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CONGRESS'S PARAMOUNT ROLE IN SETTING THE SCOPE OF FEDERAL JURISDICTION

*Michael Wells**

Article III presents a conundrum for scholars seeking a coherent explanation of the federal courts' role in our system of government.¹ On the one hand, the framers set up the judiciary as a separate branch with jurisdiction over federal law and other matters of federal interest.² They granted federal judges life tenure and undiminishable salary in order to preserve judicial independence from executive and legislative pressure.³ It is evident from these provisions that the framers saw a need for a strong national judiciary.⁴ At the same time, article III explicitly leaves to Congress the decision whether to create any lower federal courts at all,⁵ and authorizes Congress to make "exceptions" and "regulations" of the Supreme Court's appellate jurisdiction.⁶ It appears that Congress can virtually destroy the independent judiciary envisioned by the other parts of article III. Barry Friedman's "dialogic" approach is the latest in a long line of efforts to reconcile these apparently contradictory directives.

Professor Friedman seems drawn to a "constructivist coherence" approach to the interpretation of article III.⁷ Under constructivist coherence analysis, the test of a rule is not whether it comports with the text of the Constitution, the intent of the framers, the purposes behind particular provisions, precedent, or principles of justice and social policy. Rather, as Richard Fallon explains, each of these kind of arguments is relevant: "the implicit norms of our constitutional practice call for a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as

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¹ See Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1622 (1990) (noting that any interpretation of article III must confront "the inescapable tension between judicial independence and political accountability").

² U.S. CONST. art. III, § 2.

³ *Id.* at § 1.

⁴ See THE FEDERALIST Nos. 78-82 (A. Hamilton) (C. Rossiter ed. 1961).

⁵ U.S. CONST. art. III, § 1.

⁶ *Id.* at § 2, cl. 2.

⁷ See Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U.L. REV. 1, 29-30 (1990). See generally Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

prescribing the same result.”⁸ Friedman therefore follows Fallon in examining competing views of control over federal jurisdiction in terms of their fit with the constitutional text and Supreme Court precedent, as well as their compatibility with constitutional values.⁹

Proceeding within this analytical framework, Professor Friedman rejects the conventional view that the Constitution assigns to Congress control over the jurisdiction of federal courts. In his view, the congressional control thesis fails to describe the actual state of the law, and falls short in normative terms as well, because it rests on the premise of parity between federal and state courts—a premise too controversial to support a rule of constitutional dimension. He argues that it is better, from both the descriptive and normative perspectives, to think of the law in this area as a dialogue between Congress and the Supreme Court, in which neither institution has the final word and there are no fixed constitutional principles. Rather, each time a problem arises, it is resolved on the basis of an evaluation of all the circumstances, including such concerns as federal-state comity, the federal caseload, and the need for uniformity in a given context.¹⁰ “[S]hould there be a dispute between branches, politics will determine which branch prevails.”¹¹

Although the literature on this topic is already extensive, Friedman’s article makes valuable contributions. While other treatments of control of federal jurisdiction tend to focus on just one or two of the relevant constructivist coherence factors,¹² Friedman makes an effort to consider them all. He, along with Martin Redish,¹³ is one of the few scholars to attempt to forge a synthesis of the law on congressional control of federal jurisdiction and the cases in which the Supreme Court restricts the exercise of federal jurisdiction. He provides a fine analysis of the descriptive and normative weaknesses of both the conventional view that Congress is in charge and the revisionist position, championed by Akhil Amar, Robert Clinton, and others, according to which article III imposes significant limits on Congress’s power. Whatever its ultimate

⁸ Fallon, *supra* note 7, at 1193.

⁹ See Friedman, *supra* note 7, at 10-48; see also Fallon, *supra* note 7, at 1230-37.

¹⁰ Friedman, *supra* note 7, at 52.

¹¹ *Id.* at 54-55.

¹² See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985) (text and purpose); Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (text and precedent). More recently, Professor Amar has broadened his discussion of the area to embrace the other factors Fallon identifies. See Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Amar, *Reports of My Death are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990).

¹³ See Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982) [hereinafter *Constitutional Limitations*].

merits, the notion of a dialogue in lieu of rules of constitutional dimension is a fresh idea in an overworked area.

