

3-1-1999

Intrinsic Limits of Congress' Power Regarding the Judicial Branch

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Intrinsic Limits of Congress' Power Regarding the Judicial Branch

*David E. Engdahl**

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I. INTRODUCTION

The question of Congress' power pervades the law of federal courts. This crucial aspect of the Constitution's separation of powers¹ has been discussed extensively (although still inadequately) in connection with subject matter jurisdiction,² but there has been less critical discussion of Congress' power to legislate about other aspects of judicial business. It seems to be simply assumed, for example, that Congress could lift the mootness bar³ or curtail judicial abstention.⁴ When the

1. See generally AMERICAN BAR ASSOCIATION COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997).

2. The scholarly commentary on congressional control of jurisdiction is voluminous and redundant. As Professor Chemerinsky observed, "The scholarly literature is rich with articles arguing both sides of whether, and when, Congress may restrict federal court jurisdiction." ERWIN CHERMINSKY, FEDERAL JURISDICTION § 3.1, at 169 (2d ed. 1994). Actually, "corpulent" is a more suitable adjective than "rich."

Prominent articles published within the past fifteen years or so include Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter Amar, *A Neo-Federalist View*]; Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST. COMM. 89 (1990); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); 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 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847; Michael Wells, *Congress' Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1991); Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress' Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995).

Some of the commentary dealing specifically with Supreme Court jurisdiction is summarized in Christopher T. Handman, *The Doctrine of Political Accountability: Applying a New External Constraint to Congress' Exceptions Clause Power*, 106 YALE L.J. 197, 205-211 (1996). For synopses of the older commentary as to jurisdiction of federal courts in general, see, for example, CHERMINSKY, *supra*, ch. 3; DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 31-37 (3d ed. 1990); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER ch. 1 (2d ed. 1990); and CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 10 (5th ed. 1994).

3. See *Honig v. Doe*, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring).

4. See, e.g., Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 BYU L. REV. 321, 361.

Three Justices in 1984 lamented the statute directing what preclusionary effect federal courts must give to prior state proceedings. See *Migra v. Warren City Sch.*

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Supreme Court applied a statute in 1998 dispensing with “prudential” standing rules,⁵ no Justice troubled either to question or to explain Congress’ presumed power to displace the judiciary’s own “prudence” in this regard.⁶ The fact that Congress lacks the power to dispense with rules that are “constitutional” in character does not imply that it has the power to make or unmake rules about everything so long as those rules are non-constitutional in character. Ours is not a system of parliamentary omniscience: “under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.”⁷

At least as to subject matter jurisdiction, some have argued that a “plenary” power in Congress to meddle with the courts is

Dist. Bd. of Educ., 465 U.S. 75, 88 (1984) (White, J., concurring); *see also* *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985). None, however, questioned Congress’ power to impose the directive.

5. *Federal Election Comm’n v. Akins*, 118 S. Ct. 1777 (1998). The Justices split 6-3 as to whether a *constitutional* impediment to standing remained.

6. A year earlier, Chief Justice Rehnquist, for the Court, stated the following in a footnote:

It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. We acknowledge, though, that Congress’ decision to grant a particular plaintiff the right to challenge an act’s constitutionality . . . eliminates any prudential standing limitations

Raines v. Byrd, 117 S. Ct. 2312, 2318 n.3 (1997). The only explanation given for this “acknowledgment,” however, was a citation to a short passage in *Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997). *Bennet* gave no explanation either; it simply cited *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). The statute at issue in *Trafficante*, however, was the Fair Housing title of the Civil Rights Act of 1968, enacted pursuant to Congress’ enumerated power to enforce the Thirteenth Amendment “by appropriate legislation.” *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The laws involved in the *Bennett*, *Raines*, and *Akins* cases were nothing of that sort, and nothing in *Trafficante* seems relevant to them.

Justice Douglas asserted in 1970 that “Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise.” *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 154 (1970). He gave no reason or explanation, however; and the only authority he cited was *Muskrat v. United States*, 219 U.S. 346 (1911), which is the classic case illustrating that Article III sometimes does “dictate otherwise.” He cited no authority for the purported general rule to which deemed *Muskrat* an exception.

Thus, whatever *reason* there might be for “acknowledging” in Congress a general power to dispense with prudential standing rules, it still remains unarticulated, perhaps because it is so poorly conceived.

The grounds *and intrinsic limits* of Congress’ power to dispense with ‘prudential standing’ are discussed in the last part of this article.

7. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1804).

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an aspect of constitutional “checks and balances,”⁸ and there are Supreme Court dicta exhibiting what one observer described as “an almost unseemly enthusiasm in discussing Congress’ power to lop off diverse heads of . . . article III jurisdiction.”⁹ Some commentators have more or less credibly urged some constitutional limits to this “congressional

8. For example, “[t]here is . . . a fundamental right to have the system of checks and balances maintained in working order. . . . [Selective divestment of jurisdiction] would restore the balance of governmental powers and help undo some of the unfortunate consequences of judicial excess.” Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 195, 197 (1981). This view purportedly “affords legitimacy to the otherwise undemocratic practice of judicial review and reconciles two seemingly conflicting structural commitments of the American constitutional system by providing Congress a significant role in the development of constitutional doctrine without compromising the judiciary’s authority as the final arbiter of constitutional meaning.” *The Supreme Court, 1995 Term: Leading Cases: Federal Jurisdiction and Procedure: Exceptions Clause*, 110 HARV. L. REV. 135, 277 (1996) [hereinafter *Leading Cases*].

9. Lawrence G. Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 32 (1981). For example, Justice Frankfurter once wrote, “Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*.” *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting). In one earlier opinion the Court had said, “Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. . . . The general power to regulate implies power to regulate in all things.” *Duncan v. The Francis Wright*, 105 U.S. 381, 385-86 (1882). Several such *carte blanche* dicta are collected and criticized in Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 173-82 (1960).

The chronic dribble of such dicta still continues. In the 1994 case of *Dalton v. Specter*, the Court confronted the argument that a statute construed as foreclosing judiciary review of the discretion given the President regarding military base closures “would virtually repudiate *Marbury v. Madison*.” 511 U.S. 462, 477. Instead of simply pointing out that this argument is sufficiently disposed of on the face of *Marbury* itself, see 5 U.S. (1 Cranch) 137, 166 (1803) (arguing that when the executive possesses a legal discretion, his “acts are only politically examinable”), Chief Justice Rehnquist, for the plurality, wrote,

[O]ur conclusion that judicial review is not available for respondents’ claim follows from our interpretation of an Act of Congress, by which we and all federal courts are bound. The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute.

Dalton, 511 U.S. at 477. Here the first sentence connotes *carte blanche* competence; the adverb “permissibly” in the second sentence, however, identifies—but begs—the crucial question.

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primacy,"¹⁰ including due process,¹¹ equal protection,¹² and nebulous inferences from the concept of separation of powers;¹³ and two years ago, three justices encouraged such arguments by filing a short concurring opinion solely to emphasize that doubts about Congress' power regarding the judiciary remain.¹⁴ Therefore, there is some hope for a sober reassessment even regarding jurisdiction. And if this is true as to jurisdiction despite the volumes already written, there is more reason to hope for some rethinking about aspects of judiciary legislation which have received less attention.

The arguable limits suggested in the literature to date are all *extrinsic* to the congressional power supposed: they posit a legislative competence with no important *intrinsic* bounds, and then fence it from a few applications with sticks from sources independent of the posited power itself. This article, in

10. See, e.g., Wells, *supra* note 2, at 476.

11. See, e.g., REDISH, *supra* note 2, at 42-47; Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1033-34 (1982); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 158-59 (1982) [hereinafter Redish, *Constitutional Limitations*]; Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1648 (1990) [hereinafter Redish, *Text, Structure, and Common Sense*].

12. See, e.g., Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 954 (1982); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

13. See, e.g., REDISH, *supra* note 2, at 47-52; see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-40 (1995).

14. See *Felker v. Turpin*, 518 U.S. 651, 666-67 (1996) (Souter, J., concurring).

In granting certiorari, the Supreme Court specifically directed the parties to brief "(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (Act), and in particular § 106(b)(3)(E), 28 U.S.C. § 2244(B)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court." *Felker v. Turpin*, 517 U.S. 1182, 1182-83 (No. 95-8836) (granting certiorari May 3, 1996). That was one of several "jurisdiction stripping" measures enacted by Congress during the preceding weeks. Others were section 440(a) of the same Act (amending 8 U.S.C. § 1105a(a)(10) (1994)), and section 377 of the Immigrant Responsibility Act of 1996 (amending 8 U.S.C. § 1255a(f)(4)(C) (1994)).

Because the Court *sua sponte* identified and directed briefing of that very current issue, it was widely expected that the decision in *Felker* might turn upon it; and, given the various Supreme Court dicta conceding carte blanche congressional control, it was generally assumed that this restrictive legislation would be upheld. The Justices nonetheless avoided addressing the issue. Perhaps they came to realize that the issue is far more complicated than had been thought. An earlier manuscript draft of this article was in the chambers of each justice (and in the hands of all counsel) prior to briefing and oral argument in *Felker*.

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contrast, identifies and examines the *intrinsic* limits of Congress' power to legislate regarding the judiciary. These *intrinsic* limits, it turns out, are more definite, more certain, and of much greater practical importance, even though for a long time they have been almost universally overlooked.

Intrinsic limits derive from the principle of enumerated powers¹⁵ and the constitutional terms by which a particular "power" is conferred. Classic illustrations include Chief Justice Marshall's analyses of the Commerce Clause¹⁶ and the Necessary and Proper Clause.¹⁷ One more recent illustration is the Supreme Court's elucidation of Congress' Fourteenth Amendment enforcement power when it invalidated the so-called "Religious Freedom Restoration Act."¹⁸

The constitutional provision from which almost all of Congress' power regarding the judiciary derives is the Necessary and Proper Clause.¹⁹ In fact, as shown below, that clause was deliberately designed for this purpose (among others); and for generations its operation in this regard was expressly recognized. While this clause confers a power that is very substantial, in conjunction with Article III of the Constitution it also guarantees judicial independence by imposing crucial *intrinsic* limitations.

Orthodox opinion in the twentieth century, however, has overlooked the Necessary and Proper Clause as the ground of judiciary legislation, and so has failed to consider the *intrinsic* limits it entails. Orthodoxy instead attributes the relevant power to a supposed "implication" of one clause of the Constitution²⁰ and a mere allusion made in another,²¹ neither of which entails any *intrinsic* limitation at all. For reasons

15. The origin, significance, and fundamentality of the principle of enumerated powers is discussed at some length in David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 228-34 (1995).

16. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

17. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see also *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804).

18. "In assessing the breadth of § 5's enforcement power, we begin with its text. . . . [Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163-64 (1997).

19. U.S. CONST. art. I, § 8, d. 18.

20. See *infra* Part III.C.

21. See *infra* Part III.D.

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detailed in this article, however, each of those premises is utterly unsound.

Of course the credible scope of Congress' power varies with the premise employed. Therefore, acknowledging the Necessary and Proper Clause as the true premise for most laws regarding the judiciary necessarily changes the argument (and sometimes changes the outcome) regarding various judiciary laws, existing or possibly to be proposed. This article cannot explore all the ramifications, but it does pursue several sufficiently to show the potential significance of acknowledging this neglected safeguard of the Constitution's separation of powers.

II. SELF-EXECUTING AND NON-SELF-EXECUTING DIMENSIONS OF THE JUDICIAL POWER

Preliminary to the question of what Congress may do regarding the judicial branch is the question of what the Constitution accomplishes by itself regarding that branch.

The Constitution says "the judicial Power of the United States, shall be vested" in certain courts.²² Parallel "vesting" clauses appear in Articles I and II,²³ but the similarity of wording conceals some complicating considerations.

There was to be but one Congress, and no act by any other federal official or entity was prerequisite to its coming into existence and acquiring its contemplated powers. Congress would exist as soon as the Senators and Representatives, selected as prescribed in Article I,²⁴ assembled on the date that Article I specified;²⁵ and nothing more was needed to accomplish its existence or bestow its contemplated powers.²⁶ Likewise, there was to be but one President, and as soon as the certified electoral votes were counted and the prescribed oath was taken,²⁷ the "executive Power" contemplated by Article II

22. U.S. CONST. art. III, § 1.

23. "All legislative Powers herein granted shall be vested in a Congress of the United States." *Id.* art. I, § 1. "The executive Power shall be vested in a President of the United States of America." *Id.* art. II, § 1.

24. *Id.* art. I, §§ 2-3.

25. "The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day." *Id.* art. I, § 4, cl. 2, *amended by id.* amend. XX, § 2.

26. Whether and how to organize itself was left to Congress' own discretion. *See id.* art. I, § 5.

27. *See id.* art. II, § 1, cl. 8. Compare this with the general oath requirement

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would automatically vest in him.²⁸ In other words, Articles I and II are “self-executing” both as to the existence of the respective branches and as to the vesting of their powers.

The “judicial Power,” however, was to be vested not in just one, but potentially in several tribunals, the choice between one and several being expressly left to Congress by the Tribunals Clause.²⁹ Moreover, not even the mandated “one supreme Court” could exist until someone determined how many judges it should have, the President made nominations, and the Senate gave its consent. In other words, to a significant extent, Article III cannot be considered “self-executing”: the third branch was completely dependent upon the other two for its coming into being.

More difficult is the question of whether action by either of the other branches was requisite to investing the judiciary with its “judicial Power.” One might be tempted to suppose that the judicial power vests in each federal tribunal automatically upon that particular tribunal’s creation. The picture is more complicated, however, because “power” has more than one dimension.³⁰ By way of comparison, one might describe the legislative power as Congress’ prerogative to “make” laws (in contrast, for example, to “executing” them), but there is also another dimension. In that other dimension, Congress’ competence is defined by the principle of enumerated powers.³¹

in Article VI, Clause 3.

28. *See id.* art. II, § 2. The President as a solitary human being might be unable to perform all his duties alone, but his legal “power” to veto, to pardon, to make treaties subject to Senate consent, and to execute the laws was complete. His powers to nominate and to fill vacancies would remain idle until offices were created that he might fill, but nothing more than the Constitution itself was required to vest those powers in him. There might be no Army or Navy; but regardless of whether it pleased any other branch or any state, he would be commander of the militia in national service because the Constitution by its own force made him Commander in Chief.

29. “The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.” *Id.* art. I, § 8, cl. 9.

30. John Harrison observed that “Judicial power and jurisdiction are obviously closely related concepts, but, just as obviously, they are not the same concept. . . . The judicial power is . . . less specific than a particular court’s jurisdiction, as the potential is less specific than the actual.” Harrison, *supra* note 2, at 214-15. Harrison’s actual/potential and specific/general contrasts, however, do not seem apt. I find it more useful to analogize to the different dimensions of a physical object.

31. Likewise in private affairs, a “power of attorney,” for example, can be considered in at least two dimensions: to do what, and for whom. Perhaps one could

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We acknowledge the latter dimension when we use such idioms as “the commerce power” and “the bankruptcy power.”

Similarly, one might conceive the “judicial power” as competence to process and resolve litigation, but another dimension of it concerns the kinds of disputes to which that capacity extends. For example, some courts are limited to juvenile or probate or equity matters, even though in these matters their power to resolve litigation might be as great as that of other courts. In this dimension the subject matter specifications in Article III Section 2 limit the power of our federal courts. We acknowledge this dimension when we use such idioms as “diversity jurisdiction” and “federal question jurisdiction.”

With regard to this subject matter dimension, automatic or “self-executing” investiture of the “judicial Power of the United States” would be seriously dysfunctional. Article III’s vesting clause does not distinguish among the several subject matters to which the federal judicial power “shall extend,” and therefore if the vesting were automatic it would follow that the same competence vests in *every* “inferior” federal court. That would preclude, for example, specialized courts for admiralty, bankruptcy, or other categories. It also would give every “inferior” court nationwide venue (at least in civil cases),³² and would preclude designating some for trial and others for appellate functions.

It therefore should not be surprising that even before the nineteenth century began, several of the Justices had concluded that Article III is *non-self* executing with regard to subject matter jurisdiction.³³ Although there was some disagreement on the point, it disappeared rather early, and this has remained the prevailing view. This, of course, raises several questions about how, by whom, and how far the subject-matter dimension

identify more (e.g., how long), but it is not necessary here to push the spatial metaphor of “dimension” so far.

32. As to criminal cases, two clauses—Article III, Section 2, Clause 3, and Amendment VI—both contemplate that there will be statutes regarding venue for criminal trials. However, neither is a grant of power; both rather are allusions to the power Congress has by virtue of the Necessary and Proper Clause.

33. *See* *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (Chase, J., writing in a footnote) (“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.”).

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of Article III might be implemented. Much of the remainder of this article discusses these questions.

But “subject matter jurisdiction”—the matters to which judicial competence extends—is only one dimension of the federal judicial power. The other concerns what a tribunal may do regarding matters within its jurisdiction. For this dimension, customary usage has provided no such concise and convenient label. I therefore propose to call it “judicial potency.”

As to federal tribunals, judicial potency is a function of constitutional terms like “judicial” and “cases” and the meanings associated with those words through centuries of Anglo-American practice. A tribunal can have full judicial potency despite restrictions of subject matter jurisdiction (for example, to admiralty cases). However, if a body were materially debilitated in attributes of judicial potency (for example, if it could not convene hearings, compel witnesses, or adjudicate claims), it would seem anomalous to call it a “judicial” body at all. At least in the context of Anglo-American legal traditions, some characteristics and prerogatives are so of the essence to “judicial” bodies that they are ineluctably implicated when one contemplates a judiciary, whatever the scope of its jurisdiction might be.³⁴

Consider not only the form and manner of process service, but also the length and setting of court terms and sessions, and for multijudge tribunals, quorum requirements and protocol among the judges. Consider the parameters of causes of action; pleading practices, joinder, party substitution, and intervention; continuances and stays; supersedeas; costs; qualification, admission, and discipline of attorneys; methods of discovery, and compulsion relating thereto; selection and utilization of juries; the setting aside of verdicts, and the granting of new trials; administration of oaths; burdens, the

34. Occasional attempts have been made to summarize what I call judicial potency. Justice Samuel F. Miller in 1891, for example, referred to “the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.” SAMUEL F. MILLER, ON THE CONSTITUTION 314 (1891). A 1911 Supreme Court opinion referred to “the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.” *Muskrat v. United States*, 219 U.S. 346, 361 (1911). Such generalizations, however, are not nearly specific enough for meaningful discussion. Neither can judicial potency be equated with matters of process, proof, and procedure; those are important parts, but not the whole.

