. If the foreign officer involved chooses to file suit in the state court and receives an adverse decision, neither he nor his home country can lay the blame at the feet of the federal

government. The federal courts have not denied him justice nor have they even denied him a hearing, but he is deprived of it by his own election. The rationale therefore seems to be that in this scenario an adverse decision from the state court could not endanger the foreign policy of the Union. This assumption is dubious. A foreign dignitary or government is likely to feel slighted by an adverse state judgment. Whether or not the feeling is reasonable is immaterial; the foreign policy of the Union is still impaired by the offense.

Second, the federal courts were given no appellate jurisdiction over state cases in which a federal claim was upheld. That is to say, if a suit were commenced in state court under state law and the defendant claimed a right or privilege under the federal Constitution or a federal law or treaty, and the state court recognized and upheld the federal claim, the plaintiff could not appeal the decision to the federal court. Again, the rationale here is apparent. If the federal claim is vindicated by the state court, why allow an appeal? After all, appeals from state courts are reserved for encroachments on federal authority or refusals to give effect to federal claims. This rationale holds true if the only function of appellate judicial power is to maintain federal supremacy against state encroachment. Indeed, it is on precisely this ground that modern proponents of the aggregate vesting view have passed over this gap in federal jurisdiction.[29] But this defensive posture is only part of the function to be performed by the federal judiciary in general and the Supreme Court in particular. As the debate in the First Congress and in the Federal Convention attests, faithful administration of federal law was a principal object of the judiciary in general and uniformity

[29] See, e.g., Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* 65, no. 2 (1985), 262-65.

in administration of the law was a principal object of the Supreme Court in particular. The hierarchical character of the federal judiciary was principally aimed to secure uniformity.[30]

In the second tier, in which states retain concurrent jurisdiction, the gaps are much larger. A whole host of diversity cases are excluded, primarily on account of amount in controversy requirements. Generally speaking, Congress excluded civil suits involving less than $500 from the purview of federal courts, regardless of the residency of the parties. In four instances, Congress excluded whole classes of cases falling with the second tier of federal jurisdiction. No provision is made for suits between a state and citizens neither of another state— nor for suits in which a foreign state is a party or the United State is the defendant or the respondent. And a defendant sued in his own state by a citizen of another state would not be able to remove the case into federal court on the ground of diverse citizenship.

Generally speaking, other proponents of mandatory jurisdiction take no issue with these gaps. Amar points out that the gaps are so small and generally inconsequential that "one has to strain one's eyes" to see them.[31] Perhaps one does have to squint to see the gaps in federal jurisdiction left by the first judiciary act, but that fact does little to exonerate the First Congress's constitutional transgression. One has to squint only because the gaps are buried in a mountain of unnecessarily enigmatic provisions. Edmund Randolph complained to James Madison that the provisions regarding jurisdiction were "inartificially, untechnically

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[30] See. e.g., David Sewall to Caleb Strong, March 28, 1789, in *DHSC* 4:370; Richard Law to Oliver Ellsworth, May 4, 1789, in *DHSC* 4:386; William Paterson's Notes for Remarks on Judiciary Bill, June 22, 1789, in *DHSC* 4:411; Paterson's Notes for Remarks on Judiciary Bill, June 23, 1789, in *DHSC* 4:415; Oliver Wolcott, Sr. to Oliver Ellsworth, June 27, 1789, in *DHSC* 4:423; Ellsworth to Law, August 4, 1789, in *DHSC* 4:495.

[31] Akhil Reed Amar, "The Two-Tiered Structure of the Judiciary Act of 1789," *University of Pennsylvania Law Review* 138, no. 6 (1990), 1533.

and confusedly worded."[32] John Dickinson, remarking upon a copy of the bill he had seen, called it "the most difficult to be understood of any Legislative Act I ever read."[33] The same result might have been reached with considerably more clarity and efficiency had Congress simply reproduced the Constitution's jurisdictional menu and then enumerated exceptions to it. Instead, the act enumerates the various objects of federal jurisdiction in a series of enigmatic clauses and leaves the citizen to search for the gaps. This approach seems all the more senseless when one considers that the primary reason Congress avoided simple adoption of the constitutional language was the desire of many members to narrow federal jurisdiction, that is, to make exceptions to it. Of course, one might argue that Ellsworth and the other Federalists were being intentionally enigmatic in order to make the gaps in federal jurisdiction seem bigger than they really are and thereby mollify the Anti-Federalist opposition while keeping federal jurisdiction more or less intact. Or the explanation might be much simpler than that; Ellsworth may simply have been so proud of his own gloss on the Constitution that he kicked hard against any effort to alter it. As Maclay notes in his diary after taking issue with Ellsworth's divergence from the Constitution in his choice of words, "This vile bill is a child of his, and he defends it with the care of a parent, even with wrath and anger."[34]

More to the point, the relatively small number of gaps in federal jurisdiction is an early example of one of the most vexing afflictions suffered by the federal judiciary: Congress's ill-conceived efforts to control the federal docket. The amount-in-controversy requirements, the complex definitions of diversity jurisdiction, and the awkwardly worded

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[32] Randolph to Madison, June 30, 1789 in *DHSC* 4:432.

[33] John Dickenson to George Read, June 24, 1789 in *DHSC* 4:419.

[34] William Maclay, Diary Entry, June 29, 1789, in *DHSC* 4:427.

description of the Supreme Court's federal questions jurisdiction over state courts were all congressional efforts to sift out unimportant cases that might clog the federal docket. Congress insisted on framing general rules by which to triage potential cases. It is notable that even when the Judiciary Act refers to exercises of federal questions jurisdiction it avoids using the explicit "arising under" language of Article III, section two. This peculiarity persisted throughout the 1790s. As Congress passed major statutes, they would include specific grants of jurisdiction under each,[35] "lessening the possibility that an aggrieved party might claim that a contract dispute over a patent or a tort dispute arising during a bankruptcy was one 'arising under' federal laws and thus arguably within the competency of the federal courts." The bar obviously perceived the implication of Congress's insistence on enumeration. In a thorough search of federal court records, Wythe Holt was unable to discover a single attempt by a litigant to claim jurisdiction in the federal courts on federal question ground prior to 1801, when Congress finally granted generally federal question jurisdiction only to repeal it the following year.[36]

Not until 1891, after a century of failed attempts to micromanage the flow of federal cases with general legislation, did Congress begin to relinquish control. In that year, Congress eliminated much of the Supreme Court's mandatory jurisdiction, expanding the appellate responsibilities of the Circuit Courts, and introduced the writ of certiorari as the favored means of bringing cases before the Supreme Court. The writ of certiorari differed radically from the writ of error that had been in use since 1789, for it takes the form of a petition to hear the case that the Supreme Court may reject or deny at its discretion. Thus,

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[35] For a list of these acts, see *DHSC*. 4:730-41.

[36] Wythe Holt, "The First Federal Question Case," *Law and History Review* 3, no. 1 (1985), 171.

case by case discretionary judgment came to perform the sifting function that Congress had until then attempted to perform through general legislation.

Most of the First Congress's practical difficulties in framing the judiciary bill might have been resolved simply by doing less through legislative action and leaving more to judicial discretion. To take but one example, an oft-cited justification for amount-in-controversy requirements for federal appeals was the concern that litigants of modest means would find the cost of litigating an appeal in Washington prohibitive and be forced into a settlement by a wealthy adverse party. The simplest solution is to make the exercise of appellate jurisdiction discretionary, and then the Court can consider the merits of each case individually to determine if a matter of sufficient magnitude to justify the appeal is presented. Given the presence of intermediate courts of appeal, the petitioner will have had one appeal already to ensure the integrity of the trial court's decision.[37]

Institutional Integrity

The institutional integrity of the federal judiciary, embodied in the vesting clause of Article III, received the highest degree of support both from the act and from the floor debates. This is manifest in the conviction, dismissed by proponents of the orthodox account as specious, that inferior courts were a constitutionally necessary component of the federal system. Madison, Ames, and Smith all argue forcefully that at least a portion of federal jurisdiction is exclusive, that the Constitution vests this jurisdiction in Article III judges, and that Congress is therefore prohibited from vesting this authority elsewhere. Without exception, every member of the House that rose to oppose Livermore's motion and

[37] This was precisely the argument employed by Chief Justice Taft in pushing for greater discretion in the composition of the Court's appellate docket. See William Howard Taft, "Possible and Needed Reforms in the Administration of Justice," *Annual Report of the ABA* 45 (1922): 250-69.

defend the inclusion of district courts affirmed this account of Article III. It is therefore surprising to find it denounced as specious and unorthodox. More surprising is the reluctance of some proponents of mandatory jurisdiction, such as Amar, to defend the necessity of inferior courts.

Interestingly, Madison and Ames' construction of the Vesting Clauses in the debate over inferior courts mirrors their use in the debate over the removal power. The removal debate drew out the implications of the Vesting Clauses for separation of powers while the debate over the judiciary act drew out the implication of the Vesting Clauses for federalism. In both cases, they establish a presumption in favor of separation and independence. The president is presumed to control executive functions except where the Constitution provides otherwise. The exceptions to presidential control are the Senate's role in confirmation of officers and ratification of treaties. In the same way, federal judges are presumed to control the exercise of federal judicial functions unless the Constitution provides otherwise.

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categories of federal jurisdiction in federal courts, and moreover exclude them from the appellate jurisdiction of the Supreme Court, in which case the settlement of such cases would fall entirely into the hands of state judges or go unsettled. As we saw in chapter five, however, the text does give us guidance with respect to areas where state courts have a role to play in the administration of federal law. The first and most explicit provision is the Supremacy Clause, where state judges are declared to be "bound" by federal law. As Ames explained, this clause does not vest state judges with jurisdiction over federal questions; it merely declares that in the exercise of their own pre-existing jurisdiction state judges are to administer state law in compliance with all applicable federal laws, treaties, or constitutional provisions. The second provision is the jurisdictional menu in Article III, section two, where the text makes selective use of the modifier "all," which distinguishes cases of exclusive federal jurisdiction from cases of concurrent federal and state jurisdiction. In the final six categories of federal jurisdiction—the party-based controversies—the text omits "all" in recognition of the fact that every case falling in one of these categories but not in one of first three categories will necessarily arise under state law and would be decided in a state court unless removed into federal court by one of the parties or by a mandate of Congress.[38] These two provisions are the only ones to be found in the Constitution that acknowledge a concurrent jurisdiction of any sort in the state courts. Given the presumption established by the exclusivity of the Vesting Clause, these provisions are to receive a narrow construction, for the presumption is against their extension to any unenumerated object. Beyond these exceptional provisions, Congress may no more vest

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implicating these persons are properly cognizable only in federal courts. It might then be argued that there was no harm done this principle by permitting foreign emissaries to bring suit against someone else in a state court, for then they have initiated the suit and cannot complain of an injury as long as an avenue to the federal courts was open and they opted not to take it.

Hierarchy

We come now to the hierarchical structure of the federal judiciary. We found in chapters three, four, and five that this hierarchy was deliberate and that the supremacy of the Supreme Court must be given effect. The establishment of a single supreme tribunal was deliberately chosen over the separation of law and equity in the English system.[40] Among other things, a single supreme tribunal would ensure uniformity in the administration of federal law and the construction of the federal constitution. This arrangement was novel in many respects and the institutional means of giving it effect were unclear. Some legal historians have argued that much opposition to Article III and to the Judiciary Act stem from this novelty.[41] The existing state systems were not so much characterized by hierarchy as by a corps of ambulatory judges serving in various roles. Thus, much confusion arose over what constituted an appellate proceeding (whether it would involve a new trial of facts or permit reversal of an acquittal) and what was meant by a Supreme Court (whether it was to function as a court of error correcting mistakes or as a constitutional court ensuring conformity with uniform legal principles).

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[40] For a discussion of the significance of this separation, see chapter two.

[41] See, e.g., Wilfred Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence* (Norman: Oklahoma University Press, 1989), Introduction and chap. 3.

This divergence from the state model originated in the deliberations of the Federal Convention of 1787. The Framers were pushed toward greater uniformity in the administration of law while, at the same time, the continental scope of the new republic made the ambulatory courts on which the states relied impractical—westward expansion would soon render them impossible. Three considerations impressed upon the Framers the need for uniformity. First, the growth of constitutional supremacy as it displaced legislative supremacy dictated greater uniformity in judicial construction of the laws. Since courts had in the course of the 1770s and 1780s become responsible for upholding a law superior to the legislative will, the Framers could not rely on legislative power to correct misconstructions or diverse opinions; uniformity was required and must be enforced from within the judiciary. Second, direct enforcement demanded a geographically extensive system of courts that had not been necessary under the confederation. Third, the federal government would have need of uniform rules of decision in cases affecting foreign affairs. The states, of course, were relatively free of such concerns, for they had never been responsible for the conduct of foreign policy or the administration of international law, and their judiciaries did not therefore feel the great press of foreign opinion seeking uniformity in their courts of law.

Sending Supreme Court justices around the continent to hold circuit courts was not a feasible means of securing uniformity in the administration of the law, but the reflexive conservatism of the legal establishment and, by extension, Congress made divergence from the existing state template untenable. The circuit system may have been unavoidable, but it could not be anything but a temporary solution. An alternative was sorely needed and it soon became apparent that this solution lay in the institution of regionally situated, intermediate appellate courts to handle the bulk of federal appellate business. This would allow the Supreme Court to concentrate on cases of national importance and relieve it of the

burden of acting as a court of error for the federal system. This solution would eventually find short-lived articulation in the Judiciary Act of 1801.

CHAPTER SEVEN

Legislative Reform and Judicial Action in the Early Republic

Chapter six examined the constructive efforts of the First Congress. We now turn to examine early legislative efforts to reform the system they created and the Supreme Court's initial efforts, both before and during Marshall's tenure as chief justice, to give effect to the judicial power. Throughout the 1790s, important developments further vindicated the constitutional rationale outlined in chapters three through five and at the same time revealed the institutional means of fully implementing it. Repeated attempts to reform the judicial system, especially its deeply flawed circuit riding system, eventually resulted in the Judiciary Act of 1801. For the most part, this act gave full scope to federal jurisdiction and provided a brief glimpse of a mature federal judiciary. The act, however, was so closely associated with the interests of the lame duck Federalists that it became the primary object of Jeffersonian hostility. It was quickly repealed by the sixth Congress. Political constraints would continue to frustrate judicial reform for another 90 years until passage of the Circuit Courts of Appeals Act of 1891 began a process of reform that would find substantial completion with the Administrative Office Act of 1939.