Even so, I am not persuaded by Friedman's arguments. The principle of congressional primacy withstands Friedman's critique and remains a more cogent account of the law than the dialogic approach he prefers. Contrary to Friedman's thesis, the article III congressional authority provisions do embody a fundamental value that transcends the circumstances of particular problems: state governments should have some protection against the danger that the federal courts will aggrandize their power at the expense of the states, and that protection is provided by congressional control of federal jurisdiction. Since the members of Congress are elected by state and local constituencies, they are responsive to state and local concerns and provide a necessary check on the power of the unelected and tenured federal judiciary.¹⁴

Congressional primacy is not the only value at work in these cases. Here, as everywhere, Congress must respect other constitutional provisions—in particular, the due process clause of the fifth amendment. Congress may not employ jurisdictional statutes to accomplish a deprivation of life, liberty, or property without due process of law. It is true, as Professor Friedman notes, that the Court balks at efforts by Congress to preclude judicial review of government action that arguably raises this kind of constitutional concern. But the Court's resistance is not part of a dialogue. The principle that the Bill of Rights trumps congressional power is an even more fundamental principle than congressional control of federal jurisdiction.

Besides congressional primacy and constitutional limits on Congress, the cases evince a third theme. Professor Friedman demonstrates convincingly that the Supreme Court assumes an aggressive role in making jurisdictional rules, expanding or contracting federal jurisdiction in accordance with its views of sound policy. But, here again, the Court's rules do not contradict the principle of congressional control, for the Court invariably defers to congressional decisions to modify judge-made rules. For this reason, the Court's nonstatutory jurisdictional doctrine is more accurately described as a form of federal common law than as part of a dialogue with Congress in which neither side has the final say. I submit that these three principles—congressional primacy, due process limits, and a common-law role for the Supreme Court—provide a better descriptive and normative account of the law on control of federal jurisdiction than does Friedman's dialogue.

¹⁴ The arguments I advance in support of the paramount role of Congress extend only to control over lower federal court jurisdiction and do not address the distinct set of separation of powers considerations bearing on whether Congress may restrict the Supreme Court's jurisdiction over constitutional issues. The cases relevant to this problem are few, the literature is vast, and I have nothing to add to it.

I.

Let us first consider Friedman's claim that the principle of congressional primacy is descriptively inaccurate. He does not challenge the proposition that the Court routinely defers to congressional decisions to limit the jurisdiction of article III courts.¹⁵ He focuses most of his attention on the cases in which Congress has enacted a statute authorizing federal jurisdiction and the Supreme Court has proceeded to devise rules of federal jurisdiction in the guise of interpreting the statute, but without paying much attention to congressional intent. According to Friedman, whether the topic is the "arising under" jurisdiction of federal courts, diversity jurisdiction, habeas corpus, or injunctions against state proceedings, the Court makes the rules it prefers, alters them when it changes its mind, and justifies them in terms of jurisdictional policy rather than legislative intent or statutory language. It is as though the statutes were empty vessels into which the Court may pour whatever content it wants. Friedman rightly concludes that the Court plays at least as large a role as Congress in regulating federal jurisdiction.

It does not follow, however, that the process is a dialogue in which neither branch has the final word. The critical issue for the dialogic thesis is what happens when Congress disagrees with one of the Court's rules. There is no conversation between the branches, nor any defiance on the part of the Court. Instead, the Court accepts Congress's dominant role, albeit sometimes reluctantly. Consider the Court's treatment of the Anti-Injunction Act. As Friedman recounts, the Court departed from its precedents and read the Anti-Injunction Act strictly in *Toucey v. New York Life Insurance Co.*¹⁶ Congress then intervened to codify the principles the Court had developed before *Toucey*,¹⁷ and the Court proceeded to renounce *Toucey* in favor of Congress's rules. As Friedman notes, the Court generally has not read the exceptions liberally,¹⁸ but the "statute is not a model of clear draftsmanship,"¹⁹ and so the scope of the exceptions is itself a matter for judicial construction.²⁰

Other examples are not hard to find. The Court bowed before Congress's decision to alter the judge-made rules on deference to state court fact-finding in habeas corpus²¹ and such limits on jurisdiction as the Johnson Act and the Tax Injunction Act.²² A recent case in which the

¹⁵ See, e.g., *Palmore v. United States*, 411 U.S. 389, 400-01 (1973); *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

¹⁶ 314 U.S. 118 (1941).