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sequence of presenting proof, and admissibility of evidence; res judicata and collateral estoppel; imposition of sanctions for contempts of courts; designation of matters to constitute a record for appellate review; issuance of writs and other process (to effectuate jurisdiction or otherwise); requisites for personal jurisdiction; deciding whether appellate courts may enter judgment themselves, or rather must remand. The list could go on and on. If there is disagreement over precisely which of these are so integral that power over them *must* inhere in a body in order for it to be called "judicial,"³⁵ at least many of them surely are.³⁶ As the authors of a landmark study observed forty years ago:

There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*.

. . . Throughout a long history dominated by what Pound has called "the idea of legislative omnicompetence," court after court has nevertheless declared invalid under the several constitutions legislative enactments said to pass "the limit which separates the legislative from the judicial power" and to

35. See, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) (holding that, absent an independent jurisdictional basis, a federal court lacks power to enforce party agreements underlying a stipulated dismissal unless performance was made a condition of the dismissal order); *Shepherd v. American Broad. Co.*, 62 F.3d 1469 (D.C. Cir. 1995) (reviewing "a district court's use of its inherent power to punish litigation misconduct with the ultimate sanction of default"); *In re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir. 1993) (considering district court power to remand a removed case *sua sponte*).

36. The characteristics and prerogatives comprising judicial potency are distinguishable from accoutrements that might assist courts in performing their functions but are not essentially judicial themselves. Salaries, offices, and office supplies; bailiffs, marshals, secretaries, and clerks; libraries, courtrooms, and spaces for files, are *not* judicial potency matters (even though as a practical matter it might be impossible for courts to function without them).

Providing for any or all of these is not an exercise of "[t]he judicial Power of the United States." Indeed, providing these accoutrements involves the use and disposal of federal property, including federal money; and only Congress has power in that regard. Article IV, Section 3, Clause 2 of the U.S. Constitution provides that "The Congress shall have Power to dispose of . . . the . . . Property belonging to the United States." Furthermore, Article I, Section 9, Clause 7, adds: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" See generally David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994).

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constitute a “palpable encroachment upon the independence” of the judiciary.³⁷

A moment’s reflection should make it obvious that the question of whether Article III is self-executing involves quite different considerations with regard to the dimension of judicial potency than it does with regard to subject matter jurisdiction. Unsurprisingly, therefore, the prevailing view from the very beginning of our national jurisprudence has been that, with regard to judicial potency (unlike subject matter jurisdiction), Article III’s vesting clause *is* self-executing.

Even the first Congress took this for granted. The 1789 Judiciary Act did address a small handful of judicial potency issues; indeed, it made some innovations, such as providing for equity discovery techniques in actions at law,³⁸ providing for depositions *de bene esse*,³⁹ and providing for jury assessment of amounts due in some actions where liability was established by demurrer or default.⁴⁰ As to most such matters, however, the 1789 Act left the judiciary to its own devices. As to a few, it did this specifically: for example, it declared that new trials after jury verdicts should be allowed “for reasons for which new trials have usually been granted in the courts of law.”⁴¹ Otherwise, Section 17 of the Act provided that “all the said courts of the United States shall have power . . . to make and

37. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958). They continued,

We recognize that the outer boundaries of this sphere of total judicial autonomy have been difficult to locate with precision. Suffice that such a place of sanctuary exists and that whenever courts have felt themselves too tightly pressed by legislative regulation they have found in the doctrine of judicial independence a large reservoir of integral supremacy. . . . So long as a constitution maintains the fundamental separation of powers this area of functional independence of the judiciary will be preserved in the very grant of the judicial power. And within it the courts remain the vigilant watchdogs of their own freedom.

Id. at 33 (citation omitted). The Levin and Amsterdam study primarily considered practice in the several States, with only incidental attention to federal courts.

38. *See* Act of Sept. 24, 1789, ch. 20, § 15, 1 Stat. 73, 82.

39. *See id.* § 30.

40. *See id.* § 26.

41. *Id.* § 17. In criminal cases, a court could grant a new trial in favor of the prisoner, but not to his prejudice. *See* Case of Fries, 9 F. Cas. 826, 921 (C.C.D. Pa. 1799) (No. 5,126) (granting new trial).

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establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."⁴²

Accordingly the several district courts made rules of their own to govern such matters as what pleas would be allowed or disallowed, the time within which pleas must be submitted, and the order in which cases would be called for trial.⁴³ About many matters, however, no standing rules were made, and when such matters arose, the earliest federal judges simply proceeded like judges traditionally had. For example, no statute addressed how many persons should be summoned as a panel from which trial jurors should be chosen; Justice Paterson at Circuit concluded that the number was discretionary with the court as it was at the common law.⁴⁴ No statutory authorization was deemed requisite for the composition and use of grand juries, or for committing accused persons and taking bail.⁴⁵ The Justices at Circuit never hesitated for lack of statutory authorization to grant continuances in their discretion.⁴⁶ Likewise, the right to inquire by what authority an attorney acted on his purported client's behalf was regarded as "inherent in all courts,"⁴⁷ as was

42. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

43. See DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 36 (1971).

44. See *United States v. Insurgents*, 26 F. Cas. 499, 500 (C.C.D. Pa. 1795) (No. 15,443); cf. *Case of Fries*, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5,126). As an early treatise writer explained:

The words of reference in the act of September 24th, 1789, sect. 29, to the laws of the State were held to be restricted to the mode of designating the jury by lot or otherwise, and to the qualifications requisite for jurors, but not to relate to the number of jurors. The number, therefore, not being fixed by the act of Congress, nor any State rule adopted by it, it must depend on the common law, by which the Court may direct any number to be summoned, on a consideration of all the circumstances under which the *venire* is issued.

THOMAS SERGEANT, CONSTITUTIONAL LAW 249 (1822).

45. See *United States v. Hill*, 26 F. Cas. 315 (C.C.D. Va. 1809) (No. 15,364).

Although the act of September 24th, 1789, does not expressly invest the Courts of the United States, sitting as Courts, with the power to commit a person charged with an offence against the United States, yet this power is implied in the duties which the Courts must perform. And the Court may also take bail in such case.

SERGEANT, *supra* note 44, at 242.

46. See, e.g., *Hurst v. Hurst*, 12 F. Cas. 1028 (C.C.D. Pa. 1799) (No. 6,929); *Symes v. Irvine*, 23 F. Cas. 591 (C.C.D. Pa. 1797) (No. 13,714).

47. See *King of Spain v. Oliver*, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7,814).

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the prerogative to enforce courtroom decorum and to punish contumacy and contempt.⁴⁸ In sum, the earliest federal judges readily concluded they had ample power to deal with such matters, notwithstanding the lack of any statutory authorization.

The earliest Supreme Court terms significantly illustrated this power to act despite a lack of statutory authorization. Several of that Court's very first cases were original suits against States by citizens of other States,⁴⁹ and the litigants confronted threshold questions about the form of process and the mode of its service upon defendant States. Although the Judiciary Act and several Process Acts⁵⁰ dealt with process

48. Thomas Sergeant wrote in 1822:

The Supreme Court possesses, without the provision of written law, a power over their own officers, and to protect themselves and their members from being disturbed in the exercise of their functions; such as to fine for contempt, imprison for contumacy, and enforce the observance of order. They could have exercised the power to fine and imprison for contempts without the aid of this act of Congress; or in cases, if such should occur, to which its provision does not extend. The act is a legislative assertion of a right as incidental to a grant of judicial power, and is to be considered either as an instance of abundant caution, or as a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits, namely, fine and imprisonment.

SERGEANT, *supra* note 44, at 19-20. And Joseph Story wrote in 1833:

[T]here are certain incidental powers, which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1768, at 650 (1st ed. 1833).

49. The Judiciary Act contemplated Supreme Court jurisdiction of such suits, saying:

[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80; *cf.* U.S. CONST. art. III, § 2 ("Controversies . . . between a State and Citizens of another State . . ."). Congress proposed the subsequent Eleventh Amendment to bar such suits on December 2, 1793, and, following ratification, the Amendment took effect on January 8, 1798.

50. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, *continued by* Act of May 26, 1790, ch. 13, 1 Stat. 123, *continued by* Act of Feb. 18, 1791, ch. 8, 1 Stat. 191, *replaced by* Act of May 8, 1792, ch. 36, 1 Stat. 275, *amended by* Act of March 2, 1793, ch. 22, 1 Stat. 333.

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form and modes of service for other federal courts,⁵¹ no statutory provision at all regarding either process or its service in original *Supreme* Court proceedings existed.

The Supreme Court therefore made orders of its own on these matters—at first not even troubling over whether it had power to do so.⁵² Its power was not challenged until 1793, in *Chisholm v. Georgia*,⁵³ and all but one of the Justices agreed in that case with the argument advanced by Attorney General Randolph (the former Virginia Governor who had presented the Virginia Resolutions to the Constitutional Convention, and also had served on the Committee of Detail). Randolph said:

The service of process is solely for the purpose of notice to prepare for defence. The mode, if it be not otherwise prescribed by law, or long usage, is in the discretion of the Court; and here that discretion must operate

As to the steps, proper for compelling an appearance; these too, not being dictated by law, are in the breast of the Court.⁵⁴

In short, at least some elements of judicial potency were conceived from the outset to inhere in federal courts by virtue of

51. See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78-79; Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93-94.

52. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 725 (1971).

53. 2 U.S. (2 Dall.) 419 (1793).

54. *Id.* at 428-29. See also *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 289-90 (1831).

Only Justice Iredell disagreed. In his dissenting opinion in *Chisholm*, he said:

I conceive, that all the Courts of the *United States* must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. . . . [So long as Congress acts consistently with the Constitution,] the whole business of organizing the Courts, and directing the methods of their proceeding where necessary, I conceive to be in the discretion of *Congress*.

Chisholm, 2 U.S. at 432-33. Consequently, Iredell insisted, “[W]e must receive our directions from the Legislature in this particular” *Id.* at 433.

But despite his dissent regarding the particulars of process form and modes of service, even Iredell agreed that *some* prerogatives were inherent in the judicial power so that no statutory authorization was prerequisite; he simply believed that “[t]he authority contended for [by Randolph] is certainly not one of those necessarily incident to all Courts merely as such.” *Id.* at 433. Iredell himself routinely exercised prerogatives that he deemed deserving of that description: for example, without statutory authority he granted continuances as he found justice to require. See, e.g., *Hurst v. Hurst*, 12 F. Cas. 1028 (C.C.D. Pa. 1799) (No. 6,929); *Symes v. Irvine*, 23 F. Cas. 591 (C.C.D. Pa. 1797) (No. 13,714).

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their being “judicial” bodies—notwithstanding the absence of authorizing legislation, and no matter what their subject matter competence might be. Even those who believed there was no automatic vesting of subject matter jurisdiction maintained nonetheless that as to the *judicial potency* dimension, Article III *is* self-executing, at least to a considerable (albeit uncertain and debatable) extent. This view continued to predominate in succeeding generations.⁵⁵

As Part III of this article will show, not only the need for but the permissibility of legislation regarding the judiciary depends in significant part upon whether the subject of the legislation is

55. For example, while denying a habeas corpus petition because no applicable *jurisdiction* had been statutorily conferred, Chief Justice Marshall, writing for the Court cautioned, “[t]his opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions.” *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 94 (1807).

Likewise Justice Johnson, while holding that circuit courts were limited to the subject matter jurisdiction statutorily conferred, observed:

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce [sic] the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute

United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

Justice Story in his Commentaries professed a different view:

[I]n all cases, where the judicial power of the United States is to be exercised, it is for congress alone to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode, in which the judgments, consequent thereon, shall be executed. . . . They may authorize national courts to make general rules and orders, for the purpose of a more convenient exercise of their jurisdiction

3 STORY, *supra* note 48, at 625-26. But Story’s assertion of dependence upon Congress was anomalous to the otherwise uniform practice and precedent of his time.

Chief Justice Marshall reaffirmed the Supreme Court’s own prescription of process requirements for original cases in *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 287-90 (1831). On that occasion, he tried to buttress the practice with a strained reading of a statute; but thirty years later the Court confirmed that his attempt had been unnecessary, saying:

[I]t has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process . . . , and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.

Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861), *overruled in other respects by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

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a self-executing or non-self-executing aspect of the United States' "judicial Power." Whatever the need, however, it cannot be met by Congress unless to do so falls within the scope of that body's lawmaking competence. And so we return to the question of whether—and whence and to what extent—Congress has any such power.

III. TRACING CONGRESS' POWER REGARDING THE JUDICIARY TO ITS SOURCE

A. *The Principle of Enumerated Powers*

The Process Act of 1792 directed inferior federal courts to follow the forms and modes of state practice,⁵⁶ adding, subject however to such alterations and additions as the said

courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.⁵⁷

Exhibiting more imagination than discretion, in 1825 some lawyers challenged this authorization of the judiciary, denouncing it as a delegation of *legislative* power. The Supreme Court unsurprisingly rejected this argument, writing, "[a] general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."⁵⁸ The Process Act, therefore, could not be viewed as a delegation of "legislative" power.

However, the Justices added, "Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do: but this power is vested in the Courts; and it never has occurred to any one that it was a delegation of legislative power."⁵⁹ This posed (without discussing) a different question: if "this subject seems to be properly within the judicial province" and "this power is vested in the courts," how is it possible that

56. This act provided, "the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same" in federal courts as were then used in the respective States where those courts sat. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275-76.

57. *Id.*

58. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 45 (1825).

59. *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 61 (1825).

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“Congress might regulate the whole practice of the courts”? If the Process Act was not a delegation of “legislative” power, why was its directive to generally follow state practice not a congressional usurpation of “judicial” power?

To answer this, one must start at the beginning. If England’s parliamentary tradition had been adopted in this country unchanged, one might have supposed that the requisite power not only to “regulate the whole practice of the Courts”⁶⁰ but also to vest their subject matter jurisdiction resides inherently in the legislative branch. Our Constitution, however, allows no such premise. At the Constitutional Convention, the Committee of Detail⁶¹ translated the generalities of the Randolph Plan regarding the national legislative power (generalities which the Delegates had repeatedly approved) into a more particularized list;⁶² and by approving this innovation the delegates refined the postulate of “delegated powers” (a postulate characteristic of American political theory in general) into the principle of “enumerated powers” (a concept peculiar to the *federal* Constitution).

60. *Id.*

61. The motion to refer to a committee “for the purpose of reporting a constitution conformably to the Proceedings aforesaid,” and another motion fixing that committee’s membership at five, were approved unanimously on July 23. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 85, 87, 95-96 (rev. ed. 1937). The members were selected by ballot on July 24. *See 2 id.* at 97, 106. The Convention then adjourned until August 6 to abide the Committee’s work. *See 2 id.* at 118, 128.

62. The delegates had previously decided the national legislature should be competent “to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.” 2 *id.* at 131-32. However, as Detail Committee member James Wilson explained later to the Pennsylvania ratification convention:

[T]hough this principle [i.e., the resolution regarding national legislative competence] be sound and satisfactory, its application to particular cases would be accompanied with much difficulty; because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.

Speech Delivered in the Convention of Pennsylvania (Nov. 26, 1787), in 2 *THE WORKS OF JAMES WILSON* 764 (Robert G. McCloskey ed., 1967). As to the legislative branch, see particularly Article VII, Section 1 of the Committee Report, in 2 FARRAND *supra* note 61, at 181-82.

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The delegates' understanding of, and commitment to, this principle was evident in ensuing Convention deliberations. Committees and individual delegates alike took pains to ensure that all the particulars they conceived as embraced by the generalities employed in the Randolph Resolutions got included in the enumeration replacing them. For example, while other provisions clearly assumed that there would be federal taxation, the switch from generalization to enumeration made it necessary for the first time to insert an explicit grant of the power to tax.⁶³ Beyond affirming the continued validity of debts incurred by the Confederation, the delegates took care to empower the new government to pay them.⁶⁴ Late in the proceedings, Madison, Pinckney, and others proposed specific clauses for various matters arguably embraced by the approved generalities of the Randolph Resolutions, but not yet specified in the enumeration. Some of these (for example, those concerning patents and copyrights and Indian affairs) were approved, while others (for example, those concerning a university, post road stages, and the chartering of corporations) apparently were deemed within the scope of others already listed, insofar as they were considered appropriate at all.⁶⁵ Any

63. As I have explained in an earlier article,

Power to tax was one power denied by the Articles of Confederation, which all agreed the new central government must have. Nonetheless, even while specifying that federal courts should have jurisdiction to enforce federal revenue laws, the original Randolph Resolutions did not specify any taxing power for Congress. Similarly, although the resolutions referred to the Committee of Detail contained several references to national taxes they articulated no taxing power.

This, however, was not anomalous so long as Congress' power was described in ample generalities—as it was both in the Sixth Randolph Resolution and in its derivative referred to the Committee of Detail. Only with the shift to enumeration did it become imperative that any taxing power, in order to exist, be articulated more specifically. Accordingly, when it opted for enumeration, the Committee of Detail inserted a new clause saying “[t]he Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises.”

Engdahl, *supra* note 15, at 234 (footnotes omitted).

