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The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis

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THE JUDICIAL POWER AND THE INFERIOR FEDERAL COURTS: EXPLORING THE CONSTITUTIONAL VESTING THESIS

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> The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.[1]

I. INTRODUCTION

Although the Constitution vests the "[J]udicial Power" of the United States in the Supreme Court and in any inferior courts that Congress establishes,[2] both Congress[3] and the Court[4] have long propounded the traditional view that the inferior courts may be deprived cognizance of some of the cases and controversies that fall within that power.[5] Is this view fully consonant with the

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[1] THE FEDERALIST NO. 48, at 279 (James Madison) (Am. Bar Ass'n 2009).

[2] U.S. CONST. art. III, § 1.

[3] *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73–82 (establishing inferior federal courts and then limiting their jurisdiction to a subset of the cases and controversies identified in Article III); *see also* Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46 n.4 (1975) (citing and collecting various other examples of congressional enactments limiting the jurisdiction of inferior federal courts). For a more recent and controversial instance of congressional jurisdiction-stripping, see the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2623 (2006) (amended 2009):

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

[4] *See, e.g.*, United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812) ("[T]he power which congress possess [sic] to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects . . . ."); Palmore v. United States, 411 U.S. 389, 401 (1973) ("[Congress] was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States . . . . Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III.").

[5] *See* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990) ("[T]he traditional view of article III [is] that Congress has plenary authority over federal court jurisdiction. According to that view, Congress may deprive the lower federal courts, the Supreme Court, or all federal courts of jurisdiction over any cases within the federal judicial power, excepting only those few that fall within the Supreme Court's original jurisdiction."). Current statutes reflective of this traditional view are too numerous to mention here, but one of the most familiar is the federal diversity jurisdiction statute.

history and text of Article III? One possible reading of those sources suggests that the Constitution vests the *full* Judicial Power of the United States in the inferior federal courts, directly extending to them jurisdiction over matters that Congress may not abridge. This position is controversial and has been rejected.[6] However, my goal here is to explore whether the text, structure, and history of Article III provide any support for this contention.

When one consults the record of debates surrounding the drafting and adoption of the Constitution and analyzes the constitutional text in light of insights gained from those debates, it seems that the "plan of the Convention"[7] was to create an independent and equal branch of government fully capable of exercising the Judicial Power of the United States free from the control of the other branches and empowered to give greater effect to the superior authority of the central government and its laws than had been the case under the Articles of Confederation. Indeed, the Framers of the Constitution expressly considered and rejected language that would have undermined that central plan by investing Congress with the very authority over the Federal Judiciary that Congress and the Court have presumed to exist. Thus, although our system envisions certain checks and balances among the three branches of government, conceding congressional authority to manipulate the jurisdiction of inferior federal courts is in some tension with notions of judicial independence the Framers seemingly embraced and pursued.[8]

See 28 U.S.C. § 1332 (2006) (limiting federal courts to cognizance of diversity cases involving disputes where more than $75,000 is in controversy).

[6] *See, e.g.*, Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (footnote by Chase, J.) ("The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress."); *see also* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982) ("The position that the Constitution obligates Congress to create lower federal courts, or (having created them) to vest them with some or all of the jurisdiction authorized by article III, has been repudiated by an unbroken line of authoritative judicial and legislative precedent.").

[7] *See infra* Part II (defining and exploring the concept).

[8] These questions are not merely academic but are of the greatest import. For example, the importance of the jurisdictional issue derives, in part, from the fact that Congress has frequently used jurisdiction-stripping to register its disagreement with and to control how

There have been only a few challenges to the received wisdom blessing congressional control over inferior court jurisdiction,[9] even though there is a long tradition of scholarship—penned by the likes of Justice Joseph Story and Professor Henry Hart—that

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the federal courts exercise the Judicial Power. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 321 (5th ed. 2003) ("[P]erhaps the most controversial proposals to limit the jurisdiction of the federal courts have been those that reflect a substantive disagreement with the way the Supreme Court, the lower federal courts, or both have resolved particular issues.").

[9] Professor Robert N. Clinton, in *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984), offers a historical analysis of the question similar to that presented in this Article, although with different areas of emphasis and differing conclusions. *See id.* at 746–48 ("This Article will examine the history surrounding the drafting and ratification of the judicial article in order to discern any original intention of the framers that might be relevant to current debates over the source and scope of congressional power over the jurisdiction of the federal courts." (footnote omitted) (citation omitted)); *id.* at 749–50 ("The conclusion of this inquiry is that the framers, by providing that '[t]he judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish,' 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 . . . ." (emphasis omitted) (footnote omitted) (quoting U.S. CONST. art. III, § 1)); *see also* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 913 (1984) ("There have been very few academics who have suggested that there are substantial internal restraints . . . on congressional authority over lower federal courts."); Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 622–25, 630–31 (2006) (relating a fictitious dialogue in which a Supreme Court Justice expresses concerns about the constitutional propriety of jurisdiction-stripping legislation); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 21–22, 67 (1981) (arguing that although Congress has the authority to restrict the Article III jurisdiction of inferior federal courts, this authority must be exercised within constitutional limitations and be subject to full judicial review). Although in one of his writings Professor Charles Warren did well to acknowledge that "the strong pro-Constitution men" who "took the position that Congress had no power to withhold from the Federal Courts which it should establish any of the judicial power granted by the Constitution" were probably in the right, he did not further endorse or advocate for the position and indeed indicated that its failure to hold sway "was extremely fortunate for the United States." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 67–69 (1923). Scholars likely have eschewed a direct challenge to the traditional view because the Supreme Court early on affirmed without reservation that Congress has the power to limit the jurisdiction of lower federal courts to a subset of the Judicial Power set forth in Article III. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. . . . Such has been the doctrine held by this court since its first establishment.").

has otherwise thoroughly analyzed the nature of Congress's authority with respect to the Federal Judiciary.[10] This Article does not take up that challenge so much as it attempts to revive the debate.

This Article proceeds as follows: Part II examines the debates in the Federal Constitutional Convention and those of the various state ratifying conventions to discover the original understanding of the nature and scope of the Judicial Power. These discussions, as well as the proposal and amendment process of the Framers during the Federal Convention, will be combined with the perspective offered in *The Federalist* to arrive at a general understanding of the plan of the Convention with respect to the Judicial Power and the Federal Judiciary. Part III details the traditional view that Congress has the authority to limit the jurisdiction of inferior federal courts. Part IV offers a possible alternative to this traditional view, questioning Congress's authority to pare down the Judicial Power to be exercised by inferior Article III courts—the constitutional vesting thesis—and concludes with a discussion of some implications of this idea.

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[10] The debate over the nature of Congress's authority with respect to the inferior federal courts has been long and robust. Justice Story long ago set forth his vision that the "shall" language in Article III's Vesting Clause meant that the entire Federal Judicial Power must be vested in some federal court; thus, to the extent that Congress deprives the Supreme Court of jurisdiction over matters falling within the Judicial Power, Congress is obligated to create inferior federal courts invested with cognizance of those matters. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 331 (1816) ("[C]ongress 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."). Hart moved the debate forward by affirming the traditional view that Congress has plenary authority over federal court jurisdiction, *see* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64 (1953) ("Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court."), but did so with the caveat that Congress may make such exceptions to the Supreme Court's jurisdiction "such as will destroy the essential role of the Supreme Court in the constitutional plan." *Id.* at 1365.

II. THE PLAN OF THE CONVENTION

Any exploration of the meaning and import of the Article III Judicial Power must begin with a review of the evidence from the deliberations from the Federal Constitutional Convention of 1787 and the subsequent state ratifying conventions. Here, one finds the organic development of the language of Article III from its initial proposal through final approval and the accompanying sentiments, rationales, and understandings of those called to shape or to approve the resulting text. The organic development of Article III's language is significant because it reveals language and provisions considered and rejected, giving us insight into what the Framers intended the Article to accomplish and what powers they explicitly did not approve.

The evidence of drafting revisions and the accompanying debate of the Convention delegates, coupled with the debates of the delegates to the state conventions, reveal what has been termed the "plan of the Convention."[11] The plan of the Convention as it pertains to the Judicial Power interests scholars here. What was the Framers' intent with respect to the assignment of the Judicial Power to various elements within the federal government? What relationship was envisioned for Congress and the Judiciary? How did the Framers understand that the new Constitution would protect judicial independence? What role did separation of powers doctrine play in this regard and what steps did the Framers take to further the doctrine? Below, this Article will discuss early materials pertaining to the drafting and consideration of the Constitution with an eye toward answering some of these questions.

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[11] *See, e.g.*, THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 1, at 479–80 ("The plan of the convention, in the first place, authorizes the national legislature 'to constitute tribunals inferior to the Supreme Court.' It declares, in the next place, that 'the Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall . . . ordain and establish.' " (emphasis omitted) (footnote omitted)).

A. THE DEBATES IN THE FEDERAL CONVENTION OF 1787

The debates on the Constitution reveal the evolution of the Judiciary Article in the direction of less congressional control and expanded judicial authority. The starting point for debate in the Federal Convention was a set of proposed resolutions offered by Edmund Randolph of Virginia. The ninth of these concerned the Judiciary for the new government and read as follows:

> Res[olved] that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. [T]hat the jurisdiction of the inferior tribunals shall be to hear [and] determine in the first instance, and of the supreme tribunal to hear and determine in the [last] resort, all piracies [and] 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.[12]

Several aspects of this draft are noteworthy. First, the resolution vests the Legislature with authority to designate inferior tribunals. Second, in this draft we find a direct vesting of jurisdiction in the "inferior tribunals" as evidenced by the language "the jurisdiction of the inferior tribunals *shall be*."

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[12] 1 JAMES MADISON, Session of Tuesday, May 29, 1787, *in* THE DEBATES IN THE FEDERAL CONVENTION WHICH OF 1787 FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 21, 25 (Gaillard Hunt & James Brown Scott eds., 1987) [hereinafter DEBATES IN THE FEDERAL CONVENTION].

Third, the "supreme tribunal" enjoys only appellate jurisdiction.[13] Finally, the draft defines the jurisdiction of the federal courts vaguely as embracing "questions which may involve the national peace and harmony." Most relevant to our discussion are the first two.

The authority to "choose" inferior tribunals is the extent of the role that the text gives the National Legislature; it specifies none other. Then, the draft directly vests in the inferior federal courts jurisdiction over a specified class of cases: the proposed text states that "the jurisdiction of the inferior tribunals shall be to hear [and] determine in the first instance" certain specified cases and controversies.[14] These two aspects of the proposed language leave little room for the notion that the legislature has the authority to curtail inferior court jurisdiction, or at least this particular provision would not have served as a basis for presuming such authority. The questions are what became of this language and whether the proposal was revised in any way that enlarged or permitted legislative authority in such a direction.

After a summer of debate, on August 6, 1787 the Convention's Committee of Detail prepared and presented a draft of the Constitution to the Convention delegates. This draft spoke of the power of the federal courts in what was then Article XI as follows:

> 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.

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[13] *See id.* ("[T]hat the jurisdiction . . . of the supreme tribunal to hear and determine in the [last] resort . . . .").

[14] *Id.*

> 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 beforementioned, 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 abovementioned (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.[15]

By this point, the drafters had made a raft of substantial alterations. A distinction between the "Judicial Power of the United States" and the "Jurisdiction of the Supreme Court" had arisen, with the latter confined to a more specifically delineated list of cases and controversies than found in the initial proposal. Interestingly, the draft conferred this jurisdiction directly upon the Supreme Court with "the Legislature" possessing the power to "assign any part of the jurisdiction abovementioned . . . in the manner, and under the limitations which it shall think proper, to such Inferior Courts." Here, there was an explicit vesting in the Legislature of the authority to take the jurisdiction of the Supreme

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[15] Session of Monday, August 6, 1787, *in* 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 337, 344.

Court and distribute some subset of that jurisdiction to the inferior federal courts as it sees fit. With this language that authority would be plenary and unquestionable.

In late August of 1787, the Convention delegates took up consideration of Article XI dealing with the Judiciary. On August 27, 1787, James Madison and Gouverneur Morris moved for—and the Convention approved—a change in the language of section 3 of that article by striking "The jurisdiction of the supreme Court" and replacing it with "the Judicial power."[16] The effect of this change was substantial. No longer did the first clause of section 3 refer only to the jurisdiction of the Supreme Court; rather, the enumerated cases were now proper to the full scope of "the Judicial power," which—per section 1—was vested both in the Supreme Court "*and in*" any inferior courts created by Congress.