¹⁷ See P. LOW & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 534 (2d ed. 1989).

¹⁸ See Friedman, *supra* note 7, at 17.

¹⁹ C. WRIGHT, *THE LAW OF FEDERAL COURTS* 280 (4th ed. 1983).

²⁰ See P. LOW & J. JEFFRIES, *supra* note 17, at 534.

²¹ See *Sumner v. Mata*, 449 U.S. 539 (1981).

²² 28 U.S.C. §§ 1340, 1341 (1988). The Supreme Court has apparently never heard a challenge to these provisions. Nothing in its decisions suggests that a constitutional attack on them would

Court makes explicit its subordinate role is *Patsy v. Board of Regents*,²³ where the Court refused to institute a judge-made requirement that civil rights claimants exhaust state administrative remedies before proceeding to federal court. Congress had enacted such a rule for some litigants, and the Court determined that "[a] judicially imposed exhaustion requirement would be inconsistent with Congress's decision to adopt [the statute] and would usurp policy judgments that Congress has reserved for itself."²⁴ Except for cases like those discussed in the next paragraph, the Court has never challenged Congress's paramount authority over jurisdictional doctrine. For these reasons, Friedman's argument that neither branch has final authority is dubious. It seems more accurate to characterize the Court's role, however important, as subordinate to that of Congress, and its cases as a body of common-law doctrine.²⁵

There is a line of cases in which the Supreme Court opposes congressional efforts to restrict federal jurisdiction. Where Congress attempts to permit government officials to deprive someone of liberty or property, without an adequate opportunity for judicial review in either federal or state court, the Court generally finds a way to thwart the legislature's will. Suppose the government tried to deprive people of liberty without giving them a chance to challenge the grounds of their confinement before a judge, and sought to accomplish this end by denying jurisdiction to the courts to hear the prisoners' suits. Would the fact that the deprivation of the constitutional right to a hearing is accomplished by the roundabout means of a denial of jurisdiction save the government's plot from judicial nullification?

The answer is no. The closest real world analogies to my hypothetical are the military induction cases that Friedman discusses. The particulars of these cases need not detain us here, for Professor Friedman and others have described them well.²⁶ The relevant statutes seem to place

have a chance of success. Cf. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) (reasoning by analogy to the Tax Injunction Act that damages actions for unconstitutional taxation cannot be brought in federal court if a state remedy is available).

²³ 457 U.S. 496 (1982).

²⁴ *Id.* at 508.

²⁵ The Court itself often describes its jurisdictional doctrine in similar terms, *see, e.g.*, *Aldinger v. Howard*, 427 U.S. 1, 13-16 (1976) ("discretionary" restrictions on federal jurisdiction over pending state claims), *partially overruled*, *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978); *Wainwright v. Sykes*, 433 U.S. 72, 78-81 (1976) (describing the Court's freewheeling approach to habeas corpus); *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) ("prudential" limits on standing to sue), as do many commentators. *See, e.g.*, Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1323-55 (1986); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. REV. 289, 308-12.

²⁶ Besides Friedman's discussion, Friedman, *supra* note 7, at 14-16, *see, e.g.*, P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 404-07 & n.24 (3d ed. 1988).

severe restrictions on access to the federal courts for a conscript seeking to challenge an order to report for service. State courts apparently are unavailable for this purpose because of the ruling in *Tarble's Case*, a nineteenth-century decision that forbids state courts from granting habeas corpus relief in such circumstances.²⁷ Assuming that *Tarble* is still good law, Congress could succeed in barring any relief if its power to regulate the jurisdiction of federal courts were unfettered.