During this same period, the justices of the early Court gave forceful articulation to the formal attributes of Article III, asserting the institutional integrity, jurisdictional integrity, and hierarchy of the judicial power. This early assertion of judicial independence was moderated somewhat following the "revolution of 1800" and Marshall's ascension to the Court. Reacting strategically to Jeffersonian hostility, Marshall surrendered the formal limits of Article III while defending vigorously the essential functions of judicial power. Thus he

laid the foundation both for modern assertions of judicial supremacy and for modern assertions of plenary congressional discretion over federal jurisdiction.

Early Federalist Reforms

The reforms finally enacted by the lame duck Federalists of the Sixth Congress were a decade in the making. Starting with the report of Attorney General Edmund Randolph to the House in 1790, the first decade under the new Constitution saw repeated efforts to give more faithful expression to the institutional rationale of the Constitution. These repeated efforts, with only rare and minor exceptions, proved abortive. The political will to give full effect to Article III simply did not exist, at least, not until the election of 1800 confronted the Federalist Party with the prospect of political exile.

Randolph's Report

In August 1790, the House of Representatives requested that Attorney General Edmund Randolph furnish them with a report "on such matters relative to the administration of justice under the authority of the United States, as may require to be remedied: And that he also report such provisions in the respective cases as he shall deem advisable."[1] This was the beginning of a long-standing practice of relying on the office of the attorney general to advise Congress on the needs of the judiciary, even formulating the budget for the federal courts. There is some question about the object of the House's request, whether it referred only to specific matters respecting compensation for marshals, witnesses, and jurors.[2] In any case, Randolph submitted an ambitious report and draft bill that would have revised the entire judicial system. While it received no real attention in

[1] *HRJ* 1:289.

[2] *DHSC* 4:122.

Congress (it was referred to the next session and quietly died on its way there), it is important for its prescience regarding future reforms.

Most importantly, Randolph's proposed reform would have endowed the judiciary with more of the hierarchical character that the constitutional design suggested. Randolph proposed to accomplish this by instituting five reforms. First, he would have eliminated the circuit riding duties of the justices and staffed the circuit courts with district judges from within the circuit.[3] Even at this early date, the onerous burden of circuit riding had begun to wear on the justices, resulting in increasingly loud complaints to Congress and the president. Pointing to the need for extensive study to perform the task of a Supreme Court justice, Randolph complains of the impossibility of fulfilling these duties whilst riding circuit. "Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency."[4] Second, he would have extended the appellate responsibilities of the circuit courts to comprehend most cases heard in the district courts while at the same time throwing most original matters into the district courts.[5] Importantly, this prefigures the conversion of the circuit courts into intermediate appellate courts a century later. Third, Randolph proposed dropping monetary limits for appeals to the Supreme Court altogether in recognition of the fact that the importance of a question of law can rarely be determined by the amount of money at stake in a particular case.[6] Fourth, the draft bill gave full scope to federal questions jurisdiction, permitting federal courts to take cognizance of all cases

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[3] See section 18 of draft bill, *DHSC* 4:148.

[4] *DHSC* 4:134.

[5] See sections 19 and 5 of draft bill, in *DHSC* 4:148-50 and 140-41.

[6] See section 32 of draft bill, in *DHSC* 4:152-53.

arising under the Constitution and laws of the United States.[7] Finally, Randolph proposed that the clerk of the court publish annual reports of the Court's opinions for circulation among the bench and bar.[8] This last may seem insignificant, but it helps to clarify Randolph's firm belief that uniformity in the administration of federal law was indeed a principal object of Article III and that it was for this reason that the Framers constructed a hierarchical judiciary. "Should the judges of the supreme court become stationary," Randolph remarks in his report, "they will be able to execute reports of their own decisions, and thus promote uniformity through the whole judiciary of the United States."[9]

Randolph's report was not, however, without flaws. Indeed, a very serious one was the elimination of all federal appellate jurisdiction over the state courts. Section 25 of the Judiciary Act of 1789, which had permitted appeals from state courts where a federal claim was denied, would thereby be repealed. It may at first seem strange that a curtailment of the Supreme Court's jurisdiction would accompany so many extensions of the judicial power. It makes sense, however, when one realizes that the animating principle of Randolph's bill is the utter separation of federal and state judiciaries. The realm of each is set forth and ne'er the twain shall meet. Federal conflict is thereby avoided altogether. This bifurcation would simultaneously protect states from dishonor and give full scope to federal questions. Anticipating objections to this part of the plan, Randolph addresses the question at length in his report.

> Does justice intitle a plaintiff to [an appeal from a state decision to the Supreme Court]? When he institutes his suit he has the choice of the state and federal courts. He elects the former, and to that election he ought to adhere.

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[7] See section 5 of draft bill, in *DHSC* 4:140-41.

[8] See section 34 of draft bill, in *DHSC* 4:153.

[9] *DHSC* 4:136.

> Does justice intitle a defendant to it? Certainly not; should he be free to withdraw the cause by a certiorari at any time before trial, from the state court. For if with this privilege he proceeds without a murmur through the whole length of the state courts, ought he to catch a new chance from the federal courts? Have not both plaintiff and defendant thus acquiescing, virtually chosen their own judges?[10]

Randolph's proposal would in essence force litigants to choose their venue and adhere to it. If a plaintiff chooses to sue in state court when he might have sued in a federal tribunal and the defendant declines to remove the case into federal court, then they both have "chosen their own judges" and can have no ground of complaint when one receives an adverse decision. The primary problem here is that it would permit no correction of error or maladministration of the law by a state court. The Anti-Federalists in the First Congress would have confined federal control to appellate review of state decisions only, which of course gives short shrift to the need for direct enforcement. Here, Randolph makes the opposite mistake by assuming that direct enforcement means no contact of any sort between the state and federal governments. He wishes to sever state from federal judicial power in the same manner that the Constitution severs state from federal legislative power. But this ignores two of the primary functions of federal judicial power: the settlement of federal conflict in a legal (as opposed to political) forum and the maintenance of constitutional supremacy over the state and federal governments alike. The formal means by which both functions were to be performed was the appellate oversight of the Supreme Court. It is for precisely this reason that the judicial power was extended to cases arising under the Constitution as well as the laws and it is for this reason that state judges are singled out in the Supremacy Clause, for it is they who are to be held accountable by appeal to the

[10] Randolph's Report, *DHSC* 4:133.

Supreme Court. Whereas the Anti-Federalist at least saw the need for appellate review to hold state judges to their oaths, Randolph is content to rely upon the oath alone.[11]

Benson Amendments

Soon after Randolph submitted his report to Congress, Congressman Egbert Benson of New York submitted a set of constitutional amendments aimed at nationalizing the state judiciaries. Under Benson's proposed amendments, Congress would have power to establish a supreme judicial court in each state with the option of utilizing the judges of the highest common law court in the state. This court would then possess appellate authority over all other state courts, seemingly in state and federal cases alike, subject only to exceptions permitted by Congress. The judges thus appointed would hold their offices during good behavior and receive irreducible salaries out of the federal treasury.[12] The proposal is reminiscent of Hamilton's suggestion at the convention that state executives be appointed by the federal government and be given a veto on all state laws. This is simply a judicialization of the idea and would exert the same nationalizing influence. Though the amendments seems to have had little effect, they did illustrate the ambiguous effects of relying on the state judiciaries. Anti-Federalists had tended to treat it as a means of protecting state autonomy, but Benson's amendments demonstrated that such a policy might just as easily threaten the independence of the states.

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[11] Randolph also subtly omitted from his bill the power of circuit courts, which they had enjoyed under the act of 1789, to issue all writs not provided for in the act. Under this provision, a circuit court had asserted appellate authority over a North Carolina court by means of a writ of certiorari. [more on this in *DHSC*

[12] Benson Amendments, *DHSC* 4:170-72.

Circuit Riding Reform

Prompted in part by the complaints of the justices, the only remotely successful judicial reform in the 1790s was devoted to reducing the burdens of the circuit riding system. [quote from justices' letters to Washington.] The Judiciary Act of 1793, passed at the urging of both the president and the Court, required only one justice to sit at each circuit court, a reduction from the two required by the act of 1789. In practice, this meant each justice would have to ride circuit only once a year instead of twice. "This palliative eased matters a very little."[13] The pressure of westward expansion soon began to make itself felt as the Supreme Court's appellate case load increased and its circuit route stretched farther from the seaboard.

The act of 1793 also gave the courts greater control over their own affairs. The act gave to every federal court discretion "to make rules and orders for their respective Courts directing the return of writs and processes, the filing of declarations and other pleadings, the taking of Rules, the entering and making up Judgments by default and other matters in the cavation and otherwise in a manner not repugnant to the Laws of the United States to regulate the practice of the said Courts respectively, as shall be fit and necessary for the advancement of justice and especially to that end to prevent delays in proceedings" (*DHSC* 4:205).[14] This was a small step toward leaving the "minutiae" to the judges, as Randolph had suggested in 1789.[15]

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[13] Felix Frankfurter and James Landis, *The Business of the Supreme Court* (New York: MacMillan, 1928), 22.

[14] In an attempt to promote uniform procedure in federal courts, the House bill had empowered the Supreme Court to perform this rule making function for the whole judiciary (*DHSC* 4:209).

[15] Randolph to Madison, June 30, 1789, in *DHSC* 4:432-33.

No further reform of the judicial system was seriously attempted until 1798, when two bills for reforming the circuit system were introduced in the Senate. The first, reported to the Senate from committee on March 19, 1798, resurrected the proposal first put forward in Randolph's report to relieve the justices of circuit duty and instead utilize the district judges for that purpose. The bill also sought to increase the number of district courts by dividing five states into two districts each and to increase the number of circuits to five. Despite some early signs of passing the Senate, the bill died after three days of debate (*DHSC* 4:224). The second circuit reform bill followed on the heels of the first and was far more modest in its proposals. It sought little expansion in the size of the judiciary and actually would have repealed what little relief the act of 1793 had afforded the justices by returning to the requirement that two justices attend each circuit. The bill proposed to create an additional circuit, bringing the number to four, and to increase the size of the Supreme Court to eight to cover the new circuit. This time the Senate passed the bill. It was reported by a House committee and then postponed to the next session. The bill was never resurrected.

Passage and Repeal of the Judiciary Act of 1801

The circuit riding reform bills of 1798 were the first glimmers of major judicial reform. Had Congress pursued the reforms to completion at that time, the legislation might have withstood the "revolution" that was to come in 1800. Instead, the Judiciary Act of 1801 was passed by a lame duck session of the Sixth Congress. The Federalists were pretty clearly bent on ensconcing themselves in the judiciary while the Jeffersonian spirit ran its course. It is therefore tempting to treat the Act of 1801 as no more than "the effort of a

party to entrench itself on the bench after the country had sent it into the wilderness."[16] But as Frankfurter and Landis, among other, demonstrated nearly a century ago, the Federalist effort to restructure the judiciary did address pressing institutional needs. More recently, the editors of the *Documentary History of the Supreme Court* concluded that the Act of 1801 "appears to have been a reasonable effort to address the problems brought to light by the experience of the previous eleven years" (*DHSC* 4:284). Indeed, one might fairly say that the whole point of the present chapter is to show that the reforms enacted by the Sixth Congress were not only responding to the present needs of the judicial branch, but faithfully gave effect to the institutional rationale of the Constitution itself. The Judiciary Act of 1801 was therefore a brief moment in which Article III escaped the political constraints of the early republic.

Forerunners to the Act of 1801

The genesis of the Judiciary Act of 1801 was the Harper Judiciary Bill of 1800, reported by a House committee that included John Marshall and Robert Goodloe Harper on March 11, 1800 (*DHSC* 4:310-33). The Harper Bill proposed to divide the country into thirty districts, which were then to be organized into nine circuits. In distributing the 30 district courts, the Harper Bill ignored the state equality so meticulously observed since 1789. This was an important step in recognizing that the national government that operates on the people directly must be tailored to serve them and therefore cannot treat the states as equals. A judge was to be appointed in each district bearing the title of circuit judge. These thirty circuit judges, in addition to their duties in the district courts, would sit on their respective circuit courts. The composition of the circuit courts formed the most important part of the bill, for it relieved the justices of the Supreme Court of the burden of riding circuit. The

[16] Frankfurter and Landis, 21.

judges presently staffing the district courts in the coastal states were to be shifted to new courts having admiralty jurisdiction. In addition to federal crimes and a few other broad categories of cases, the circuit courts were authorized to hear all cases cognizable by the federal judicial power under the Constitution as long as the amount in controversy exceeded one hundred dollars and matter did not fall within the exclusive jurisdiction of the Supreme Court or the new admiralty courts.

Importantly, at least some of the justices of the Supreme Court had this time been consulted in framing the bill. Committee member Samuel Sewall wrote to Justice William Cushing while Harper and Bayard were still preparing the bill to update him on the committee's progress. Evidently, Justices William Paterson and Bushrod Washington had actually met with the committee to provide input on its provisions (*DHSC* 4:285; *HRJ* 3:622-23). This direct consultation with the justices in formation of Harper Bill, along with Randolph's suggestion to Madison in 1789 that the justices of the Supreme Court be consulted before a complete judiciary act was passed and the justices' constant pressure to alleviate the burden of the circuit system, legitimizes somewhat Taft's influence in legislative process a century later (*DHSC* 4:432-33; 2:288-90, 442-44).

When the Harper bill was initially reported to the House, it died on arrival. The *Annals* records that on March 24 the bill was read in committee of the whole and that, when the House adjourned, progress was reported and a question taken whether the committee should have leave to sit again. The House narrowly voted in the affirmative and "the bill was lost" (March 24, *Annals*, 10:643). Nonetheless, Speaker of the House Theodore Sedgwick brought the bill before the House again on March 25 and it was debate for three days. Little of the substance of the debate is recorded aside from the fact that Harper and Marshall defended it at length. On March 27, the opponents of the bill succeeded in

removing the seventh section, which provided for the staffing of the circuit courts. This being the heart of the bill, Harper rose on the following day to concede defeat and request that the House form a new committee for the purpose of making another attempt at reform. Opponents of reform attempted to delay action on the question to the next session of Congress, scheduled to convene in December, but Harper prevailed and a select committee was appointed by the House that again included Marshall (March 28, *Annals*, 10:647-49).