Although the revision vested the inferior federal courts with a Judicial Power that extended to the enumerated cases and controversies of section 3, the final clause of that section still authorized Congress to "assign any part of the jurisdiction abovementioned . . . under the limitations which it shall think proper, to such Inferior Courts." Thus, this language would have given Congress the authority to restrict the jurisdiction of the lower federal courts to some subset of what the larger Judicial Power might comprehend. Of course, vesting Congress with such authority would have been in tension with the vesting of the Judicial Power in the inferior federal courts. If Congress could determine which part of that power the lower courts could exercise, then it would nowise be true that those inferior courts fully possessed the "Judicial Power of the United States." In what might have been an effort to resolve that tension, the Convention unanimously approved a motion to strike the entire last sentence in section 3 beginning with "The Legislature may assign . . . ."[17] This change indeed was the most dramatic and the most critical to our discussion. The draft no longer vested the Legislature with plenary authority to determine what portion of the federal

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[16] Session of Monday, August 27, 1787, *in* 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 471, 475.

[17] *Id.* at 476.

jurisdiction the inferior federal courts would enjoy; rather, the revised text stripped the Legislature of such power and placed those inferior federal courts on equal footing with the Supreme Court with respect to possessing the Judicial Power, save where the provision reserved matters to the Supreme Court's original jurisdiction.

As they were trimming back congressional authority to limit the jurisdiction of inferior federal courts, the delegates to the Convention also rebuffed an effort to extend to Congress additional power over the Judiciary. When a motion was made to insert at the end of section 3, "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct," the Convention delegates rejected the motion by a vote of 6-to-2.[18] Although discussion of this item does not appear in Madison's notes of the debates, one can imagine that delegates deemed the proposed insertion to be at odds with the majority's sentiment that Congress had no business interfering with the Federal Judiciary's exercise of the Judicial Power. Indeed, the combination of extending the Judicial Power to the inferior federal courts, the shearing of congressional authority to "assign any part of the jurisdiction abovementioned," and the rejection of the idea that Congress should be able to "direct" the "manner" in which "the Judicial power shall be exercised" stands as a clear victory for judicial independence and a repudiation of the idea that the Judicial Branch should be subordinate to Congress rather than its co-equal sibling.

The only accession to congressional authority over judicial matters left intact after these amendments—besides authority in section 1 to constitute inferior federal tribunals—was the authority in section 3 to make "exceptions" and "regulations" governing the appellate jurisdiction of the Supreme Court. On August 28, 1787, the Convention approved a motion to strike the words "it shall be appellate" and to insert the words "the supreme Court shall have appellate jurisdiction," in section 3 of Article XI.[19]

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[18] *Id.* at 475–76.

[19] Session of Tuesday, August 28, 1787, *in* 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 476, 476.

The rationale reported in Madison's notes was "to prevent uncertainty whether 'it' referred to the *supreme Court*, or to the *Judicial power*."[20] Thus, it was clear that the Judicial Power was not to be limited to appellate review and that Congress's power to make "exceptions" and "regulations" applied not to the exercise of the Judicial Power but only to the appellate jurisdiction of the Supreme Court.[21]

A final detail worth noting is that the Convention delegates rejected a motion by Madison and James McHenry to reinsert the words "increased or" before the word "diminished" in section 2.[22] Had this change been made, Congress would have been constitutionally prevented from *increasing* judicial pay for existing federal judges. The delegates felt that increases would be necessary to counter the effects of inflation and to compensate judges properly for the inevitable increase in judicial business they would have to manage as the country aged.[23] Although Madison

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[20] *Id.*

[21] Collecting these amendments together, section 3 would have then read as follows:

> The Judicial Power 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 beforementioned, the supreme Court shall have appellate jurisdiction, with such exceptions and under such regulations as the Legislature shall make.

See supra notes 15–20 and accompanying text (presenting draft of then Article XI and discussing subsequent revisions).

[22] Session of Monday, August 27, 1787, *in* 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 271, 274. The initial proposal to the Convention had prohibited the "increase or diminution" of judicial compensation. Session of Tuesday, May 29, 1787, *in* 1 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 21, 25.

[23] *See* Session of Wednesday, July 18, 1787 (remarks of Gouverneur Morris), *in* 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 274, 278 ("The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners [and] the style of living in a Country. The increase of business can not, be provided for in the supreme tribunal [by increasing the number of

suggested that the power to increase would be a slight weight against judicial independence in the event the judges became overly desirous of a raise, the Convention seemed to disagree, or at least to place more value on the need to attract the best talent to the federal bench.[24]

The draft that the Committee on Style presented to the Convention for final consideration contained a judiciary article that closely tracked the language ultimately adopted as Article III of the U.S. Constitution, with the enumeration of cases and controversies falling within the Judicial Power moving to Section 2 of the Article.[25]

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judges]. All the business of a certain description whether more or less must be done in that single tribunal. Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.").

[24] *See* Session of Monday, August 27, 1787 (remarks of Charles Cotesworth Pinkney), *in* 2 DEBATES OF THE FEDERAL CONVENTION, *supra* note 12, at 471, 474 ("The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can allow in the first instance." (footnote omitted)).

[25] Session of Wednesday, September 12, 1787, *in* 2 DEBATES IN THE FEDERAL CONVENTION, *supra* note 12, at 545, 551–52:

> *Sect.* 1. 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 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.
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> *Sect.* 2. The judicial power shall extend to all cases, both in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. To all cases affecting ambassadors, other public ministers and consuls. To all cases of admiralty and maritime jurisdiction. To controversies to which the United States shall be a party. To controversies between two or more States; between a state and citizens of another state; between citizens of different States; between citizens of the same state claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.
>
> In cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have

B. THE DEBATES IN THE STATE CONVENTIONS

The proceedings of the state ratifying conventions are useful for gaining some insight into the meaning ascribed to the words of the Constitution by people of the day.[26] A central concern among state convention delegates was the scope of the jurisdiction given to the federal courts by Article III. The Massachusetts Convention addressed these concerns by ratifying the Constitution but recommending several amendments. Relevant to our discussion is the seventh proposal:

> *Seventhly.* The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different states, unless the matter in dispute, whether it concern the realty or personalty, be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any action between citizens of different states, where the matter in dispute, whether it concern the realty or personalty, is

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been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

[26] For a discussion of the various originalist approaches of looking to the drafters versus the ratifiers of the Constitution for insight into its original meaning, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 249–50 (2009):

> Even in the early days of "original intent" originalism, there was internal disagreement about the proper focus of the inquiry. The "intent of the Framers" was a misleading abstraction that implied a degree of agreement that was not really there. Just who were the "Framers" whose intentions mattered: the men who drafted the text of the Constitution and agreed upon it at the Philadelphia convention, or the men whose ratification votes at the subsequent state conventions gave it the force of law? The early originalists could not agree on the answer to that question.

For another useful discussion of originalism as an approach to constitutional interpretation, see Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. PUB. & POL'Y 5, 5 (2011) ("Although it is customary to speak of originalism as a single constitutional theory, even a cursory review of recent scholarship reveals that the range of originalist theories has grown startlingly broad and diverse and is becoming more so all the time. So great are the differences among originalist theories that I question the premise that we can talk meaningfully about Originalism . . . .").

> not of the value of fifteen hundred dollars at the least.[27]

What does this tell us about the understanding that Massachusetts Convention delegates had of the Constitution? Well, if these delegates felt there was a need to amend the Constitution to limit the Federal Judicial Power to diversity actions valued at $1,500 or more, that may indicate they believed that the Constitution as presented to them permitted inferior courts to exercise jurisdiction in actions of any dollar amount.[28] It is instructive, then, that the delegates offered an amendment of this kind; it may be that the Massachusetts delegates had some sense that unless the Framers adopted this type of amendment, the federal courts would hear diversity cases in which less than $1,500 was in dispute. If the Massachusetts delegates had an understanding that the description of the Judicial Power in Article III did not vest such jurisdiction in the inferior federal courts and that Congress itself could limit the cognizance of the federal courts in the manner that the Massachusetts amendment proposed, one can at least doubt whether the Massachusetts delegates would have felt compelled to propose such a specific amendment. The Convention of Maryland reached like conclusions and proposed amending language to attach an amount in controversy to the jurisdiction of the inferior federal courts.[29]

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[27] Debates in the Convention of the Commonwealth of Massachusetts (Feb. 5, 1788), *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 177 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1891) [hereinafter ELLIOT'S DEBATES].

[28] Admittedly, it could also mean that Massachusetts delegates were concerned that Congress would not impose any limitations on inferior federal court jurisdiction.

[29] The amendment proposed by the Maryland delegates read as follows:

> That the inferior federal courts shall not have jurisdiction of less than _____ dollars; and there may be an appeal, in all cases of revenue, as well to matter of fact as law; and Congress may give the state courts jurisdiction of revenue cases, for such forms, and in such manner, as they may think proper.

A Fragment of Facts, Disclosing the Conduct of the Maryland Convention (Apr. 24, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 547, 550 (blank space appears in the original). Explaining the amendment, the Convention wrote, that one of "[t]he great objects of these amendments [was] . . . [t]o give a concurrent jurisdiction to the state courts, in

Similar efforts to amend the text of Article III arose out of the New York Convention. Delegates there proposed a slew of amendments that would curtail the scope of the Judicial Power. For example, the first amendment offered to Article III read as follows:

> *Resolved*, as the opinion of this committee, that nothing in the Constitution now under consideration contained shall be construed so as to authorize the Congress to constitute, ordain, or establish, any tribunals, or inferior courts, with any other than appellate jurisdiction, except such as may be necessary for trial of causes of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas; and in all other cases to which the judicial power of the United States extends, and in which the Supreme Court of the United States has no original jurisdiction, the cause shall be heard, tried, and determined in some of the state courts . . . .[30]

This proposal is interesting because it reflected a concern with the breadth of authority that the Constitution appeared to vest in the inferior federal courts and because it portended a debate that would recur in the First Congress over the scope of inferior federal court jurisdiction.[31]

The former point—the breadth of inferior federal court authority that concerned New York's delegates—is mildly instructive because it again suggests there was a sense that the text vested those courts with power in such cases if the Constitution was approved with its proposed language intact. One

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order that Congress may not be compelled, as they will be under the present form, to establish inferior federal courts . . . ." *Id.* at 550–51. Although the idea that Congress would be obligated to establish inferior federal courts is inconsistent with the plain language of Article III, the sentiment that Article III was in some respects imperative is noteworthy.

[30] The Debates in the Convention of the State of New York (July 5, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 205, 408.

[31] *See infra* notes 89–91 and accompanying text.

could surmise that the delegates believed only an amendment of the kind suggested above could ensure that this was not the case since there was no discussion of any notion that Congress could step in and curtail the jurisdiction in the manner the amendment desired. The latter point—that this amendment foreshadowed a central debate within the First Congress surrounding the Judiciary Act of 1789—is interesting because it offers some confirmation of the claim that members of the First Congress were fighting battles that they had lost during the various Constitutional Conventions.[32] The New York delegates proposed other jurisdiction-curbing amendments,[33] each of which only

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[32] *See infra* notes 161–62 and accompanying text.

[33] The series of proposed additional amendments to Article III read as follows:

Resolve 1. "*Resolved*, as the opinion of this committee, that all appeals from any courts in this state, proceeding according to the course of the common law, are to be by writ of error, and not otherwise."

Res. 2. "*Resolved*, as the opinion of this committee, that no judge of the Supreme Court of the United States shall, during his continuance in office, hold any other office under the United States, or any of them."

Res. 3. "*Resolved*, as the opinion of this committee, that the judicial power of the United States, as to controversies between citizens of the same state, claiming lands under grants of different states, extends only to controversies relating to such lands as shall be claimed by two or more persons, under grants of different states."

Res. 4. "*Resolved*, as the opinion of this committee, that nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner what ever."

Res. 5. "*Resolved*, as the opinion of this committee, that the judicial power of the United States, in cases in which a state shall be a party, is not to be construed to extend to criminal prosecutions."

Res. 6. "*Resolved*, as the opinion of this committee, that the judicial power of the United States, as to controversies between citizens of different states, is not to be construed to extend to any controversy relating to any real estate not claimed under grants of different states."

Res. 7. "*Resolved*, as the opinion of this committee, that the judicial power of the United States, as to controversies between citizens of the same state, claiming lands under grants of different states, extends only to controversies relating to such lands as shall be claimed by two or more persons, under grants of different states."