As Friedman's analysis demonstrates, the Court has not permitted Congress to evade the fifth amendment due process clause by unduly limiting the federal courts' jurisdiction over military induction cases. While the decisions are often couched in terms of statutory construction, it is evident that they are based on constitutional considerations.²⁸ The teaching of these cases is not that there is a dialogue between Congress and the Court regarding the scope of congressional power to limit all judicial review of a deprivation of liberty. Rather, it is that the article III principle of congressional primacy over federal jurisdiction is not unbounded. The Constitution forbids Congress from exercising that power, or any of its other powers, in ways that undermine the safeguards granted by the Bill of Rights. Since Friedman seems to endorse this reading of the military induction cases,²⁹ it is all the more puzzling that he would favor a "dialogic" description of the area over one that emphasizes a dominant constitutional principle forbidding Congress to evade the due process clause by stating its directives in jurisdictional language.

II.

Some observers assert that the paramount role of Congress is so firmly established in the cases that the discussion of alternative points of view is pointless.³⁰ Professor Friedman, however, performs a valuable service by demonstrating that the Court does indeed take an active role in this area and rarely frames any issue as a direct conflict between itself and Congress. There may be just enough ambiguity in the decisions to permit reasonable differences of opinion over whether the case law supports the three principles I have identified—(1) congressional primacy,

²⁷ 80 U.S. (13 Wall.) 397 (1871).

²⁸ Friedman, *supra* note 7, at 16; see, e.g., *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968). Recent illustrations of the same theme at work in other contexts include *Webster v. Doe*, 486 U.S. 592 (1988) (straining to construe a statute as providing a right of judicial review of dismissal from a government job) and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (due process requires that there be some meaningful judicial review of administrative determinations that will be used in later criminal proceedings). See also *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts . . . it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . .").

²⁹ Friedman, *supra* note 7, at 16.

³⁰ See, e.g., Bator, *supra* note 12; Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-64 (1953).

(2) which dominates the Court's common-law role, but (3) which is in turn trumped by constitutional rights—or, instead, Professor Friedman's dialogue with case-by-case decisionmaking and no fixed constitutional rules as to which branch controls which determinations. If his approach is superior normatively to the three conventional principles I discern in the cases, then perhaps constructivist coherence requires that we overlook its descriptive flaws, abandon the standard view, and conceive of the law on control of federal jurisdiction as a dialogue.

Two of the three conventional principles are easy enough to defend in terms of their value. No one—certainly no one who questions broad congressional control—would challenge the merit of the general principle that legislative power, whether exercised pursuant to article III, article I, or some other constitutional provision, ought to be constrained by the Bill of Rights. It is axiomatic that the majority's will may not nullify such fundamental rights as due process of law,³¹ even if we sometimes disagree about the precise content of the due process clause. At the same time, where fundamental rights are not at stake, our society operates on the premise that majority rule is the best form of government and Congress should be the predominant federal lawmaker.³² Given a choice between viewing the undemocratic Court's incursions in this or any area as common-law rules subject to nullification by the majoritarian branches, or as part of a dialogue in which it is an equal partner, the former is far more consonant with the democratic principles we all value.

I do not regard either majority rule or the trumping power of constitutional rights over the majority's will as mere factors to be taken into account with all the other circumstances when a question regarding control of federal jurisdiction arises. Both are basic principles of our political life, transcending the details of particular disputes, and both deserve to dominate the resolution of individual cases. Accordingly, I prefer the conventional view, which recognizes the normative force of these principles, over Professor Friedman's dialogic approach, which focuses on case-by-case resolution of issues and seems to accord them no more force than such factors as the federal caseload or the need for uniformity of federal law.³³

Friedman never questions the validity or importance of these two propositions, instead directing his normative attack against the principle of congressional primacy. He contends that the argument in favor of broad congressional power is based on the premise that there is parity between federal and state courts. If state courts do as good a job as federal courts at the task of adjudicating claims based on federal law, then there is no compelling reason to oppose broad congressional power to allocate federal cases to state court. Although Friedman does not agree

³¹ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (free speech).

³² See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313-317 (1981).