On March 31, a mere three days later, the committee reported the Judiciary Bill of 1800, which Harper introduced in floor debate. Though the bill was a somewhat less ambitious expansion of the judiciary, dividing the country into nineteen districts to be grouped in six circuits, it retained the essential features of the Harper Bill. Unlike the Harper Bill, however, it vested general federal question jurisdiction in the federal courts. This was a significant divergence from existing practice. Throughout the 1790s, Congress had approached extensions of jurisdiction in piecemeal fashion. As though to punctuate its claim to plenary control of federal jurisdiction, Congress included in each federal law passed a provision for federal jurisdiction in cases arising under it.[17]

Passage of the Judiciary Act of 1801

When the Judiciary Bill of 1800 came up for consideration in the Committee of the Whole on April 7, it was moved by Aaron Kitchell of Kentucky to postpone it until the first week of December. Kitchell's motion passed by a two-vote margin. The bill was indeed revived at the second session of the Sixth Congress where it underwent significant revision in the House and eventually passed into law as the Judiciary Act of 1801 on February 13. At the beginning of the second session, President Adams urged Congress to pass a new

[17] For a collection of the acts of Congress containing these piecemeal jurisdictional grants, see *DHSC* 4:730-41.

judiciary act in his annual message and the House responded by again appointing a committee. On December 19, the committee reported a bill that is assumed to have been substantially indistinguishable from the Judiciary Bill of 1800. Though there is no extant copy of it, we do know that it had the same number of sections and was spoken of by members as being substantially unaltered from the previous bill (*DHSC* 4:289n30).[18]

When the bill came before the House, a serious debate ensued that rehashed a number of constitutional questions familiar from the passage of the first judiciary act. On January 5, the House reached section five of the proposed bill, which provided for a division of Virginia into two districts, among other things. Joseph Eggleston of Virginia moved to preserve one district court at Richmond. Eggleston and his supporters argued that there simply was not enough business to occupy a federal judge in the remote parts of the state. "From the remarks of some gentlemen," someone quipped, "it really appeared, as if they wanted an additional Judge, and knew not where to locate him" (*Annals* 10:880). In response a number of Federalists averred that the lack of business was a self-fulfilling prophecy of sorts that likely resulted from the remote location of the federal court.

When debate resumed on January 7, John Dennis of Maryland, a Federalist, raised the constitutional question of the propriety of leaving the state courts to adjudicate federal questions, which of necessity was the case if the district courts were not geographically coextensive with the reach of federal law. "He had himself no doubt of the power. Under our present system of Government, as well as under the Confederation, it had been exercised in analogous cases. The old Congress had expressly vested in the State courts the jurisdiction over Admiralty cases." Dennis goes on to point out that in some of the state ratifying conventions, adovates of ratification had palliated Anti-Federalist concerns about

[18] See also, John Marshall to William Paterson, February 2, 1801, in *DHSC* 4:707.

the extent of the judicial power by arguing that "though Congress had the right of establishing independent judicatories, it was not probable that they would extensively exercise the right; but that they would devolve Judicial powers on the State tribunals." Dennis nonetheless favored giving full scope to the federal judicial power as a matter of expediency, for the example of all other governments taught that the judicial ought to be coextensive with the legislative power. "Besides, Mr. D[ennis] discerned no way of compelling State Judges to perform their duty" (January 7, *Annals* 10:891). Even Harper, with whom the Act of 1801 had its genesis, was ready to embrace a plenary view of Congress's power over judicial structure. "At present we are not under the necessity of establishing a Judicial system as extensive as the powers of Congress." Congress may leave the decision of federal questions to state courts. And Harper is not as convinced of the impracticability of this as Dennis is. "It is true that we cannot enforce on the State courts, as a matter of duty, a performance of the acts we confide to them; but we give them the power, and until they refuse to exercise it, we have no cause to complain" (January 7, *Annals* 10:892).

Other Federalists, however, still held to the mandatory and exclusive construction articulated by Ames and Madison in 1789. John Bird of New York, for example, "declared himself still of opinion, that the delegation of Judicial power to the State courts was unconstitutional." Bird takes exception to Dennis's reliance on the precedent of the First Congress, for practice is not an infallible guide to Constitutional meaning. Finally, harkening back to Madison's discourses in the First Congress, Bird explains the Constitution's rationale in furnishing the federal government with its own judicial apparatus.

> [T]he institution of a Judiciary coextensive with the other branches of the Government, was essential to the due administration of all just plans of civil policy. On the judiciary depended the fair administration of justice. It was an or-gan of essential use and necessity. It should be attached to the system of which it formed a

> part, independently of all other systems. As well might the organ of one human body expect to derive support from the organ of another disconnected body, as the Federal Judiciary expect to gain support from State tribunals. So thought the framers of the Constitution[.] (January 7, *Annals* 10:892)

At this point, Abraham Nott of South Carolina launches into a lengthy explanation of the textual basis for the exclusivity of federal jurisdiction over federal questions and the attendant necessity of inferior courts. He first explains the textual barriers to utilizing state courts as inferior federal courts. The term "inferior courts," he argues, "mean[s] a court possessed of subordinate powers within the same judiciary system, and necessarily implied a superior court, capable of controlling an under exercise of those powers." Whereas the hierarchy that characterizes Article III had been generally neglected in previous congressional debates, Nott here makes it explicit. He continues by observing that "the State Legislatures might with as much propriety be called inferior to the Federal Legislature, or the Executive of any State be called a subordinate officer of the President of the United States, as the State courts could be considered inferior courts of the United States." The appellate jurisdiction of the Supreme Court aside, the very theory on which the federal system was based would be violated by the employment of state officers for the performance of federal functions. The unique character of American federalism derives from its insistence that both the state and federal constitutions draw their authority immediately and independently from the people and that they both consequently exercise their powers directly upon the people. Randolph had attempted to carry this separation so far as to undermine federal supremacy in his 1790 report, while Benson had sought to overcome the separation by his proposed amendments. Nott here properly restores the balance between the two, appreciating both the supremacy and the independence that define the federal system.

Nott also points out the import of the terms "ordain and establish" in the Constitution. When Article III acknowledges Congress's power to ordain and establish inferior courts, the "obvious meaning of the Constitution, was that the Judicial power of the United States should be confided to courts established and organized by their own Government" (*Annals* 10:893). He might have reinforced his point by reference to the real source of Congress's power in Article I—as opposed to the mere recognition of it in Article III—where Congress is authorized to "institute Tribunals inferior to the supreme Court." Nott's point could hardly be more clearly affirmed than it is by this language. As we saw in chapter five, the evolution of the language in these provisions supports this reading.

Again following Madison, Nott further observes that even were Congress somehow authorized to vest jurisdiction in a state judge, the judge would have to receive his appointment from the president; to do otherwise "would be to divest the President of the power given him by the Constitution of appointing all officers, and to exercise it ourselves." In that case, Congress would in effect be making the appointment.

The most important passage of Nott's speech for the present purpose, though, is his construction of the jurisdictional menu of Article III, section two, where he cites the selective use of "all" as an indication of exclusive jurisdiction. It is worth quoting at length.

> He said there was a marked difference between the words of the Constitution relating to the catalogue of cases enumerated in the first part of that section, and those in the latter part of the same. The word "all" was prefixed to each of the cases first mentioned, down to the words "admiralty and maritime jurisdiction" inclusive, but was omitted in all the subsequent cases. He could see no reason why that word was added in the former part of the section, and omitted in the latter, except it meant that there was no case of the former description to which the Judicial power of the United States should not extend; in fact that the courts of the United States should have exclusive jurisdiction of all those cases, and in the latter their jurisdiction should be concurrent with the State courts. (*Annals* 10:894)

Nott then goes beyond the mere textual distinction to explain the rationale behind setting these classes of cases apart for settlement exclusively in the federal courts.

> It was further to be observed, he said, that the first description of cases here enumerated, were such as had received their birth from the Constitution and laws of the United States, and could not have existed previous to the establishment of the Government, or be such as immediately involved the rights and interests of the General Government; but that the latter were such as the individual States might have jurisdiction of, previous to that period. He presumed the State courts were not vested with more power under the present Constitution than they were before, unless given them by the Constitution; nor are they divested of any, unless by the same instrument, or by Congress, in pursuance of the power therein given to them. And he had seen no part of the Constitution that delegated this power to the State courts, or that authorized Congress to do it. It appeared to him that the meaning of the Constitution was to give to the courts of the United States exclusive jurisdiction over cases arising under the Constitution or laws of the United Staes, and also over all cases immediately affecting the general interests, and to reserve to the individual States the exclusive jurisdiction over their own local concerns; and that in cases involving their own interest and the rights of others, they might have concurrent jurisdiction. (*Annals* 10:894-95)

Nott's explanation runs immediately up against the Supremacy Clause and, like his predecessors in the First Congress, he must explain the reason this provision does not vest jurisdiction over federal questions in the state courts. He attempts at length to explain by use of examples the distinction between a rule of decision and a source of jurisdiction, but cannot seem to reduce the principle to clear terms as Ames had done in the First Congress.

The *Annals* contain no answer to Nott's construction of the constitutional provisions. Assuming there was none, we may assume that it was either on account of an inability to do so on the part of the opposition or due to the other members' conviction that the expediency of the bill was the more immediate question. In light of this diverse reliance on constitutional principle and expediency, the editors of the *Documentary History of the Supreme Court* characterize the January 7 debate over the propriety of delegation of judicial power to state courts as "inconclusive" (*DHSC* 4:290). Had the majority on the question eroded? It seems that at least some had embraced a deferential posture toward the determinations of the First Congress. Already, its acts were taking on a quasi-constitutional aspect and delegates seem reluctant to confront it.

The remainder of the House debate is largely devoid of constitutional considerations. The remainder of the time spent in Committee of the Whole seems to have been consumed by debate over salaries and the issue of establishing diverse citizenship by assignment. On January 12, the Committee of the Whole reported the bill to the House with a handful of amendments, which the House proceeded to approve over the next five days. On Friday, January 16, the *Annals* record that the bill "was ordered to be engrossed, and read the third time on Tuesday next" (*Annals* 10:912). The bill was affirmed by a vote of 51 to 43 and sent to the Senate for their concurrence (*Annals* 10:915). The Senate committed the bill quickly and it was reported a week later without amendment. Floor debate proceeded rapidly and the bill was passed without amendment on February 7. One senator explained the haste with which the Senate proceeded in passing the bill: "Such is the critical state of the Votes in the House…that it is Supposed it will be in imminent Danger, if it should return to the House & be placed within their Power."[19] Gouverneur Morris later defended the Senate's obstinate refusal to allow amendments in 1802 while opposing the effort to repeal it.

> [A]ll the amendments wer rejected, pertinaciously rejected; and I acknowledge that I joined heartily in that rejection. It ws for the clearest reason on earth. We all perfectly understood, that to amend the bill was to destroy it; that if ever it got back to the other House, it would perish. Those, therefore, who approved of the general provisions of that bill, were determined to adopt it. We sought the practicable good, and would not, in pursuit of unattainable perfection, sacrifice that good to the pride of opinion. We took the bill, therefore, with its imperfections, convinced that when it ws once passed into law, it might be easily amended. (*Annals* 11:79-80)

In terms of jurisdictional and institutional integrity, the act of 1801 extended the reach of federal courts almost to their utmost constitutional limit. The most significant expansion of federal judicial power was in the extension of the original jurisdiction of the circuit courts to "all cases in law or equity, arising under the constitution and laws of the

[19] William Bingham to Richard Peters, February 1, 1801, in *DHSC* 4:706. See also, Bingham to Peters, February 10, 1801, in ibid., 712.

United States [and] also of all actions, or suits, matters or things cognizable by the judicial authority of the United States."[20] The first (and only) federal question case to come to the circuit courts under this grant was a libel action. Holt speculates that the circuit judges who granted jurisdiction in the case, who were incidentally Jefferson's appointees, did so on the assumption that the "laws of the United States" comprehended the common law or so much of it as federal judges saw fit to apply.[21] This would be an extravagant expansion of federal jurisdiction indeed. But would it really be as significant as it seems on its face? The most vexing implication of common law jurisdiction would be the federal courts' capacity to hear state cases, but most state cases in which federal courts might take interest were already cognizable under diversity jurisdiction. Of course, there is the prospect of federal judges employing the common law to set aside state legislation or state judicial decisions under the Supremacy Clause. Presumably, the Supreme Court could even use it to produce a uniform common law throughout the states. Justice Story may well have welcomed something of this sort. On the other hand, one might very well argue that the common law thus employed by federal judges would be confined, as all "laws of the United States" are, to constitutionally designated objects. It would be strange indeed to limit the scope of Congress's power to certain objects and then leave all other matters to judicial legislation through the common law. Such a construction makes utter nonsense of the 10th Amendment as well as the eighth section of Article I. It is certainly doubtful that it might have been used to invalidate federal legislation, as Jeffersonians feared, for the common law had always been understood to be subject to legislative revision.

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[20] Judiciary Act of 1801, §11.

[21] Holt, "The First Federal Question Case," 175-84.

The principle virtue of the Act of 1801, though, was its establishment of a sustainable system, more adaptable to westward expansion. John Marshall, newly minted as Chief Justice, wrote to Justice Paterson while the bill was pending before the Senate declaring his approval of the new system. "Its most essential feature is the separation of the Judges of the supreme from those of the circuit courts, & the establishment of the latter on a system capable of an extension commensurate with the necessities of the nation." It was in this regard especially that the Act of 1801 excelled the existing system, for creating a clear separation between the Supreme and circuit courts was a necessary ingreadient of any system that gave effect to the hierarchy inherent in Article III. The Supreme Court must be free to perform its appellate duties with minimal distraction if uniformity in the administration of law is to be secured in so extensive a country as the United States. And though the act did not entirely realize the potential of the circuit courts in this regard, extensive intermediate appellate courts are likewise a necessary ingredient of a uniform system. Their ability to sift cases for Supreme Court review and to function as courts of error for the district courts is irreplaceable. Though the act of 1801 did not itself fully implement these principles, it did lay the necessary institutional groundwork. Indeed, the modern judiciary might well have developed in 19th rather than the 20th century had this foundation been allowed to stand. But it was not permitted to stand and the development of the judicial power would have to wait.