Res. 8. "*Resolved*, as the opinion of this committee, that the person aggrieved by any judgment, sentence, or decree of the Supreme Court of the United States, with such exceptions, and under such regulations, as the Congress shall make concerning the same, ought, upon application, to have

buttresses the view that they felt that the originally proposed text vested the inferior federal courts with the authority to hear all of the cases enumerated in Article III, Section 2 unless some amendments were made.

Delegates to Pennsylvania's convention also pondered the scope of federal jurisdiction, with some contending that it was too broad. In response to this charge, James Wilson—also a delegate to the Federal Convention—offered the following defense of the breadth of the Judicial Power:

> He said, "that the judicial powers were coextensive with the legislative powers, and extend even to capital cases." I believe they ought to be coextensive; otherwise, laws would be framed that could not be executed. Certainly, therefore, the executive and judicial departments ought to have power commensurate to the extent of the laws; for, as I have already asked, are we to give power to make laws, and no power to carry them into effect?[34]

Concededly, the suggestion that the Judicial Power should generally be coextensive with the power of the national government does not necessarily mean that the power of the

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> a commission, to be issued by the President of the United States, to such learned men as he shall nominate, and by and with the advice and consent of the Senate, appoint, not less than seven, authorizing such commissioners, or any seven or more of them, to correct the errors in such judgment, or to review such sentence and decree, as the case may be, and to do justice to the parties in the premises."
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> Res. 9. "*Resolved*, as the opinion of this committee, that the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, ought not, in any case, to be increased, enlarged, or extended, by any fiction, collusion, or mere suggestion."

The Debates in the Convention of the State of New York (July 5, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 205, 408–09.

[34] The Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 415, 469; *see also id.* at 489 ("The article respecting the judicial department is objected to as going too far . . . . Controversies may certainly arise under this Constitution and the laws of the United States, and is it not proper that there should be judges to decide them?").

inferior federal courts must be coextensive in that regard. Rather, Wilson could have meant that the Judicial Power as exercised collectively by the Federal Judiciary would need to be coextensive with the Legislature's power or that at a minimum the Supreme Court needed to have authority of such breadth.[35] Nevertheless, it is also possible to see in this logic support for the idea that the inferior courts require jurisdiction coextensive with the power of the national government so that all of its laws might be enforceable.[36] In light of the language of Article III that Wilson was defending—that the Judicial Power of the United States is vested "in such inferior Courts" as Congress may establish—one can at least legitimately use Wilson's defense of the coextensive scope of the Judicial Power to argue that the inferior courts in which such power is vested should have such coextensive authority as well.

Although not a proponent of expansive federal court jurisdiction, Virginia's Patrick Henry revealed that he understood the Constitution to confer upon the federal courts jurisdiction to the extent indicated by the enumerated cases and controversies. In opposing so empowering the federal courts he argued,

> The sheriff comes to-day as a state collector. Next day he is federal. How are you to fix him? How will it be possible to discriminate oppressions committed in one capacity from those perpetrated in the other? . . . When you fix him, where are you to punish

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[35] This would be a view in line with the one articulated by Justice Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816). *See also infra* notes 104–05 and accompanying text.

[36] Edmund Pendleton made the point about the need for the jurisdiction of the federal courts to be coextensive with the authority of the national government and suggested that the notion applied to the inferior courts as well as the Supreme Court:

> [T]he power of that judiciary must be coextensive with the legislative power, and reach to all parts of society intended to be governed. They must be so arranged, that there must be some court which shall be the central point of their operations; and because all the business cannot be done in that part, there must be inferior courts to carry it on.

The Debates in the Convention of the Commonwealth of Virginia (June 18, 1788), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 27, at 1, 517.

> him? [F]or I suppose they will not stay in our courts: they must go to the federal court; for, if I understand that paper right, *all controversies arising under that Constitution, or under the laws made in pursuance thereof, are to be tried in that court.*[37]

Of course one could argue that Henry was simply voicing his opinion that federal question cases were mandatorily vested in the federal courts.[38] Nevertheless, the statement is reflective of the sentiment common among delegates to the state conventions that the grant of authority to the federal courts was quite broad. The quotation is also typical in that it offers no hint of an understanding that Congress could intervene to pare down the jurisdiction granted to the federal courts. One might imagine that opponents would have tempered their objections to some extent if they believed this to be the case; proponents of the proposed Federal Judiciary might have pointed to such a feature to pacify the concerns of opponents had it been thought that Congress would be so empowered.[39]

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[37] *Id.* at 168 (emphasis added).

[38] This is part of the view propounded by Professor Akhil Reed Amar in his article *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240 (1985) ("The implication of the text, while perhaps not unambiguous, is strong: although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all cases in the last six.").

[39] This is exactly the approach taken by defenders of Article III who sought to ease concerns regarding the scope of the Supreme Court's appellate jurisdiction:

> The appellate jurisdiction is, therefore, undoubtedly proper, and would not have been objected to if they had not introduced, unfortunately, in this clause, the words "both as to law and fact." Though I dread no danger, I wish these words had been buried in oblivion. If they had, it would have silenced the greatest objections against the section. I will give my free and candid sentiments on it. We find them followed by words which remove a great deal of doubt—"with such exceptions, and under such regulations, as Congress shall make;" so that Congress may make such regulations as they may think conducive to the public convenience.

The Debates in the Convention of the Commonwealth of Virginia (June 18, 1788) (statement of Edmund Pendleton), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 27, at 1, 519; *see also id.* at 534 (statement of James Madison) ("The principal criticism which has been made, was against the appellate cognizance as well of fact as law. . . . [I]f gentlemen should contend that appeals, as to fact, can be extended to jury cases, I contend that, by the word *regulations*, it is in the power of Congress to prevent it, or prescribe such a mode as

Perhaps the strongest affirmation of the idea that state convention delegates read the Constitution to vest in the inferior federal courts full jurisdiction over all the matters enumerated in Section 2 of Article III comes from George Mason of Virginia. In the Virginia Convention debates, he made the following remarks:

> The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please. Read [Section 2 of Article III], and contemplate attentively the extent of the jurisdiction of these courts, and consider if there be any limits to it.
>
> I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. If there be any limits, they must be contained in one of the clauses of this section; and I believe, on a dispassionate discussion, *it will be found that there is none of any check.*[40]

Mason certainly was not under the impression that Congress had the authority to limit the jurisdiction of the inferior federal courts to a subset of those matters set forth in Section 2. To the contrary, upon reading the document he stated that "there is none of any check" on their jurisdiction. Fellow Virginia Convention delegate John Tyler seemed to concur somewhat with Mason's understanding when he stated, "Is there any limitation of, or restriction on, the federal judicial power? I think not."[41] Ultimately, the Virginia Convention addressed its concerns with the jurisdiction of the inferior courts by proposing an amendment to Article III that would have eliminated the inferior federal courts

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will secure the privilege of jury trial. They may make a regulation to prevent such appeals entirely . . . .").

[40] *Id.* at 521 (emphasis added); *see also id.* at 523 (statement of George Mason) ("I say that the general description of the judiciary involves the most extensive jurisdiction. Its cognizance, in all cases arising under the system and the laws of Congress, may be said to be unlimited.").

[41] *Id.* at 638–39; *see also id.* at 565 (statement of William Grayson) ("My next objection to *the federal judiciary* is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude.").

and replaced them with admiralty courts.[42] Again, there must have been some sentiment that Article III vested the inferior federal courts with cognizance of all matters enumerated in Section 2—with no available check by Congress—if the delegates were so moved to abolish all but their admiralty jurisdiction by amendment.

Besides the central issue of the jurisdiction of the federal courts, the provisions of the Constitution that created and bolstered the independence of the Federal Judiciary from the other branches of the national government were a frequent point of reference among those pondering the Constitution in the various state conventions.[43] In Connecticut, Oliver Ellsworth—himself a delegate to the Federal Convention[44]—remarked,

> This Constitution defines the extent of the powers of the general government. 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 general government, the law

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[42] *Id.* at 660 ("[T]he judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states.").

[43] *See, e.g.*, Debates in the Convention of the Commonwealth of Massachusetts (Feb. 4, 1788) (statement of Rev. Thomas Thacher), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 1, 145 ("The independence of judges is one of the most favorable circumstances to public liberty; for when they become the slaves of a venal, corrupt court, and the hirelings of tyranny, all property is precarious, and personal security at an end; a man may be stripped of all his possessions, and murdered, without the forms of law."); The Debates in the Convention of the Commonwealth of Virginia (June 12, 1788) (remarks of Edmund Pendleton), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 27, at 1, 303 ("Whenever, in any country in the world, the judges are independent, property is secure.").

[44] Ellsworth also served as the third Chief Justice of the United States. KENNETH BERNARD UMBREIT, OUR ELEVEN CHIEF JUSTICES, at vii (1938).

> is void; and upright, independent judges will declare it to be so.[45]

The need to have a dispersion and balancing of power within the national government was also an important theme for state convention delegates.[46] James Wilson of Pennsylvania articulated the importance of the separation of powers by contrasting it with the complete consolidation of authority that characterized the Continental Congress under the Articles of Confederation:

> Is the Senate, under the proposed Constitution, so tremendous a body, when checked in their legislative capacity by the House of Representatives, and in their executive authority by the President of the United States? Can this body be so tremendous as the present Congress, a single body of men, possessed of legislative, executive, and judicial powers? To what purpose was Montesquieu read to show that this was a complete tyranny? The application would have been more properly made, by the advocates of the proposed Constitution, against the patrons of the present Confederation.[47]

In the Virginia Convention, Governor Edmund Randolph—another former delegate to the Federal Convention—offered a similar refrain when he stated,

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[45] Fragment of the Debates in the Convention of the State of Connecticut (Jan. 7, 1788), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 185, 196.

[46] *See id.* at 198 (statement of Gov. Samuel Huntingdon) ("[I]f the government be properly balanced, it will possess a renovating principle, by which it will be able to right itself."); The Debates in the Convention of the State of New York (June 17, 1788) (remarks of Robert Livingston), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 205, 215 ("[I]f [the federal government] was to enjoy legislative, judicial, and executive powers, an attention as well to the facility of doing business as to the principles of freedom, called for a division of those powers."); The Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787) (statement of James Wilson), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 415, 479 ("I shall mention another good quality belonging to this system. In it the legislative, executive, and judicial powers are kept nearly independent and distinct.").

[47] The Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 459.

> Are we not taught by reason, experience, and governmental history, that tyranny is the natural and certain consequence of uniting these two powers, or the legislative and judicial powers, exclusively, in the same body? . . . Whenever any two of these three powers are vested in one single body, they must, at one time or other, terminate in the destruction of liberty.[48]

As seen in the following review of the defense of the Constitution offered in *The Federalist*, these themes of judicial independence and separation of powers continued to hold center stage in the discussion of the Judiciary.

C. *THE FEDERALIST* PAPERS

Mining the passages within *The Federalist* for support for constitutional arguments has long been the favorite pastime of many a constitutional law scholar and member of the Court.[49] The shortcomings of using *The Federalist* as proof of any particular interpretation of the Constitution are well-known. In a nutshell, the argument is that the essays of *The Federalist* were advocacy pieces[50] written principally by two individuals—James Madison and Alexander Hamilton[51]—and, therefore, it is not wholly legitimate to permit their explanation of text and meaning to prevail over the understanding derived directly from the text itself

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[48] The Debates in the Convention of the Commonwealth of Virginia (June 16, 1788), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 27, at 1, 83.

[49] *See, e.g.*, Printz v. United States, 521 U.S. 898, 971 (1997) (Souter, J., dissenting) ("In deciding these cases, . . . it is The Federalist that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45."). *See generally* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243 (2005) (discussing the Court's use of *The Federalist* to interpret the Constitution and decide cases).

[50] *See* Meltzer, *supra* note 5, at 1581–82 ("*The Federalist Papers* were, of course, political debate, not constitutional exegesis.").

[51] *See* James G. Wilson, *The Most Sacred Text: The Supreme Court's Use of* The Federalist *Papers*, 1985 BYU L. REV. 65, 65 n.2 (attributing only five of the total eighty-five essays to John Jay).

or from the records of debates of those who considered and voted on the Constitution.[52]

That said, these writings are of immense value in that they give analytical structure to arguments and sentiments espoused by the Framers during the debates. They also serve as confirmation that various threads of thought that one might discern from consulting the Convention debates were indeed on the Framers' minds when they crafted and pondered the constitutional text. To the extent that these writings were read by people at the time, they also reveal what the public at large may have understood to be the purpose and meaning of various constitutional provisions.[53] In sum, the writings of Hamilton and Madison are indispensable aids for understanding the mind of the Convention and the original understanding of those who ultimately passed judgment on the Constitution's text.