³³ See Friedman, *supra* note 7, at 52.

with this proposition, the critical objection he raises against it is not that of his own misgivings. Rather, he points out that parity between federal and state courts is controversial, and has been throughout our history. Thus it would be folly to base a rule of constitutional dimension upon the premise of parity.³⁴

Partisans of congressional primacy sometimes do rely upon federal-state parity,³⁵ and parity is indeed a controversial premise.³⁶ If the case for congressional control rests on parity, then it may well be vulnerable to the attack Friedman mounts against it. In my view, however, the real basis for the paramount role of Congress is virtually the opposite of the parity premise. At the Constitutional Convention and in the ratification debates, both sides perceived that there inevitably would be important institutional differences between state and federal courts. In any given piece of litigation, state courts would be more likely than their federal counterparts to favor state interests, while federal courts would tend to prefer national interests. Accordingly, defining the scope of federal judicial authority was more than a matter of symbolic importance; that determination would influence significantly the balance of power between the national government and the states in the new nation. Bit by bit, in one case after another, federal courts would build bodies of law that favored national aims to the detriment of the states' diverse goals.³⁷ Advocates of maintaining strong state governments resisted constitutional stature for lower federal courts because they feared national power in general, and national judicial power in particular. For the same reason, nationalists like Madison and Hamilton favored federal courts.

In the debate over article III, only the nationalists adverted to the likelihood of disparity between state and federal courts, invoking it as a justification for creating powerful federal courts. The supporters of state courts might have agreed with the disparity premise and forthrightly de-

³⁴ See *id.* at 34-38.

³⁵ See, e.g., Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 918-19 (1984); Redish, *Constitutional Limitations*, *supra* note 13, at 146-47 (attributing to the framers the view that "Congress and the executive [may] conclude in a particular instance that there is no need to worry about state court interference . . . with federal supremacy . . ."). Professor Redish does not believe there is parity between federal and state courts. See Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 332-38 (1988)[hereinafter *Judicial Parity*].

³⁶ For diverse views, see Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Redish, *Judicial Parity*, *supra* note 35; Solimine & Walker, *State Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127 (1989); Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988).

³⁷ Cf. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (federal courts need not follow the common law decisions of the states in which they sit, but may make their own common law rules), *overruled*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

fended state judicial power on the ground that state courts would be more sympathetic to state interests in litigation. Instead, they steered clear of this argument in the debate at the Constitutional Convention over the creation of lower federal courts, in favor of arguments based on the expense of federal courts and the lack of a pressing need for them.³⁸ But the fight to preserve state court power must have begun from the implicit premise that federal and state courts would sometimes reach different results in close cases. Otherwise, the issue of whether to create lower federal courts would have little more than symbolic importance, and the opposition to federal courts at the Convention, in the ratification process, and in the debates in Congress over the Judiciary Act of 1789 was too stubborn to bear that interpretation.³⁹

In this view of article III, the point of the Madisonian Compromise, by which the creation of lower federal courts was assigned to Congress,⁴⁰ was to leave the decision to a body that would be sensitive to local concerns without giving undue weight to the narrow interests of any one state. The framers understood that Congress would be politically responsive to the states, since members would be elected from the states.⁴¹ At the same time, no one state could dominate a body whose members came from all over the country. On any given issue, only a widespread preference for local control could prevail against nationalist sentiment.

This reading of article III holds that Congress's paramount role in regulating the jurisdiction of federal courts is not that of a mere house-keeping device to assure that the government does not waste money on unneeded federal judges,⁴² but is part of the system of checks and bal-

³⁸ See 4 THE FOUNDERS' CONSTITUTION 133-39 (P. Kurland & R. Lerner eds. 1987). For example, Edward Rutledge opposed the creation of inferior federal courts on the ground that "it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system." *Id.* at 134. Roger Sherman opposed them on account of the "supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose." *Id.* On the other hand, James Madison, a proponent of federal courts, countered that state court decisions may be tainted by "the biassed directions of a dependent Judge, or the local prejudices of an undirected jury[.]" *Id.*

Modern advocates of a prominent role for state courts in constitutional adjudication also are reluctant to rely forthrightly upon disparity. See Wells, *supra* note 36, at 318-21 (discussing the views of advocates of broad state court jurisdiction over constitutional claims).

³⁹ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124-25 (June 5) (M. Farrand rev. ed. 1966); M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79-80 (1913). For a compilation of materials bearing on the relevant sections of article III and the debates in the first Congress on the Judiciary Act of 1789, see 4 THE FOUNDERS' CONSTITUTION, *supra* note 38, at 133-61, 220-52.

⁴⁰ See Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-56 (1975).