64. This was done, not by the allusions to debts, defense, and welfare in Article I, Section 8, Clause 1, but rather by the aptly tailored language of Article IV, Section 3, Clause 2, and as to some applications, by the Necessary and Proper Clause, Article I, Section 8, Clause 18. See the discussion and citations Engdahl, *supra* note 15, at 238-51.

65. Elaboration and documentation of these examples is too complex to detail here; it is set forth in *id.* at 243-46, 244 n.154.

remnant of doubt as to the fundamentality of this enumerated powers principle was dispelled when the Tenth Amendment gave it exclamatory punctuation.

The enumeration technique is most often discussed with regard to Congress' competence vis-a-vis that of the States, but it also was utilized to allocate power among branches of the national government itself. It was well understood that for Congress to have any power at all regarding judicial tribunals (or regarding the executive branch), a sufficient grant or grants of power *must be included among Congress' enumerated powers*. No parliamentary tradition of inherent or presumed legislative competence to prescribe the organization of government or to provide for government operations could survive this principle of enumerated powers.⁶⁶ Consequently, the search for some congressional power to legislate regarding the judiciary is necessarily a search for one or more *enumerated* powers.

Moreover, identifying the particular enumerating text is crucial, not only because the power must be enumerated in order to exist at all, but because to the (considerable) extent that usage gives language relatively definite and objective meaning, the function of any written authorization is not only to empower but also to define and delimit the power conferred. The great significance of the framers' choice to replace the Randolph Plan's generalizations about national legislative power with a more particularized enumeration is that the wording of each particular grant sets *intrinsic limits* to the power thus conferred.

B. *The Necessary and Proper Clause*

The delegates to the Constitutional Convention agreed that a national judiciary should exist,⁶⁷ but they disagreed whether it should consist of one court or several. They compromised on June 5th by amending the ninth Randolph Resolution⁶⁸ (Ninth

66. As Chief Justice Marshall wrote several years later, "under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1804).

67. As to the experience with central judicial organs under the Articles of Confederation, see 1 GOEBEL, *supra* note 52, at 182-95; Clinton, *supra* note 2, at 754-57.

68. The Ninth Resolution proposed "that a National judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals." 1 FARRAND, *supra*

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Resolution), the judiciary provision of the so-called "Virginia Plan," to require one and leave the existence of others to legislative discretion.⁶⁹ That compromise held for the rest of the Convention⁷⁰ and is twice reflected in the Constitution as ultimately approved.⁷¹

This compromise, however, entailed some complications. The Ninth Resolution had been drafted on the premise that several federal courts should exist, and when that premise was compromised, some terms of the Ninth Resolution became inapt. For example, the Ninth Resolution contemplated that certain cases should be heard by a federal court in the first instance, but it gave the Supreme Court only appellate jurisdiction, "in the dernier resort."⁷² Along with some other

note 61, at 21.

69. The Journal records the vote as 7-3, with one State divided. *See 1 id.* at 118. Madison reports it as 8-2, with New York divided. *See 1 id.* at 125. Yates concurs with the Journal. *See 1 id.* at 127.

The delegates first agreed to substitute language providing that the judiciary "consist of One supreme tribunal, and of one or more inferior tribunals." *1 id.* at 95 (Journal); *see also 1 id.* at 104-05 (Madison's notes). Then they compromised the phrase regarding inferior tribunals, as indicated in the text. As to the import of the change to "one" from "one or more supreme tribunals," *see* David E. Engdahl, *What's In A Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457 (1991).

70. The authorization for the legislature to establish "inferior" courts was set out as a separate resolution in the Committee of the Whole's Report to the Convention on June 13, *see 1 FARRAND, supra* note 61, at 231, and in the body of resolutions referred to the Committee of Detail, *see 2 id.* at 133. The Committee of Detail included it separately in the enumeration of legislative powers set forth in Article VII, Section 1, of its Report. *See 2 id.* at 181-82.

71. The power to constitute "inferior" tribunals is *conferred upon* Congress by U.S. Constitution Article I, Section 8, Clause 9, and also is *alluded to* in Article IV, Clause 1.

72. From the French for "ultimate" or "final." *See 1 FARRAND, supra* note 61, at 22.

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questions of judicial branch organization,⁷³ these problems were referred to the Committee of Detail.

It was that Committee, as already noted, that introduced enumeration to concretize the Resolutions' generalizations about national legislative power; and in the process of enumeration, that Committee addressed the judiciary issues, too. Governor Randolph (a member of the Committee) prepared an outline⁷⁴ that concluded its list of powers for the legislature with a clause empowering the national legislature "to organize the government."⁷⁵ That clause was crossed out in the original document, apparently by Randolph himself,⁷⁶ but a similar clause pertaining specifically to the judiciary was not. The latter provided that "the legislature shall organize it."⁷⁷

Randolph's "shall organize" clause would have empowered the legislature to resolve any otherwise unresolved issues of judicial structure and workload allocation. However, its language imposed no intrinsic limitation on the power thus bestowed. The word "organize" imports general discretion over structure, function, and operations, and since Randolph's clause contained no qualifying terms, the discretion given to Congress over the judiciary could have been fairly described as "plenary."

It is therefore significant that Randolph's proposed language did not get past the Committee of Detail. Instead, committee member James Wilson proposed different language, no less ample but imposing important intrinsic limits. At the end of his list of powers for the legislature Wilson placed a

73. For example,

[T]here would be only one court labelled "supreme," but how many judges should it have? Should they sit in separate panels, or only en banc? Might (or must) any "inferior" courts serve as auxiliary organs on the model of nisi prius or assize, or could they (or must they) be separate entities in their own right? If the latter, must they have judges of their own, or could the judges appointed to the one "supreme" court be designated to serve on "inferior" courts as well? Appointment, compensation, and tenure provisions to insulate the judiciary from untoward political influence were debated easily, repeatedly, and at length; but these other, more intricate details of organization, involved complex and interrelated considerations, less susceptible to large group debate.

Engdahl, *supra* note 69, at 477-78.

74. The Randolph outline is printed in 2 FARRAND, *supra* note 61, at 137.

75. 2 *id.* at 144.

76. See 2 *id.*; see also 2 *id.* at 137 n.6.

77. 2 *id.* at 147.

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clause empowering it “to make all Laws that shall be necessary and proper for carrying into . . . Execution . . . all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof.”⁷⁸

At the second ellipsis indicated here, Wilson had included the words, “the foregoing Powers, and”⁷⁹—words, of course, which remained in this “necessary and proper” clause when it was included in the Committee’s Report⁸⁰ and ultimately in the finished Constitution.⁸¹ But in Wilson’s own document those four words were stricken, apparently by Wilson himself.⁸² This might suggest that the clause, at its origin, was conceived less as auxiliary to the other *legislative* powers (the role in which it receives more attention today) than as a grant to the legislature of authority to direct such details of government organization and operation as the Constitution itself might not prescribe. These of course would include various matters regarding the judiciary which had been referred to the Committee, but which it did not more specifically resolve.

This “necessary and proper” clause barely stirred a ripple of debate when the Detail Committee’s Report came before the Convention for approval.⁸³ Moreover, although the Report separately addressed relatively few of the judiciary issues referred to the Committee,⁸⁴ the delegates perceived no need for

78. 2 *id.* at 168.

79. 2 *id.*

80. *See* 2 *id.* at 182.

81. “The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, d. 18.

82. *See* 2 FARRAND, *supra* note 61, at 168; *see* 2 *id.* at 163 n.17.

83. The only recorded discussion of the Necessary and Proper Clause occurred on August 20, when Madison and Pinckney moved that power to “establish all offices” which might be necessary and proper be added to the authority to “make Laws.” *See* 2 *id.* at 337, 340, 345. Their concern that power to establish offices might otherwise be caviled was not shared by the other delegates, several of whom (including three Committee of Detail members) pointed out that the language as proposed by the Committee was ample to authorize creation of offices by law. *See* 2 *id.* at 345. The additional language proposed was then firmly voted down, and the clause was agreed to without dissent. *See* 2 *id.* at 337, 340, 345.

84. The Committee of course did deal with some of the jurisdiction questions, and it did so by means of enumeration. The relevant Resolution as it stood late in July said only that the jurisdiction of the national judiciary “shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony,” 2 *id.* at 132-33; and the

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further Convention attention to those issues. This reinforces the impression that the framers viewed the Necessary and Proper Clause as sufficiently empowering Congress to enact legislation suitable for detailing the judicial branch and putting it into operation.

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Unsurprisingly, therefore, it was recognized for at least a century that one of the functions of this felicitous clause was to empower Congress to make laws regarding the judiciary. In 1793, for example, Justice Iredell wrote that prescribing the form of process and the mode of service for original cases

appears to me to be one of those cases, with many others, in

which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority. There being many such, at the end of the special enumeration of the powers of *Congress* in the Constitution, is this general one: "To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the *United States*, or in any department or officer thereof."<sup>85</sup>

Iredell's fellow Justices found the Court competent to prescribe forms of process and service by itself, even without statutory

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Committee of Detail replaced the latter phrase with an enumeration similar to that which the Convention eventually approved. *See 2 id.* at 186 (art. XI, § 3 of the Committee Report).

A diversity provision had been included in the original ninth Randolph Resolution, and an amendment to it had been approved on June 12. The Committee included a more elaborate diversity provision even though none had been included in the language approved by the Convention on June 13, or in the resolution as referred to the Committee.

The Committee included admiralty and maritime cases even though the resolutions referred to them had not, and even though the piracy, high seas felony, and capture provisions of the ninth Randolph Resolution had been disapproved on June 12. This evidently was adapted from the Pinckney Plan, *see 2 id.* at 136, perhaps under the impetus of Wilson's strong desire for national jurisdiction in such cases.

The Committee's inclusion of cases involving diplomatic representatives apparently was adapted from the Paterson Plan. *See 1 id.* at 244. Provision for cases between States, and between States and sister State or foreign citizens, was original with the Committee. The Committee also included jurisdiction over impeachments of national officers, even though that had been disapproved by the Convention on July 18.

85. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432 (1793).

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authorization; only Iredell considered legislation to be prerequisite. Other Justices apparently agreed, however, that such legislation could be enacted by virtue of the Necessary and Proper Clause.

The same point was recognized by Justice Baldwin for the Court in 1838:

It was necessarily left to the legislative power to organize the

Supreme Court, to define its powers consistently with the constitution as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, . . . defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, *congress exercised their power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial*, as well as all other departments and officers of the government of the United States. . . . [T]he constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; . . . *leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own.* The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by congress . . . .<sup>86</sup>

Justice Strong wrote for the Court in 1879,

By the last clause of the eighth section of the first article of

the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government.<sup>87</sup>

And the first Justice Harlan for the Court in 1886 wrote as follows to justify an 1867 statute conferring federal question jurisdiction over habeas corpus petitions of state prisoners:

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86. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (emphasis added).

87. *Tennessee v. Davis*, 100 U.S. 257, 263 (1879).

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[A]s the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; . . . and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress [to enact the law].<sup>88</sup>

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This application of the Necessary and Proper Clause is so obvious, once it is noticed, that the almost total lack of reference to it in the federal courts literature of the twentieth century seems very odd. For two generations, however, constitutional issues of federalism were treated by legal educators as essentially political in character.<sup>89</sup> Additionally, these issues were given far less attention than embellishment of the noble epigraphs memorializing individual rights. Law teachers and students grew inattentive to the classic, means-to-enumerated-end rationale by which federal regulation of local rolling stock,<sup>90</sup> local rail rates,<sup>91</sup> local stockyard activities,<sup>92</sup> and local manufacturing monopolies<sup>93</sup> had been upheld for years before the dual federalism extravagance of Justices McReynolds, VanDevanter, Sutherland, and Butler attained its temporary dominance.

Due to that inattention, the renaissance of 1937-1941 deteriorated into a revolution instead. The landmark New Deal cases applying in commercial contexts the Necessary and Proper Clause rationale of *McCulloch v. Maryland*<sup>94</sup> were mistaken for expositions of the Commerce Clause itself. This failure to keep separate issues distinct not only produced the confused and unsustainable notion of plenary congressional

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88. *Ex parte Royall*, 117 U.S. 241, 249 (1886).

89. See David E. Engdahl, *Casebooks and Constitutional Competency*, 21 SEATTLE U. L. REV. 741, 776 (1998).

90. See, e.g., *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911).

91. See, e.g., *Railroad Comm'n v. Burlington & Quincy R.R. Co.*, 257 U.S. 563 (1922); *Houston, East & West Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

92. See, e.g., *Stafford v. Wallace*, 258 U.S. 495 (1922); *Swift and Co. v. United States*, 196 U.S. 375 (1905).

93. See, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

94. 17 U.S. (4 Wheat.) 316 (1819).

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power over everything “affecting interstate commerce,” but also induced lawyers (and Justices) to ignore important analogies between commerce and other contexts where the Necessary and Proper Clause model of analysis rightly applies.<sup>95</sup> Given such nonchalance toward assertions of federal legislative power, it should not be surprising that the Necessary and Proper Clause basis of Congress’ power regarding the judiciary fell from notice.

Now, however, constitutional jurisprudence is in transition. Justices have begun to emphasize the Necessary and Proper Clause basis of the so-called “affecting commerce” cases,<sup>96</sup> and scholars have begun to probe this clause’s independent meaning.<sup>97</sup> The time, therefore, is propitious for examining how the Necessary and Proper Clause operates in the context of laws regarding the judiciary.

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The power conferred by the Necessary and Proper Clause is defined and circumscribed by these important words: “for carrying into Execution the . . . Powers vested by this Constitution.”<sup>98</sup> Thus, while the clause imports a great deal of

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95. See, for example, the confused second rationale of *Katzenbach v. Morgan*, 384 U.S. 641, 656-58 (1966), hopefully at last put to rest by *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). See generally David E. Engdahl, *Constitutionality of the Voting Age Statute*, 39 GEO. WASH. L. REV. 1 (1970) (showing Congress’ mistaken reliance on the second rationale of *Katzenbach* to support the Kennedy Amendment).

96. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O’Connor, J., dissenting); *Lopez v. United States*, 514 U.S. 549, 584, 588 (1995) (Thomas, J., concurring).

97. In addition to my own treatment of the clause in DAVID E. ENGDahl, *CONSTITUTIONAL FEDERALISM IN A NUTSHELL* (2d ed. 1987), and DAVID E. ENGDahl, *CONSTITUTIONAL POWER, FEDERAL AND STATE, IN A NUTSHELL* (1976), see, for example, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); and Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

In celebrating the attention now being given to this clause, I neither endorse nor detract from any particular spin other commentators have put upon it. I do note, however, that after having been marginalized to the right by most academic commentators for more than thirty years, I now am amused to find myself considered to the left of some. In fact, of course, I have always occupied the center.

98. U.S. CONST. art. I, § 8, cl. 18.

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discretion,<sup>99</sup> that is only discretion “*for carrying in to Execution*” the Constitution’s design, not for altering or counterm anding it.

Congress therefore has a different scope of discretion when it employs the Necessary and Proper Clause to effectuate powers of another branch than when it employs this same clause to effectuate its own powers. Those other powers of Congress also entail discretion for Congress, whereas the powers conferred on other branches entail discretion for those other branches instead. Thus, the sum of Congress’ discretion when it acts under the Necessary and Proper Clause is not always the same.

To take the easiest example, the Commerce Clause gives Congress “plenary” power over “commerce among the several States,”<sup>100</sup> and it is, therefore, in Congress’ discretion to determine whether, how, and when interstate commerce should be facilitated, constrained, or even destroyed. The Necessary and Proper Clause compounds this discretion by empowering Congress to make whatever laws “shall be necessary and proper for carrying into Execution”<sup>101</sup> its interstate commerce policy, including laws about things that are *not* interstate commerce, insofar as those laws are means to an interstate commerce policy end.<sup>102</sup> If this compounded discretion seems “plenary,”

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99. Chief Justice Marshall wrote of this clause in 1804, “Congress must possess the choice of means, . . . and must be authorized to use the means which appear to itself most eligible to effect that object.” *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1804). In a better known 1819 statement, Marshall elaborated that Congress may “exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government,” because “the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable [the performance of constitutional duties] in the manner most beneficial to the people.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819).

See also the dissenting opinion of Justice Miller in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 626 (1870), vindicated by the holding in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553 (1871) (“[W]e overrule so much of what was decided in *Hepburn v. Griswold* . . .”).

100. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195-96 (1924).

101. U.S. CONST. art. I, § 8, d. 18.

102. For example, the Commerce Clause gives it discretion over the interstate market, and if in that discretion Congress elects to stabilize interstate commodity trading, reconcile interstate pricing, prevent strike interruptions of interstate transportation, or facilitate interstate travel by racial minorities, the Necessary and Proper Clause *adds* discretion to regulate even *non*-interstate matters like farming, production wages and hours, labor relations, and restaurant discrimination in ways

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however, that is only because there is no intrinsic limit on Congress' own discretion as to the ends to be served (in this example, as to the policies Congress may choose for interstate commerce itself). Congress' discretion regarding the ends derives, not from the Necessary and Proper Clause, but from some other power grant to the legislative branch (in this example, the Commerce Clause).

With reference to the powers of another branch, however, whatever discretion inheres in them belongs not to Congress but to that other branch, and the Necessary and Proper Clause only empowers Congress to help effectuate the discretion confided to that other branch. Although the decision whether and how to render assistance is committed to Congress' discretion,<sup>103</sup> it is only *assistance* that is authorized by the Necessary and Proper Clause. The words of this clause are so perfectly adapted as to seem specifically tailored to *exclude* laws that restrict or inhibit the constitutionally contemplated power (hence discretion) of another branch.