Turning to the essays of the *The Federalist*, what do they tell us about the Judicial Power that relates to our current topic? Much discussion respecting the Judiciary in *The Federalist* comes in the context of explanation and defense of the separation of powers scheme that emerged from the Convention. For Madison, the driving motivator behind every aspect of the composition and empowerment of each branch of the federal government was the desire to avoid tyranny and governmental excess:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be

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[52] For discussion of the use of *The Federalist*, see generally John F. Manning, *Textualism and the Role of* The Federalist *in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998); Wilson, *supra* note 51.

[53] *See* Gregory E. Maggs, *A Concise Guide to The Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 823 (2007) (explaining the theoretical bases for citing *The Federalist* as evidence of original public meaning).

> necessary to inspire a universal reprobation of the system.[54]

So the concentration of executive, legislative, and judicial powers in the same hands was viewed as "the very definition" of tyranny. Hamilton later explained the connection between an accumulation of power and tyranny when he argued for the independence of the Judiciary thusly:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[55]

Absent a robust and independent Judiciary, there would be no means of protecting the rights of the people, and the reservation of those rights would become meaningless. How then was one to avoid this dreaded accumulation of power?

According to Madison, the very separation of power into three branches and then controlling the ability of one branch to dominate the others was critical to forestalling the tyranny that results from a concentration of power:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of

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[54] THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 271.

[55] THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 451.

> them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.[56]

Although the need to delimit the precise boundaries of authority among the branches was acknowledged as a necessary step in protecting against a tyrannical regime, Madison—writing in *The Federalist No. 48*—ultimately deemed such a step to be woefully insufficient:

> Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? . . . [E]xperience assures us that the efficacy of [that approach] has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.[57]

In other words, articulating the limits of departmental power would not suffice because the natural strength of the Legislature in a republic is such that it will inevitably intrude upon the spheres and prerogatives of the other two branches.[58]

Indeed, Hamilton contrasted the strength of the Legislature with the weakness and vulnerability of the Judiciary. Hamilton said it best when he wrote,

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[56] THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 279.

[57] *Id.*

[58] *See* THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 294 ("In republican government, the legislative authority necessarily predominates.").

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .
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> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that *all possible care is requisite to enable it to defend itself against their attacks.*[59]

Such vulnerability demanded special efforts to protect the Judiciary; otherwise, the inevitably stronger Legislature would exploit its "natural feebleness."[60]

What then would be the means of constraining the authority of the three branches, particularly the Legislative Branch? Madison asked and answered this question at the beginning of *The Federalist No. 51*:

> To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that as all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual

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[59] THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 450 (emphasis added) (footnote omitted).

[60] *Id.* ("[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches . . . .").

> relations, be the means of keeping each other in their proper places.
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> . . . .
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> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.[61]

Thus, we see a threefold approach emerge: each of the three branches was to be designed in a manner that would permit them to exercise their vested authority independently; each required some ability to check the behavior of any wayward branch; and the separate departments were to be given the means of protecting themselves against encroachments by the other departments.

How was this approach translated into specifics? Focusing on the Judicial Branch—the concern here—Madison indicated that because members of the Judiciary would be dependent upon the other branches for their appointment, there was a need to neutralize that dependency through other measures bolstering judicial independence. The two measures he alluded to were the life-tenured status of the judges once appointed[62] and their protection against diminution in pay.[63] However, one could easily take the logic of his point to articulate a defense of the need for other strong measures to keep the Judiciary separate and independent from the other branches.

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[61] THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 293–94 (emphasis omitted).

[62] *See id.* at 293 ("[T]he permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them.").

[63] *See id.* at 294 ("It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.").

Hamilton expounded on this point in *The Federalist No. 78.* Remarking on the innovation of life tenure for federal judges, Hamilton wrote,

> The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. . . .
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> . . . .
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> . . . [A]s nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.[64]

Hamilton also explained the importance of the guarantee against a diminution in judicial pay by stating,

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in

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[64] THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 449–50; *see also id.* at 453 ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.").

> any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.[65]

Clearly, then, the independence and potency of the Judiciary were of paramount importance; the Founders thus constituted the Judicial Branch to preserve those principles.

The founding vision of judicial independence and potency was not left dependent solely upon the provision for life tenure and salary protection. The scope of the Judiciary's authority was also critical in this regard. As Hamilton explained, the Judiciary needed to have authority that was "coextensive" with the scope of federal legislative authority and competent to "giv[e] efficacy to constitutional provisions."[66] Thus, he regarded it imperative that the judicial authority extended to "all" of several classes of cases:

> [First], to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; [second], to all those which concern the execution of the provisions expressly contained in the articles of Union; [third], to all those in which the United States are a party; [fourth], to all those which involve the peace of the confederacy, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves; [fifth], to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.[67]

By extending to all such matters, the Judiciary would be fully competent to address all matters that the Legislature could touch,

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[65] THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 1, at 457 (emphasis omitted).

[66] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 461–62.

[67] *Id.* at 461 (emphasis omitted).

a critical element in setting up the federal courts as a bulwark against legislative excess. Similarly, cognizance of constitutional questions would permit the Judiciary to protect the rights of the people against encroachments by the other branches or by the states.[68]

It is worth noting that at the end of *The Federalist No. 80*, Hamilton makes the following statement:

> From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan it ought to be recollected that *the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.*[69]

Is Hamilton here endorsing the notion that the Constitution permits the Legislature to remove some portion of the cases and controversies falling within the Judicial Power from the cognizance of the federal courts? Although such a reading of Hamilton's words is possible—even plausible—it is at least equally plausible to limit the reference to Congress's authority to curtail the appellate jurisdiction of the Supreme Court. Hamilton's wording indicates that the latter is the better reading: the

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[68] *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 453 ("[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . . ."); THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 461 ("The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union and others with the principles of good government. . . . No man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.").

[69] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 466 (emphasis added).

Legislature will have the authority "to make such exceptions and to prescribe such regulations" as will obviate or remove any inconveniences. This language closely tracks Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*[70]

Hamilton likely had the text of the Constitution clutched immediately in his hand when he wrote his words given that he had just quoted extensively from the previous clause of Section 2 in the same essay.[71] That he was loosely quoting from Clause 2 here is thus all the more probable. That said, it is not disputed that the constitutional language only confers upon Congress power over the jurisdiction of the Supreme Court, not the inferior federal courts. Thus, if Hamilton was referring to the passage as a source of congressional authority to limit the jurisdiction of all federal courts, he clearly misunderstood it; his statement cannot transform the Clause into congressional authority that it indisputably does not confer.

In sum, the essays of *The Federalist* reveal at least some of the Framers' and the public's understanding of Article III as being extremely protective of the independence of the Judicial Branch. Although the Constitution's promise of lifetime tenure and salary protection for judges certainly reflects this independence, reading the Constitution as furthering and protecting that independence through direct vesting of the Judicial Power in the inferior federal courts is also consistent with this vision of judicial independence, given the need for judicial authority to be coextensive with the

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[70] U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

[71] *See* THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 1, at 465–66 (quoting and paraphrasing the language of Article III, Section 2, Clause 1).

scope of legislative authority. Thus, although one fails to find a direct endorsement of the constitutional vesting thesis among the pages of *The Federalist*, one sees no rejection of it either, and one certainly can imagine such vesting being consistent with the Framers' desired level of independence for the federal courts.

* * * * *

The relevant contemporary evidence of the public debate surrounding the development and adoption of the Constitution reveals a clear theme with respect to the Judicial Department of the newly created federal government: *Separation of powers in the service of judicial independence and judicial independence as a backstop against tyranny*. Far from being a matter of mere form—or simply fodder for political rhetoric—the issue of separation of powers and its concomitant concept of checks and balances resided at the core of the plan of the Convention.[72] Having revolted against and overthrown a tyrannical regime that ruled from afar, the new Americans were dedicated to devising a government that would not be able to so dominate them from within. The means identified for achieving this end was to divide power among various departments, to set each one up as independent from the other, and to vest each of them with some means of checking their fellows.[73]

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[72] *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 450 ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." (citation omitted) (internal quotation marks omitted)); The Debates in the Convention of the Commonwealth of Virginia (June 24, 1788) (statement of John Dawson), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 27, at 1, 608 ("That the legislative, executive, and judicial powers should be separate and distinct, in all free governments, is a political fact so well established, that I presume I shall not be thought arrogant, when I affirm that no country ever did, or ever can, long remain free, where they are blended.").

[73] *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (attached circuit court opinion by Jay, C.J., Cushing, J., and Duane, D.J.) ("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." (internal quotation marks omitted)); *id.* at 411 (letter of Wilson and Blair, JJ., and Peters, D.J.) ("It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle the people of

Achieving this balance was a tricky matter. The Framers first had to agree on what powers the national government as a whole would have and then they had to decide to which department to assign such powers. Although the assignment process in the aggregate was a simple matter of assigning legislative, executive, and judicial powers to the respective branches of Congress, the President, and the Supreme Court and inferior federal courts, it was on the margins where difficult decisions affecting the balance of power between the three branches had to be made. For example, would the trial of impeachments—clearly a judicial power—be placed within the Judicial Branch or would that matter be better handled by another department?[74] Should the warmaking power—a seeming executive power traditionally exercised by a country's head of state—lay exclusively in the hands of our President or should such capability be dispersed?[75] Deciding these matters one way or the other was what the game was all about; going in either direction would substantially alter the delicate balance the Framers were attempting to strike.

Given what rested on these decisions at the margins, one is obligated to honor the decisions made and take seriously the allocations of power on which the Framers settled. In the next Part, the Article will consider how Congress and the Court have understood the nature of this allocation with respect to the Judicial Power, leaving to Part IV an examination of whether this traditional understanding is fully consonant with the text, structure, and history surrounding the Constitution's relevant texts.

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the United States, in forming their Constitution, have manifested the highest regard. They have placed their *judicial* power not in congress, but in *courts*.").

[74] This matter was ultimately resolved in favor of assigning the trial of impeachments to the Senate. U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.").

[75] Dispersion of the warmaking power was achieved by giving Congress the power to declare war, *id.*. art. I, § 8, cl. 11, but making the President the Commander in Chief of the military forces, *id.* art. II, § 2, cl. 1.

III. THE TRADITIONAL VIEW OF THE JUDICIAL POWER

The traditional view of the Judicial Power consists of the understanding that the courts have the exclusive authority to decide cases and controversies of the kind enumerated in Article III, with no role in the dispute resolution process being reserved for the Executive or Congress.[76] Thus, neither the Executive Branch[77] nor Congress[78] may attempt review of the decisions of Article III courts. Notwithstanding this exclusive judicial authority, it is generally felt that Congress can manipulate the class of cases over which the inferior Article III courts will have cognizance.[79]

As discussed, the plan of the Convention was for the Judiciary Branch to be, as near as possible, free from manipulation by the other two branches to facilitate the untainted exercise of its vested judicial authority. However, from the very beginning of the Republic, Congress has asserted—and the Supreme Court has acquiesced in—the power to withhold some portion of the Judicial Power of the United States vested in the inferior federal courts under Article III. The development and acceptance of this congressional incursion into the judicial sphere will be reviewed below.

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[76] Miller v. French, 530 U.S. 327, 342 (2000) ("Article III 'gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.' " (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995))).

[77] *Plaut*, 514 U.S. at 218 ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." (citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409)).

[78] *Id.* at 226 (" '[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested.' " (alterations in original) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) at 413 (letter of Iredell, J., and Sitgreaves, D.J.))).

[79] *See, e.g.*, Gunther, *supra* note 9, at 912–14 (summarizing the traditional view); Bator, *supra* note 6, at 1030–31 ("[Article III] leaves it to Congress to decide, having created lower federal courts, what their jurisdiction should be—that is, to decide *which* of the cases to which the federal judicial power extends should be litigated in the lower federal courts.").