The Repeal Act of 1802

Talk of repeal had of course begun before the Judiciary Act of 1801 had even received Adams' signature. Republicans were indignant that the outgoing Federalist had so blatantly used the courts as a vehicle for preserving their own influence in the government contrary to the movement of public opinion in favor of the Jeffersonians. Accordingly, at

the first session of the Seventh Congress, John Breckenridge of Kentucky, who was to become Jefferson's principal mouthpiece in the Senate, introduced a motion to repeal the Judiciary Act of 1801 (January 6, 1802, *Annals* 11:23-24). A lengthy and heated debate ensued respecting the constitutional extent of legislative discretion in abolishing offices once created. It is perhaps ironic that the repeal of the Act of 1801 occasioned more debate over the constitutional questions involved than the passage of it had. Indeed, the debate over this question fills nearly 200 pages in the *Annals of Congress*.

The central question in the debate was a simple one. Is the legislative power of revision as extensive as power of creation? The Republicans' argument on behalf of repeal may be stated succinctly. With respect to the expediency of the repeal, the Republicans argued that the extension of the circuit courts had been an unnecessary expense. As evidence, they cited a message from President Jefferson that detailed the cases then pending in the federal courts with the object of demonstrating that the existing system had been fully adequate to dispose of the judicial business. Moreover, having demonstrated that the act did not originate in necessity, they argued that its sole motive was the creation of offices that the Federalists might fill with their own personnel. Having originated in corrupt patronage, the bill was all the more subject to repeal.

With respect to the constitutionality of the measure, the Republicans essentially asserted that a legislature may not be bound by the acts of a previous one. While the legislature may possess no power to remove a judge from office, it may abolish the office he occupies, for the existence of the office derives from an act of the legislature. Following this logic, some members asserted a distinction between the Supreme and inferior courts in this respect. Since the inferior courts derived their existence entirely from legislative creation, they were subject to abolition in a way that the Supreme Court, which derived its existence

from the Constitution, was not. Textually, this argument relied heavily on Congress's power to establish inferior courts "from time to time."

The opponents of repeal argue that the power of creation does not carry with it the power of annihilation.[22] On the one hand, this distinction was evident from the text of the Constitution. Congress was authorized by the eighth section of Article I to "institute" inferior tribunals and this power was further described in Article III as a power to "ordain and establish" courts. Furthermore, the case of judges was different from that of other officers on account of their tenure of office deriving directly from the Constitution.[23] On the other hand, the distinction between the power of creation and the power of annihilation was also evident in the nature of separated powers. The power of creation never conflicts with judicial independence. Unmaking a court, however, encounters immediate conflict with independence, for it is but a "circuitous" means of removal from office, to borrow a phrase from Senator Tracy. If an office is to be annihilated, some provision must be made whereby the office holder is not deprived of the office until the established tenure has expired. For example, the annihilation of the office may be made contingent upon the next vacancy (*Annals* 11:58). This was how the Sixth Congress had proceeded in the Judiciary Act of 1801 when they provided that the number of Supreme Court justices would be reduced to five at the next vacancy.

Reversion to the old system also raised anew the old questions of the exclusivity of federal jurisdiction and the propriety of vesting it in state judges. Some of the Federalists gave powerful articulation to the jurisdictional and institutional integrity of the judicial power

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[22] Gouverneur Morris furnishes the most articulate opposition to the repeal. See, e.g., *Annals* 11:26-41, 76-92, 157, 159, and 180-82.

[23] Some would argue that this distinction between constitutionally and legislatively established tenure is irrelevant. Even were Congress to establish the term of an office, they could not deprive the office holder of his office until the specified term had expired.

of the Union. Ultimately, though, this important constitutional debate was submerged in the politics of the moment and would not emerge for a long while.

The Judiciary Act of 1802

Upon repealing the Federalist Judiciary Act of 1801, the new Jeffersonian majority found itself under considerable pressure to replace it with some reform of the judicial institution. "They had to face the same conditions that had moved the Federalists to reorganize the judicial system. They, too, had to provide for the needs of new territory; they, too, had to relieve the Justices from excessive circuit burdens; they, too, had to pass 'an Act to amend the judicial system.'"[24]

The Judiciary Act of 1802, which President Jefferson signed into law on April 29, divided the country into seventeen districts organized into six circuits. Each circuit court was to be composed of one Justice and one district judge and was to convene twice a year in each district. Anticipating the burden this would place on Supreme Court justices, the act permitted a single judge to preside over a circuit court. It took little time for this proviso to translate into circuit courts regularly held by district judges sitting alone. "With the growth of the country and the corresponding increase in circuit court business, the latter provision was constantly invoked if circuit courts were to be held at all. Increasingly it became impossible for the Justices to attend circuit in all the districts at all sessions, and the circuit courts devolved more and more into the hands of single district judges."[25]

[24] Frankfurter and Landis, 30.

[25] Frankfurter and Landis, 32.

Judicial Construction of Article III

Judicial construction of Article III in the early republic exhibits much the same ambivalence toward congressional regulation that the debate in Congress exhibited. Up until about 1796, the Supreme Court expressed an understanding of Article III and the limits it placed on legislative discretion in a manner that was in line with the constitutional rationale, much as the majority in the First Congress had. As the Court transitioned to the Jeffersonian era, with Marshall at the helm, its support for the constitutional rationale became more sporadic. Marshall's construction of Article III preserved the most important functions of the judicial power but gave little scope to the formal limits that gave these functions substance.

The Institutional Integrity of the Judicial Power: Hayburn's Case

Hayburn's Case is the first reported constitutional case coming before the Supreme Court of United States. The circuit courts had been directed by the Invalid Pensions Act of 1792 to extend each of their sessions by five days to examine the claims of invalid pensioners injured in the Revolutionary War. The courts were then to transmit to the Secretary of War, for his review and approval, a recommendation in each case detailing the claims of the pensioner and the amount to which the court judged him to be entitled. The Secretary of War would then forward those recommendations he deemed meritorious to Congress for their approval. All three circuit courts sitting in the spring of 1792 expressed in some form their opinion that the law was unconstitutional. Chief Justice John Jay and Justice Cushing, sitting on circuit in New York with district judge James Duane, issued a statement on April 5 declaring the delegation of this duty to the courts unconstitutional, but nonetheless agreeing to hear the pensioners' claims as "commissioners" rather than judges. Justices Wilson and Blair, sitting on circuit in Pennsylvania with Judge Richard Peters,

refused to hear the claims of one Mr. Hayburn and addressed a letter to President Washington on April 18 stating their reasons for the refusal. Justice Iredell, sitting on circuit with Judge Sitgreaves in North Carolina, addressed a similar letter to the president on June 2. Thus, the substantive opinions in the record were actually issued by the justices sitting on circuit in the spring of 1792.[26] Attorney General Edmund Randolph appeared before the Supreme Court at the August term to request a mandamus commanding the circuit courts to hear the pensioners' claims. The justices postponed the attorney general's petition until the next term of the Court and in the interim Congress passed a new law that mitigated the concerns of the justices.[27]

The opinions of the justices on circuit were unanimous in the rationale of their objections to the Pension Act; all three held inviolable the institutional integrity of the judicial power. The starting premise for the justices' objections was the separation of powers embodied in the Vesting Clauses. Article III vested the judicial power of the United States in courts of law and nowhere else. Though Congress might provide and arrange inferior federal courts, Congress could not itself wield any judicial power. At the same time, Congress could not vest any but judicial powers in the federal courts, nor could Congress extend the judicial power to objects beyond the jurisdictional grant of the Constitution. Jay and Cushing declared that "by the constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the

[26] The statements of the circuit courts are compiled in a footnote to *Hayburn's Case*, 1 U.S. (1 Dal.) 410-11 (1792).

[27] An Act to Regulate the Claims to Invalid Pensions, February 28, 1793, 1 U.S. Stat. 324.

executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."[28]

Though it was clear that the responsibility devolved on the courts by the act was non-judicial in character, the justices pointed out that its ministerial character was further confirmed by the fact that the courts' determinations were reviewable by an executive officer and by the legislature. Jay's letter, as well as the others, firmly rejected any review of a judicial determination by the other branches, for "by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."[29]

Thus, the justices vigorously defended the institutional integrity of the judicial power, making clear that they would countenance neither its extension beyond the jurisdiction conferred by the Constitution nor its corruption by the legislative delegation of non-judicial powers to the courts. Wilson, Blair, and Peters stated the whole matter succinctly.

> 1st. [T]he business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded *without* constitutional authority. 2d. [I]f, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.[30]

It is of immense importance to note, however, that the justices did not go further in their opinions and deny Congress the power to curtail the jurisdiction of the courts. While there is some language in the opinions suggesting that the immediate source of the judicial

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[28] *Haybunr's Case*, 1 U.S. at 410.

[29] *Haybunr's Case*, 1 U.S. at 410.

[30] Ibid.

power is the Constitution and not a legislative grant, they do not explicitly challenge congressional authority to refuse to extend the judicial power to its constitutional limits. Thus, they did not insist on the jurisdictional integrity of the judicial power, or, more accurately, they protected it in only one direction by insisting that it may not be extended beyond the jurisdictional menu in the second section of Article III.

Before leaving *Hayburn's Case*, one other observation is in order. The controversy that followed upon the justices' refusal to perform the duties imposed on them by the Pension Act may have furnished the first instance of the Supreme Court declaring a federal law unconstitutional. Among other things, the act of 1793, which displaced the Invalid Pensions Act of 1792, preserved a right to any pensions issued under the 1792 act that were founded "upon any legal adjudication" and by exclusion invalidated all pensions issued under any non-legal adjudication. This raised a question about whether the pension issued by Jay and Cushing on the Eastern Circuit were invalid, since they had claimed to issue these pensions as "commissioners" and not judges. The act of 1793 therefore authorized the attorney general and the secretary of war to obtain a decision from the Supreme Court regarding the authority of persons "styling themselves commissioners" to hear claims under the act of 1792. Under this provision, the United States sued one Yale Todd for a sum he had received pursuant to a hearing before the "commissioners." The suit was brought before the Supreme Court as an original matter at the February term of 1794. In order to preserve Todd's claim to the pension, the Court would have to find that circuit court before which he made his claim was sitting as the circuit court and not as a ministerial commission. Only the outcome of the case is known for certain as no written opinion survives. The Supreme Court declared that the Todd must return the sum he had received as the commission from which he received it had no authority to issue it. In 1851, Chief Justice

Taney inserted a note in the U.S. Reports, appended to the case of *United States v. Ferreira*, averring that the Supreme Court had thus ruled the Invalid Pensions Act of 1792 unconstitutional nearly a decade before *Marbury v. Madison*. As Chief Justice Taney points out, it seems that "the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists [in the 1790s], and seems to have been entertained by the learned judges who decided Todd's case."[31] Ironically, this is precisely the congressional power that the Marshall Court would declare unconstitutional nine years later and illustrates the extent to which Marshall's construction of Article III in that case is questionable.

Hierarchy and the Jurisdiction of the Supreme Court: Chisholm v. Georgia

Whereas *Hayburn's Case* dodged the question whether Congress could curtail the constitutionally vested jurisdiction of the federal courts, *Chisholm v. Georgia* presented the question directly, at least as it respects the Supreme Court. The case involved a suit by a citizen of South Carolina against the state of Georgia. Chisholm sought to recover a debt owed to him by the state in federal court, citing Article III's extension of the judicial power to "Controversies between a State and Citizens of another State[.]" The Judiciary Act of 1789 made no provision for cases of this sort, either as an original matter or on appeal to the Supreme Court. And with respect to the Supreme Court's constitutionally vested original jurisdiction over cases "in which a State shall be a Party," section 13 of the Judiciary Act of 1789 had explicitly excluded suits between a state and citizens of another state from the Supreme Court's original jurisdiction.[32] Thus, in order to take cognizance of the case, the

[31] *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), 53.

[32] Section 13 declared: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party except between a State and its Citizens; and except also between a State

Supreme Court would have to derive its jurisdiction to do so directly from the Constitution and bypass the Judiciary Act of 1789, which it did in a four to one decision, Justice Iredell (who had rendered the initial decision denying Chisholm's claim on circuit) being the only dissenter.

Chisholm is also of immense importance because it furnishes us with the considered opinion of James Wilson and Edmund Randolph on the power of Congress to regulate the jurisdiction of the Supreme Court. Recall that Randolph and Wilson were the principal drafters of Article III in the Committee of Detail at the Federal Convention of 1787. They had held the pens that that created the jurisdictional menu of the second section of that article and their construction of its language therefore carries great weight. It is fortunate then, that Randolph's oral argument on the question before the Court and Wilson's written opinion are both preserved entire.[33]

The single most important aspect of Randolph's and Wilson's arguments is their direct reliance upon Article III as an irreducible grant of jurisdiction to the Supreme Court. Indeed, Wilson's opinion confirming the jurisdiction of the Court never so much as refers to the Judiciary Act or the Exceptions Clause of Article III. He instead goes straight to the jurisdictional menu. Finding there an extension of judicial power over "Controversies between two or more States," Wilson queries whether "the most consummate degree of professional ingenuity [could] devise a mode by which [such cases] could be brought before

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and Citizens of other States or Aliens, in which latter case [i.e., suits involving aliens] it shall have original but not exclusive jurisdiction." Grammatically, the "latter case" refers to suits between "a State and…Aliens" in contradistinction to suits between "a State and citizens of other States." Therefore, the exception embodied in "except also" applies with full force to suits between a state and citizens of other states, while such suits involving aliens is additionally modified by the subordinate clause. For the text of section 13, see *DHSC* 4:69. Had the Eleventh Amendment not enshrined this exception in the Constitution, it would nonetheless have fallen within the scope of the Court's invalidation of Section 13 in *Marbury*.

[33] Randolph's argument is reprinted in 2 U.S. (2 Dal.) 419-29; Wilson's opinion, along with the other seriatim opinions in the case, is reprinted in *DHSC* 4:193-217 as well as the relevant section of the U.S. Reports.

a court of law, and yet neither of those states be a defendant?" Wilson is of course responding to Georgia's claim that the language of the jurisdictional menu referring to suits between individuals and states referred only to suits in which a state was plaintiff; suits in which a state found itself defendant were presumptively excluded from federal jurisdiction by the doctrine of state sovereign immunity. Wilson dismisses this by pointing out the impossibility of such a construction, since controversies between two or more states must involve at least one state as a defendant. The fact is, then, that the subsequent provisions granting jurisdiction over suits "between a State and Citizens of another State" makes no distinction between who is to be defendant and who is to be plaintiff.