⁴¹ See THE FEDERALIST No. 45, at 291 (J. Madison), No. 46, at 296 (J. Madison) (C. Rossiter ed. 1961); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954).

⁴² For an influential expression of this point of view, see Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

ances by which the framers sought to cabin the power of each branch of the national government.⁴³ Without the political constraint supplied by congressional control of their jurisdiction, the unelected federal court judges, serving for life with a salary that could not be diminished, would be free to aggrandize power to themselves at the expense of the states. It is entirely consonant with the intent of the framers for Congress not only to exercise broad control over federal jurisdiction, but also to send cases to state court *because of* Congress's perception that state courts are more sympathetic to state interests and will decide open questions differently than would the federal courts.⁴⁴

The value underlying the congressional primacy thesis, then, is not parity, which is indeed a myth, but the continuing vitality of the state governments in the constitutional scheme. The state courts' greater sensitivity to state concerns is the means by which the states' independence may be preserved. Like majority rule and judicial protection of rights against majorities, the independence of the states is a principle of constitutional dimension that ought to dominate the resolution of particular cases, and not be relegated to the status of a factor to be taken into account along with uniformity, comity, caseload concerns, and the like.

It may be objected that this account of article III gives too little respect to the tenure and salary provisions. The objection is misplaced. Congress does not flout the constitutional value of judicial independence by channeling federal cases to state court. In the framers' plan, judicial independence is an aspect of the separation of powers among the three branches of the national government. The purpose of the tenure and salary provisions is to check the power of Congress to control the judicial branch of the national government, not to guarantee the integrity of any court that may adjudicate federal law.⁴⁵ It is far more difficult for Congress to bring pressure to bear on the state courts, which are organized under, paid by, and responsible to the state governments and not to Congress. However dependent they may be upon state governments, they are

⁴³ For illustrations of this theme in other contexts, see *Pennsylvania v. Union Gas Co.*, 490 U.S. 920 (1989) (Congress may abrogate the states' eleventh amendment immunity when it acts under the commerce clause); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (states hold no constitutional immunity against congressional encroachments on their authority, since the political process preserves the states' interests). See also Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683, 1685 (1974); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 695 (1976).

⁴⁴ See Bator, *supra* note 12, at 1037 (discussing Congress's decisions in the 1930s to shift litigation challenging state taxes and state utility rate orders from federal to state courts, by enacting the Johnson Act and the Tax Injunction Act); see also Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 227-28 (1948) (similar). Cf. Wells, *supra* note 36, at 324-30 (on the advantages of a dual judicial system where there is systemic disparity between federal and state courts over unitary judicial systems).

⁴⁵ See Redish, *Constitutional Limitations*, *supra* note 13, at 149-53.

in little danger from Congress.⁴⁶

III.

Champions of strong federal judicial protection of individual rights, like Professor Friedman, may not find congressional primacy an attractive feature of our system, given the indifference manifested by many state governments and courts to federal constitutional rights held against the states. The framers, however, would not have considered this sort of objection to the Madisonian Compromise, for the original Constitution included very few restraints upon state governments.⁴⁷ Not until after the Civil War, with the passage of the thirteenth, fourteenth, and fifteenth amendments, did the Constitution grant many important rights against the states.

Yet, even if my interpretation of the Madisonian Compromise is correct, it takes account only of the 1787 Constitution. Perhaps the issue should be resolved differently in light of the Bill of Rights, ratified in 1791, and the post-Civil War amendments. Do the sweeping changes in our constitutional scheme brought about in the 1860s, and by the Court's expansive readings of the due process clauses in the 1960s, require us to re-evaluate congressional primacy? The earlier discussion of the military induction cases notes one well-established due process limit on congressional power: Congress may not employ its authority over federal jurisdiction in a way that deprives a person of life, liberty, or property without an opportunity for an adequate hearing. Perhaps the extension of the due process constraint to the states justifies further limits upon Congress's power.⁴⁸ Martin Redish, for example, has suggested that due process of law may demand not only a hearing, but a hearing before a judge with the tenure and salary protections of the federal judiciary. He considers judicial independence a requisite of due process.⁴⁹

While Professor Redish's position has much to recommend it, he

⁴⁶ For a contrary view, see Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1512 (1990) ("[T]he framers could not fully trust state judges to police Congress, for both were likely to be too closely tied to state legislatures and excessively vulnerable to short term political pressures.") (emphasis in original).