A. THE UNDERSTANDING OF CONGRESS

Congress has always asserted the right to limit the jurisdiction of the inferior federal courts.[80] It was the First Congress that initially created a collection of inferior federal courts in the Judiciary Act of 1789.[81] Beyond constituting these courts, the Judiciary Act also provided in detail for their jurisdiction. Regarding the district courts, the Act indicated that certain matters were within their jurisdiction to the exclusion of the state courts: minor crimes[82] cognizable under the authority of the United States, civil causes of admiralty and maritime jurisdiction, matters involving seizures on land or other waters under the laws of the United States, and suits against consuls or vice-consuls.[83] The same section of the Act then indicated that district courts would have "concurrent" jurisdiction over causes where an alien sues for a tort in violation of the law of nations or a U.S. treaty and all suits at common law by the United States valued of at least one hundred dollars.[84] The Act assigned the circuit courts concurrent jurisdiction over:

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[80] That Congress may limit the *appellate* jurisdiction of *the Supreme Court* is not in question. Article III provides:

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

U.S. CONST. art. III, § 2, cl. 2 (emphasis added). The Supreme Court has affirmed Congress's authority in this regard. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1868) ("[W]hile 'the appellate powers of this court are not given by the judicial act, but are given by the Constitution,' they are, nevertheless, 'limited and regulated by that act, and by such other acts as have been passed on the subject.' " (quoting Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810))). Although the power of Congress to regulate the appellate jurisdiction of the Supreme Court is universally acknowledged, the scope of that authority has been the subject of debate. *See* Gunther, *supra* note 9, at 901–08 (describing the narrow view of Congress's power to make exceptions to the appellate jurisdiction of the Supreme Court).

[81] *See* Judiciary Act of 1789, ch. 20, §§ 2–3, 1 Stat. 73–74 (establishing the first district courts).

[82] The Act defined minor crimes as those subject to punishments not exceeding one hundred dollars of fines, six months of prison, or thirty lashes of the whip. *Id.* § 9.

[83] *Id.*

[84] *Id.*

> all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State.[85]

The Act gave the circuit courts exclusive jurisdiction over crimes "cognizable under the authority of the United States," except that jurisdiction over minor crimes was to be concurrent with the district courts that were located where such crimes occurred.[86] Congress also gave the circuit courts appellate jurisdiction over matters coming from the district courts.[87] However, the Act conferred no general federal question jurisdiction on the circuit or district courts.[88] Thus, for both the district courts and the circuit courts, Congress delineated the scope of their jurisdiction and provided that such jurisdiction would extend only to a subset of the cases and controversies described in Article III as comprising the Judicial Power of the United States.

Debate over the Judiciary Act of 1789 embraced both consideration of the desirability of limiting federal court jurisdiction and of Congress's authority to do so.[89] However, many

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[85] *Id.* § 11.

[86] *Id.*

[87] *Id.*

[88] *See* FALLON ET AL., *supra* note 8, at 320 ("The first Judiciary Act did not provide for general federal question jurisdiction in civil cases . . . . Federal question cases that did not fall into some more specialized grant of jurisdiction had to be litigated in state court, subject to Supreme Court review.").

[89] *See* Warren, *supra* note 9, at 67 ("This was the crucial contest in the enactment of the Judiciary Act. The broad pro-Constitution men took the position that Congress had no power to withhold from the Federal Courts which it should establish any of the judicial power granted by the Constitution."). Indeed, Warren's useful research reveals that the effort to reduce federal jurisdiction to a subset of the Article III Judicial Power was the product of an effort on the part of some to undermine the broad grant of Article III in favor of limited jurisdiction that trenched less upon the authority and dignity of the states. *See id.* at 53 ("The fact is that the final form of the Act . . . was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction.").

members seemed to suppose that such authority existed and focused their energy on determining the precise scope of the prospective limits. A statement by Congressman William Smith of South Carolina is illustrative of the presumption of many that Congress could control inferior court jurisdiction. During the debate over whether to approve the proposed Judiciary Act, Smith indicated that after the House determined whether to create a system of inferior federal courts, "the next [point] which occurs is the extent of jurisdiction to be annexed to this court. . . . [S]ome gentlemen are of opinion that the district court should be altogether confined to admiralty causes; while others deem it expedient that it should be entrusted with a more enlarged jurisdiction."[90]

Indeed, a major point of contention among members of the House was whether the competency of the inferior federal courts should be limited solely to admiralty jurisdiction.[91] The ultimate limits decided upon were much broader than admiralty jurisdiction, but the more important point for our purposes is that the members of the First Congress clearly affirmed congressional authority to impose jurisdictional limits on the inferior federal courts when they enacted the final version of the Judiciary Act.

One member of the House of Representatives in particular spoke forcefully in favor of congressional authority to shape and limit the jurisdiction of the inferior federal courts. Here is an extended excerpt of a speech on the topic by Congressman Michael Stone during the debates on the Judiciary Act:

> It appears from the words of the constitution, that Congress may, from time to time, ordain and establish inferior courts, such as they think proper: Now, if this

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[90] 1 ANNALS OF CONG. 828 (1789) (Joseph Gales ed., 1834); *see also id.* at 848 (statement of Rep. William Smith) ("The objection to the extent of jurisdiction is premature, and ought to be reserved for the clause which ascertains the jurisdiction; if, upon an investigation of that clause, it should appear that it ought to be restricted, that would be the seasonable time for moving to strike out the exceptionable part.").

[91] *See id.* at 827 (statement of Rep. Samuel Livermore) ("Now, if we have a Supreme Court, to which appeals can be carried, and an Admiralty Court for deciding cases of a maritime nature, our system will be useful and complete.").

> is a command for us to establish inferior courts, if we cannot model or restrain their jurisdictions, the words which give us the power from time to time so to do, are vain and nugatory.... [T]he words ordain and establish will not only go to the appointment of Judges of inferior courts, but they comprehend every thing which relates to them.... It is not said in that instrument, that you shall exercise the judicial power over all those cases, but that the judicial power shall extend to those cases. If it had been the idea of the convention that its Judiciary should extend so as positively to have taken in all these cases, they would have so declared it, and been explicit; but they have given you a power to extend your jurisdiction to them, but have not compelled you that extension.[92]

This statement is one of the clearest made by those debating the Act in favor of congressional authority over inferior court jurisdiction.

Was Stone correct in his argument that congressional authority over the jurisdiction of inferior federal courts arose from the power to "ordain and establish" such courts? Stone clearly conflates the distinct issues of (1) whether Congress *must* create inferior federal courts and (2) whether, once created, jurisdiction over the full range of cases and controversies that comprise the Judicial Power must be vested in such courts. Only the latter of the two points is at issue here, and in supporting the latter point, Stone makes a linguistic argument. He attempts to draw a distinction between the existing language of Article III—that the Judicial Power "shall extend" to certain cases—and what it otherwise might have said—that "you shall exercise the Judicial Power over all those cases." That the Framers did not employ the latter formulation is taken as evidence of their intent to leave the scope of inferior court jurisdiction to Congress.

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[92] *Id.* at 854–55.

This wordplay should not be confused for sound argument. The term "extend" is used in Article III because it is used to describe the concept "Judicial Power." It would be improper to say "the Judicial Power shall *exercise* all cases . . ." because that is not something that Judicial Power can do. To make the sentence proper using the term "exercise," the sentence would have to read "the Judicial Power shall *be exercised* in all cases." But then the sentence would no longer describe the nature and scope of the Judicial Power; rather, it would describe what the courts are supposed to do. In other words, the latter formulation would focus on what the courts must do (exercise the Judicial Power in certain cases) as opposed to focusing on explaining exactly what the Judicial Power is (the Judicial Power extends to the enumerated cases and controversies). But that is not the office of the first sentence of Section 2; that clause describes the scope of the Judicial Power. It is for Section 1 to vest that power in the relevant components of the federal government—the Supreme Court and any created inferior courts. Given the role of Section 2 as the definer of the Judicial Power, the Framers' word choice not only makes sense, but is likely the clearest way that they could have imparted an imperative meaning for the term.

Another observation will complete the refutation of Stone's thesis. As noted above, the previous version of the Judiciary Article considered by the Framers in the Convention used the following language: "[t]he Jurisdiction of the Supreme Court shall extend to all cases."[93] The Framers amended this language by substituting "the Judicial power" in the place of "The jurisdiction of the supreme Court."[94] Certainly, Stone would have no warrant for asserting that the previous language, that "[t]he Jurisdiction of the Supreme Court shall extend to all cases" would have been insufficiently imperative regarding the scope of the Court's jurisdiction simply because the Framers failed to say "The Jurisdiction of the Supreme Court shall *be exercised* in all cases . . . ." What other way could one craft a sentence to describe the scope of the Court's jurisdiction than saying it "*shall* extend to

[93] Session of Monday, August 6, 1787, *supra* note 15, at 344.
[94] Session of Monday, August 27, 1787, *supra* note 16, at 475.

all cases" of a particular kind? Similarly, claiming that the substituted language that one now finds in Article III does not do the job is simply untenable; the Framers agreed and stated that the Judicial Power "shall extend" to certain enumerated cases and controversies.

B. THE VIEW OF THE COURT

From the beginning, the Supreme Court has also consistently endorsed the notion that Congress has the authority to limit the jurisdiction of inferior federal courts.[95] Although an advocate in *Turner v. Bank of North America*[96] raised early on the idea that Congress had no authority to vary the jurisdiction of inferior federal courts from the class of cases and controversies in Section 2 of Article III, the Court rejected the argument. In that case, counsel for the appellee—who was attempting to defend the jurisdiction of a circuit court over a commercial paper dispute based on diversity—argued,

> [T]he judicial power, is the grant of the constitution; and congress can no more limit, than enlarge, the constitutional grant. . . . By the opposite construction, however, congress has imposed a limitation upon the judicial power, not warranted by the constitution, when, without regard to the immediate parties to the controversy, the law excepts from the cognizance of the federal Courts, suits upon promissory notes, which, by assignment, have placed the immediate parties, in the relation of citizens of different states.[97]

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[95] *See, e.g.*, Palmore v. United States, 411 U.S. 389, 400–01 (1973) ("Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested 'in such inferior Courts as the Congress may from time to time ordain and establish.' The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress." (quoting U.S. CONST. art. III, § 1)).

[96] 4 U.S. (4 Dall.) 8 (1799).

[97] *Id.* at 10.

To this argument Chief Justice Ellsworth[98] responded, "How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the *United States* extends, the federal Courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?"[99] Justice Chase expressly rejected the idea:

> The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.[100]

The Supreme Court subsequently affirmed the understanding of Justice Chase on the matter when it offered the following definitive statements in *United States v. Hudson*:[101]

> Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no

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[98] Recall that Chief Justice Ellsworth was himself a delegate to the Federal Convention and the ratifying Connecticut Convention. *See supra* notes 44–45 and accompanying text.

[99] *Turner*, 4 U.S. (4 Dall.) at 10 n.1.

[100] *Id.* Note Justice Chase's recognition that an acceptance of congressional authority over federal court jurisdiction is a "political" rather than "constitutional" truth. This may reflect the reality that Congress possessed a superior ability to impose its will than did the Court, but it also could reflect a sense that such authority over jurisdiction would be exercised for political reasons.

[101] 11 U.S. (7 Cranch) 32 (1812).

> jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.
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> . . . .
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> . . . [S]uch is the opinion of the majority of this Court: For, the power which congress possess [*sic*] to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects . . . .[102]

The famous case of *Martin v. Hunter's Lessee*[103] reaffirmed this view, with a minor caveat. In the course of determining whether the Supreme Court's appellate jurisdiction extended to the review of state court decisions, the Court indicated that Congress did have the authority to parcel out jurisdiction among the federal courts provided that the whole of the Judicial Power is vested in the federal courts collectively.[104] Thus, according to the *Martin* Court, so long as all of the Judicial Power was in the hands of the collective of federal courts, how such power was apportioned among those courts was for Congress to control.

A final citation will solidify the point. In *Cary v. Curtis*[105] the Court sealed the status of this idea (of congressional power over inferior court jurisdiction) as one of unquestionable validity when it wrote,

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[102] *Id.* at 33.

[103] 14 U.S. (1 Wheat.) 304 (1816).

[104] *Id.* at 331 ("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. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority."); *see also* McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813) ("[A]lthough the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases.").

[105] 44 U.S. (3 How.) 236 (1845).

> [One of] the doctrine[s] so often ruled in this court [is] that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government . . . .[106]

Why the early Court took this view of congressional power over jurisdiction—which goes against the interests of the Federal Judiciary—is unclear; perhaps restraint in this area at this point in the Court's history was wise, as it avoided a direct confrontation with Congress that might have encouraged more encroachment on the exercise of the Judicial Power. In any event, the Court has stood by this view in subsequent cases, each time simply asserting (as in previous cases) rather than demonstrating or establishing the veracity of the proposition.[107]

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[106] *Id.* at 245.