Of course, Wilson's rejection of Congress's effort to exclude the constitutionally vested jurisdiction of the Court is, at least in this case, merely implicit. Nowhere in his opinion does he affirmatively deny Congress's power to exclude cases from the Court's appellate jurisdiction. He does, however, do so in a later case. "Even…if a positive restriction [on the appellate jurisdiction of the Court] existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision."[34] Randolph had expressed a similar sentiment in a letter to Madison in 1789 and does so again in his oral argument here. Not only may the Court disregard the Judiciary Act in assuming constitutionally vested jurisdiction, it may moreover formulate its own processes and procedures for hearing the case and executing its judgment.[35] "From the tenor of opinions of the justices in the majority, it is evident that they substantially accepted the constitutional

[34] *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796), 325.

[35] See Edmund Randolph to James Madison, June 30, 1789 in *DHSC* 4:432.; 2 U.S. (2 Dal.) 420-21 and 426-27. For a discussion of Randolph's remarks, see Clinton, "Early Implementation and Divergences," 1563-65.

premises of Randolph's argument."[36] Cushing, Blair, and Jay all followed Wilson's example in relying upon the constitutional grant rather than the Judiciary Act,[37] Cushing going so far as to suggest that any inconvenience stemming from the jurisdiction of the federal courts would have to be remedied by constitutional amendment[38] and Blair declaring that the "Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal."[39]

Iredell was alone in his account of plenary view of congressional discretion and would remain so until Ellsworth joined the Court as chief justice. It was then that a debate ensued between Wilson (the drafter of Article III) and Ellsworth (the drafter of the Judiciary Act of 1789) over the extent of congressional power. Ellworth's spirited defense of congressional discretion led one observer to "wonder whether the dispute was one of legal theory and principle or of ego."[40]

In any case, the mere fact that Randolph articulated and Wilson confirmed (along with three of his colleagues) this rationale lends weighty support to the view that Article III creates a hierarchical judicial system in which the Supreme Court must function as a court of last resort. In practice, this means that no act of Congress may deprive the Supreme Court of the discretion to review any decision, state or federal, falling within the scope of the judicial power of the United States. The Eleventh Amendment is no detriment to this argument, for it merely altered the scope of the judicial power; it contains no language that

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[36] Clinton, "A Mandatory View," 1565.

[37] Clinton, "A Mandatory View," 1567.

[38] 2 U.S. (2 Dall.) 468.

[39] Ibid., 450.

[40] Clinton, "A Mandatory View," 1568.

contradicts the rule that the Court here establishes that its appellate jurisdiction is vested immediately by the Constitution.

Jurisdictional Integrity and the Necessity of Inferior Courts: Martin v. Hunter's Lessee

While these early decisions furnished a judicial construction of Article III that gave effect to the institutional integrity and hierarchical structure of the judicial power, the full articulation of the jurisdictional integrity (and the corresponding necessity of inferior courts) would not surface until Justice Story's famous dictum in *Martin v. Hunter's Lessee*.[41] "[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."[42] He comes to this conclusion through a familiar line of reasoning.

> If Congress may lawfully omit to establish inferior Courts, it might follow that, in some of the enumerated cases, the judicial power could nowhere exist…. Congress cannot vest any portion of the judicial power of the United States except in Courts ordained and established by itself, and if, in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on State courts) could not reach those cases, and, consequently, the injunction of the Constitution that the judicial power "shall be vested," would be disobeyed. It would seem therefore to follow that Congress are 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.[43]

Echoing the arguments of Ames and Madison in the First Congress, Story draws out the implications of exclusive federal jurisdiction. If purely federal cases, such as those identified in the first tier of the jurisdictional menu, may only be decided by a federal court, then some federal tribunal must have original jurisdiction in the case. Though Story does not make much of it here, the rationale requires not only some inferior courts, but geographically

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[41] *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

[42] Ibid., 304, 336-37.

[43] Ibid., 330-31.

extensive inferior courts, for Article III requires all criminal cases to be tried in the state wherein the crime was committed.

Relying on the selective use of "all" in the jurisdictional menu, Story later enumerates the cases in which federal jurisdiction is exclusive and for which Congress must therefore provide inferior courts with original jurisdiction.

> In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, and that the judicial power shall extend to all cases; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms 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, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason, and it is not very difficult to find a reason sufficient to support the apparent change of intention….[44]

Story's dictum in this case with respect to the existence of exclusive jurisdiction is usually dismissed on the ground that it conflicts with the Madisonian compromise on inferior courts. But, as we saw in chapter five, there are ample reasons to doubt the authority of the compromise, not least of which is the fact the Madison among others argues in the First Congress that inferior courts are a necessity and that the Constitution has settled exclusive jurisdiction on the federal courts in some cases. Story's rationale for considering the first tier of federal jurisdiction exclusive is remarkably similar to that offered in the First Congress.

> The vital importance of all the cases enumerated in the first class to the national sovereignty might warrant such a distinction. In the first place, as to cases arriving under the Constitution, laws, and treaties of the United States. Here the State courts

[44] *Martin v. Hunter's Lessee*, 14 U.S. at 333-34.

> 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. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would therefore be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations, and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not therefore to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.[45]

As Story demonstrates, the Constitution's distinction between the exclusive first tier of jurisdiction and the concurrent second tier is not merely arbitrary. It flows from the nature of the Union and recognizes that not all federal powers are carved out of pre-existing state sovereignty, but arise from the Constitution itself in a direct grant from the people.

Marshall's Strategic Ambivalence

Thus far we have found support in the case law of the early Court for the three formal principles—hierarchy, institutional integrity, and jurisdictional integrity—that the Framers employed to secure the three functions assigned to the judicial power—direct enforcement, the maintenance of constitutional supremacy, and the legal settlement of federal conflict. But in all of this, the most influential voice in the development of the judicial function in the early republic has stood silent. What of John Marshall? Did he not lay the foundation for the independent exercise of judicial review and establish the Court as the arbiter of constitutional meaning in the federal system? Marshall's silence thus far stems

[45] *Martin v. Hunter's Lessee*, 14 U.S. at 334-35.

first from his distinctive approach to securing judicial power and second from his peculiar role in debates over the balance between legislative power and judicial independence. Let us begin with the latter point.

Marshall, it seems, is the medium most favored by proponents both of judicial independence and legislative control. He is the authority both for Congress's claims of plenary discretion in the arrangement and curtailment of judicial power and for the modern judiciary's claim to guardianship of the Constitution. To view it another way, he is cited as authority for the *violation* of all the formal principles and for the *protection* of all the judicial functions outlined above. His example is thus employed both to buttress and to undermine the rationale of Article III. *Marbury v. Madison* is a microcosm of this duality, for it is cited simultaneously as the basis of the Court's function in maintaining constitutional supremacy and as the basis for stripping the courts of jurisdiction. Under that precedent, the judges may invalidate any legislative act they deem contrary to the Constitution and the legislature may strip the judges of jurisdiction over every matter except those comprehended by the original jurisdiction of the Supreme Court. How can the same hand provide so firm a support for the judicial function and at the same time withhold from the judiciary its formal protections?

The problem is largely resolved, however, if we look to the institutional and political context of Marshall's decisions. Marshall recognized that the Court was relatively powerless to combat Congress's claims to plenary control over the structure and jurisdiction of the courts; the political constraints successfully imposed on the constitutional order by the Anti-Federalists and Jeffersonians in the early republic were simply to resilient to challenge from the bench. Moreover, even had the Marshall Court asserted its supremacy over the judiciary, the necessity of extensive federal trial courts, and the unconstitutionality of concurrent state

jurisdiction in exclusive federal cases, it possessed no institutional means of giving effect to these forms. For example, under the rationale articulated by Wilson and Randolph in *Chisholm*, the Supreme Court might have given effect to its supremacy by adopting the writ of certiorari at any time as a discretionary means of reviewing all state and federal cases within the scope of federal jurisdiction rather than waiting for legislative enactment of the procedure over a century later. With apparent irritation at the accession of the Court to congressional encroachment, Justice Baldwin would suggest as much in 1831 in a dissent from one of Marshall's opinions.

> Though the courts of the United States are capable of exercising the whole judicial power, as conferred by the constitution; and though congress are bound to provide by law for its exercise, in all cases to which that judicial power extends; yet it has not been done, and much of it remains dormant for the want of legislation to enable the courts to exercise it, it having been repeatedly and uniformly decided by this court, that legislative provisions are indispensable to give effect to a power, to bring into action the constitutional jurisdiction of the supreme and inferior courts.[46]

The problem, though, is that the circuit riding duties and mandatory appellate jurisdiction with which Congress so burdened the Court left little time for the justices to exercise discretionary appellate jurisdiction. Marshall could see that this was not a hill worth dying on. Similar institutional constraints might be adduced with respect to the other formal principles that rendered them equally impracticable.

The very structure of the federal judiciary as Congress had designed it created additional constraints on the Court's construction of Article III. As Clinton observes, the "segmented" manner in which the early court considered Article III questions may have influenced its decisions. The provisions of Article III, especially passages such as the exceptions clause, must be read in conjunction with the whole of the article--and Article III must likewise be read in the context of other important provisions of the Constitution--if its

[46] *Ex Parte Crane*, 30 U.S. (5 Pet.) 190 (1831), 202.

provisions are to be consistently interpreted. But questions regarding federal jurisdiction were presented to the courts piecemeal in the early republic. The Supreme Court's appellate jurisdiction over inferior federal courts was far from complete; thus, many constitutional questions respecting inferior court jurisdiction were presented in the district and circuit courts, considered there in isolation from questions about Supreme Court jurisdiction, and never received subsequent consideration by the Supreme Court itself. This explains why, for example, the most complete statements the Supreme Court makes on constitutional questions regarding the Supreme Court come in the form of dicta, such as Story's in *Martin* and Marshall's in *Durousseau*. At the same time, the Supreme Court tended to deal with constitutional questions about its own jurisdiction in similar isolation from other constitutional questions, as in *Marbury* and *Cohens*. "The judicial misinterpretation of article III [that characterized the early Court] may have been the product of the segmented manner in which congressional power questions initially were raised in the federal courts."[47]

What is remarkable about Marshall's tenure on the Court was his ability to concede so much to the claims of legislative supremacy and yet lay so broad a foundation for judicial independence. Instead of expending the court's political capital to gain what little ground was possible with respect to the formal principles of Article III, Marshall instead chose to expend his energies to firmly establish the judiciary's role in maintaining constitutional supremacy and in the legal settlement of federal conflict. We need only examine a few examples to establish the truth of this assertion.

Again we find that the *Marbury* decision is illustrative of the point. In 1802, the Jeffersonians presented Marshall with a prime opportunity to fully repudiate legislative transgression on judicial independence. Because of the Court's temporarily expanded

[47] Clinton, "A Mandatory View," 1562.

jurisdiction and the diverse set of questions raised by the repeal of the Judiciary Act of 1801, the Court might have heard a case requiring a complete account of Article III, but Marshall declined to do so. In an effort to limit the interference of the Court with the Republican program, the repeal act had even canceled the 1802 term of the Supreme Court, delaying it until 1803. Of course, when the Court reconvened in 1803, Marshall nonetheless found a way to effect an extension of judicial power. Realizing, we may presume, that the Court could not secure institutional reform by demanding that the administration reinstate the judges ousted by the repeal, Marshall did the one thing that courts can always do without the concurrence of the political branches: he declined to act. Withholding the writ of mandamus from Marbury obviously accomplished little aside from averting a confrontation with Jefferson. But Marshall understood the power of words and he took the opportunity not only to exercise the power of judicial review but to frame the power in such a way as to suggest that it was an implicit component of the constitutional order. He tied judicial independence and constitutional government so closely together as almost to suggest that the two were inseparable. Marshall had fixed a conception of judicial power as guarantor of constitutional supremacy in the public mind.

Fletcher v. Peck carried this function yet further by establishing the Court's role in securing state observance of constitutional limits. "[A state] cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States which none claim a right to pass."[48] In particular, this case was the opening shot of a long campaign that

[48] *Fletcher v. Peck*, 10 U.S. 87 (1810), 136.

the Marshall Court waged against state encroachment on the sanctity of contracts. Marshall's opinion left no doubts about the extent to which he saw the protection of constitutional rights against state encroachment a basic function of the federal judiciary. "It is, then, the unanimous opinion of the Court that…the State…was restrained, either by general principles which are common to our free institutions or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."[49] One might plausibly say that Marshall here introduces a surprisingly modern conception of fundamental rights into the jurisprudence of the Court.

The Court had also hereby indicated that it had no intention of waiting for Congress to take the initiative, but would intervene in state affairs to preserve constitutional limits even absent legislative or executive action. It was precisely this kind of judicial independence, or activism if you will, that had so struck the delegates to the Federal Convention when Dr. Johnson moved to include cases "arising under this Constitution" in the jurisdictional menu. That the institutional demands imposed by the circuit riding system would prevent the Supreme Court from performing this function to its fullest potential is not material. The fact is that Marshall had firmly legitimized the Court's function as guarantor of constitutional supremacy over both state and federal governments.

In *McCulloch v. Maryland*, the Marshall Court vindicated the constitutionality of the national bank and preserved federal supremacy from Maryland's attempt to levy a tax on a federal corporation. The Court thereby asserted its role as the forum in which major federal conflicts would be resolved. Disputes over the extent of federal power and the reservation of state power would, as far as possible, receive a legal resolution.

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[49] Ibid., 139.

> The Constitution of our country, in its most interesting and vital parts, is to be considered, the conflicting powers of the Government of the Union and of its members, as marked in that Constitution, are to be discussed, and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.[50]

Marshall aptly summarizes the Framers' rationale for devolving the settlement of federal conflict on the courts of law. The legal forum is the least prone to degenerate into violence and it forces the parties to the dispute to articulate their claims in terms of generally accepted constitutional principles. As long as a legal resolution may be had, the resort to force is averted. As Marshall later pointed out in *Cohens v. Virginia*, to withhold a legal resolution of such contentious controversies, "the government is reduced to the alternative of submitting to [state encroachments] or of resisting them by force."[51]

Though the Marshall Court never laid claim to the full implications of its supremacy in the federal judicial system and its attendant function of ensuring uniformity in the administration of the law, it did at least sow the seeds of supremacy in its review of state court decisions. The most important in this regard is *Cohens v. Virginia*. In that case, the highest court of a state claimed that its decisions were not appealable to the Supreme Court. Marshall responded by reference to the Court's constitutionally vested jurisdiction. Specifically, he interpreted the "arising under" jurisdiction of Article III, section two to include any case in which a correct outcome depends on the construction of the Constitution, laws, or treaties of the United States.