⁴⁷ See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights does not apply to the states); G. GUNTHER, *CONSTITUTIONAL LAW* 406 (11th ed. 1985) (noting that "[t]here were relatively few references to individual rights in the original Constitution").

⁴⁸ Congress itself is not directly limited by the fourteenth amendment because it applies only to the states. But the fifth amendment due process clause may be read as limiting Congress's power to assign constitutional claims to an adjudicator lacking independence. Or perhaps fourteenth amendment due process bars dependent judges in state cases where constitutional rights are at stake. In that event, the fourteenth amendment would effectively prevent Congress from granting jurisdiction over such cases to state courts lacking tenure and salary protection.

⁴⁹ See Redish, *Judicial Parity*, *supra* note 35, at 335; see also Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475, 496-97 (1986). It appears that state judges with tenure and salary protection granted by state law would meet this test. See Redish, *Constitutional Limitations*, *supra* note 13, at 163 & n.96.

recognizes that the Supreme Court does not agree with him on this issue.⁵⁰ I think the Court is correct.⁵¹ If state courts were so hostile to federal rights that a constitutional claimant could not get a fair hearing in them, then due process would require access to federal court.⁵² But state courts today generally adjudicate constitutional issues in good faith.⁵³ The forum issue makes a difference only in hard cases where a conscientious judge could rule either way and remain faithful to the precedents and other legal materials.⁵⁴ The recent growth of constitutional constraints on state governments may actually count in favor of state court adjudication. In this way the states can retain at least some of the authority they have lost to the national government through the enactment and expansive interpretation of the fourteenth amendment, and our system can retain some of the benefits, such as innovation, multiple avenues of relief, and differing points of view, that accompany dispersal of governmental power among a number of institutions.⁵⁵

IV.

Perhaps I am wrong about the Madisonian Compromise, and scholars like Akhil Amar, Robert Clinton, and Lawrence Sager are right in arguing for strict limits on Congress's power over federal jurisdiction.⁵⁶ However the congressional control issue comes out, Professor Friedman's dialogic approach fails to capture what is at stake in the choice between the two sides. Neither the vitality of the states nor adjudicatory independence is a value that is properly weighed together with numerous other circumstances in resolving a given jurisdictional issue. The champions of each position rightly put forth their claims as matters of fundamental law, outranking all nonconstitutional considerations, and one or the other of them is right.

While I subscribe to congressional primacy, the basic flaw in Friedman's thesis is that he fails to acknowledge that some jurisdictional ques-

⁵⁰ Redish, *Constitutional Limitations*, *supra* note 13, at 161; *see, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

⁵¹ *See also* Gunther, *supra* note 35, at 915-16.

⁵² When this condition is met, access to federal court is available today. *See* Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C.L. REV. 49, 54-72, 78-91 (1987).

⁵³ *See* Monaghan, *The Burger Court and "Our Federalism,"* 43 LAW & CONTEMP. PROBS. 39, 49 (1980); Neuborne, *supra* note 36, at 1119 & n.55.

⁵⁴ *See* Wells, *supra* note 36, at 323.

⁵⁵ *See* Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Bator, *supra* note 36, at 634-35 & n.66; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489-91 (1954).

⁵⁶ Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

tions are too important to be left to the case-by-case method of adjudication that he apparently favors. The point of a written constitution is that principles of basic governmental structure and individual rights should remain more or less permanently in place, subject always to equally fundamental objections raised against them. Considerations such as uniformity, comity, convenience, and caseload⁵⁷ should count for little or nothing next to principles of federalism and separation of powers.⁵⁸ At the very least, judges should strive to identify and articulate such principles, even if they know the content will be controversial and subject to re-examination by other judges with different points of view. The dialogic approach at least discourages, if it does not entirely forbid, judges from engaging in *constitutional* decisionmaking.

⁵⁷ See Friedman, *supra* note 7, at 52.

⁵⁸ See *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *INS v. Chadha*, 462 U.S. 919, 944 (1983).