[107] *See, e.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 233–34 (1922) ("The effect of [Article III] is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion . . . . The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it."); Stevenson v. Fain, 195 U.S. 165, 167 (1904) ("The Supreme Court alone 'possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it,' but the jurisdiction of the Circuit Courts depends upon some act of Congress." (citation omitted) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812))); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867) ("The Constitution must have given to the court the capacity to take it, and an act of Congress

IV. A POSSIBLE ALTERNATIVE VIEW OF THE JUDICIAL POWER

Having reviewed the historical context and the traditional views of Congress and the Supreme Court respecting Article III, does the traditional view represent an unduly narrow view of the Judicial Power that impermissibly cedes to Congress authority over the Federal Judiciary that it was not given and that it should not have been permitted to take? One might derive from the historical record an alternative understanding of Article III—that it fully and directly vested the Judicial Power in *all* federal courts, a view that, if correct, would preclude congressional manipulation of the jurisdiction of inferior Article III courts once created. I refer to this viewpoint as the "constitutional vesting thesis."

The constitutional vesting thesis—that all federal courts (Supreme and inferior) are *respectively* vested with the Judicial Power in full—would mean that once constituted, an Article III court constitutionally enjoys cognizance of all classes of cases and controversies set forth in Article III. This goes well against the prevailing current of thought on the matter throughout this country's history.[108] However, even though the Supreme Court's embrace of the view that Congress may limit the jurisdiction of inferior federal courts is of ancient lineage, the proposition has never satisfactorily been established by the Court.[109] At least one

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must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("[I]t would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

[108] *See supra* Part III.

[109] The Court has employed a greater-includes-the-lesser-power line of reasoning to derive and defend the notion of congressional control over inferior court jurisdiction. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845))). However, such a logical argument is not satisfactory in the face of Article III's language and drafting history, as will be discussed in this Part. *See infra* notes 125–33 and accompanying text.

lower court, a circuit court in *Dundas v. Bowler*,[110] deigned to challenge the received wisdom that the jurisdiction of the inferior federal courts is dependent upon a congressional dispensation rather than on the Constitution itself:

> That the judicial power shall extend to controversies between citizens of different states, is clearly and in terms declared in the constitution. Where suit is brought by the assignee of a note against the maker, who lives in a different state, the case is literally within the constitution; and yet the act of congress declares the jurisdiction shall depend not alone upon the citizenship of the parties on the record, but also upon the citizenship of those by whom the note may have been negotiated. In so far as this law is restrictive of the constitutional right of a non-resident, it is, in my judgment, unconstitutional. If congress can impose this restriction, they may go farther, and impose other restrictions, as their discretion may dictate. In this way a constitutional right may be modified or taken away in whole or in part, as congress may determine. This is a new and most dangerous principle, and cannot be maintained. It is too late to say that a constitutional right, though explicitly given, cannot be carried into effect, except through legislative action. No legislation was required, and the only inquiry is, whether a legislative act can abrogate the right thus given. I am aware that the practice of the courts of the United States has been different, and that, by frequent decisions, they have sanctioned the law; and I am also aware that *this has been done without inquiry, as to the validity of the act.* Its constitutionality has not been questioned, and, after so many years of acquiescence, it may excite some surprise that it is now questioned. Satisfied as I am

[110] 8 F. Cas. 28 (C.C.D. Ohio 1843) (No. 4140).

> that the act restrictive of a constitutional right should be held void, yet, by the course of decisions made on the act under consideration, I cannot rest my decision on its unconstitutionality.[111]

The position so well stated above is, in sum, that the Supreme Court's embrace of the idea that Congress may manipulate the jurisdiction of the inferior federal courts is a position arrived at without thorough examination of its constitutionality.

Sheldon v. Sill[112] is illustrative of the Court's inadequate analytical treatment of this issue. There, the Court directly responded to the claim in *Dundas* that the jurisdiction-limiting provisions of the Judiciary Act of 1789 were unconstitutional:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result[ ]—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. . . .
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> . . . .

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[111] *Id.* at 28–29 (emphasis added).

[112] 49 U.S. (8 How.) 441 (1850).

> Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.[113]

This type of *ipse dixit* is typical of the Court's treatment of this principle, as was seen in the previous discussion of the Court's earlier cases.[114]

Can such non-analysis suffice as the foundation for acceptance of the doctrine that Congress has unquestioned authority to constrain inferior Article III courts' exercise of the Judicial Power? Challenges to this idea, as were articulated by counsel in *Turner* and the court in *Dundas*,[115] deserve a much more reasoned consideration given the gravity of the question they address and the implications of a contrary view. This Article will now turn to such a consideration.

Article III reads, "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."[116] From this language all should agree that the Constitution vests "[t]he judicial Power of the United States" in whatever "inferior Courts" Congress may establish, the same Judicial Power that is vested in the "one supreme Court." Many have suggested that this language vests the Judicial Power in the Federal Judiciary as a whole, a view that would permit Congress to partition the Judicial Power and to allocate that power among components of the Judiciary as Congress sees fit.[117] The wording of Section 1, however, challenges

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[113] *Id.* at 448–49.

[114] *See supra* Part III.B; *see also Cary*, 44 U.S. (3 How.) at 245 ("This argument is in nowise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.").

[115] *See supra* notes 96–100, 110–11 and accompanying text.

[116] U.S. CONST. art. III, § 1.

[117] *See, e.g.*, Amar, *supra* note 38, at 231 ("[The] opening words of Article III . . . establish that the judicial power of the United States *must* be vested in the federal judiciary as a whole.").

this view. Section 1 reads: "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."[118] Had the Framers intended a collective vesting, they might have written "shall be vested *in* one supreme Court *and* such inferior Courts as the Congress may" using the word "in" once rather than twice. By using the word "in" two times, Section 1 directly vests all of the Judicial Power "in one supreme Court" but also simultaneously vests the same Judicial Power "in such inferior Courts" as Congress chooses to create. Thus, one can at least question the apportionment-within-the-judiciary approach because it renders nugatory the Section's language indicating that the Judicial Power is vested fully "in" the Supreme Court "and in" the inferior federal courts.[119]

Turning then to what this Judicial Power embraces, Section 2 of Article III reveals that this very same 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

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[118] U.S. CONST. art. III, § 1 (emphasis added).

[119] It is for this reason that I disagree with Clinton's conclusion that the Judicial Power must be vested in the Federal Judiciary as a whole. *See* Clinton, *supra* note 9, at 749–50 (explaining his conclusion). I also differ with his interpretation of the Exceptions and Regulations Clause as empowering Congress to allocate federal jurisdiction among the Supreme and inferior courts. *See id.* at 793 (reaching "the conclusion that 'exceptions' contemplated under the exceptions and regulations clause were at most assignments of portions of the judicial power from the Supreme Court *to inferior federal courts*"). Clinton seems to acknowledge that not reading the Exceptions and Regulations Clause in this manner would require an understanding of Article III that lacks any congressional authority over inferior court jurisdiction, the proposition put forth in this Article. *See id.* ("[T]he framers must have intended the exceptions and regulations clause to be read in conjunction and conformity with the mandatory first paragraph of the judiciary article, rather than in isolation, as it has most often been construed since the Convention. Otherwise, the deletion of the power to assign jurisdiction to the inferior federal courts would have left Congress without any explicit grant of authority in the judiciary article to so allocate the judicial power of the United States.").

> Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[120]

Putting the two provisions together, it appears that whatever "inferior Courts" that Congress establishes are "vested" with a power that includes all of the "Cases" and "Controversies" to which the "judicial Power *shall* extend"; the use of the term "shall" here being imperative.[121]

Indeed, Justice Story long ago indicated that this language was critical when he wrote:

> The language of the [third] article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as

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[120] U.S. CONST. art. III, § 2, cl. 1.

[121] *See, e.g.*, David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 133 ("Article III certainly is imperative in mood. The only candid reading of the text imports a mandatory duty to vest. 'Shall' is an auxiliary verb that normally denotes more than mere futurity or prediction; in the second or third person it ordinarily expresses some degree of compulsion by the will of the speaker (here, 'We the People'), rather than mere preference, wish, or recommendation. The word usually is indicative of command, converting what otherwise would be a declarative statement into an imperative one."). Engdahl's understanding of the imperative meaning of the term "shall" did not lead him to embrace the constitutional vesting thesis propounded in this Article. *See id.* at 134 ("Of course, this does not mean that Congress must vest the full range of contemplated subject matter jurisdiction in each federal court, if more than one exists. Should Congress elect to have more than the one federal court constitutionally required, Article III's mandate could be satisfied by distributing the subject matter competence—so long as every fraction of the constitutionally prescribed jurisdiction was vested somewhere in the judicial branch.").

> congress may, from time to time, ordain and establish. Could congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? . . . But one answer can be given to th[is] question[ ]: it must be in the negative.[122]

Although not the position advocated by Justice Story, the question posed at the end of this excerpt might as easily have read: Could Congress have created inferior courts but lawfully refused to vest in them the constitutional jurisdiction? Justice Story deftly drove home the point when he highlighted the mandatory nature of the vesting clauses of the two preceding constitutional articles:

> The same expression, "shall be vested," occurs in other parts of the constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares that "all legislative powers herein granted *shall be vested* in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? [T]hat the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power *shall be vested* in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?[123]

Again, Justice Story's ultimate view was that, though mandatory, the Constitution could distribute the Judicial Power within the Federal Judiciary as a whole. But might an equally plausible view be—given the mandatory nature of the vesting and the "and in"

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[122] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–29 (1816).

[123] *Id.* at 329–30.

language of Section 2 highlighted above—that this imperative vesting applies with equal force to the inferior courts on their own?

Professor John Harrison points out that although the "Judicial Power" may be vested in the inferior federal courts, that term is different from the concept of "jurisdiction," with the latter being a more narrow concept over which Congress may exercise control.[124] Although this distinction between Judicial Power and jurisdiction may be a valid one, it would remain to be established that Congress is given authority to control the latter. Such authority is traditionally drawn not from an express grant of jurisdictional control in Article III but rather from Congress's power to "ordain and establish" inferior Article III courts.[125] Must the lesser authority to delimit the jurisdiction of these inferior courts necessarily fall with the greater authority to create and abolish them?[126] While the creator ordinarily might presume the power to shape the scope of authority its creation will enjoy, Article III does

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[124] John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 214–15 (1997).

[125] U.S. CONST. art. III, § 1.

[126] The greater-includes-the-lesser argument is well-worn. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845))); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982) ("Since Congress need not have created lower courts, it could just as easily abolish them altogether. Because it retains this broad power, Congress may exercise the 'lesser' power of 'abolishing' lower federal courts as to certain *issues—i.e.*, limit their jurisdiction."). This argument is also alluded to in Gunther, *supra* note 9, at 899:

> The second part of that sentence is relied upon heavily by those who assert that there exists a broad congressional authority to curtail the jurisdiction of the lower federal courts: since "inferior Courts" are not mandated by the Constitution and since Congress has explicit discretion whether or not to "ordain and establish" them, the argument goes, Congress presumptively may give or take away whatever portions of the "judicial Power" it wishes.

Professor Paul Bator referenced, but did not make, this "mechanical" argument regarding Congress's authority to regulate inferior court jurisdiction. *See* Bator, *supra* note 6, at 1031 ("The position that Congress has this additional power to 'pick and choose,' to create lower federal courts and give them less than the entire federal judicial power, is not based primarily on the mechanical argument that the greater power (not to create such courts at all) must include the lesser (to create them but limit their jurisdiction).").

not leave the cognizance of these inferior courts an open matter. To the contrary, Article III is clear that although Congress gives inferior courts their life, the same Article vests those courts with the "judicial Power of the United States," which "*shall* extend" to the list of matters enumerated therein. Further, the overall constitutional framework alters the ordinary presumption that the power to create an entity comprehends the authority to shape and structure its workings as the creator sees fit. The plan of the Convention was one that concerned itself mightily with achieving as near as possible a separation of one department from the other two, with a specific eye towards devising a Judiciary that was independent and free to exercise its Judicial Power.[127] The clear wording of the text vests the full Judicial Power in the inferior federal courts. Implying a congressional power to deny the inferior federal courts some portion of that same power opposes the principle of judicial independence the Framers were intended to enshrine.