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[50] *McCulloch v. Maryland*, 17 U.S. 316 (1819), 400-01.

[51] Ibid., 377.

> The jurisdiction of the Court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.[52]

As we saw in chapter five, Marshall had elsewhere admitted broad legislative discretion in regulating the composition of the Court's appellate jurisdiction. Here, though, Marshall finds a limit. Any exception to the Supreme Court's jurisdiction over federal questions arising in a state court must be sustained "on the spirit and true meaning of the Constitution," and by implication could not be sustained on the basis of a legislative enactment. Marshall seems to suggest that the Court's federal questions jurisdiction over state cases must be left intact. Here, as in the other cases, Marshall energetically asserts the function of the Court, but does not insist on legislative observance of the constitutional forms associate with it.

From this discussion, Marshall seems to emerge as a mere functionalist, giving effect to the spirit of the Constitution and ignoring its forms. Proponents of the "essential functions" view of Supreme Court jurisdiction might therefore be seen as the true heirs to Marshall. They, like him, attempt to promote and preserve the Court's function as a constitutional court, but without insisting upon observance of the formal limitations enshrined in the text. The difference between them, though, is that Marshall was arguably a functionalist out of necessity; defending the formal limits of Article III simply was not feasible in the context of the political and institutional constraints he faced. Marshall was merely picking his battles. Modern functionalists, on the other hand, persist in ignoring the sanctity of formal limitations for no apparent reason. The only reason, at least, that seems

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[52] *McCulloch v. Maryland*, 17 U.S. at 379-80.

plausible is the assumption that if Marshall (and the later Court's that relied on his precedents) did not bother to defend the formal limits, then the limits must not be defensible.

But treating Marshall as a mere functionalist is a gross misinterpretation of his legacy. By legitimizing the constitutional functions of judicial power, Marshall paved the way for the institutional reforms that would follow in the next century. Like the Framers, he articulated a conception of the judicial function that went beyond the institutional needs of the moment. The geographic extension of the judiciary would come by force of circumstance and the circuit riding system was destined for eventual reform. The most pressing need in during Marshall's tenure was to establish the broad principles, so that when the institutional expansion came to fruition, it would be guided by a right conception of the judicial function. In this, Marshall, along with Wilson and Randolph on the early court and Madison and Ames in the First Congress, demonstrated the capacity to comprehend the constitutional order as a perpetual frame of government. It is their vision of the judicial power that comes to fruition in the great reforms of the 20th century.

CHAPTER EIGHT

Constitutional Forms and Political Practice

Responding to an inquiry about the proceedings of the Federal Convention, Gouverneur Morris wrote in 1814 that constitutional interpretation "must be done by comparing the plain import of the words, with the general tenor of the instrument." He continued:

> That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others[.][1]

Subsequent experience bears testimony to Morris' success. So subtly did he embed his "own notions" in the text that one reader of Article III can find ample room for plenary congressional control of the federal judiciary while another finds rigid barriers to legislative encroachment. Congress has found itself in this predicament for the last 200 years, constantly claiming plenary control of federal jurisdiction but at the same time prodded by the developing needs of the nation to give full scope to the judicial power. The foregoing chapters have argued that Congress's assertion of plenary power finds its true foundation in the political constraints of the early republic (chapters six and seven) while the institutional and jurisdictional expansion of the judicial power finds its true origin in the institutional design of the Constitution itself (chapters three, four, and five).[2]

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[1] Morris to Timothy Pickering, December 22, 1814, in *RFC*, 3:419-20.

[2] It is important to clarify this statement about the constitutional pedigree of the modern judiciary by pointing out that it includes only the institutional scope of the judicial power: its structure, its jurisdiction, its power to regulate its own procedures, and its power to refuse to give effect to unconstitutional laws.

The present chapter will attempt to illustrate this further by tracing the emergence of the modern judiciary in the half-century between 1891 and 1939. We will begin with a brief prefatory account of judicial reform from 1802 through Reconstruction. While Congress made little progress in reforming the judicial system in this period, its failed attempts to do so vividly illustrate the disparity between the constitutional design and congressional practice. We will then turn to consider the work of Congress as they brought the judicial institution to maturity, beginning with the Circuit Courts Act of 1891. The concluding section of the chapter draws out the implications of this account for studies of American political development. It is hoped that this account will confirm not only the constitutional origins of the federal judiciary as we know it but also the important role that the Constitution plays in the development of American political institutions.

Judicial (non-)Reform before 1891

The Act of 1802 did little to accommodate westward expansion. Like the Federalist scheme the Jeffersonians had repealed, it left the creation of additional districts and circuits to future Congresses as the need arose. However, the act also required that each new circuit be accompanied by a new Justice on the Court, meaning that every extension of the lower courts implied a reconfiguration of the Supreme Court. This did little more than erect an unnecessary barrier to reform. The Jeffersonians' assumption, of course, was that additional justices would be needed to fulfill the new circuit duties, but given the increasingly remote situations of the new circuits, it was unlikely that the justices would make a serious effort to

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Questions about the ends toward which these powers have been employed are beyond the scope of this inquiry. One might fully approve the institutional arrangement and powers of the federal judiciary and still take issue with its interpretation of the Commerce Clause or the First Amendment. The present investigation is agnostic with respect to such questions.

fulfill the new duties. Tying the size of the Supreme Court to the extent of the circuit courts made little sense in this context.

The 1802 system would govern the judiciary until 1869, but the intervening period saw a number of important developments, not the least of which being the repeated recognition that the circuit riding system was deeply flawed. Westward expansion rendered the system increasingly indefensible.

The narrative of congressional action from 1802 to the Civil War was a repeated narrative of inadequate and untimely congressional action. Time and again, growing delay in the administration of judicial business would prompt largely unheeded complaints from Western statesmen and from the president. Congress would then shuffle in several years too late with a solution already rendered obsolete by intervening developments. Each time, Congress employed some mixture of the same three solutions: adding circuits to comprehend new states, adding justices to perform the new circuit duties, and extending the Court's term to accommodate its growing docket.

Even if Congress had provided these remedies in a timely fashion, it would have done little to ameliorate the underlying problems. Since the increasing remoteness of new circuits prevented Justices from sitting on circuit, the district judges were in effect handling the whole of the judicial business in some areas. Furthermore, given the enormous $2000 amount-in-controversy requirement for appeals from inferior federal courts to the Supreme Court, the decisions of the district judge were often final even in cases where divergent constructions of the statutes and constitutional provisions had been applied in different districts. Congress's attempt to identify important cases through general rules was proving cumbersome, but would nonetheless continue to dictate much of the Court's docket until well into the twentieth century.

At the same time, what circuit riding duties the justices did fulfill only pilfered their attention from the business of their own Court. Congress's solution was to extend the Court's term, which in turn made circuit riding duties even more difficult to fulfill. Congress was bailing water from one part of a sinking ship into another.

By the time California joined the Union in 1850, the circuit riding system had long since proved unworkable. In 1838, Justice McKinley reported having traveled 10,000 miles to sit on circuit in Alabama, Louisiana, Mississippi, and Arkansas. This was a staggering figure that nearly tripled the next longest circuit on the court and was twenty times longer than Chief Justice Taney's.[3] Long as it was, though, one can only surmise that it would pale in comparison to circuit travel comprehending California and the other Western states. Thus it happened that sheer necessity compelled Congress to appoint a circuit judge distinct from the Supreme Court, a remedy repeatedly suggested to Congress by good policy and common sense from the 1790s onward.

After the war, the dockets of the federal courts began to swell. On the one hand, cases falling under existing federal jurisdiction multiplied rapidly. On the other, Congress steadily extended the reach of federal jurisdiction in the 1860s and 70s. This new jurisdiction was occasioned in part by new laws and new sources of appeal such as the Court of Claims, the Bankruptcy Act of 1867, the National Bank Acts, the Civil War Amendments, and the Civil Rights Acts. Another voluminous source of jurisdiction was opened by Congress in the Removal Act of 1875, which vested jurisdiction over all cases raising federal questions in the federal courts and provided for the removal of such cases initiated in the state courts into federal courts. All of this led Judge Dillon in 1881 to observe that "the small tide of litigation that formerly flowed in Federal channels has swollen into a mighty stream." He

[3] Frankfurter and Landis, 49.

went on to note that "much, perhaps most, of the great litigation of the country is now conducted in them."[4]

Despite its tremendous impact on federal jurisdiction, the Act of 1875 went almost unnoticed among contemporary observers.[5] Its legislative history, however, raised some interesting points. Most importantly, the bill's author, Senator Matthew Carpenter, "reflect[ed] the persistence of Story's dictum in *Martin v. Hunter's Lessee*"[6] by arguing that the Judiciary Act of 1789 was "substantially in contravention of the Constitution" by virtue of its failure to vest the full scope of federal jurisdiction in the federal courts.[7]

Emergence of the Modern Judiciary, 1891-1939

This newly expanded jurisdiction put even greater strain on the "old machinery" of the federal judiciary. "Again it became manifest that the federal judiciary articulates as an entirety. The efficacy of the Supreme Court was seen to depend upon the distribution of federal judicial power and the system of courts devised for its exercise. A drastic reorganization of the whole judicial structure had thus become imperative."[8] Despite widespread recognition of the dire need for reform, it would be long in coming. For fifteen years, a string of efforts to establish intermediate appellate courts to siphon off the Court's overflowing docket proved abortive.

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[4] Dillon, *Removal of Causes*, 4 ed., 3 quoted in Frankfurter and Landis, 66, n. 34.

[5] Frankfurter and Landis, 65.

[6] Frankfurter and Landis, 68 n. 43.

[7] *Cong. Rec.*, 2:4986.

[8] Frankfurter and Landis, 70.

The Circuit Courts Act of 1891

The most serious reform efforts after 1875 called for the creation of intermediate appellate courts that would exercise final jurisdiction in most cases. Such a scheme was introduced first by Judge George Washington McCreary, then a representative from Iowa, in 1876 and was followed six years later by a substantially similar bill authored by Senator Davis of Illinois. Basically, the McCreary and Davis bills gave concurrent jurisdiction to the existing district and circuit courts while eliminating the appellate jurisdiction of the latter. Nine new appellate courts would be created, one in each circuit, with judges to be drawn from the circuit and district courts. At the same time, the bills raised the bar for Supreme Court review, limiting it to cases involving more than $10,000 or raising a federal question. Thus, much of the Supreme Court's diversity jurisdiction was eliminated.

Aside from the usual objections that stemmed from jealous suspicion of federal power, critics of these reform efforts raised concerns about the maintenance of uniformity under such a scheme.[9] If nine separate appellate courts were to exercise final jurisdiction in most cases, would not uniform administration of the laws be defeated? The concern was (and is) a valid one. The manifest purpose of vesting the judicial power of the Union in "one supreme Court" was to preserve uniformity in the administration of federal law. The multiplication of intermediate appellate courts would seem to frustrate that aim. In practice, though, it may help to promote uniformity. One of the oft-noted occasions for appellate review is division in the lower courts on a significant question of law. Intermediate appellate courts may actually aid in the identification of such divisions. Because the courts of appeals have responsibility for only a part of the federal courts, they can more easily sift out divisions on difficult questions in the trial courts. Presumably, similar questions of national

[9] Frankfurter and Landis, 82.

importance will arise in other circuits as well. If the courts of appeals settle the questions uniformly, the difficulty is at an end. If, however, a question is of such delicacy that it produces divergent outcomes in the courts of appeals, its importance may easily be recognized by the Supreme Court. In this way, a multi-tiered appellate system may actually furnish a more efficient system for identifying difficult cases that warrant settlement by the Supreme Court.

The alternative schemes recommended by critics of the McCreary and Davis bills ultimately failed to provide an answer to this difficulty. One school of thought, embodied in the so-called Maury Bill and later advocated by the Philadephia Law Association, called for the creation of a single intermediate court of appeals to hold sessions at various cities throughout the year. A variation on this scheme involved the enlargement of the Supreme Court to eighteen members, a number of which were to be selected each year to sit as an intermediate tribunal. Yet another plan would partition the Supreme Court to produce three specialized panels.[10] All of these proposals aimed at easing the burden on the Supreme Court's docket without sacrificing uniformity. The problem, however, is that the uniformity thus secured would be fictitious. Whereas the multi-tiered system proposed by McCreary and Davis (and later embodied in the Act of 1891) effectively highlighted the most divisive questions by producing conflicting decisions in the courts of appeals, these alternative proposals furnished no such means of bringing important questions to the fore. The so-called proponents of uniformity failed to appreciate the extent to which divisions among the courts of appeal would promote uniformity rather than undermine it.

The Davis and McCreary bills were not, of course, free of defects. While their efforts to create intermediate appellate courts were well reasoned, their corresponding effort

[10] Frankfurter and Landis, 82-83.

to constrict the Supreme Court's appellate jurisdiction was ill-advised. The error lay in a basic assumption that had pervaded congressional action from the first Congress onward. Congress assumed that the best means of identifying important cases for decision by the Supreme Court was the establishment of general legislative guidelines. The most prominent example of such guidelines was the amount in controversy requirement that persisted throughout much of the nation's history. The problem with such an approach is that the importance of a case can rarely be determined by the amount of money at stake in it, or for that matter by any other predetermined criteria. The factors that determine the importance of a case are so various and complex that nothing short of individual scrutiny and discretionary judgment can accurately make the determination. By declining to incorporate this kind of jurisdictional discretion into their reforms, McCreary and Davis failed to appreciate the promise of their own proposals.

A sense of urgency pervaded Congress's deliberations, but produced no decisive action until passage of the Circuit Courts of Appeals Act in 1891. That act not only gave effect to the repeated efforts of reformers like McCreary and Davis; it excelled their efforts insofar as it gave broader scope to the discretion of the Supreme Court in filling its own docket. The Circuit Courts Act finally created a system of intermediate appellate courts. Under the act, the existing circuit and district courts were collapsed to form a more extensive system of trial courts. Nine new courts of appeals—one in each circuit—would consist of three judges to be drawn from among the district and circuit judges. Justices of the Supreme Court were eligible to sit on the appellate bench, but no duty to do so was laid on them. Thus ended the much-criticized circuit riding system. The act also provided for the appointment of an additional circuit judge in each circuit to help shoulder the new duties that the courts of appeal would occasion.