For example, the Constitution empowers the President to pardon.<sup>104</sup> By virtue of the Necessary and Proper Clause, Congress might enact laws to help effectuate that power, perhaps creating offices to conduct investigations or screen clemency requests. However, no law *inhibiting* the President's discretion—as by prohibiting pardons of impeached chief executives, or conditioning pardons on specified terms—could find colorable support in the Necessary and Proper Clause. Likewise, the President has power (and the duty) to “take Care that the Laws be faithfully executed.”<sup>105</sup> The Necessary and Proper Clause supports laws to enhance the President's law enforcement capacity, but it cannot support laws to constrain or inhibit enforcement.<sup>106</sup>

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rationally fit to accomplish such interstate market stability, price equity, or movement of goods or people. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

103. As Chief Justice Marshall said, Congress may “exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819).

104. *See* U.S. CONST. art. II, § 2, cl. 1.

105. *Id.* art. II, § 3.

106. Insofar as “the Laws” are statutory, of course, Congress might amend or

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In other words, in connection with the powers of the other branches, the Necessary and Proper Clause operates like a one-way ratchet: it lets Congress make laws facilitating the powers (hence discretion) of the other branches, but it gives Congress no power, no discretion, over whether, how far, or how those other branches should perform the roles contemplated for them by the Constitution. The words “for carrying into Execution” are wholly unsuited to authorize laws which diminish, curtail, or interfere. This ratchet feature of the Necessary and Proper Clause with regard to the powers of the other branches is a crucial element of the Constitution’s separation of powers.

By virtue of this clause, then, Congress has power to make laws “necessary and proper for carrying into Execution” the “judicial Power of the United States,” which Article III says “shall be vested” in the federal judiciary and “shall extend to” the subject matters constitutionally prescribed. According to orthodox opinion, however, Congress has far more power than this. Indeed, it is generally assumed that Congress’ power regarding the judiciary has *no intrinsic* limits at all—as if the Detail Committee had reported, and the Convention approved, Edmund Randolph’s “shall organize” clause instead of James Wilson’s formulation, “necessary and proper for carrying into execution.” But the choice to use Wilson’s clause was not inadvertent.

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repeal them, and to that extent it might be said to diminish the executive’s function. Some “Laws,” however, such as constitutional provisions on individual rights, Congress is not competent to change. No legislation undertaking to restrain the President in his use of his own powers in his own discretion to enforce constitutional protections could claim colorable support in the Necessary and Proper Clause.

A caveat is necessary regarding military means for law enforcement. While the Constitution makes the President commander in chief of the armed forces, *see id.* art. II, § 2, it gives Congress power “[t]o make Rules for the Government and Regulation of the land and naval Forces,” *id.* art. I, § 8, cl. 14, as well as to make laws necessary and proper for effectuating *both* of these powers. Therefore statutes like the “Posse Comitatus Act,” 18 U.S.C. § 1385, restricting the executive’s use of the military for execution of the laws, have ample constitutional basis. *See generally* David E. Engdahl, *Foundations for Military Intervention in the United States*, 7 U. PUGET SOUND L. REV. 1 (1983) [hereinafter Engdahl, *Foundations*]; David E. Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 IND. L.J. 581 (1974).

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In order to sustain the virtually unqualified legislative control over jurisdiction and judicial business presumed by orthodox commentators, some premise *other than* the Necessary and Proper Clause must be used. Thus, every single modern commentator discussing Congress' power regarding the judiciary has employed other premises; and almost none has mentioned the Necessary and Proper Clause at all. Two distinct premises have been used; but both of them are *demonstrably* false. Because they nonetheless dominate conventional thinking, however, each of these false premises must be examined and discredited before the application of the true premise is further explored.

*C. The Specious "Necessary Implication" of the "Tribunals Clause"*

The Constitution explicitly gives power to Congress "[t]o constitute Tribunals inferior to the supreme Court."<sup>107</sup> The power conferred by this Tribunals Clause is *alluded to* by a phrase in Article III referring to "such inferior Courts as the Congress may from time to time ordain and establish."<sup>108</sup> That Article III allusion, however, does not confer the power to ordain and establish them; the power is instead conferred by the Article I Tribunals Clause.

The Tribunals Clause encapsulates the June 5th compromise between those who wanted several national courts and those who wanted only one: the clause leaves to Congress' discretion whether and how many "inferior" courts should exist. Moreover, it was not expected that Congress should exercise this discretion only once for all time: the Article III allusion to the exercise of this power "from time to time" suggests

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107. U.S. CONST. art. I, § 8, cl. 9. Another provision worth passing notice is that authorizing Congress to provide by law for judicial appointments without presidential appointment and Senate "Advice and Consent." *See id.* art. II, § 2, cl. 2.

108. *Id.* art. III, § 1.



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continuing discretion in Congress<sup>109</sup> to reconsider and redetermine what “inferior” courts (if any) should exist.

But conventional opinion takes the Tribunals Clause to mean much more than this. It is taken to sustain all manner of judiciary legislation, from prescribing and circumscribing subject matter jurisdiction to dictating details of procedure, evidence, and remedies. It is thought to give Congress “plenary” power (i.e., with no intrinsic limitations) to direct and control whatever “inferior” federal courts are permitted to exist. As one federal district judge put it, “to paraphrase the scripture, the Congress giveth, and the Congress taketh away.”<sup>110</sup>

One might try to support this view by citing the broadest dictionary meaning of the word “constitute”; after all, the instrument that not only creates but also sets the operating parameters for our government as a whole is called a “constitution.” This argument, however, would hang constitutional doctrine by too frail a verbal thread. Madison, who cosponsored with James Wilson the motion from which the Tribunals Clause derives, reports that the motion used the

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109. Professor Julius Goebel suggests that some tinkering by the Committee of Style removed this discretion from the legislature in order “to assure that federal inferior courts must be created.” 1 GOEBEL, *supra* note 52, at 247.

Goebel’s thesis, however, is not credible. What the Style Committee did was replace some unduly cumbersome language of the Committee of Detail (which the Convention had approved) providing that “[t]he Judicial Power . . . 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.” Proceedings of Convention Referred to the Committee of Style and Arrangement, art. XI, § 1, in 2 FARRAND, *supra* note 61, at 565, 575. The Committee replaced that with this much simpler provision: “The judicial power . . . shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.” Report of Committee of Style, art. III, § 1, in 2 FARRAND, *supra* note 61, at 590, 600.

Goebel’s attribution of deft sleight-of-hand to subvert the June 5th compromise dishonors the Style Committee members and supposes the other delegates fools. The alteration is entirely apt to streamline the language with no such change in meaning, and the revised wording won convention approval without even a whisper of criticism on this point. See 2 FARRAND, *supra* note 61, at 621-41.

A sufficient answer to Goebel’s fancy is that the power (and hence discretion) over the existence of “inferior” tribunals was actually conferred, not by this allusive language in the judiciary article, but rather by explicit power-granting language in a different article dealing with the legislative branch, which, as even Goebel himself acknowledged, the Style Committee left completely unchanged. See 1 GOEBEL, *supra* note 52, at 246.

110. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973).

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word “institute,” not “constitute.”<sup>111</sup> “Institute” also was the word Dickinson used in the earlier comment that prompted the Wilson-Madison motion.<sup>112</sup> Accounts of the same motion in the Journal and in Yates’s notes use the word “appoint” instead.<sup>113</sup> Moreover, Madison reports that discussion of the motion took place in terms of “establishing” such courts.<sup>114</sup> Both the Journal and Madison show the word “appoint” being used when the proposition was reaffirmed on July 18th,<sup>115</sup> and “appoint”<sup>116</sup> was the word employed in the resolution as referred to the Committee of Detail.<sup>117</sup>

In Committee proceedings the outline prepared by Randolph also used “appoint”;<sup>118</sup> but the draft prepared by James Wilson used “constitute” instead,<sup>119</sup> and that was the word the Committee’s Report employed.<sup>120</sup> Even though “constitute” may be susceptible to a broader meaning, no record suggests that either Wilson or the Committee meant anything significant by this word change. The Convention approved the provision containing Wilson’s word not only without objection, but, so far as appears, with no discussion at all;<sup>121</sup> given the delegates’ adamant and repeated rejection of legislative control over jurisdiction (to be detailed below), it seems highly unlikely that the Convention would have quietly approved this clause if any delegate had conceived the word “constitute” to carry such meaning. Moreover, in the Article III phrase *alluding to the Tribunals Clause*<sup>122</sup> the word “constitute” does not appear; that phrase instead uses the words “ordain” and “establish.”

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111. See 1 FARRAND, *supra* note 61, at 125.

112. See 1 *id.*

113. See 1 *id.* at 118, 127.

114. See 1 *id.* at 125.

115. See 2 *id.* at 38-39, 46.

116. Seizing upon this word “appoint,” Professor Julius Goebel speculated that delegates who opposed any but one national tribunal supported the Madison-Wilson compromise on June 5th because they believed that *state* courts would be “appointed” for national purposes (as sometimes had been done under the Articles of Confederation). See 1 GOEBEL, *supra* note 52, at 211-12 & n.76. This speculation, however, seems unwarrantably strained.

117. 2 FARRAND, *supra* note 61, at 133.

118. See 2 *id.* at 144.

119. See 2 *id.* at 168.

120. See 2 *id.* at 182.

121. See 2 *id.* at 315, 313.

122. See U.S. CONST. art. III, § 1 (second half of first sentence).

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Perhaps for these reasons, those who hold the conventional view have not tried to defend it by construing the word “constitute.” Instead they have relied on a “necessary implication”: The purportedly “greater” power to create or abolish inferior courts is taken *a fortiori* to include the “lesser” powers to create or abolish them in part by vesting or divesting

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less than all the contemplated jurisdiction,<sup>123</sup> and to dictate how these creatures shall proceed in performing their judicial tasks.

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123. Most commentators discussing proposals for jurisdictional divestment have endorsed some variation of the "necessary implication" view. *See, e.g.*, REDISH, *supra* note 2, at 29; Raoul Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801, 804; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Kenneth R. Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 JUDICATURE 185, 186 (1981); Robert W. Meserve, *Limiting Jurisdiction and Remedies of Federal Courts*, 68 A.B.A. J. 159, 160 (1982); Ratner, *supra* note 9, at 158; Ratner, *supra* note 12, at 955; 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, 46-48, 106 (1975); Rice, *supra* note 8, at 192; Sager, *supra* note 9, at 25; Telford Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 199 (1981); Michael Vitiello, *Congressional Withdrawal of Jurisdiction from Federal Courts: A Reply to Professor Uddo*, 28 LOY. L. REV. 61 (1982); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

Some have conceded the inference as historically defensible but argued against its application in modern circumstances. *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501, 502-04, 510-13, 532-33 (1974); *see also* Sager, *supra* note 9, at 36.

Some have said the constitutionality of divestment should turn on congressional motive. *See, e.g.*, John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1307-08 (1970); Vitiello, *supra*, at 75. But others say this thesis suffers "fatal flaws." *See, e.g.*, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, in ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, FINAL REPORT OF THE 1983 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, THE COURTS: SEPARATION OF POWERS 15, 29-30 (1983), *revised version reprinted in* 36 STAN. L. REV. 895 (1984).

A few have insisted at least that state judgments in cases divested from lower federal courts must remain subject to Supreme Court review. *See, e.g.*, Bator, *supra* note 11, at 1034, 1037, 1039. If congressional discretion over subject matter jurisdiction were really a "necessary implication" of the Tribunals Clause, however, such attempts at qualification could draw no credible support from any constitutional language. They all amount, as Professor Redish has said, to "constitutional wishful thinking." Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 911 (1982) [hereinafter Redish, *Congressional Power*]. As Professor Gunther observed, "much of the debate turns on whether arguments about sensible and desirable judicial structures can be converted into constitutionally mandated ones." Gunther, *supra*, at 908.

Redish and some others have posited "due process" limits on divestment, at least as to constitutional claims. *See, e.g.*, Bator, *supra* note 11, at 1033-34; Redish, *Constitutional Limitations*, *supra* note 11, at 158-59; Redish, *Text, Structure, and Common Sense*, *supra* note 11, at 1648. *See also* the equal protection argument of Professor Ratner, *supra* note 12, at 954.

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References to this specious “necessary implication” appeared at least as early as 1811, when Justice Livingston wrote at Circuit,

[The inferior courts] have hitherto been regarded as dependent on that body [Congress] for all the powers they possess. Owing as they do their existence to congress, from them must necessarily flow that portion of the general judicial power which, by the constitution, they have a right to divide among the inferior courts that may be established.<sup>124</sup>

Justice Washington at Circuit had written something similar six years before, but Washington’s statement was more ambiguous and it is unclear whether he was espousing this “necessary implication” view or instead was applying the Necessary and Proper Clause.<sup>125</sup> There is no ambiguity, however, in Justice Johnson’s 1812 statement for the Supreme Court, that “the power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects.”<sup>126</sup>

There is, however, no reason to believe that these occasional espousals<sup>127</sup> represent the predominant early view. In earlier

124. *Livingston v. Van Ingen*, 15 F. Cas. 697, 698 (C.C.D.N.Y. 1811) (No. 8,420).

125. Justice Washington wrote:

[T]he residuum of the judicial power is vested in such inferior courts, as congress may, from time to time, ordain and establish. Now, it follows, that when congress has established such inferior courts, it lies with that body, to parcel out the judicial powers amongst them, in such manner, as may seem to them most proper.

*Ex parte Cabrera*, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2,278).

126. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812).

The first to assert that Congress actually could divest jurisdiction after it once had been vested was Justice Story. He said at Circuit in 1812, “I am well satisfied, that the legislature may at will give or take away the jurisdiction of the circuit and district courts.” *Ex parte United States*, 24 F. Cas. 737, 738 (C.C.D.R.I. 1812) (No. 14,411). At the date of this dictum, however, *divestment* (as distinguished from *incomplete investment*) was only a theoretical possibility; as of 1812, Congress never had undertaken to totally divest any fragment of jurisdiction once vested somewhere in the federal judicial system. Not even the controversial 1802 measure repealing the 1801 Judiciary Act was such a divestment; see the extensive discussion of that 1802 measure *infra* notes 235-39.

127. An opinion for the Supreme Court in 1850 articulated the “necessary implication” rationale again. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

Justice Sutherland cited Johnson’s 1812 opinion in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), when he wrote for the Court in 1922 that Congress “may give, withhold, or restrict such jurisdiction at its discretion . . . . And the jurisdiction,

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cases, the Justices had respected statutory parameters without articulating any rationale;<sup>128</sup> and the Necessary and Proper Clause, which from the outset had been understood to authorize laws effectuating Article III,<sup>129</sup> is certainly ample to sustain laws vesting jurisdiction even if they vest only part of what is contemplated by Article III. (The Necessary and Proper Clause cannot support divestment, but no early case involved that.)

Chief Justice Marshall in 1807, observing that “courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction,” declared, “It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied.”<sup>130</sup> However, as of that date the “necessary implication” view not only had *not* been “repeatedly given by this court,” but had *never* been given at all—not in any opinion for the Court, nor even in a separate opinion or statement by any Justice thereof. The Necessary and Proper Clause, in contrast, was well understood, and had been prominently employed in other contexts.<sup>131</sup> If it is not absolutely certain that Marshall’s 1807 allusion was to the Necessary and Proper Clause, at least there is no reason whatsoever to consider it an endorsement of the “necessary implication” notion, which no one seems ever to have articulated until some years later.

In any event, no matter how early the mistake first appeared, this so-called “necessary implication” is an implication which the framers actually had tried deliberately

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having been conferred may, at the will of Congress, be taken away in whole or in part . . . .” *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Sutherland also cited *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), but the Justices in *Turner* had not articulated a “necessary implication” rationale.

128. See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809); *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806); *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (C.C.D. Va. 1811) (No. 8,411); *Wescott v. Fairfield TP.*, 29 F. Cas. 709 (C.C.D.N.J. 1811) (No. 17,418); *The Little Ann*, 15 F. Cas. 622, 623 (C.C.D.N.Y. 1810) (No. 8,397).

129. See Justice Iredell’s opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432-33 (1793).

130. *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 93 (1807).

131. See, e.g., *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1804). For example, see the extrajudicial debate on Congress’ power to incorporate a bank, eventually reflected in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

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and repeatedly to *foreclose*. The delegates at the 1787 Convention specifically and repeatedly refused to allow Congress the discretion this faulty reasoning infers. The Detail Committee's rejection of Randolph's unqualified "shall organize" clause (already discussed) is only the weakest example. Professor Robert Clinton documented several others fifteen years ago.<sup>132</sup> But there are even more examples than Professor Clinton showed, and they all should be briefly reviewed.

As already observed, the complications entailed by the June 5th compromise included some pertaining to subject matter jurisdiction. For example, with the very existence of "inferior" courts left to legislative discretion, the "supreme" one could not be limited to "the dernier resort," because some categories embraced by the ninth Randolph Resolution (for example, "impeachments of any National officers") would be inappropriate for state court adjudication even "in the first instance." There also were misgivings about some of the categories of subject matter listed in that Resolution.

These jurisdiction issues came up for discussion the next week, late in the day on June 12th. That this discussion occurred at all is some indication that the delegates did *not* perceive the Tribunals Clause, approved a week earlier, as leaving the problems of jurisdiction to legislative discretion. The series of ensuing Convention actions, however, makes this unmistakable.

First, the delegates deleted the "first instance" phrase regarding the inferior courts and amended the Ninth Resolution to provide "[t]hat the jurisdiction of the supreme Tribunal shall be to hear and determine in the dernier resort all" cases in the categories listed; then they proceeded to tinker with the category list.<sup>133</sup> As they did so, however, it must have become apparent that more extensive alterations were needed in order to accommodate the June 5th compromise, for soon the delegates postponed the entire matter to the next morning.<sup>134</sup> Then the whole provision regarding the jurisdiction of the

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132. See Clinton, *supra* note 2, at 764, 773, 776, 791.