Indeed, we have a record of the extent of the drafters' commitment to judicial independence; the drafters *unanimously* voted to strike the following language from an early draft of what would become Article III: "The Legislature may assign any part of the jurisdiction abovementioned (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."[128] The rejection of this clause leads to two conclusions. First, it can hardly be claimed that Congress implicitly enjoys an authority that the drafters voted to eliminate. The power that the delegates to the Convention withdrew from Congress—the power to assign "part of the jurisdiction" and "in the manner, and under the limitations" Congress thought proper—is the very power that Congress arrogated to itself in the Judiciary Act of 1789 and has enjoyed ever since.[129] Second, that this

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[127] *See infra* Part II.

[128] *Compare* Session of Monday, August 6, 1787, *supra* note 15, at 334 (presenting an early draft of Article III), *with* Session of Monday, August 27, 1787, *supra* note 16, at 476 (striking the quoted provision from the draft).

[129] *See supra* Part III.A–B.

amendment to the draft Constitution was part of a comprehensive effort to shore up the independence of the Judiciary in the enjoyment and exercise of its Judicial Power is evident. Clearly, the power to assign only a "part" of the jurisdiction extended to the federal courts would give Congress the ability to undermine and marginalize the inferior federal courts by manipulating their jurisdiction.[130] If Congress felt inclined against the positions that the courts were taking in a particular field, it could respond with the expedient of withdrawing from them all cognizance of such matters.[131] Such a state of affairs would not reflect the judicial independence the Founders sought, but rather would subordinate the inferior courts to the will of the Federal Legislature. The principles of judicial independence and separation of powers held so dear by those who drafted and adopted the Constitution[132] should not be deemed to include any caveat that would permit congressional authority of this kind.

Several members of Congress who initially debated the Judiciary Act offered a sound reason for supposing that the Constitution compelled the vesting of the full Judicial Power in whatever inferior courts Congress created. The failure to vest inferior federal courts with such authority would leave the adjudication of important matters within the Judicial Power of the United States in the hands of the state courts, a result that would be both imprudent and arguably inconsistent with the plan of the Constitution. Debate revealed several iterations of this argument.

The most notable occurred in response to a motion to amend the proposed Judiciary Act to eliminate a provision for U.S. district courts in favor of instituting inferior federal courts solely with admiralty jurisdiction:

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[130] *See* Dundas v. Bowler, 8 F. Cas. 28, 28–29 (C.C.D. Ohio 1843) (No. 4140) ("If congress can impose this restriction, they may go farther, and impose other restrictions, as their discretion may dictate. In this way a constitutional right may be modified or taken away in whole or in part, as congress may determine.").

[131] *See* FALLON ET AL., *supra* note 8, at 321 ("[P]erhaps the most controversial proposals to limit the jurisdiction of the federal courts have been those that reflect a substantive disagreement with the way the Supreme Court, the lower federal courts, or both have resolved particular issues.").

[132] *See supra* notes 43–48, 54–65 and accompanying text.

> There is another important consideration; that is, how far the constitution stands in the way of this motion. It is declared by [the Constitution] 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.*[133]

Here we see the suggestion that Congress may not vest any of the Judicial Power of the United States in *state* courts, which is precisely what would occur—albeit by default—if Congress created no inferior federal courts *or* if Congress created inferior federal courts whose jurisdiction did not extend to the full complement of cases and controversies outlined in Article III.[134]

Other Members emphasized the imprudence of limiting the jurisdiction of the inferior federal courts in the manner proposed:

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[133] 1 ANNALS OF CONG. 831–32 (1789) (Joseph Gales ed., 1834) (statement of Rep. William Smith) (emphasis added); *see also id.* at 843 (statement of Rep. James Madison) ("[I]n 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.").

[134] *See also id.* at 835 (statement of Rep. Egbert Benson) ("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."). This is not offered to suggest or endorse the idea that state courts may not enjoy concurrent jurisdiction over some or all of the cases and controversies within the Judicial Power of the United States, but merely to reflect contemporaneous impressions of the extent to which the full Judicial Power was vested in inferior federal courts.

> [W]hat is the object of the present motion? Sir, it 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.
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> 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*?[135]

The argument now becomes even clearer. Even if Congress had the authority to create inferior federal courts neutered of all but their admiralty jurisdiction, doing so would undermine the very government the Constitution was designed to create. This very prudential argument is what buttresses the constitutional point: The plan of the Convention was to overcome the deficiencies of the Articles of Confederation to create a strong national government whose laws were supreme and that had the capacity—through its Judiciary—to see to that end.[136] Any interpretation of Article III that permitted Congress to create inferior federal courts that lacked some component of the full Judicial Power of the United States would thus be inconsistent with the plan of the Convention because not only would judicial independence be undermined, but

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[135] *Id.* at 836 (statement of Rep. Theodore Sedgwick) (emphasis added); *see also id.* at 837–38 (statement of Rep. Fisher Ames) ("[U]ntil miracles shall become more common than ordinary events, . . . 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.").

[136] *See, e.g.*, The Debates in the Convention of the State of Pennsylvania (Dec. 4, 1787) (statement of James Wilson), *reprinted in* 2 ELLIOT'S DEBATES, *supra* note 27, at 415, 459 (criticizing the then-current government of the Articles of Confederation); *cf.* 1 ANNALS OF CONG. 837 (1789) (Joseph Gales ed., 1834) (statement of Rep. Fisher Ames) ("The judicial power is, in fact, highly important to the Government . . . because by this means its laws are peaceably carried into execution. We know, by experience, what a wretched system that is which is divested of this power.").

the ability of the federal government to ensure that its laws were properly executed and preserved as supreme would be gutted.[137]

To be sure, the soundness of this alternative view of congressional authority is questionable, as critics of this viewpoint abound. Professor Theodore Eisenberg suggested long ago that reading Article III to vest inferior federal courts with cognizance of the full array of matters outlined in Section 2 is "faulty."[138] It is important to note, however, that he based his critique of the constitutional vesting thesis on a policy argument, not on interpretation of the constitutional text, and rooted it in his debatable belief that the Constitution requires the creation of inferior federal courts.[139] His argument, that "an overabundance of federal forums with unrestricted jurisdiction to hear all federal cases could in fact undermine the judiciary,"[140] might be an apt description of the consequences of the constitutional vesting thesis, but it does not speak to whether a proper understanding of Article III's text, structure, and history warrant an acceptance of the position nonetheless.

Other critics have challenged the constitutional vesting thesis on the ground that the "Madisonian Compromise"—the decision to leave the creation of inferior federal courts to Congress rather creating them in the Constitution[141]—warrants the conclusion that Congress has the power to regulate the jurisdiction of lower federal courts.[142] According to Professor Paul Bator,

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[137] Congressman Sedgwick buttressed this point by recounting the widespread scofflawry of the states under the Articles of Confederation with respect to an American treaty with Great Britain concerning the debts of Americans owed to British subjects. 1 ANNALS OF CONG. 837 (1789) (Joseph Gales ed., 1834) (statement of Rep. Theodore Sedgwick) (noting that "State after State" made laws contrary to the national treaty with Britain and that "the State Judiciaries could not, or did not, decide contrary to their State ordinances").

[138] Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 514–15 (1974).

[139] *Id.*

[140] *Id.* at 515.

[141] FALLON ET AL., *supra* note 8, at 319.

[142] *See* Bator, *supra* note 6, at 1031 (arguing that the purpose of the compromise was to give Congress discretion over creation and jurisdiction of the lower federal courts); Gunther, *supra* note 9, at 912 (arguing the same).

> The essence of that compromise was an agreement that the question whether access to the lower federal courts was necessary to assure the effectiveness of federal law should not be answered as a matter of constitutional principle, but rather, should be left a matter of political and legislative judgment . . . . It would make nonsense of that notion to hold that the only power to be exercised is the all-or-nothing power to decide whether *none* or *all* of the cases to which the federal judicial power extends need the haven of a lower federal court.[143]

Bator's view conflicts with the evidence from the Convention reviewed above. Although it is possible that implicit in the Madisonian Compromise was an understanding that Congress would have the discretion to dole out to inferior federal courts some lesser portion of the Judicial Power of Article III, the Framers explicitly rejected proposed language that would have invested Congress with exactly such a power.[144] Indeed, beyond the Madisonian Compromise and repeated indications that the constitutional vesting thesis "has been repudiated by an unbroken line of authoritative judicial and legislative precedent,"[145] Bator offers little more to commend the traditional view of congressional authority than the Court ever has.

The following comment from Bator thus overstates the case for the traditional view: "The Constitution contains many provisions that are not at all clear. It does, however, contain a few that are clear. One of the *clearest* is the power of Congress to regulate the jurisdiction of federal '[t]ribunals inferior to the Supreme Court.' "[146] Article III says nothing of Congress's authority to regulate the jurisdiction of inferior federal courts, a fact that is rooted in the Framer's excision of a clause that would have granted such authority from the proposed text. Further,

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[143] Bator, *supra* note 6, at 1031.

[144] *See supra* note 128 and accompanying text.

[145] Bator, *supra* note 6, at 1031.

[146] *Id.* at 1030 (emphasis added).

Article III explicitly gives Congress such regulatory authority when it comes to the appellate jurisdiction of the Supreme Court, strongly indicating that the failure to extend such authority with respect to the jurisdiction of the inferior federal courts means that it was excluded; *expressio unius est exclusio alterius*. To suggest that the contrary view is one of the "clearest" aspects of the Constitution cannot be simply accepted uncritically.

Professor Akhil Amar has offered a plausible argument in response to the constitutional vesting thesis with his idea that Section 2 of Article III has "two tiers" of matters that comprise the Judicial Power, one mandatory and one discretionary.[147] Specifically, his argument is as follows: Because Section 2 extends the Judicial Power to "*all* cases" but then just to "controversies" rather than *all* controversies of a particular kind, the first tier of Section 2—addressing "cases"—is mandatory and must be fully vested in some federal court while the second tier—covering "controversies"—is permissive and allows Congress to decide what portion of those matters inferior courts may entertain.[148]

There are two ways to respond to this argument. First, the omission of the word "all" from the portion of the Clause referring to those controversies that "shall" comprise part of the Judicial Power could be read simply as an indication that state courts could concurrently entertain such controversies. The use of "all" for the series of cases listed in the initial portion of the Clause would then be read as indicative of a command that the entirety of cases falling within such description are within the Judicial Power, which is vested exclusively in the Federal Judiciary whose members are to have life tenure and protected compensation. This reading would not permit state courts to exercise any part of this authority. This could have been the original understanding of the Framers; debates on the Judiciary Act of 1789 reveal that some members of Congress believed that the states could not exercise

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[147] Amar, *supra* note 38, at 240.

[148] *See id.* ("The implication of the text, while perhaps not unambiguous, is strong: although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all cases in the last six. The choice concerning the precise scope of federal jurisdiction in the latter set of cases seems to be given to Congress . . . .").

jurisdiction over those matters falling within the Judicial Power.[149] However, this interpretation has long been rejected. Both Congress[150] and the Court[151] have held that states may exercise jurisdiction in the cases listed after the "all" modifier of Section 2. Alexander Hamilton, writing in *The Federalist No. 82* also seemed to reject this view when he wrote,

> I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. . . . The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New

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[149] *See, e.g.*, 1 ANNALS OF CONG. 844 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison) ("On the whole, . . . [I cannot] 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 . . . ."); *id.* at 850 (statement of Rep. William Smith) ("The 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 . . . . 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?").

[150] *See, e.g.*, Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 9 (granting federal district courts only concurrent jurisdiction with state courts over claims by foreign citizens arising from the violation of a treaty and common law claims by the United States when the amount in controversy exceeded one hundred dollars).

[151] The Supreme Court spoke of state court authority to hear matters falling within the Article III Judicial Power thusly:

> It is certainly true that state courts of "general jurisdiction" can adjudicate cases invoking federal statutes, such as § 1983, absent congressional specification to the contrary. "Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States," *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). That this would be the case was assumed by the Framers, see The Federalist No. 82, pp. 492–493 (C. Rossiter ed. 1961). Indeed, that state courts could enforce federal law is presumed by Article III of the Constitution, which leaves to Congress the decision whether to create lower federal courts at all.

Nevada v. Hicks, 533 U.S. 353, 366–67 (2001).