To relieve the Supreme Court's burgeoning docket, the Act of 1891 gave the courts of appeals final jurisdiction in a whole host of cases, including cases in which federal jurisdiction was dependent entirely upon the diverse citizenship of the parties and those arising under criminal, admiralty, revenue, or patent laws. Had the act stopped here, it would have achieved its purpose only in part. The Supreme Court's case load would certainly have been more manageable, but its ability to ensure uniformity in the construction of the laws would have been seriously undermined. Those who framed the act must have realized this and consequently provided the Supreme Court with discretionary authority to intervene when necessary in the proceedings of the courts of appeals by means of the writ of certiorari.[11]

The Judiciary Act of 1925

With the Act of 1891, Congress took a giant leap toward a fully independent judiciary by furnishing the Court with the means to oversee the exercise of federal jurisdiction in its entirety. But an important impediment to the Court's discretionary exercise of its jurisdiction remained, for Congress continued its habit of setting apart large categories of cases for mandatory appeal to the Supreme Court. The eventual solution would be Congress's abandonment of its ill-advised effort to control the Court's docket in the so-called Judges Bill of 1925. However, this move to discretionary jurisdiction was rendered impracticable in 1891 by important political constraints. As Frankfurter and Landis explain, "The establishment in 1891 of intermediate appellate tribunals had to overcome a deep professional feeling against taking away from litigants the right to resort to the Supreme Court for vindication of their federal claims." Frankfurter and Landis go on to argue that it

[11] *Stat.*, 26:826-27.

would not have been politically possible to establish ciurcuit courts of appeals if Congress had not preserved a right of appeal in many cases.[12] This political impediment would have to be removed before expansion of the Court's discretionary jurisdiction could be fully realized.

In the meantime, though, the Supreme Court was asked to perform two distinct roles in the judicial system. On the one hand, the Court's mandatory jurisdiction suggested that it was a court of error functioning to correct the decisions of lower courts. On the other hand, the Court's discretion in the use of certiorari suggested that it was a constitutional court functioning to ensure the uniform and faithful application of the constitution and laws of the United States.

The latter role was more consonant with the design of the Constitution. From the inception of the government of the Union, the Court had struggled to perform the functions of a constitutional court, but had been hindered by its circuit-riding and mandatory appeal duties. As late as 1922, Chief Justice Taft complained to the American Bar Association "that counsel were often astute in framing pleadings in state courts to create an unsubstantial issue of federal constitutional law and so obtain an unwarranted writ of error to the Supreme Court." Such litigants, he explained, "sought merely to get another chance to have questions of importance to them, but not of importance to the public, passed upon by another court."[13] In principle, these duties were peripheral, but in practice, they consumed an inordinate share of the Court's time. This "frivolous and unnecessary consumption of the time of the Supreme Court" interfered materially with the national interest and the writ of

[12] Frankfurter and Landis, 258.

[13] Taft, "Possible and Needed Reforms," 5.

certiorari appeared to be the only feasible remedy.[14] "The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country," Taft further elaborated before the House Judiciary Committee, "passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal."[15] Writing in 1927, Frankfurter and Landis summarized the case for discretionary jurisdiction and pointed out the defect in legislative control of the docket:

> To resolve conflicts among coordinate appellate tribunals and to determine matters of national concern are the essential functions of the Supreme Court. But such issues appear in myriad forms and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment.[16]

Congress had begun the process of converting the Court's appellate procedure from error to certiorari in the Circuit Courts Act of 1891 and had extended its use to most appeals from state courts in 1916. Taft was determined to see the process completed during his tenure as chief justice. His remarks to the ABA in 1922 were merely part of an extensive legislative campaign that he pursued while heading the Court. Taft's principal role in shepherding through the reforms of the 1920s and 30s was a sharp departure from precedent. He "deemed it the prerogative and even the duty of his office to take the lead in promoting judicial reform and to wait neither upon legislative initiation in Congress nor upon professional opinion."[17]

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[14] Ibid., 6.

[15] Quoted in Frankfurter and Landis, 257n10. Taft had raised the same point while president in his annual messages to Congress. See, e.g., First Annual Message, December 7, 1909, in Richardson, *Messages and Papers of the Presidents*, 16:7431; Second Annual Message, December 6, 1910, in ibid., 7423-24.

[16] Frankfurter and Landis, 257.

[17] Ibid., 259-60.

The immediate context and the occasion for his speech was the Court's presentation of the so-called Judges' Bill to Congress, a proposal that would evolve into the Judiciary Act of 1925. Recognizing its inability to triage cases by way of general regulations, Congress was finally ready to cede responsibility for the Court's appellate docket to the justices. Moreover, the legal profession had become more amenable to the idea of eliminating the Court's mandatory appellate jurisdiction in favor of discretionary review.

> Thirty years of active and efficient functioning on the part of the circuit courts of appeal had resulted in a different temper [among members of the bar]. These courts were now taken for granted as courts of great authority. The prestige they enjoyed invited greater reliance upon them in the general burden of appellate review. Very different considerations could thus guide the framers of new judiciary acts from those that confronted the authors of the [Circuit Courts Act] of 1891.[18]

Sensing that the time was ripe for major reform, the justices took the initiative and went to the House and Senate judiciary committees with their concerns about the increasing size of the docket. The result was a suggestion that the justices themselves prepare a bill. A committee was formed consisting of Justices Day, McReynolds, and Van Devanter. This was just prior to Taft's appointment as chief justice. Following his appointment, he encouraged the work of the committee and took part in its deliberations *ex officio*. The Judges' Bill, as it came to be known, was introduced in Congress on February 17, 1922. Over the next three years, Taft actively lobbied Congress and the legal community to secure adoption of the reforms recommended by the Court.[19]

When it became known that the Judges' Bill gave the Court discretionary control over practically its entire docket, it met with resistance from some quarters. The flood of

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[18] Frankfurter and Landis, 258.

[19] See, e.g., Taft, "Possible and Needed Reforms in the Administration of Justice in the Federal Courts," *Annual Report of the American Bar Association* 45 (1922): 250-69. Following passage of the Judiciary Act of 1925, Taft even published an apologia for the new law that was reprinted, as many of his essays and speeches were, in numerous law journals. See Taft, "The Jurisdiction of the Supreme Court of the United States under the Judiciary Act of 1925," *Yale Law Journal* 35, no. 1 (1925): 1-12.

criticism focused largely on concerns about the potential for abuse and the abdication of legislative prerogative. But Congress was not abdicating its legislative responsibilities by turning over control to the Supreme Court. It was instead abandoning its own misguided effort to micromanage judicial business. That congressional control of the Court's docket originated in the first judiciary act does not save it from criticism, for even then prescient statesmen had urged Congress to leave the Court to manage its own affairs.[20]

Other critics complained that the conversion to discretionary jurisdiction would deprive litigants of the right to have their case reviewed by the highest court in the land. Taft answered these critics by arguing that one appeal to an intermediate tribunal was adequate protection against error in the trial courts. Indeed, he had been making the case for a single appeal since at least 1908, when he advocated the simplification of procedures and the reduction of appeals in a speech before the Virginia state bar association. "The court of first instance and the intermediate appellate court should be for the purpose of finally disposing in a just and prompt way of all controversies between litigants. So far as the litigant is concerned, one appeal is all that he should be entitled to." Appeals to the court of last resort, he averred, are to be reserved for those cases raising questions in which the public has an interest.[21]

Taft further argued that not only was limitation to one appeal permissible, it would actually better secure equality in the administration of justice. "It may be asserted as a general proposition, to which many legislatures seem to be oblivious, that everything which tends to prolong or delay litigation between individuals, or between individuals and

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[20] See, for example, Randolph to Madison, June 30, 1789 in *DHSC* 4:431-32..

[21] Taft, "Inequalities in the Administration of Justice," *Green Bag* 20 (1908), 444-45. Taft later made the same argument in his second annual message to Congress. "No man ought to have, as a matter of right, a review of his case by the Supreme Court. He should be satisfied by one hearing before a court of first instance and one review by a court of appeals" (Richardson, *Messages and Papers*, 16:7423-24).

corporations, is a great advantage for that litigant who has the longer purse." This may seem counterintuitive at first glance.

> Many people who give the subject hasty consideration regard the system of appeals, by which a suit may be brought in a justice of the peace court and carried through the other courts to the Supreme Court, as the acme of human wisdom. The question is asked: "Shall the poor man be denied the opportunity to have his case re-examined in the highest tribunal in the land?" Generally the argument has been successful. In truth, there is nothing which is so detrimental to the interests of the poor man as the right which, if given to him, must be given to the other and wealthier party, of carrying the litigation to the court of last resort, which generally means, two, three, and four years of litigation.[22]

It may be true that revision by two or three appellate tribunals would ensure a correct outcome in more cases, "but the injustice which meantime has been done by the delay to the party originally entitled to the judgment generally exceeds the advantage that he has had in ultimately winning the case."[23]

Judicial Control of Procedure and Administration

The most important institutional components of the modern judiciary were now in place. An extensive system of trial courts and intermediate appellate courts now took cognizance of virtually the full scope of federal jurisdiction under Article III. And the Supreme Court was now enabled to function as a true constitutional court, with discretionary jurisdiction with which to ensure the uniform administration of the constitution and laws in both the state and federal systems. But the judiciary was not yet in full possession of those prerogatives envisioned by Article III. The full maturation of the federal judiciary as an independent branch of government finally came in the 1930s with two important reforms that ceded responsibility for judicial procedure and judicial administration

[22] Taft, "Inequalities in the Administration of Justice," 444-45.

[23] Ibid., 445.

to judicial institutions. These took the form of the Rules Enabling Act of 1934 and the Administrative Office Act of 1939. We might also add to these reforms the important symbolism of the Court's occupation, for the first time since 1790, of its own building in Washington. Though Taft would not live to see these reforms through to completion, he laid the groundwork for them all.

The Rules Enabling Act of 1934 authorized the Supreme Court to promulgate rules of civil procedure for the federal courts. In practice, primary responsibility for formulating amendments to the rules has devolved upon a standing committee of the Federal Judicial Conference and the five advisory committees it relies upon.[24]

Passage of the Rule Enabling Act was the product of a 20 year reform effort. Leading the charge was the ABA with both Taft and Roscoe Pound taking an active role in the drafting and passage of the various proposals that prefigured the eventual Act of 1934.[25] Significantly, throughout this long struggle, numerous voices declared legislative authorization of judicial rulemaking a nullity. The Constitution itself, they urged, conferred on the Supreme Court power to promulgate rules of procedure for the federal courts not only in the absence of congressional authorization but even in the face of congressional opposition—some going so far as to argue that Congress possessed no rulemaking authority in the field of judicial procedure.[26] Though Taft never went this far, he had long been an advocate of vesting control over legal procedure in the Supreme Court, going so far as to

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[24] A helpful summary of the process is available from the Administrative Office of the Federal Courts, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx (accessed May 23, 2011)

[25] Stephen Burbank, "The Rules Enabling Act of 1934," *University of Pennsylvania Law Review* 130, no. 5 (1982): 1015-1197, provides an immensely valuable and detailed history of the act and its background.

[26] See, e.g., John H. Wigmore, "All Legislative Rules for Judiciary Procedure are Void Constitutionally," *Illinois Law Review* (Northwestern) 23, no. 3 (1928): 276-79; Tyrell Williams, "The Source of Authority for Rules of Court Affecting Procedure," *Washington University Law Quarterly* 22, no. 4 (1937): 459-509, citing a number of other contemporary sources challenging legislative control of procedure.

hold up the English system as a model.[27] The groundwork was laid in 1922, when, at Taft's urging, Congress established the Conference of Senior Circuit Judges. Later to become the Judicial Conference of the United States, this body would meet annually to examine the business being conducted in the federal courts and, under the guidance of the chief justice, recommend measures to Congress to improve judicial administration.

The Rules Enabling Act delegated authority to the Judicial Conference to promulgate the Federal Rules of Civil Procedure and was subsequently amended to encompass the Federal Rules of Criminal Procedure as well. Under the act, the Judicial Conference develops proposed rules, a task performed by its five standing committees on procedure, which are then submitted to the Supreme Court for approval. Congress had finally decided to leave the "minutiae" to the judges as Randolph had urged nearly 150 years earlier.[28]

Though the Rules Enabling Act placed basic judicial policy-making within the power of the judges, the judiciary still lacked the administrative apparatus to compile information and administer its policies. For most of its history, the judiciary had relied on the office of the attorney general to perform these functions. The Administrative Office Act of 1939, which established the Administrative Office of the Federal Courts (AOFC), essentially furnished the judiciary with a dedicated agency through which it could administer the policies developed by the Judicial Conference and handle the other business of the federal courts.

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[27] See Taft, "Possible and Needed Reforms," 260-67; "Inequalities in the Adminstration of Justice," 443-44.

[28] See Randolph to Madison, June 30, 1789 in *DHSC* 4:431-32.. The independence of the courts thus secured has come into question in recent decades, most notably with Congress's interference in the passage of the Federal Rules of Evidence in 1973.

From 1789 onward, political practice was in constant tension with constitutional design. What began as political constraints imposed on Article III, first by the Anti-Federalists and then by the Jeffersonians, were perpetuated through most of the 19th century by the force of precedent and the reflexive conservatism of the legal profession. When the scope of federal regulation mushroomed on the heels of Reconstruction, Congress was impelled to give fuller scope to the judicial power. One could therefore see the Constitution as an important, though not the only, determinant of the eventual reforms that successively expanded the judiciary from 1891 to 1939.

This is not the conventional account of institutional change among scholars of American political development. The reforms embodied in the Circuit Courts of Appeals Act of 1891, the Judges Bill of 1925, the Rules Enabling Act of 1934, and the Administrative Office Act of 1939 all flowed from a conception of judicial independence actively advocated by William Howard Taft both before and during his tenure as Chief Justice.[29] Recent scholarship has therefore depicted Taft's efforts at judicial reform as liberation from the narrow confines of the Constitution.