133. See 1 FARRAND, *supra* note 61, at 211-12, 220.

134. See 1 *id.* at 220.

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courts “was struck out nem. con in order to leave full room for their organization.”<sup>135</sup>

Once having thus deferred the complicating issues of structural organization (e.g., single or plural tribunals; “first instance” versus “dernier” roles), the delegates were able to concentrate on the scope of jurisdiction for the judicial branch *as a whole*. They then unanimously approved a motion by Randolph and Madison providing “[t]hat the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.”<sup>136</sup>

Professor Clinton considered it significant that these actions more or less conformed the judiciary’s competence to the scope proposed for the national legislature’s power.<sup>137</sup> However, at that early stage the process of detailing national legislative competence had scarcely even begun, and the very rough similarity between the generalizations regarding the respective branches at that stage is far less significant than the manifest determination (which Clinton noted, too) that the Constitution itself must govern the scope of both.

This June 13th determination that, while the size and configuration of the judicial branch might be left to the legislature’s discretion, its subject matter competence must be constitutionally and not legislatively prescribed, was soon followed by other actions confirming that resolve. Together, these actions render completely untenable any inference that

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135. 1 *id.* at 232.

136. 1 *id.* at 223-24. Only Yates reported that the approval was unanimous.

The three categories included in this motion correspond to the last three of the six categories in the originally proposed Ninth Resolution. The motion took account of votes taken the previous day deleting jurisdiction over piracies, felonies on the high seas, and captures from enemies. It also omitted all reference to suits between citizens of different States.

This motion, however, was not intended as a final determination: According to Yates’s notes,

Gov. Randolph observed the difficulty in establishing the powers of the judiciary—the object however at present is to establish this principle, to wit, the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof. This being once established, it will be the business of a sub-committee to detail it . . . .

1 *id.* at 238.

137. See Clinton, *supra* note 2, at 764.



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Congress should have discretion over the scope of jurisdiction entrusted to the judicial branch as a whole.

As already noted, the problems of detailing the jurisdictional terms to accommodate the uncertainty as to what courts might exist, and to designate original or appellate roles, were among the several questions<sup>138</sup> regarding the judiciary referred to the Committee of Detail. Although in certain respects the Committee's proposals respected the delegates' resolve against legislative control of jurisdiction,<sup>139</sup> in major

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138. Another was whether and to what extent inferior federal courts (if any were created) should review state court judgments in cases within federal judicial competence.

Those delegates wanting only one national court obviously expected that national laws and treaties should routinely be considered in the first instance by state tribunals. That is why Proposition 6 the Paterson plan provided "that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding." Madison's Notes (June 15, 1787), in 1 FARRAND, *supra* note 61, at 242, 245. This of course was the prototype of the supremacy clause, U.S. CONST. art. VI, § 2, first incorporated into the Convention's work product on July 17th. See 2 FARRAND, *supra* note 61, at 22, 28-29.

This origin of that clause indicates that the other delegates, too, consistently assumed that in most federal law cases the state courts would have concurrent competence. (Incidentally, it also explains why the second part of the Supremacy Clause specifies "the Judges in every State" inconsequentially failing to specify *federal* judges.) See U.S. CONST. art. VI, § 2.

The June 5th compromise accordingly *presumed* that state courts would have concurrent jurisdiction, subject to federal court review. However, the terms of that compromise did not address *which* federal court should do the reviewing, should there be more than one. With respect to this issue, Randolph's outline for the Committee specified that inferior federal courts should operate only "as original tribunals," 2 FARRAND, *supra* note 61, at 147. However, the Wilson document, *see 2 id.* at 173, and the Committee Report, *see 2 id.* at 186, gave the legislature discretion to assign inferior courts appellate roles, with regard both to state courts and other inferior federal tribunals, saying, "[t]he Legislature may assign any part of the [Supreme Court's appellate] Jurisdiction, . . . in the Manner, and under the Limitations which it shall think proper, to such inferior Courts, as it shall constitute from Time to Time." 2 *id.* at 186-87; *see also 2 id.* at 173.

Ultimately this was displaced by different language, but in this respect the final text has the same effect: The framers deliberately left it to Congress' discretion whether and how far any "inferior" federal courts might have appellate competence *even over state* courts within the subject matter parameters described.

139. One jurisdictional question was how cases deemed inappropriate for adjudication by state courts should be assured a national forum. Randolph's outline in the Committee provided that the "supreme" court's jurisdiction "shall be appellate only, except . . . in those instances, in which the legislature shall make it original." 2 FARRAND, *supra* note 61, at 147. However, if the legislature was not obliged to create *other* federal courts, to make the "supreme" one strictly appellate unless and until the legislature made it otherwise would have left cases deemed inappropriate

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respects they did not. Randolph's outline for the Committee had completely ignored that resolve: it called for giving the "supreme" court jurisdiction over all cases arising under national laws and "such other cases, as the national legislature may assign," and then added that "the whole or a part" of this jurisdiction, "according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals."<sup>140</sup> This made the jurisdiction of the entire judicial branch dependent on legislative will.

James Wilson's draft for the Detail Committee corrected this only in part. For the Supreme Court, Wilson prescribed categories of jurisdiction without legislative discretion to pick and choose;<sup>141</sup> but for the inferior courts, Wilson (like Randolph) proposed that the legislature be free to assign as much or as

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for adjudication in state courts to originate in those state courts anyway.

The other members of the Committee declined to leave that much to legislative discretion. Instead, to guarantee a national forum for such cases, whether or not "inferior" courts were created, the Committee followed Wilson in borrowing an idea from the defunct Paterson Plan: Paterson had contemplated just one national tribunal, but provided that cases inappropriate for state court decision should be heard by that national court "in the first instance." Madison's Notes (June 15, 1787), in 1 FARRAND, *supra* note 61, at 242, 244 (discussing Proposition 5 of the Paterson Plan); see also 2 FARRAND, *supra* note 61, at 173, 186.

That the idea of an "original" jurisdiction for the "supreme" Court derived from the Paterson Plan suggests it was designed, not to prevent those cases being heard by *inferior* federal courts in the event any were established, but rather to ensure access to *some* federal forum in the first instance regardless. If so—contrary to the mutually exclusive view of original and appellate jurisdiction articulated by Chief Justice Marshall for the Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803)—nothing forecloses concurrent jurisdiction for inferior federal courts in cases within the Supreme Court's "original" jurisdiction.

140. 2 FARRAND, *supra* note 61, at 147. Professor Clinton noted this feature of Randolph's draft. See Clinton, *supra* note 2, at 773-74.

In addition to violating the delegates' instruction against legislative control of jurisdiction, this also affronted the expectation that the decisions of inferior courts should be final in many cases. See Engdahl, *supra* note 69, at 472.

Randolph himself had made the motion approved on June 13, but his comments at that time suggest he had done so simply to facilitate the consideration of subject matter parameters by postponing the problem of allocating roles. See 1 FARRAND, *supra* note 61, at 238. Apparently Randolph remained unhappy with the Committee's (and the Convention's) handling of jurisdiction issues, for he later included among the changes he thought necessary before he could sign the finished Constitution, "limiting and defining the judicial power." Letter of E. Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), in 3 FARRAND, *supra* note 61, at 123, 127.

141. See 2 FARRAND, *supra* note 61, at 172-73.

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little within the prescribed subject matter limits as it might choose.<sup>142</sup>

Because the Detail Committee's August 6 Report<sup>143</sup> followed Wilson's draft in this regard,<sup>144</sup> during the five weeks spent considering that Report, the delegates found it necessary to revisit the question of legislative discretion over jurisdiction. Their relevant discussions took place on August 27 and 28,<sup>145</sup> and their stalwart *rejection* of such legislative discretion was the dominant, and very prominent, theme.

It was first moved and seconded to replace the Detail Committee's language regarding supreme court appellate jurisdiction with language providing that in all cases except those where the supreme court could act in the first instance, "original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures<sup>146</sup> shall make."<sup>147</sup> For one thing, this would have limited the inferior courts (should Congress create any) to strictly appellate roles; but that is not the most interesting feature of this motion. Its "exceptions and

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142. See 2 *id.* at 173. Professor Clinton noted this feature of Wilson's draft. See Clinton, *supra* note 2, at 775-76. However, Clinton concentrated his attention on a different feature of Wilson's draft: its "exceptions and regulations clause." *Id.* at 776.

143. See 2 FARRAND, *supra* note 61, at 176, 177, 190.

144. The Committee Report provided, "The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time." 2 *id.* at 186-87.

145. On August 17th the delegates approved the Detail Committee's decision to place in the legislative Article the language (resulting from the June 5th compromise) giving Congress discretion to "constitute" inferior tribunals. 2 *id.* at 313, 315. The discussions about discretion over jurisdiction had reference to a different Article, however, and took place on the later dates.

The first several actions on August 27th regarding jurisdiction are not of particular interest to us here. In one of those actions language was added to the subject matter descriptions to ensure that they included matters of equity as well as law. In another the provisions giving the judiciary jurisdiction over cases arising under the treaties and the Constitution and controversies "to which the United States shall be a party" were added. And the decision concerning the provision for jurisdiction over impeachments was postponed. See 2 *id.* at 422-24, 428, 430-31.

146. The plural is used in the Journal as printed by Farrand. It thus is possible that the motion contemplated exceptions and regulations by *state* legislatures, as well as by Congress. If so, had it been approved this might have permitted state legislatures to exercise their respective powers so as to preclude appellate recourse to the federal courts.

147. 2 FARRAND, *supra* note 61, at 424.

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regulations" phrase applied not just to the "supreme" court, but to all "the courts of the United States," and thus it contemplated that the legislature might exclude certain cases within the listed categories from the reach of *any* federal court.<sup>148</sup> This particular indulgence of legislative discretion attracted so little support that the motion, even though seconded, was dropped without being put to a vote.<sup>149</sup>

Apparently, however, the discussion of that and another unsuccessful motion<sup>150</sup> elevated consciousness on the issue, for the delegates undertook next to positively reassert their repudiation of legislative control. One section of the Detail Committee's Report, after saying, "[t]he Jurisdiction of the Supreme Court shall extend to" the listed subject matter categories, continued by providing (as had Wilson's draft) that "The Legislature may assign any part of the jurisdiction above mentioned" to inferior federal courts.<sup>151</sup> The delegates then changed the first of these sentences to provide that "The Judicial Power" (rather than "The jurisdiction of the Supreme Court") "shall extend to" the categories listed.<sup>152</sup> They had just previously approved language providing that "the judicial

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148. The *different* "exceptions and regulations" clause actually included in the Constitution, unlike this one, countenances jurisdictional exclusions only as to the "supreme" court. Under this motion instead, however, even legislation that excluded some Article III jurisdiction from the *whole* judiciary could have passed muster under the Necessary and Proper Clause as "carrying into Execution" the "judicial Power" as so prescribed.

149. Indeed, it might have been deemed undeserving even of serious discussion, for Madison (who generally took pains to abstract points of debate whether motions succeeded or failed) did not even note the motion being made. *See* 2 FARRAND, *supra* note 61, at 431; *cf.* 2 *id.* at 424. Like Madison, Professor Clinton overlooked or disregarded this unsuccessful motion, and the nominal added support its failure provides for his thesis.

150. A motion was made to give the legislature discretion to add to the cases eligible for original "supreme" court cognizance those in which the United States is a party. This was amended to give the legislature discretion only over whether such cases could be appealed; but as so amended, the motion meant nothing more than was contemplated already by the combination of Necessary and Proper and Exceptions Clauses in the Committee's Report; and the motion as thus rendered superfluous was voted down. *See* 2 *id.* at 424-25.

Madison's notes mention neither this motion nor the actions taken upon it. Like Madison, Clinton seems to have missed it, too.

151. 2 *id.* at 186-87.

152. 2 *id.* at 425, 431. The delegates also reworded the clause that distinguished the "original" and "appellate" jurisdiction of the "supreme" court, conforming it with the foregoing change. 2 *id.* at 424-25 (Journal). Madison did not report this minor verbal adjustment.

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Power” shall be vested alike (or collectively) in the supreme *and inferior* courts (should Congress create any),<sup>153</sup> and consequently, by thus describing the extent of the the whole “judicial Power” (as distinguished from the reach of the one supreme tribunal), they affirmed that the jurisdiction of *all* federal courts, at least collectively, must be constitutionally and not legislatively prescribed. This again confirmed the June 13th rejection of legislative discretion over inferior court jurisdiction.<sup>154</sup>

There did, however, remain some support for such legislative discretion; its proponents next moved to replace the entire sentence about appellate jurisdiction with one saying that in all cases except those within supreme court original jurisdiction, “the judicial power shall be exercised in such manner as the Legislature shall direct.”<sup>155</sup> That motion, however, was defeated by a three-fourths majority.<sup>156</sup>

Still there remained in the Detail Committee’s Report the separate sentence providing, “The Legislature may assign any part of the jurisdiction above mentioned . . . to such Inferior Courts, as it shall constitute from time to time.”<sup>157</sup> That sentence therefore was stricken, without an opposing vote.<sup>158</sup>

Thus, by a succession of consistent actions and by overwhelming votes, the delegates at the Constitutional Convention specifically refused to countenance legislative discretion over what fraction of the constitutionally authorized jurisdiction the inferior courts should actually have. For the drafters of the United States Constitution, discretion over the existence of inferior courts manifestly carried no “necessary implication”—nor even any possible implication—of discretion over those courts’ collective jurisdiction! The framers treated these as separate and independent issues and expressly

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153. *See 2 id.* at 186.

154. Professor Clinton does not mention this.

155. 2 FARRAND, *supra* note 61, at 425, 431.

156. *See 2 id.* at 425, 431. Professor Clinton did note this. *See Clinton, supra* note 2, at 791.

157. 2 FARRAND, *supra* note 61, at 186-87.

158. *See 2 id.* at 425, 431. Professor Clinton also noted this. *See Clinton, supra* note 2, 791.

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conferred legislative discretion as to the one, while repeatedly disallowing discretion as to the other.<sup>159</sup>

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At the same time, it certainly was not supposed that the entire range of authorized subject matter competence must exist in each and every court that Congress might create. That would preclude specialization and any differentiation of roles. The Necessary and Proper Clause, conceived in part specifically to empower Congress to detail judicial branch organization for effectuating the judicial power, was approved just days before the delegates' finalized their decisions regarding jurisdiction,¹⁶⁰ and it must have been obvious that if inferior tribunals were created at all this felicitous clause would enable Congress to *distribute* the contemplated jurisdiction without diminishing the subject matter scope contemplated for the judicial branch as a whole. Although they were determined to deny the legislature any discretion to curtail or delimit the extent of the federal judiciary's power, the framers did want the legislature to be able to help *effectuate* that judicial power. Language better suited to this compound purpose than the Necessary and Proper Clause could hardly have been devised without losing the conciseness for which careful draftsmen strive.

Had it been generally known among early American lawyers and Justices that legislative discretion over inferior court jurisdiction had been specifically considered and rejected at the Constitutional Convention, the "necessary implication" premise under the Tribunals Clause could never have caught on. However, the Convention records so readily accessible today were still hidden when that misconstruction took hold. The scant official Journal and a few other papers were first published in 1819,¹⁶¹ after thirty years of practice under the

159. See 1 GOEBEL, *supra* note 52, at 241-43 & 243 n.228.

160. See 2 FARRAND, *supra* note 61, at 337, 340, 344-45.

161. The Convention had met in closed sessions. When it was over, the secretary destroyed the papers he deemed unimportant and delivered the others, along with the official Journal of proceedings, to the Convention's president, George Washington. Washington sequestered them until 1796, when he delivered them to the Department of State. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 194 (1913) [hereinafter FARRAND, FRAMING]; 1 FARRAND, *supra* note 61, at xi. There the Journal

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Constitution; but they provided at best a skeletal account of the proceedings and contained some significant inaccuracies. The notes Robert Yates had made before leaving the Convention in early July were published in 1821,¹⁶² yet the vastly more informative notes of James Madison remained closeted almost two decades more.¹⁶³ Rufus King organized and revised his notes sometime after 1818, but they were not published until 1894.¹⁶⁴ A sparse scattering of fragmentary accounts by a few other delegates were found,¹⁶⁵ but others were essentially lost until late in the nineteenth or early in the twentieth century.¹⁶⁶ In particular, several documents indispensable to an accurate understanding of the Convention's actions concerning Congress' power regarding the judiciary (including very important documents from the Committee of Detail) lay buried among the private papers of James Wilson in the Library of the Historical Society of Pennsylvania until Max Farrand accessed and published them for the first time in 1911.¹⁶⁷

Consequently, lawyers for generations were consigned to a sort of forensic "blind man's bluff."¹⁶⁸ Those much nearer the formative period were far *less* favorably situated than we, two centuries later, to understand the strategies, compromises, and firm resolves evident, but not always obvious, in the Constitution's terms.

and other papers lay unstudied until 1818, when a joint resolution of Congress ordered that they be printed. The sizeable task of arranging the disordered documents fell to then Secretary of State John Quincy Adams. He received some random additional documents and secured help from James Madison in completing the record of the Convention's final four days. The product of Quincy Adams's labors was published in 1819. *See* 1 FARRAND, *supra* note 61, at xii; FARRAND, FRAMING *supra*, at 59.

162. *See* 1 FARRAND, *supra* note 61, at xiv.

163. Despite urgings that he publish them sooner, Madison had resolved upon posthumous publication. He assembled and edited the notes during his retirement, and they ultimately were published in 1840, four years after his death. *See* 1 *id.* at xv.

164. *See* 1 *id.* at xix-xx.

165. *See* 1 *id.* at xxi-xxii.

166. *See* 1 *id.* at xx-xxii.

167. *See* 1 *id.* at xxii-xxiii; FARRAND, FRAMING, *supra* note 61, at 124.