> York, may furnish the objects of legal discussion to our courts. . . . [T]he inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited.[152]

In the end, the matter is sufficiently unclear, and one may resolve the matter by following the collective wisdom of Congress and the Court (echoed by Hamilton) that jurisdiction over "cases" was not to be exclusive of the states, at least for our present purposes.[153]

An alternative understanding of the lack of the modifier "all" with respect to the enumerated controversies is that the Judicial Power extends to such controversies, but the federal courts retain discretion to determine whether to exercise jurisdiction over all such matters. This is a slight but important variant of the interpretation to which it is opposed. Amar's two-tiered view suggests that the Constitution distributes identified controversies to inferior federal courts according to the wishes of Congress because the Constitution does not extend the Judicial Power to "all" such controversies.[154] But the fact that the Judicial Power does not specify "all" such controversies does not necessarily lead to the conclusion that the Constitution vests Congress with any role in determining which of these controversies the courts may entertain. No language in Article III makes such a suggestion, and, as we have already seen, the Framers rejected a congressional role in manipulating the jurisdiction of the inferior federal courts during the Federal Convention.[155] So if any discretion exists to forbear from the exercise of jurisdiction over some subset of the controversies described in Section 2, perhaps that discretion lies with the Federal Judiciary.

Ultimately, Professor Daniel Meltzer does the best job of dismantling Amar's two-tier theory but does so in the direction of

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[152] THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 1, at 478–79.

[153] My purpose here is not to defend or establish the notion that federal courts have *exclusive* jurisdiction over the matters enumerated in Section 2 of Article III. It is beyond the scope of this Article to address the exclusivity issue.

[154] Amar, *supra* note 38, at 229–30.

[155] *See supra* note 128 and accompanying text.

arguing that none of the nine enumerated classes of cases must be mandatorily within the cognizance of the inferior federal courts. Meltzer echoes the idea of another commentator that the Framers used the modifier "all" to emphasize that the cases falling within the Judicial Power were to include both criminal and civil matters, a clarification not necessary for an enumeration of "controversies," which were generally understood to be only civil in nature.[156] Setting that point aside, Meltzer demonstrates that there is not really any evidence supporting the idea that the Framers placed the weight on the use of the word "all" in Section 2 that Amar does.[157] Surely a specification of such import would have commanded at least a remark by one of the gentlemen considering the proposed Constitution. None can be found, a fact that Meltzer treats as weighing heavily against Amar's thesis.[158]

Finally, does the fact that the First Congress—comprised of members who participated in the Federal Constitutional Convention[159]—itself rejected the constitutional vesting thesis undermine its validity? The efforts of Convention delegates to rid Article III of proposed provisions that would have provided for greater congressional authority over the jurisdiction of the inferior

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[156] Meltzer, *supra* note 5, at 1575 (citing William A. Fletcher, Correspondence, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 118, 131, 133 (1990)).

[157] For example, after enumerating the cases and controversies that fell within the Judicial Power, Edmund Pendleton, President of the Virginia Convention, said, "Without entering into a distinction of all its parts, I believe it will be found that they are all cases of general and not local concern. The necessity and propriety of a federal jurisdiction, in all such cases, must strike every gentleman." The Debates in the Convention of the Commonwealth of Virginia (June 18, 1788), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 27, at 1, 518. Clearly Pendleton did not distinguish between two tiers of jurisdiction here but rather saw "all such cases" as necessitating federal jurisdiction.

[158] Meltzer, *supra* note 5, at 1578–79 ("The short of the matter is that Amar has not identified any speech at the Convention or ratification debates that articulated a distinction between mandatory and permissive jurisdictions.").

[159] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 420 (1821) ("A contemporaneous exposition of the constitution . . . is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution."); Louis J. Sirico, Jr., *Original Intent in the First Congress*, 71 MO. L. REV. 687, 689 (2006) ("At least twenty-eight members of the House and fourteen members of the Senate had been delegates to their respective state ratifying conventions. Nine delegates to the Constitutional Convention served in the House and eleven served in the Senate." (footnotes omitted)).

federal courts offers at least one compelling counterweight to that evidence.[160] Further, Professor Charles Warren long ago uncovered the fact that members of Congress who were disgruntled with the breadth of Article III's grant of jurisdiction used the Judiciary Act of 1789 to accomplish a narrowing of authority that proponents failed to get in the final document emerging from the Federal Convention.[161] To the extent that there is evidence of sentiment within the First Congress both that the jurisdictional grant of Article III was overly broad and that the Judiciary Act of 1789 was the opportunity to correct that error,[162] such evidence could undermine the value of pointing to the actions of the First Congress as confirming evidence that the constitutional vesting thesis is invalid.[163]

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[160] *See supra* notes 12–21 and accompanying text.

[161] *See* Warren, *supra* note 9, at 62–63 (" 'I am satisfied to see a spirit prevailing that promises to send this system [the judicial system designed by the Judiciary Act of 1789] out, free from those vexations and abuses that might have been warranted by the terms of the Constitution.' " (quoting Letter of Richard Henry Lee to Patrick Henry (May 28, 1789), *in* 2 THE LETTERS OF RICHARD HENRY LEE (James Curtis Ballagh ed. 1912))); *see also* Meltzer, *supra* note 5, at 1611 ("[T]oday's congressional debates are uncertain evidence of contemporary constitutional understandings. Similar caution is equally appropriate in looking back to 1789, when the new legislators may have been re-fighting old battles about the Constitution, unwilling to carry out any constitutional imperatives they divined." (footnotes omitted)).

[162] Amar has speculated that Anti-Federalist dominance of the First Congress accounts for its legislative efforts in directions potentially at odds with the vision of the Convention. *See* Amar, *supra* note 38, at 259 ("Because the Anti-Federalist forces wielded far more power in the first Congress than they had at Philadelphia, it would not be surprising if the Act only imperfectly reflected the Federalist vision that had earlier been crystallized in the Constitution." (citing Warren, *supra* note 9, at 53)). *But see* Sirico, *supra* note 159, at 692 ("The Federalists dominated the new Congress, initially holding forty-nine of fifty-nine seats in the House and twenty of twenty-two seats in the Senate." (citing CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS, 1789–1791, at 4 (1989))).

[163] Meltzer offers an additional reason to temper the credence one accords to the views of the inaugural legislators of our Union; he surmises that there may be less value in the opinions of the Members of the First Congress because they were "confused":

> [O]ne thing I have learned from delving into the surviving records of debates about the Act is how many of the participants were confused. . . . Perhaps the most fundamental example of confusion involves the question whether article III obliges Congress to create lower federal courts or give them jurisdiction over any particular matters. The history of the Convention clearly shows that the answer is no . . . . Yet in the first Congress . . . it was not uncommon to hear just the opposite asserted.

In sum, when one combines the language of the Vesting Clause with the history of Article III—which includes a rejection of congressional power to distribute "any part" of the federal jurisdiction to inferior federal courts—and its structure—which elsewhere includes a similar congressional power over Supreme Court appellate jurisdiction, it at least becomes more plausible to suppose that the Constitution reflects a lack of congressional authority over inferior court jurisdiction rather than the presence of such power.

What would be the implications associated with an embrace of the constitutional vesting thesis? The most troubling implication arising from an acceptance of the constitutional vesting thesis is that congressional curtailment of the jurisdiction of the inferior federal courts to a subset of the cases and controversies enumerated in Article III, Section 2 is impermissible. Clearly, to suggest such a proposition is audacious.[164] If members of the First Congress presumed the authority to impose such limits, surely any assertion to the contrary must be untenable.[165] Although members of the First Congress are entitled to some degree of deference, can they bind us to constitutional understandings that are unsupported by the history, text, and structure of the Constitution itself? There is also the point that Warren's research surrounding the Judiciary Act of 1789 revealed: Members of the First Congress were politicians with particular agendas, most notably an agenda aimed at undoing much of what Article III had done—vest the

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Meltzer, *supra* note 5, at 1610–11.

[164] *Cf.* Dundas v. Bowler, 8 F. Cas. 28, 29 (C.C.D. Ohio 1843) (No. 4140) ("Its constitutionality has not been questioned, and, after so many years of acquiescence, it may excite some surprise that it is now questioned.").

[165] The Supreme Court has treated the views of the First Congress as dispositive on an issue and has used their actions as the bases for resolving constitutional questions in the past. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) ("History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime. As earlier recounted, the First Congress accorded the protections of the Nation's first federal copyright statute to existing and future works alike." (citation omitted)).

inferior courts with broad jurisdiction over a wide swath of cases and controversies.[166]

V. CONCLUSION

Ultimately the traditional view challenged here—that Congress has authority over inferior federal court jurisdiction—is too entrenched and too relied upon to doubt at this late stage. Indeed, the historical evidence and textual arguments presented above are far from conclusive on these matters. Further, the practical consequences of embracing the constitutional vesting thesis would be the allowance of *all* Article III disputes in the federal courts, regardless of the amount in controversy[167] or the remoteness of the federal issue;[168] such breadth could result in the inundation of the federal courts with too many matters of too little significance. However, value abounds in the insights gained from our discussion. Thinking more broadly about the Judicial Power may enable us to see the Judiciary not as the weakest of the three branches, but as a truly equal branch that can exercise all of that power with little congressional interference.

Perhaps accepting the alternative view developed above would be easier were one to take the traditional, prevailing view of Judicial Power to its ultimate endpoint. Under the traditional view, Congress can completely confine inferior federal court jurisdiction to any limited set of matters as it sees fit. Thus, if Congress does not like the decisions of the inferior courts regarding a matter, jurisdiction-stripping legislation is the handy solution. It is alarming enough that Congress has the ability to

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[166] *See supra* note 89.

[167] Harrison noted this defect in response to Clinton's view of mandatory vesting of the Judicial Power in the Federal Judiciary collectively. *See* Harrison, *supra* note 124, at 207 ("Among the objections to Clinton's thesis is that it would fill the federal courts with diversity cases.").

[168] The "ingredient" theory put forth in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) would permit much broader federal question jurisdiction were the current limiting interpretations of the federal question statute, 28 U.S.C. § 1331, not in place.

impact the Judiciary through its power over procedure,[169] budgetary starvation,[170] and salary stagnation.[171] The resulting picture of absolute domination by the Legislative Branch that results from coupling those procedural and fiscal controls with the power of jurisdiction-stripping just seems too at odds with the plan of the Convention to be accepted uncritically. That said, the constitutional vesting thesis offered above only goes so far in protecting inferior federal courts against congressional interference; Congress, were it so inclined, could still express its displeasure by deciding to abolish the inferior federal courts altogether, although it is highly unlikely that it would ever do so.[172]

In the end, it is unlikely that the constitutional vesting thesis propounded herein will be embraced; however, giving some thought to the possibility of this alternative vision may make

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[169] *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts . . . ."); Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 61 (1825) ("Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do . . . ."). Further reflection might permit me to question this plenary authority over judicial procedure; however, it is beyond the scope of this Article to address that issue.

[170] *See* Mark C. Miller, *When Congress Attacks the Federal Courts*, 56 CASE W. RES. L. REV. 1015, 1023–24 (2006) ("More generally, overall appropriations for the judicial branch have been a source of conflict and concern between Congress and the federal courts. In addition to judicial salaries, the federal courts depend upon Congress for funds for new judgeships, courthouses, staff, technology, and a variety of other purposes. As I have written previously, 'The annual appropriations process provides a clear avenue to see the different institutional perspectives of the Supreme Court and of Congress. The courts rightly see themselves as an independent third branch, and many judges seem to resent Congress's interference with their budget requests.' Congress, however, often views the federal courts as just one more federal agency begging for funds." (footnotes omitted)).

[171] *See id.* at 1021 ("Congress has sometimes used judicial salaries to send a clear message to the courts. For example, in 1964, Congress increased the salaries for lower federal judges by $7,500 per year but increased the salaries for Justices of the U.S. Supreme Court by only $4,500 per year. . . . 'The $3,000 differential clearly reflected a direct Congressional reprimand to the Supreme Court.'" (quoting JOHN R. SCHMIDHAUSER & LARRY L. BERG, THE SUPREME COURT AND CONGRESS 8 (1972))); *id.* ("[I]n 1995, 1996, 1997, and 1999, Congress blocked previously announced 'automatic' cost of living increases for various governmental officials, including federal judges, that had been provided for in the Ethics Reform Act of 1989.").

[172] Such a maneuver would have to endure the obstacle of life tenure for incumbent federal judges as well as confront the utter disarray that would result from a shuttering of inferior federal courts in the United States of today.

Congress more circumspect in its manipulation of inferior court jurisdiction going forward. Furthermore, perhaps this historical evidence will lead courts and academics to reconsider the long-held presumption of plenary congressional power over jurisdiction and show more skepticism towards future efforts to curtail the Judicial Power of the inferior federal courts.