> The Framers of the Republic would not have recognized the Supreme Court's jurisdiction in the form that it has taken since 1925. During more than a century under the 1789 Act, massive changes in both federal law and the makeup of the United States during the Industrial Revolution created a crisis, which reached several zeniths between 1891 and 1925. Anticipating and responding to that crisis, William Howard Taft convinced Congress and the American legal establishment to effect the Judiciary Act of 1925—the most sweeping alteration of the Supreme Court's role ever passed in American history. [T]he Justices are unanimous in their praise for the virtues of the discretionary court. They owe those virtues to the struggle that Taft

[29] "Possible and Needed Reforms in Administration of Justice in Federal Courts," *American Law School Review* 5, no. 1 (1922): 2-13; "Inequalities in the Administration of Justice," *Green Bag* 20 (1908): 441-48; "Recent Criticism of the Federal Judiciary," *Annual Report of the American Bar Association* 18 (1895): 237-73; "The Jurisdiction of the Supreme Court under the Act of February 13, 1925," *Yale Law Journal* 35; First annual message, in Richardson, *Messages and Papers of the Presidents* 16:7431; Second annual message, Dec. 6, 1910, in ibid., 7523-24.

> and his colleagues endured to give the Court its defining characteristic in the modern era: the power to decide not to decide.[30]

The narrative of American political development thus constructed simply is not adequate. It underestimates the foresight of the Framers and misses the extent to which Taft's reforms are a fulfillment of, not a divergence from, the Constitution. We must not, however, fall into the opposite error of treating the institutional development of the judiciary as though its only determinate is the Constitution. As Justin Crowe's recent study of Taft's reforms has shown, the judiciary is not "institutionally thin,…lacking the complex institutional features—actors, structures, and rules—that make other political institutions worth studying."[31] The study of judicial power is not simply an exercise in constitutional law and behavioral analysis. Crowe rightly employs Taft's reforms as a counterexample.

> As the Taft case demonstrates…this view of the judiciary as simply an Article III abstraction that does not itself develop over time is misguided. As an institution, the federal judiciary is at least as complex—and its historical development at least as dynamic—as Congress, the presidency, or the federal bureaucracy. Indeed, looking back at the indeterminacy of Article III and the politics of the early republic, we see that the development of an active and interventionist third branch of government was far from a foregone conclusion. The American judiciary, that is to say, was not born independent, autonomous, and powerful; rather, it had to become so, largely through a continuous process that was both politically determined and politically consequential. The story of judicial institution building, in other words, is not a single moment of revelation but a series of battles—of which the Taft episode is a single, albeit critical, one—in Congress and courts over the politics of institutional development. It is the story of how the judiciary, long outlined in pencil rather than pen, was, perhaps more so than the legislature or the executive, built—piece by piece, from the ground up, as part and parcel of American political development.[32]

Crowe's point is well taken. Politics and all its determinants did indeed build the judicial institution as we know it, but in attempting to demonstrate the modern judiciary's

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[30] Jonathan Sternberg, "Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court," *Journal of Supreme Court History* 33, no. 1 (2008), 13-14.

[31] Justin Crowe, "The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft," *Journal of Politics* 69, no. 1 (2007), 84.

[32] Crowe, "The Forging of Judicial Autonomy," 85.

dependence on political development (as opposed to mere constitutional forms) Crowe falls into the opposite error. He neglects constitutional forms as an important determinate of institutional development. Congress long resisted the move toward an "independent, autonomous, and powerful" judiciary—and might have done so indefinitely—but their conservative resistance to institutional reform was in tension not only with the practical demands of the country but with the institutional rationale of the Constitution as well. This argument only seems novel because scholars, judges, and lawyers have accorded too much weight to the constructive efforts of the First Congress and the Marshall Court, wrongly conflating the political constraints faced by these institutions with the constitutional constraints embodied in the text of Article III. The real tension is not between the modern judiciary and the Constitution but between the modern judiciary and the political constraints of the early republic. The institutional developments that so radically liberated the judiciary from legislative control between 1891 and 1939 were all in the direction of the original constitutional rationale.

This misunderstanding is not confined to the development of judicial power, but pervades many debates over the constitutionality of developments in executive power, administrative government, and constitutional rights. Jeffrey Tulis explains the remedy to these conflations of the Constitution and the political constraints of the early republic. Responding to the common assumption that the "unanticipated demands" imposed by historical developments like industrialization, urbanization, and immigration render the Constitution "out-of-date," Tulis gives due credit to the foresight of its Framers. "These and other similar social facts," he explains, "might be the product of crucial constitutional commitments which in turn imply constitutionally appropriate institutional reforms." Applying this logic to the development of "centralized and bureaucratized institutions" that

accompanied the New Deal, Tulis notes that "both Federalists and Anti-Federalists would regard the New Deal as a mature expression of the original Constitution. And it is precisely because they understood that the Constitution set us on a road to a new deal that the most thoughtful Federalists supported the Constitution and the most insightful Anti-Federalists opposed it. Americans had committed themselves to a national government, a national economy, and a strong executive long before the necessity of those attributes became fully manifest. They became manifest because of social, cultural, and political developments that the fundamental commitments initially set in motion."[33] The development of American political institutions cannot be fully understood apart from the constitutional rationale that gave them birth.[34]

Whatever the accuracy of these remarks may be as applied to the growth of national regulatory and executive power, they may certainly be applied to the growing independence of the judiciary. We should not be surprised to find in the Federal Convention of 1787 an anticipation of the future needs of the nation. After all, as Marshall reminded his own contemporaries who wished to set artificial limits to the scope of the judicial power of the Union, "a Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."[35] The Framers were not building a judicial institution for 18th century America; they were building a judiciary to administer the Constitution and the laws for an expanding and developing Union of states that they fully anticipated would one day span the continent.

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[33] Tulis, "On the State of Constitutional Theory," *Law and Social Inquiry* 16, no. 4 (1991), 712-14.

[34] Presidency scholars have furnished a number of attempts to trace the constitutional pedigree of institutional developments. See, e.g., Nichols, *The Myth of the Modern Presidency*; Tulis, "The Constitutional Presidency in American Political Development," in Martin L. Fausold and Alan Shank, eds., *The Constitution and the American Presidency* (Albany: State University of New York Press, 1991), 133-47.

[35] *Cohens v. Virginia*, 19 U.S. 264 (1821), 387.

APPENDICES

APPENDIX A

Development of Judiciary Provisions in Federal Convention of 1787

In the Committee of the Whole
May 30-June 13

~~8~~10. Resd. that the natl. Executive shall have a right to negative any Legislative Act, which shall not be afterwards passed unless by two thirds of each branch of the National Legislature ~~Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the Naitonal Legislature be again passed, or that of a particular Legislature be again negative by of the members of each branch~~.[1]

~~9~~11. Resd. that a National Judiciary be established, to consist of ~~one or more supreme tribunals, and of inferior tribunals~~ one supreme tribunal,~~ and of one or more inferior tribunals~~[2] ~~to be chosen by the National Legislature,~~[3] the judges of which to be appointed by the 2d. branch of the National Legislature,[4] to hold their offices during good behaviour; and 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 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.~~[5]

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[1] Substitution made on Gerry's motion. June 4, *RFC* 1:97-104. Wilson moves to reinstate judiciary in revisionary power on June 6. *RFC* 1:138-40.

[2] Substitution moved and seconded without attribution and with no indication of vote, June 4, RFC 1:104-5. There is some ground to doubt the reliability of the Journal from which this section of Madison's notes is taken. For a discussion, see chapter three. "One or more" is then struck out at opening of business on June 5; Madison gives no indication of the motive and no attribution (1:119). The Committee proceeds to consider appointment of judges after which they return to inferior tribunals. On reconsideration, inferior tribunals are eliminated altogether on motion of Rutlidge over the objections of Madison, Wilson, and Dickenson, June 5; the vote was rather narrow, only 5 of 11 states in favor, 4 against, 2 divided (NY [Yates?] and Mass [Gerry?]). *RFC* 1:124-25.

[3] Appointment by the legislature struck out on Madison's motion. June 5, *RFC* 1:120.

[4] Insertion prompted by Madison, agreed to nem. con. June 13, *RFC* 1:232-33.

[5] June 13, 1:232. Madison notes: "Struck out nem. con in order to leave full room for their organization."

12. Resold. that the National Legislature be empowered to institute inferior Tribunals.[6]

13. Resold. that the jurisdiction of the national Judiciary shall extend to [all] cases, which respect the collection of the National revenue, impeachments of any national officers, and questions which involve the national peace and harmony.[7]

From the Committee of the Whole to the Committee of Detail
June 13-July 26

Resd. that the natl. Executive shall have a right to negative any Legislative Act, which shall not be afterwards passed unless by two thirds of each branch of the National Legislature.

Resd. that a National Judiciary be established, to consist of one supreme tribunal, the judges of which to be appointed by the 2d. branch of the National Legislature,[8] to hold their offices during good behaviour; and 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.[9]

Resold. that the National Legislature be empowered to institute inferior Tribunals.

Resold. that the jurisdiction of the national Judiciary shall extend to [all] cases~~, which respect the collection of the National revenue, impeachments of any national officers,~~[10] ~~and questions which~~ arising under the national laws [laws passed by the national legislature], and to such other questions as may involve the national peace and harmony.[11]

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[6] Inserted on motion of Madison and Wilson on June 5. *RFC* 1:125.

[7] Inserted apparently without debate on motion of Madison and Randolph immediately following deletion of the enumeration in section 11. June 13, *RFC* 1:232. The report of the Committee of the Whole reads "to all cases" (1:237) whereas Madison's record of the original motion in debate (1:232) as well as the report in the Journal (1:231) and Luther Martin's transcription in Genuine Information (3:176) read "to cases" excluding "all" from the formulation.

[8] A failed attempt is made to substitute executive appointment by Ghorum, Wilson, Madison, and Morris on July 18. *RFC* 2:41-44. Besides the rampant Whiggish distrust of executive discretion, impeachments are also a principle barrier since the Supreme Court is to try them. Madison revives his suspended motion to give appt. to exec with a negative in the Senate on July 21, but despite powerful support, the motion fails and Senatorial appointment is retained. *RFC* 2:80-83.

[9] Eliminated on motion of Morris on July18. *RFC* 2:44-45.

[10] July 18, *RFC* 2:46.

[11] Madison moves to substitute this definition of federal jurisdiction on July 18. *RFC* 2:46. Again Madison uses "all cases" while the resolutions given to the Committee of Detail exclude the word "all"; likewise, they use the terms "laws passed by the general Legislature" rather than Madison's less specific "national Laws." *RFC* 2:132-33.

Judiciary Provisions Submitted to the Committee of Detail
July 26

Resolved That a national Judiciary be established to consist of one Supreme Tribunal--the Judges of which shall be appointed by the second Branch of the national Legislature--to hold their Offices during good Behaviour--to receive punctually at stated Times a fixed Compensation for their Services, in which no Diminution shall be made so as to affect the Persons actually in Office at the Time of such Diminution.

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.

Resolved That the national Legislature be empowered to appoint inferior Tribunals.[12]

Judiciary Provisions Reported by the Committee of Detail
August 6

Sect. 1. The Judicial Power of the United States 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.

Sect. 2. The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

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 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.[13]

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[12] *RFC* 2:132-33.

[13] *RFC* 2:186-87.

Sect. 1. The Judicial Power of the United States both in law and equity[14] 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.

Sect. 2. The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect. 3. ~~The Jurisdiction of the Supreme Court~~ The Judicial power[15] shall extend to all cases both in law and equity[16] arising under this Constitution and the[17] laws ~~passed by the Legislature~~ of the United States and treaties made or which shall be made under their authority[18]; 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 to which the United States shall be a party,[19] 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, between Citizens of the same State claiming lands under grants of different States,[20] and between a State or the Citizens thereof and foreign States, citizens or subjects. In ~~cases of impeachment,~~[21] cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a party, ~~this jurisdiction shall be original~~the Supreme Court shall have original jurisdiction.[22] In all the other cases before mentioned, ~~it shall be appellate~~ the Supreme Court shall have appellate jurisdiction,[23] both as to law and fact[24] with such

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[14] Inserted on motion of Dr. Johnson. August 27, *RFC* 2:428.

[15] Gouverneur Morris and Madison move the substitution on August 27. *RFC* 2:431.

[16] The insertion of "both in law and equity" is not recorded in the journal or in Madison's notes. We may assume that it was put in sometime following Johnson's motion on August 27.

[17] Inserted on motion of Dr. Johnson on August 27. *RFC* 2:430.

[18] On motion of Rutlidge, "passed by the Legislature" was struck out and the phrase respecting treaties added on August 27. *RFC* 2:431.

[19] Inserted on motion of Madison and Morris on August 27. *RFC* 2:430.

[20] Sherman moves to import this provision from the Articles of Confederation on August 27. *RFC* 2:431-32.

[21] Judicial impeachment is presumably eliminated when the power of impeachment was transferred to Congress.

[22] Presumably altered with appellate jurisdiction clause on August 28 to reflect the alteration of the first clause of this section from 'The Jurisdiction of the Supreme Court" to "The Judicial Power."

[23] Unattributed motion, Aug. 28, 2:437

[24]Inserted on motion of Dickinson following a question from Morris. August 27, *RFC* 2:431.

exceptions and under such regulations as the Legislature shall make. ~~The Legislature may assign any part of the jurisdiction above mentioned (except for 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.~~[25]

[25] Unattributed motion passes unanimously to eliminate this sentence on August 27. *RFC* 2:431.

APPENDIX B

Renditions of the Supremacy Clause

In the New Jersey Plan
June 15

6. Resd. That all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye. Carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties. (*RFC* 1:245)

As Proposed by Luther Martin
July 17

That the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants -- & that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding. (*RFC* 2:29)

In the Report of the Committee of Detail
August 6

The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding. (*RFC* 2:183)

As Altered on Motion of Rutlidge
August 23

This Constitution & the laws of the U.S. made in pursuance thereof, and all Treaties made under the authority of the U.S. shall be the supreme law of the several States and of their citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions, any thing in the Constitutions or laws of the several States, to the contrary notwithstanding. *(RFC* 2:389)

Alterations Inserted on Motion of Madison and Morris
August 25

Inserted "or which shall be made" after "all treaties made" to "obviate all doubt concerning the force of the treaties preexisting, by making the words 'all treaties made' refer to them, as the words inserted would refer to future treaties." (*RFC* 2:417)

In the Report of the Committee of Style
September 13

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. (*RFC* 2:603)

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