168. This probably is why the FEDERALIST PAPERS came to be so relied upon in construing the Constitution. While they were documents of advocacy rather than exposition, at least they had been written for the most part by two significant participants in Convention deliberations, Madison and Hamilton.

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The analysis of the Convention proceedings presented here is not a scavenging of “legislative history” to contradict plain meaning, or even to clarify ambiguous text. The records of the framing simply illuminate what the words of the document seem plainly to mean when they are read without conventional preconceptions and are thoughtfully considered as a whole. The “necessary implication” premise for congressional control of inferior courts has always been a slipshod construction of the Tribunals Clause; its spuriousness is simply made incontestable by the records of the framing. When good government and the blessing of judicial independence are enhanced by fresh recourse to the text, the fact that lawyers for generations have misunderstood its plain meaning is a lousy excuse for perpetuating mistakes. If it is foolish to bind the living to the “framing intent” of dead men, it is *more* foolish to persist in grave distortions of the Constitution’s design for no better reason than that misconceptions have prevailed a long time.

D. The “Exceptions” Clause Allusion

The second false premise of Congress’ power regarding the judiciary is the so-called Exceptions Clause of Article III, which provides, “[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”¹⁶⁹ This clause pertains only to the “supreme Court,” not to the “inferior” ones. It explicitly contemplates more than the subject matter scope of appellate jurisdiction; however, as with the “tribunals” clause its application to jurisdiction is paradigmatic, and so that is the principal focus of the discussion here.

Virtually every modern commentator on the law of federal courts assumes that the power of Congress to alter and regulate Supreme Court jurisdiction and practice derives from this Exceptions Clause;¹⁷⁰ that is why it is commonly called the

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

170. For example, Justice Douglas wrote in 1968, “As respects our appellate jurisdiction, Congress may largely fashion it as Congress desires by reason of the express provisions of § 2, Art. III.” *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (Douglas, J., concurring). Likewise citing the Exceptions Clause, others have said “the Constitution specifically grants to Congress the power to determine the Court’s appellate jurisdiction,” C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT*

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“exceptions power.”¹⁷¹ However, that clause is *not the source* of this power; and the *source* of a power, of course, is crucial to ascertaining its *intrinsic* limits.

Commentators have spun threads of argument for *extrinsic* limitations to trammel this “exceptions power.” Some, for example, have claimed that the Exceptions Clause only authorizes “procedural” regulations,¹⁷² or “prudent steps which help avoid case overloads.”¹⁷³ Some have suggested that the clause was included only to address concerns over the possible displacement of jury findings of fact, and that therefore it permits restricting Supreme Court review only of facts, not of law.¹⁷⁴

Some have argued that the Exceptions Clause implicitly requires that a residuum of appellate jurisdiction be left in the Supreme Court.¹⁷⁵ One commentator said, for example, “I think it is arguable that if Congress attempted to wholly obliterate Supreme Court appellate jurisdiction that it would cease to be an exception to jurisdiction within the meaning of the clause.”¹⁷⁶ This, however, is no basis for challenging any

1957-1960, at 122 (1961), or “the power to make exceptions to the appellate jurisdiction of this court is given by express words,” *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869). *See also, e.g.*, REDISH, *supra* note 2, at 25; Gunther, *supra* note 123, at 899-901.

Even Professor Clinton mistakes the Exceptions Clause as the premise of Congress’ power regarding Supreme Court appellate jurisdiction. *See* Clinton, *supra* note 2, at 776-86 (1984). So also does John Harrison, whose article, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, *supra* note 2, is an excellent attempt to defend the traditional and orthodox (but hardly original or accurate) understanding.

171. *See, e.g.*, Rice, *supra* note 8, at 195.

172. *See, e.g.*, Frank W. Grinnell, *Proposed Amendments to the Constitution: A Reply to Former Justice Roberts*, 35 A.B.A. J. 648, 650 (1949); Ratner, *supra* note 12, at 938, 957; Comment, *Removal of Supreme Court Appellate Jurisdiction: A Weapon Against Obscenity?*, 1969 DUKE L.J. 291, 305-06, 309.

173. Eisen berg, *supra* note 123, at 516; *see also id.* at 520-21.

174. *See* Berger, *supra* note 123, at 806 (confessing that “my research met with little enthusiasm in academe”); *see also* RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* 285-95 (1969). Berger was not the first to advance this thesis. *See* Henry J. Merry, *Scope of the Supreme Court’s Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 68 (1962).

This view is discredited, however, by the fact that the Convention’s working text included the Exceptions Clause even before the words “both as to law and fact” were added to the appellate jurisdiction clause on August 27.

175. *See, e.g.*, Tribe, *supra* note 12, at 135.

176. *Symposium Proceedings*, 27 VILL. L. REV. 1042, 1043 (1982) (Professor Charles E. Rice commenting).

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particular exception or any particular combination of exceptions short of a total divestment. Others have suggested that exceptions to the Supreme Court's *appellate* jurisdiction are valid only insofar as that Court's *original* jurisdiction is enlarged;¹⁷⁷ but as Professor William Van Alstyne pointed out, "the entire history of the clause" contravenes this suggestion.¹⁷⁸

There are variations on the theme that exceptions may not "negate the essential functions of the Supreme Court,"¹⁷⁹ but those playing this theme embarrass themselves by small, yet significant disagreements over what those "essential functions" might be.¹⁸⁰

Some argue that exceptions may not operate so as to preclude any *federal question case* being heard by *some* federal tribunal or to prevent any particular *federal question* from being addressed at all by the Supreme Court.¹⁸¹ Yet that presumes a distinction between federal question cases and

177. See Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 853 (1974); Sager, *supra* note 9, at 32.

178. William Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229, 258-59 n.95 (1973).

179. Ratner, *supra* note 9, at 202; see also *id.* at 172.

Attorney General William French Smith in 1982 endorsed a comparable thesis under yet another rubric: "core constitutional functions." See *Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. (1968).

For judicial applications of one or another such theory, see *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987), and *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948). See also Choper, *supra* note 177, at 852-53; Van Alstyne, *supra* note 178, at 258-59 n.95.

180. Compare, e.g., Ratner, *supra* note 9, at 160-61, 173, 201; Ratner, *supra* note 12, at 935-36; and Tribe, *supra* note 12, at 135 ("essential role"); with Eisenberg, *supra* note 123, at 505-07, 513, 532-33 ("central" roles and "vital" functions); Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238, 245, 255-56 (1970) ("irreducible minimum substantive power"); and Sager, *supra* note 9, at 42-43, 70, 82. Professors Ratner and Redish agreed that Sager's thesis is "sort of a modification of Professor Ratner's theory. It is like a floating essential functions thesis." *Symposium Proceedings*, 27 VILL. L. REV. 1042, 1068-69 (1982).

Some have tried to avoid the embarrassments of specificity by opining simply that exceptions or regulations might at some uncertain point cross a forbidden line. See, e.g., James J. Lenoir, *Congressional Control Over the Appellate Jurisdiction of the Supreme Court*, 5 KAN. L. REV. 16, 41 (1956); Meserve, *supra* note 123, at 160; Taylor, *supra* note 123, at 200.

181. See 1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 610-18 (1953); Choper, *supra* note 177, at 853; see also Van Alstyne, *supra* note 178, at 258-59 n.95.

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others on the Article III menu—a distinction that the Exceptions Clause does not intimate at all. Professor Clinton avoided this flaw by saying that *no* Article III case (federal question or other) can be “excepted” from Supreme Court review unless provision is made for determining it in some other federal tribunal.¹⁸² However, while that conclusion is correct for different reasons explained below, Professor Clinton based his conclusion on a redundant, ungrammatical, and unpersuasive construction of the Exceptions Clause.¹⁸³

It really seems quite remarkable that so many forensic filaments have been drawn from what has been called “a relatively unambiguous . . . provision.”¹⁸⁴ By far the predominant view, however, is that “Congress has *plenary* power to confer or withhold appellate jurisdiction.”¹⁸⁵ Because the Exceptions Clause contains no qualifying terms whatever, most commentators have concluded that Congress’ power to govern Supreme Court appeals is subject to no intrinsic constitutional constraint.¹⁸⁶ This statement by William Van Alstyne is typical:

The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated and, hopefully, generally to be

182. See Clinton, *supra* note 2, at 749-50, 793.

183. Clinton emphasizes the comma separating the phrases “such exceptions” and “such regulations” and argues that “such exceptions” refers back to the cases designated in the preceding sentence for Supreme Court *original* jurisdiction. Only the “such” conjoined to the word “regulations,” he claims, refers to anything “the Congress shall make.” See *id.* at 779-80. This reasoning, however, is too casuistic to persuade.

184. Redish, *Congressional Power*, *supra* note 123, at 907.

185. *Yakus v. United States*, 321 U.S. 414, 472-73 (1944) (Rutledge, J., dissenting on other grounds) (emphasis added).

186. See, e.g., Carl A. Anderson, *The Government of Courts: The Power of Congress Under Article III*, 68 A.B.A. J. 686, 686-88, 690; Bator, *supra* note 11, at 1032, 1034-35; Gunther, *supra* note 123, at 908-09, 920; Christopher T. Handman, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress’ Exceptions Clause Power*, 106 YALE L.J. 197, 200 (1996); Redish, *Congressional Power*, *supra* note 123, at 902-03; Rice, *supra* note 8, at 195-96; Owen J. Roberts, *Now Is the Time: Fortifying the Supreme Court’s Independence*, 35 A.B.A. J. 1, 4 (1949); Wechsler, *supra* note 123, at 1005-06.

A few of these, however, have ventured caveats against arbitrary discrimination. See, e.g., Bator, *supra* note 11, at 1034; Gunther, *supra* note 123, at 916; Rice, *supra* note 8, at 196; see also Taylor, *supra* note 123, at 201.

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respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent.¹⁸⁷

The predominant view, in other words, is that the bounds are political, not constitutional; at most, there might be some nebulous inhibition against arbitrary discrimination,¹⁸⁸ but even that is *extrinsic* to the purported power itself.

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In all the decades of redundant debate over Congress' power regarding Supreme Court jurisdiction no one seems ever to have noticed that the Exceptions Clause really is not a grant of power at all! Certainly there are "express terms" in the Constitution that give Congress power to make laws regarding the Court's appellate jurisdiction. However, those express terms are not to be found in the Exceptions Clause; they appear, rather, in the Necessary and Proper Clause.

For persons committed both to the separation of powers and to the principle of enumerated powers, it would have been remarkably offhanded to grant to one branch hegemony over another by two words placed as subordinate terms in prepositional phrases. The framers were otherwise careful to articulate grants of power in straightforward, unequivocal terms; for them to bestow by such indirection a power sufficient to cripple a coordinate branch would have been very peculiar. It must be remembered that whether any inferior federal courts should exist is discretionary under the Tribunals Clause; and if inferior courts did not exist, no case "excepted" from Supreme Court appellate review could ever be heard in *any* federal tribunal at all! Thus, if the Exceptions Clause really were a grant of power, it would lie in Congress' discretion to foreclose *all* access to *any* federal court, except in the tiny handful of cases within the Supreme Court's "original" jurisdiction. The combination of the Tribunals and Exceptions Clauses thus would enable Congress to all but abolish the judicial branch!

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187. Van Alstyne, *supra* note 178, at 260.

188. See, e.g., Bator, *supra* note 11, at 1034; Gunther, *supra* note 123, at 916; Rice, *supra* note 8, at 196; Taylor, *supra* note 123, at 201.

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This bizarre possibility impels a closer look at the clause's context and rhetorical form. The Exceptions Clause appears in a section that deals, not with the powers of Congress but with the judiciary; and it adjoins language which says imperatively that except where it has original jurisdiction "the [S]upreme Court *shall have* appellate [j]urisdiction."<sup>189</sup> Certainly the conjoined clause—"with such Exceptions, and under such Regulations as the Congress shall make"—does temper that imperative. However, to vitiate a mandatory directive by conjoining language conferring unqualified discretion to flout the directive would, at the very least, constitute very curious drafting.

Therefore, it is enlightening to compare the Exceptions Clause with another clause in Article III which resembles it in rhetorical form; the similarity provides an important clue to meaning. That other clause makes reference to "such Inferior Courts" as the Congress may "from time to time" ordain and establish.<sup>190</sup> No one ever has imagined that this clause is the source of Congress' power to constitute inferior tribunals; it obviously only alludes to that power, which is conferred by a different clause, located in Article I and written in straightforward power, granting terms.<sup>191</sup> It would certainly be odd if the same rhetorical form employed in that instance merely to allude, were used in the Exceptions Clause to actually confer a power. It is thus especially ironic that proponents of the conventional misconception describe theirs as a "literal interpretation" or "literal reading" of the Exceptions Clause.<sup>192</sup>

As I have explained above, before the Detail Committee set to work, the Delegates had already resolved that the subject

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

190. *See id.* art. III, § 1; *cf.* Art. XI, § 1, of the Committee Report, *in* 2 FARRAND, *supra* note 61, at 177, 186-87; Art. 14 of the Wilson document, *in* 2 *id.* at 129, 172 (the first paragraph of Art. 14). The judicial section of Wilson's document alluded to "such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature"; but the power to create those courts was conferred elsewhere in appropriate rhetorical form: "The Legislature . . . shall have the power . . . To constitute tribunals inferior to the Supreme Court . . ." Art. VII, § 1 of the Committee Report, *in* 2 FARRAND, *supra* note 61, at 177, 181-82 (following the first paragraph of Art. IX, § 8 of the Wilson document, *see* 2 *id.* at 129, 168.) This rhetorical structure, of course, survives in the Constitution as adopted. *See* U.S. CONST. art. III, § 1, & art. I, § 8, cl. 9.

191. *See* U.S. CONST. art. I, § 8, d. 9.

192. *See, e.g., Leading Cases, supra* note 8, at 277.

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matter competence of the federal judiciary must be constitutionally defined; and they afterwards reaffirmed that resolution by lopsided votes specifically against legislative control of jurisdiction. It therefore seems likely that, had the delegates even conceived it possible to construe the Exceptions Clause as empowering Congress to block from the courts any cases embraced by the subject matter list, at least some passing comment would have been made. There is no hint, however, that even a whisper was stirred.

For the Convention delegates to casually empower Congress to render almost useless the only federal court the Constitution actually requires, while repeatedly and emphatically rejecting proposals for comparable authority over inferior courts that might never even exist, would have required of them somewhat greater inattention or incompetence than can be credibly supposed. It would have been foolish for them to labor over selection, salary, and tenure provisions to brigade judicial "independence" if Congress could subjugate the judicial branch anyway by whatever combination of "exceptions" might suit its fancy. One need not attribute genius to the framers to doubt they were so stupid as to give Congress, by mere words of allusion, a license to avulse the ramparts of judicial independence they had so carefully built up.<sup>193</sup>

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The mistake of regarding the Exceptions Clause as a *source* of congressional power arose early. Any inference of legitimacy from age, however, is rebuffed by the fact that there were two versions of the error, each contradicting the other.

One is represented by Chief Justice Ellsworth's 1796 response to Justice Wilson's suggestion in *Wiscart v. Dauchy*<sup>194</sup> that appellate jurisdiction vests in the Supreme Court automatically, without need for statutory conferral.<sup>195</sup> Ellsworth

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193. For an equivalent conclusion, reached by a less streamlined argument and stated less bluntly, see Clinton, *supra* note 2, at 741.

194. 3 U.S. (3 Dall.) 321 (1796).

195. The question in *Wiscart* was whether the Court could review issues of fact as well as issues of law. *Id.* at 324. Section 22 of the Judiciary Act, see Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, provided that federal circuit court judgments and decrees could be reviewed only "upon a writ of error," a process of common law origin which

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generally precluded review of facts. 1 Stat. 73, 85-86. The word "appeal" at that time, on the other hand, was frequently used in its technical sense, contemplating a review process of civil law rather than common law origin which involved review of facts and law alike. As an early commentator explained,

The writ of error submits to the revision of the Supreme Court only the law; but the remedy by appeal brings before the Supreme Court the facts as well as the law. It may correct on an appeal, not only wrong conclusions of law from the facts, but wrong conclusions of fact from the evidence.

SERGEANT, *supra* note 44, at 43.

A distinction between fact and law for review purposes had been made in the Paterson Plan, which contemplated only a single national court with virtually all litigation commencing in state courts. It provided that in reviewing state court proceedings to enforce national regulations of revenue and commerce, the national court should have power "for the correction of all errors, both in law & fact in rendering judgment," but that in all other proceedings the national court's review should reach errors of law only, not errors of fact. Madison's Notes, *in* 1 FARRAND, *supra* note 61, at 242, 243-44 (discussing Propositions 2 and 5 of the Paterson Plan).

The Committee of Detail Report, in contrast, had used the word "appellate" without elaboration. However, to confirm what James Wilson (himself a Committee Member) said was intended, the delegates on August 27 added the phrase "both as to Law and fact." 2 FARRAND, *supra* note 61, at 424, 431.

Opponents of ratification then claimed that the phrase "both as to law and fact" portended appellate judge review of jury-tried issues of fact, abridging the right to jury trial. The first Congress approved two responses to that concern. One was the Seventh Amendment clause regarding reexamination of facts "tried by a jury"; but that was irrelevant in *Wiscart*, because it was an equity case, of course tried without a jury. The other was section 22 of the Judiciary Act, which simply omitted to provide for any appellate process except writ of error.

Wilson conceded that the Seventh Amendment made the rule different for common law cases; but for equity (like *Wiscart*) and other non-common law matters, he argued that treating the Judiciary Act as confining Supreme Court review to the writ of error process would be unconstitutional.

While *Wiscart* was in equity, Wilson was most concerned for a different class of non-jury cases, insisting, "it is of moment to our domestic tranquility, and foreign relations, that causes of Admiralty and Maritime jurisdiction, should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal." 3 U.S. (3 Dall.) at 327. District court admiralty and maritime causes were reviewable in the circuit courts by "appeal" rather than "writ of error" (secs. 9, 21 of the Judiciary Act), but that Act did not mention Supreme Court review of such causes specifically. It did say the Supreme Court could review circuit court judgments and decrees in "civil actions" (as well as in equity) by "writ of error," but Wilson claimed "civil actions" was "in contradistinction to causes of Maritime and Admiralty jurisdiction." *Id.* at 325. On this view, the Act said nothing at all about Supreme Court review of admiralty and maritime matters; but Wilson—an advocate of national authority in that realm since his own admiralty law practice during the Confederation—refused to find the Supreme Court therefore powerless.

This is the reason why Wilson maintained in *Wiscart* that the Constitution is self-executing with respect to the Supreme Court's appellate jurisdiction. He argued:

It is true, the act of Congress makes no provision on the subject; but, it is equally true, that the constitution (which we must suppose to be always in the view of the Legislature) had previously declared that in certain enumerated cases, including admiralty and maritime cases, "the Supreme

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argued to the contrary, saying that if Congress had not exercised the power he attributed to the Exceptions Clause,<sup>196</sup>

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Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." The appellate jurisdiction, therefore, flowed, as a consequence, from this source; nor had the Legislature any occasion to do, what the Constitution had already done.

*Id.* at 326. And with regard to the Exceptions Clause, Wilson said:

The Legislature might, indeed, have made exceptions, and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the Constitution, which in general terms, and on general principles, provides and authorises [sic] an appeal; the process that, in its very nature, (as I have before remarked) implies a re-examination of the fact, as well as the law.

*Id.* at 326-27.

Wilson even suggested that attempted statutory curtailments of Supreme Court appellate jurisdiction would be void, saying, "Even, indeed, if a positive restriction existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision." *Id.* at 325. Although Wilson did not further elaborate this suggestion, as to any attempt to preclude Supreme Court appellate review of an Article III matter for which no alternate federal forum is provided, this suggestion is consistent with the Necessary and Proper Clause premise of Congress' relevant power—for insofar as they curtailed, rather than "carrying into Execution," the scope of judicial power contemplated by Article III, purported "exceptions" or "regulations" could not be supported under that clause. (Wilson, of course, had figured prominently in the invention of the Necessary and Proper Clause, and surely understood its meaning.)

196. While Ellsworth did not spell out in so many words that Congress' power to make rules about Supreme Court appellate jurisdiction *derives from* the Exceptions Clause, that seems to have been his premise. At least he did not associate it with the Necessary and Proper Clause; that is manifest from his statement that confining review to the writ of error process "may, indeed, be improper and inconvenient," *Wiscart*, 3 U.S. (3 Dall.) at 328. The national bank controversy five years earlier had prominently and permanently associated the words "convenient" and "proper" with the Necessary and Proper Clause. See Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett ed., 1965); Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 225 (J.P. Boyd ed., 1974).



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the Court would have had no appellate jurisdiction at all.<sup>197</sup> He noted that

the appellate jurisdiction is . . . given “with such exceptions, and under such regulations, as the Congress shall make.” Here then, is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply, whether Congress has established any rule for regulating its exercise?<sup>198</sup>

Ellsworth was satisfied in *Wiscart* that “no denial of justice” resulted from the statutory lacuna he found, for the resulting gap in Supreme Court competence did not leave the parties without a federal forum.<sup>199</sup> He so firmly rejected Justice

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197. Ellsworth first exploded Wilson’s premise that the Judiciary Act was silent about Supreme Court review of admiralty and maritime cases. The term “civil actions” in the applicable section of the Act, Ellsworth said, “was used by the Legislature, not to distinguish between Admiralty causes, and other civil actions, but to exclude the idea of removing judgments in criminal prosecutions, from an inferior to a superior tribunal.” *Wiscart*, 3 U.S. (3 Dall.) at 328. Indeed, the Act authorized Supreme Court writ of error review specifically of judgments in “civil actions” that had reached circuit courts “by appeal from a district court,” Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73, 84, and the *only* district court proceedings that could reach circuit courts by “appeal,” rather than by “writ of error,” were admiralty and maritime proceedings. *See id.* § 21. Ellsworth reasoned that the rule for admiralty and maritime cases must be the same as for equity suits because the same statutory terms dealt with both types of cases.

198. *Wiscart*, 3 U.S. (3 Dall.) at 327. Further,

It is observed, that a writ of error is a process more limited in its effects than an appeal: but . . . if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the Congress, and if Congress has prescribed a writ of error, and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make, nor adopt, another. The law may, indeed, be improper and inconvenient; but it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be.

*Id.* at 328.

199. Fact and law alike were triable in the district courts; moreover, both alike were reviewable in the circuit courts on “appeal.” Ellsworth reasoned that,

surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all parts of his case, justice is satisfied; and even if the decision of the Circuit Court had been made final, no denial of justice could be imputed to our government . . . .

*Id.* at 329.

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Wilson's notion of a self-executing Article III jurisdiction, however, that three years later he adhered to his view in the face of a statutory gap that left some Article III cases with no federal forum at all.<sup>200</sup>

The second early version of the error took as its starting point, by contrast, the very notion that Ellsworth so adamantly rejected: Justice Wilson's self-executing view of Article III. Chief Justice Marshall articulated this version in an opinion for the Court in 1805;<sup>201</sup> but there is no reason to think it was new at that time, either to Marshall himself<sup>202</sup> or to others. While a majority had shared Chief Justice Ellsworth's *conclusion* in *Wiscart* nine years before, the report of that case does not indicate which Justices (if any) had endorsed Ellsworth's *rationale*;<sup>203</sup> and some of the same Justices who supported Chief Justice Ellsworth's conclusion, later joined the 1805 opinion of Marshall with its irreconcilably different rationale. Marshall's considerable talent was not at original thinking,<sup>204</sup> and the

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If it were to appear, Ellsworth added, that the statute failed to afford even *one* federal court hearing in a case contemplated by the Constitution for the federal judiciary, so that it "would amount to a denial of justice, would be oppressively injurious to individuals, or would be productive of any general mischief, I should then be disposed to resort to any other rational exposition of the law, which would not be attended with these deprecated consequences." *Id.* But even that would drive him only to a reinterpretation of the statute.

200. See *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1798).

201. See *United States v. More*, 7 U.S. (3 Cranch) 159, 171 (1805).

202. As a Congressman in 1800, John Marshall had taken the view that Article III is self-executing regarding the jurisdiction even of *inferior* courts, suggesting that inferior federal courts would have had jurisdiction in admiralty and maritime matters even if no statute had conferred it. See 10 ANNALS OF CONG. 614 (1800).

203. From the opinion Justice Chase wrote three years later in *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799), one might infer that he shared Ellsworth's rationale.

On the other hand, Justice Cushing probably did not. Even before Ellsworth had joined the Court, Cushing had agreed with Wilson that the judicial power is "given by the constitution" (i.e., vests by self-executing force) at least sufficiently that the Court could prescribe rules for service of process without statutory authority. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 466, 469 (1793). If he thus disagreed with Ellsworth and yet shared Ellsworth's conclusion in *Wiscart*, it seems likely that Cushing held a view like that which John Marshall articulated six years later.

We know from *Jennings v. The Brig Perseverance*, 3 U.S. (3 Dall.) 336, 337 (1797), that Justice Paterson had agreed with Wilson in *Wiscart*, but afterwards changed his view. We do not know, however, whether he changed his view by adopting Ellsworth's rationale, or by endorsing instead the rationale articulated by Marshall in *More*, where Paterson joined silently again.

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rationale he articulated in 1805 could well be the same as was used by those others in 1796.

Under Marshall's rationale, if Congress made no relevant laws at all, the Supreme Court would have all the appellate jurisdiction constitutionally allowed, because as he (like Wilson) supposed, Article III was self-executing. However, Congress under the Exceptions Clause could limit that jurisdiction, and Marshall reasoned that legislation which confirms the jurisdiction in part limits it to the parts so confirmed, implicitly denying any jurisdiction that is not statutorily confirmed.<sup>205</sup> Partial confirmation, in other words, carried a "negative pregnant."

Justice William Johnson in 1807 reiterated Ellsworth's version;<sup>206</sup> but otherwise, at least through 1830,<sup>207</sup> the Court

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[Marshall's] peculiar forensic skill was excellence not at original, but at comprehensive and systematic argumentation. A colleague [Joseph Story], twenty years intimately familiar with his work, wrote that Marshall's "expositions of constitutional law . . . remind us of some mighty river . . . which, gathering in its course the contributions of many tributary streams, pours at last its own current into the ocean, deep, clear, and irresistible." Hence one can find in Marshall's *Marbury* opinion [for example] the ideas and even the phrases of others: not only of Hamilton, but also of Madison, St. George Tucker, and other Virginians, like Roane and—yes—even Jefferson.

David E. Engdahl, *John Marshall's 'Jeffersonian' Concept of Judicial Review*, 42 DUKE L.J. 279, 330-31 (1992).

205.

[W]hen the constitution has given congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and congress, under that power, . . . has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.

United States v. More, 7 U.S. (3 Cranch) 159, 171 (1805).

206. Johnson said the Supreme Court's appellate "powers are subjected to the will of the legislature of the union, and it can exercise appellate jurisdiction in no case, unless expressly authorised [sic] to do so by the laws of congress." *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 103 (1807) (dissenting only on statutory grounds).

207. In 1830, when appellate review of criminal cases was not yet authorized by statute, the Supreme Court held that no writ of habeas corpus could be issued if its effect would be to allow review of a circuit court conviction. *See Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830). In one earlier case the Court had allowed a habeas petition with respect to a commitment by order of the Circuit Court for the District of Columbia. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 74 (1807). But in that case, the majority had found a statutory authorization.

Probably the same rationale also underlay the Court's compliance with the rather stringent statutory requisites under the 1789 Judiciary Act for appellate review of state court judgments, although in that context no opinion has ever fully set out a

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utilized Marshall's "negative pregnant" version of the Exceptions Clause premise.<sup>208</sup> This "negative pregnant" rationale, however, logically depends on Wilson's view that Article III is self-executing with regard to jurisdiction; and as the debilitating implications of that view came to be better perceived, it was gradually abandoned, first as to inferior tribunals<sup>209</sup> and then also as to Supreme Court appellate jurisdiction.<sup>210</sup> The only remnant of it surviving today is the

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rationale. *See* Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85; *see also* *Williams v. Norris*, 25 U.S. (12 Wheat.) 117 (1827); *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 312 (1819).

208. Marshall elaborated his view in 1810, saying:

Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. . . . The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject . . . .

. . . [Congress has] not, indeed, made these exceptions in express terms. . . . [B]ut they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

. . . .

It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers.

*Dourousseau v. United States*, 10 U.S. (6 Cranch) 307, 313-14 (1810).

209. Justice Johnson wrote in 1812, for example, "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." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812).

210. In 1847, for example, the Court ruled that "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes." *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847). And in 1866 the Court said,

[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.

*Daniels v. Chicago & Rock Island R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866).

In 1869, Chief Justice Chase, in retrospect, telescoped the doctrinal development and characterized as logical inference what in fact had been a chronological transition of views:

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed [i.e., the "negative pregnant" principle articulated by Marshall] having been thus established [although the premise of self-executing effect presumed by that principle was not

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unanalyzed assumption that Article III is somehow anomalously self-executing as to the Supreme Court's original jurisdiction (to which the Exceptions Clause does not apply).<sup>211</sup>

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established at all], it was an almost necessary consequence [necessary only to preserve Ellsworth's contrary view] that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

*Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1869).

The Evarts Act (Circuit Court of Appeals Act) of March 3, 1891, 26 Stat. 826, established a new set of exclusively appellate tribunals and distributed the appellate caseload between the Supreme Court and those new circuit courts of appeals. Cases from state courts remained reviewable by the Supreme Court as before, but among cases originating in the federal trial courts, most were routed through the new intermediate courts. Moreover, as to most cases originating in federal tribunals, including all in which diversity was the only subject matter base, the Act did not provide for Supreme Court review of court of appeals decisions as a matter of course: The Supreme Court in its discretion could require certification of particular cases for decision there instead of by a circuit court of appeals, and the latter could certify particular questions to the Supreme Court for instructions; but the broader avenues of Supreme Court access previously open for many cases were cut off. Because the notion of self-executing jurisdiction had been abandoned, the Supreme Court had no difficulty sustaining the validity of these statutory curtailments of its own appellate jurisdiction. *See Ayers v. Polsdorfer*, 187 U.S. 585 (1903); *see also Stevenson v. Fain*, 195 U.S. 165 (1904).

Although the Evarts Act eliminated the appellate role of the old circuit courts with respect to district court decisions, those courts persisted along with the district courts as trial tribunals until 1911, when the old circuit courts were abolished and their jurisdiction assigned instead to the district courts. *See Act of March 3, 1911*, 36 Stat. 1087.

211. In 1807, Justice Johnson wrote, "The *original jurisdiction* of this court . . . it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted nor extended." *Ex parte Bollman*, 8 U.S. (4 Cranch) 74, 103 (1807) (Johnson, J., dissenting). Two years earlier Justice Washington had written at circuit, "The only court, by name, whose jurisdiction is defined by the constitution, is the supreme court; and, therefore, congress has no power to restrain it in those cases where it is defined." *Ex parte Cabrera*, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2,278).

Justice Story, in his 1833 *Commentaries on the Constitution*, observed quite accurately that there is no logical or exegetical basis for distinguishing in this regard between original and appellate Supreme Court jurisdiction. Story's way of escaping the logical problem, however, was to conclude (like Wilson and Marshall before him) that the Constitution *is* self-executing as to *both*. He said,

There is certainly very strong grounds to maintain, that the language of the constitution meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action by congress; and to require this action to divest or regulate it. The language, as to the original jurisdiction of the Supreme Court, admits of no doubt. It confers it without any action of congress. Why should not the same language, as to the appellate jurisdiction, have the same interpretation? It leaves the power of congress

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Once deprived of its indispensable foundation in Wilson's notion of self-executing jurisdiction, Marshall's "negative pregnant" rationale simply ceased to appear in judicial opinions.

The previously discarded Ellsworth rationale, however, was not revived to replace that of Marshall. Instead, the habit of treating the Exceptions Clause as the source of Congress' power persisted (as habits commonly do) with no rationale supporting it at all, both rationales that were used to establish it having been discarded as unfit, and no argument ever having been put in their place.

The mischief is that this persisting and unreasoned habit of attribution has helped obscure the true basis of Congress' power regarding the judicial branch, and thus its intrinsic limitations. That basis is the Necessary and Proper Clause; and the limitations inherent in that clause have extremely important consequences, to some of which we now turn.

## IV. LAWS "CARRYING INTO EXECUTION" THE JUDICIAL POWER

Recognizing the Necessary and Proper Clause as the premise of Congress' power regarding the judiciary entails consequences regarding subject matter jurisdiction, judicial system structure, and judicial potency. Because the potency issues require consideration of certain additional analytical refinements, it is simpler to discuss jurisdiction and structure first.

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complete to make exceptions and regulations; but it leaves nothing to their inaction.

3 STORY, *supra* note 48, at 648-49. However, Story's argument proved insufficient to perpetuate the Wilson-Marshall view.

Nevertheless, without any serious effort to buttress it with reason, the anomalous proposition that the Supreme Court's *original* jurisdiction does automatically vest has been continuously maintained. *See, e.g., Daniels v. Chicago & Rock Island R.R. Co.*, 80 U.S. (3 Wall.) 250, 254 (1866); Redish, *Congressional Power*, *supra* note 123, at 901; Sager, *supra* note 9, at 23-24; Tribe, *supra* note 12, at 134-35.

While this proposition is anomalous, seemingly inexplicable, and certainly unexplained, however, it also is of little consequence: The 1789 Judiciary Act vested the Supreme Court's original jurisdiction anyway, with no substantial shortfall. *See* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 523-25 (1989).

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*A. The Duty to Vest and In capacity to Divest*

Even if it is not self-executing in the dimension of subject matter jurisdiction, 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.

By my count, "shall" appears 191 times in the original United States Constitution and 115 more in the amendments. A small number of these are instances of the future or future perfect tense,<sup>212</sup> but in the overwhelming majority it is evident that "shall" imports compulsion or obligation. Several other clauses in Article III itself provide illustration: judges "shall hold their Offices during good Behaviour";<sup>213</sup> the "Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes"<sup>214</sup> were committed. "Shall" with a negative (e.g., "shall not,"<sup>215</sup> "no State shall,"<sup>216</sup> or "shall make no law"<sup>217</sup>) is the standard form of constitutional rights guarantees. Care seems to have been taken to use "may" rather than "shall" wherever permission without obligation was contemplated.<sup>218</sup>

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212. See, for example, the references to the President's recommendation of "such Measures as he shall judge necessary and expedient," U.S. CONST. art. II, § 3; to trials "where the said Crimes shall have been committed," *Id.* art. III, § 2, cl. 3; to supremacy for laws and treaties which "shall be made," *Id.* art. VI, d. 2; and to succession when "the President elect shall have died," *Id.* amend. XX, § 3.

213. *Id.* art. III, § 1.

214. *Id.* art. III, § 2, cl. 3.

215. "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." *Id.* art. I, § 9, cl. 2; *see also id.* art. III, § I (providing that judges' compensation "shall not be diminished during their Continuance in Office").

216. "No State shall . . . pass any . . . ex post facto Law . . . ." *Id.* art. I, § 10, cl. 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1.

217. "Congress shall make no law respecting an establishment of religion . . . ." *Id.* amend. I.

218. *See, e.g., id.* art. I, § 5, cl. 2 ("Each House may . . . expel a Member."); *id.* art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); *id.* art. III, § 1 (including in the constitutional judicial structure "such

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Moreover, it is too incongruous to suppose that the framers, who repeatedly refused to let Congress decide the subject matter scope, nonetheless left it to Congress' discretion whether jurisdiction as to some or all of those subject matters ever should be vested. For these reasons, the only credible conclusion is that Article III imposes a mandatory duty: To whatever extent it is not self-executing, Article III requires that Congress vest jurisdiction (whether original or appellate), over each subject matter listed in Article III, in one or another (or several) of whatever tribunals might constitute the judicial branch. To this extent, Justice Story was correct in declaring that Article III is a mandate "to vest the *whole judicial power*."<sup>219</sup>

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.

Even a mandatory duty, however, can be disobeyed,<sup>220</sup> whatever reprobation the dereliction might incur. Not even Story believed that inferior federal courts could exercise jurisdiction notwithstanding congressional disobedience or default.<sup>221</sup> In an 1818 case at Circuit, Story lamented:

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inferior Courts as the Congress may from time to time ordain and establish").

219. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330 (1816).

However, only by piling some very unsound propositions on top of this valid "mandatory duty" premise, could Story support his untenable conclusion "that Congress are bound to create some inferior courts." *Id.* at 331. Justice William Johnson found Story's dictum objectionable enough that he wrote a response, even though acquiescing in the Court's actual holding. *See id.* at 362.

Story repeated his mandatory duty thesis in his *Commentaries on the Constitution*. *See* 3 STORY, *supra* note 48, §§ 1584-90. It was endorsed by Chancellor Kent. *See* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 290 (3d ed. 1836). It was also supported in *Mayor of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247, 251-52 (1868).

220. Occasionally a writer seems to have missed this point. *See, e.g.,* Paul Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States Be Preserved*, 18 A.B.A. J. 499, 503 (1932).

221. He did maintain that the *Supreme* Court could proceed in the absence of legislation, but that was because he shared the fading view that even the appellate jurisdiction of *that* court was self-executing. *See* 3 STORY, *supra* note 48, at 648-49, also quoted *supra* note 211.



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The constitution declares, that it is mandatory to the legislature, that the judicial power of the United States shall extend to controversies “between citizens of different states”; and it is somewhat singular, that the jurisdiction actually conferred on the courts of the United States should have stopped so far short of the constitutional extent. That serious mischiefs have already arisen, and must continually arise from the present very limited jurisdiction of these courts, is most manifest to all those, who are conversant with the administration of justice. But we cannot help them. The language of the act is so clear, that there is nothing on which to hang a doubt.<sup>222</sup>

Story’s comment was actually inapt in that case,<sup>223</sup> but it makes the point that not even he supposed the mandatory character of the vesting duty sufficient to override statutory shortfalls.

However, although Congress at the outset could have frustrated the Constitution’s design by defiant refusal (or simple failure) to vest some or all of the contemplated jurisdiction, it did not. Instead, the 1789 Judiciary Act vested in one or more federal courts virtually all that Article III provides for. One prominent error of orthodox opinion is the notion that Congress (for reasons which no one has been able to explain) initially withheld from the judiciary the great bulk of federal question jurisdiction,<sup>224</sup> bestowing it only some eighty-five years later, in 1875. I have elsewhere demonstrated the inaccuracy of that view with greater detail and documentation than is necessary here,<sup>225</sup> but a short summary is appropriate.

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222. *White v. Fenner*, 29 F. Cas. 1015, 1015-16 (C.C.D.R.I. 1818) (No. 17,547).

223. Section 11 of the Judiciary Act required that civil suits be brought in the district where the defendant resided or was served, and the place of residence or service was not of record in *White v. Fenner*. The case could have been brought in some other circuit court—or even in Story’s own—if that were shown to be the place of residence or service.

Story’s complaint that jurisdiction under the 1789 Act was “very limited” and “stopped . . . far short of the constitutional extent” was also inaccurate in other respects. See generally Engdahl, *supra* note 211, at 521.

224. See, for example, the statements in *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807 (1986); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950); PAUL BATOR, ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 34 (2d ed. 1973); FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT 12, 25, 30 & 65 (1928); and CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 90 (4th ed. 1983).

225. See Engdahl, *supra* note 211, at 522-38.

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While the 1789 Act did not contain the familiar words used since 1875 to embrace federal questions in general, it accomplished the same thing in terms that were suited to the circumstances of that time. Before 1824, the extravagant construction of "arising under" adopted in the *Osborn* case to preserve the Bank of the United States<sup>226</sup> had been only rarely conceived;<sup>227</sup> and on the more credible, well established construction explained in Justice Johnson's *Osborn* dissent, the 1789 Act quite amply provided for cases "arising under" the federal Constitution, laws, or treaties. The original Constitution did not provide bases for plaintiffs' claims, but constitutional or federal statutory issues raised unsuccessfully in defense or justification would render a case eligible for Supreme Court review under section 25 of the 1789 Act.<sup>228</sup> So would treaty issues, even where party-based jurisdiction did not apply.<sup>229</sup> As

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226. See *Osborn v. United States*, 22 U.S. (9 Wheat.) 738 (1924).

227. The extravagant "arising under" thesis employed by the majority in *Osborn* had been advanced by the *first* bank, in *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 71-72 (1809), but the Court in that case disregarded it and held that jurisdiction must rest on diversity instead.

So far as my research has disclosed, prior to *Osborn* its "arising under" thesis had only been used successfully once: in a very early criminal prosecution at circuit, where a man was sentenced to pillory and prison and fined for counterfeiting bills of the bank. There was no statute prohibiting or prescribing punishment for such counterfeiting, but the circuit court deemed it a "common law offense." But that of course could not give the federal court jurisdiction, so for the jurisdictional purpose the circuit court held that because "the act incorporating the Bank . . . was a constitutional act," and its "bills were made in virtue thereof," the counterfeiting prosecution made out "a case arising under" the laws of the United States. *United States v. Smith*, 27 F. Cas. 1147, 1147-48 (C.C.D. Mass. 1792) (No. 16,323).

Because criminal cases were not reviewable under the 1798 Act, this extravagant view of "arising under" was tested no further on that 1792 occasion, and I have found no evidence that it was given any further credence until 1824.

228. See Engdahl, *supra* note 211, at 530-31.

229. Supreme Court writ of error review of state court judgments was authorized

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

Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (footnote omitted).

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to private claims for damages caused by violations of federal statutes, the remedy traditionally and routinely prescribed at that time was “forfeiture” recoverable by an action of debt,<sup>230</sup> and the 1789 Act gave jurisdiction to the district courts over “all suits for . . . forfeitures incurred, under the laws of the United States.”<sup>231</sup> (Indeed, forfeiture cases comprised nearly as large a proportion as admiralty in the business of district courts in the earliest years.<sup>232</sup>) Overall, apart from the subcategory of diversity cases affected by the “assignee clause,”<sup>233</sup> the only cases within Article III that were afforded no federal forum by the 1789 Act were civil suits below certain modest amounts in controversy, suits between States and their own citizens, and suits brought against the United States.

A gulf between constitutional and statutory parameters did develop over the next several decades; and this federal question shortfall did, indeed, remain until 1875. The shortfall, however, was not a result of deliberate congressional choice; it resulted, instead, from failures to modify the jurisdictional statutes to accommodate intervening developments, most of them very subtle and not of Congress’ own making.<sup>234</sup> The absence for decades of any adequate statutory grant of general federal question jurisdiction illustrates that congressional neglect of its vesting duty will leave the mandated vesting undone; but it does not constitute an historical argument for discretion in Congress to withhold jurisdiction at will.

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230. For example, forfeiture to the injured party recoverable in action of debt was the remedy for patent infringement under the Act of Apr. 10, 1790, ch. 7, § 4, 1 Stat. 109, 111; and for copyright infringement under the Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125.

231. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77.

232. See HENDERSON, *supra* note 43, at 61.

233. See *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799). In essence the assignee clause precluded jurisdiction based on diversity between the debtor and the creditor’s assignee absent diversity between the debtor and the assignee. See also *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

234. For example, the Court’s bifurcation of “original” and “appellate” in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), vitiated the 1789 Act’s only provision for mandamus of federal officers; the “forfeiture” device fell out of use for redressing private injury resulting from violations of federal laws; some Justices at Circuit misconstrued statutes as failing to authorize equity enforcement of federal law rights; and the majority in *Osborn* took its extravagant, unanticipated view of “arising under” in Article III. See Engdahl, *supra* note 211, at 538-43.

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In any event, however, discretion to give or withhold is one question, while discretion to take away is another. If the true premise of Congress' power regarding the judiciary is the Necessary and Proper Clause, it seems impossible to uphold statutory *divestment*. With regard to the other branches, Congress' power under the Necessary and Proper Clause (as already noted) works like a one-way ratchet. It hardly is credible to characterize *divestment* as "carrying into Execution" the "judicial Power" when the Constitution says "[t]he judicial Power shall extend to" the matter thus taken away. For reasons to be further elaborated below, Congress may shuffle jurisdictional assignments among whatever federal courts might exist; but the Constitution gives it no power to divest entirely, from the judiciary as a whole, any fraction of the subject matter competence contemplated by Article III once that fraction has been vested somewhere in the judicial branch.

One very prominent early episode might seem at first to demonstrate the contrary; but it does not. Amidst great public controversy in 1802, Congress repealed²³⁵ a reforming judiciary act it had passed the previous year.²³⁶ Among other things, the 1801 Judiciary Act included a general grant of federal question jurisdiction which mirrored the federal question language of Article III,²³⁷ just like the modern statutes in force since 1875. If this general federal question language in the 1801 Act vested some jurisdiction omitted when the federal courts were created in 1789, then the 1802 repeal, reinstating the 1789 regime, was a jurisdictional divestment; and judicial acquiescence in such a divestment barely a decade after the Constitution was adopted would argue for construing the Constitution to countenance divestment even today.

In fact, however, as already explained, the 1789 Act had fully vested federal question jurisdiction, albeit in different

235. See Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

236. See Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

237. The 1801 Act gave the new circuit courts jurisdiction over "all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority." Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92.

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terms.²³⁸ The 1801 statute just described it more conveniently and reassigned it to different inferior courts. Thus, when the 1802 repeal reinstated the 1789 regime, no jurisdiction was divested from the federal judiciary as a whole. Significantly, not even the critics of the 1801 Act had regarded it as vesting any new jurisdiction;²³⁹ and therefore it is unsurprising that no contemporary account regarded the 1802 repeal as a divestment. Neither in the six hundred columns of the Annals of Congress reporting the heated debate over repeal, nor in the accompanying press commentary or contemporaneous literature, is there any hint that Congress or anyone else perceived the 1802 repeal as a divestment of any jurisdiction at all.

On the other hand, important precedents *against* jurisdictional divestment have been generally overlooked. In a 1995 article,²⁴⁰ Gordon Young exhumed two examples from 1872—*Armstrong v. United States*²⁴¹ and *Witowski v. United States*²⁴²—admitting that they were rather weak by themselves. But they are not, indeed, by themselves: Professor Young's examples corroborate others from the same decade that I unearthed thirty years ago.²⁴³ If anyone were to undertake a page-by-page search of the old cases (or even of only the published ones, which are effectively unindexed), more examples might well be found; but these seem sufficient to make the point.

When the Radicals in Congress resorted to military expedients for "reconstructing" the South after the Civil War,²⁴⁴

238. See generally Engdahl, *supra* note 211, at 521.

239. See *id.* at 535-37.

240. See Young, *supra* note 2, at 156-65.

241. 80 U.S. (13 Wall.) 154 (1872).

242. 7 Ct. Cl. 393 (1872).

243. See David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 49-51 (1972); David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History Of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 59-60 (1971) [hereinafter Engdahl, *Soldiers, Riots, and Revolution*].

244. Even though civilian authority—federal as well as state—had been in place and functioning for some time, the Civil Rights Act of 1866 authorized military action to enforce its terms. See Act of April 9, 1866, ch. 31, §§ 5, 9, 14 Stat. 27, 28, 29. In addition, the Military Reconstruction Act of March 2, 1867, ch. 153, 14 Stat. 428, established five military districts embracing the ten States in question, each to be governed under martial law by a commanding general with an ample force of federal

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they must have anticipated judicial denunciation. The ancient rule of due process prohibiting military measures where civil authority exists was reaffirmed by the Supreme Court in *Ex parte Milligan*²⁴⁵ only days before Congress enacted the 1866 Civil Rights Act,²⁴⁶ which called for military enforcement of its terms, and only eleven months before Congress subordinated the civilian governments of ten states to military district commanders through the 1867 Military Reconstruction Act.²⁴⁷ In addition, a federal circuit court in 1866 invalidated military proceedings pursued against a civilian in South Carolina seven months after the end of the war.²⁴⁸ The unconstitutionality of such military expedients was notorious: General Grant himself is reported to have said of the Reconstruction legislation, "much of it, no doubt, was unconstitutional; but it was hoped that the laws enacted would serve their purpose before the question of constitutionality could be submitted to the judiciary and a

troops; and it gave these military commanders discretion whether to try offenders in military tribunals or to permit trials by the established local civilian courts. Military district commanders ousted thousands of civilian officials and six state governors, installing others in their places by military fiat. State legislation was set aside or modified by military decrees. A distinctively military force of some 20,000 soldiers served as the primary peacekeeping force. Congress even enacted that "no district commander . . . or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States." Act of July 19, 1867, ch. 30, § 10, 15 Stat. 14, 16.

Twice during the first months after enactment of the military reconstruction legislation, states sought judicial denunciation of it; but their requests for injunctions to preserve arguable rights of sovereignty against executive action were held to lie beyond the constitutional limits of federal court jurisdiction. *See Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867).

245. The court held:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866); *see generally* Engdahl, *Soldiers, Riots, and Revolution*, *supra* note 243; Engdahl, *Foundations*, *supra* note 106.

246. Act of April 9, 1866, ch. 31, 14 Stat. 27.

247. Act of March 2, 1867, ch. 153, 14 Stat. 428.

248. *See, e.g., In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4,303).

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decision obtained.”²⁴⁹ Seeking ways to evade or postpone judicial embarrassment of their enterprise, the Radicals first considered eliminating all of the Supreme Court’s appellate jurisdiction. Then, however, they instead enacted in 1867 a jurisdictional divestment that was narrow in subject matter scope but applied to *all* courts, state as well as federal: it provided that “no civil court . . . shall have or take jurisdiction of” any case arising out of military action taken between the date of President Lincoln’s inauguration and July 1, 1866, a date fifteen months after the end of the Civil War.²⁵⁰

Federal courts nonetheless exercised jurisdiction as if this divestment statute had never passed. One example involved the very same person whose habeas corpus appeal had occasioned the Supreme Court’s prominent reiteration of the constitutional rule against military expedients in *Ex parte Milligan*. Notwithstanding Congress’ attempt at jurisdictional divestment, a federal court gave Milligan a judgment for damages against the army general who had seized and confined him in Indiana during the war.²⁵¹

Another instance of a federal court’s disregard of the 1867 divestment statute was assigned as error by the Attorney General in *Beckwith v. Bean*,²⁵² an 1878 case growing out of a military arrest and confinement in Vermont during the Civil War. However, the Supreme Court declined even to criticize the trial court for defying the divestment statute. Indeed, Justice

249. SAMUEL E. MORRISON, ET AL., A CONCISE HISTORY OF THE AMERICAN REPUBLIC 344 (1977).

250. Act of March 2, 1867, ch. 155, 14 Stat. 432.

This 1867 divestment statute did not prevent the journalist’s habeas corpus petition involved in *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868), because the facts of that case arose after the statute’s cutoff date of July 1, 1866. However, the suitability of those facts to occasion a Supreme Court denunciation of the military Reconstruction enterprise prompted Congress to repeal the particular statute on which Supreme Court jurisdiction of McCardle’s appeal had been based. *See* Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. That repeal, however, was not a divestment of jurisdiction from the judiciary as a whole: not only had McCardle’s case already been heard by a federal court, but also there remained another avenue of recourse to the Supreme Court in such cases.

251. *See* *Milligan v. Hovey*, 17 F. Cas. (C.C.D. Ind. 1871) (No. 9,605). The jury, however, awarded only nominal damages.

State courts ruled similarly regarding earlier Acts of Congress having a comparable effect. *See, e.g.*, *Johnson v. Jones*, 44 Ill. 142, 161-63 (1867); *Griffin v. Wilcox*, 21 Ind. 370, 373 (1863).

252. 98 U.S. 266 (1878).

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Field (in a separate opinion which Justice Clifford joined), after reiterating the constitutional rules against military expedients except in “the theater of active military operations, where war really prevails,”²⁵³ declared that neither the President nor Congress could “shield the defendants from responsibility in disregarding them. Protection against the deprivation of liberty and property would be defeated if remedies for redress, where such deprivation was made, could be denied.”²⁵⁴

The majority in *Beckwith v. Bean* purported to reserve these issues, reversing instead on a different ground and saying, “We express no opinion as to the construction of [the divestment statute and another], or as to the questions of constitutional law which may arise thereunder.”²⁵⁵ That, however, was disingenuous: if the divestment statute were valid, the case should have been ordered abated²⁵⁶ for lack of subject matter jurisdiction, but instead the Court remanded for a new trial. A new trial, of course, would be no less defiant of the divestment statute than the first had been.

The Justices found no other occasion to consider this divestment statute,²⁵⁷ but the majority’s reasoning in other cases of the same period²⁵⁸ makes it seem probable that the others would have agreed with Justices Field and Clifford had they been willing in *Beckwith* to address the divestment issue with candor.

Following these long-forgotten examples, federal courts confronted today with purported divestments like those attempted, for example, in the 1996 Antiterrorism and Effective Death Penalty Act,²⁵⁹ the 1996 Immigration Responsibility Act,²⁶⁰ and similar measures recently enacted or proposed,

253. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 127 (1866).

254. *Beckwith*, 98 U.S. at 298 (Field, J., dissenting).

255. *Id.* at 285.

256. In terms of twentieth century practice, “abated” would be equivalent to being dismissed.

257. *Beckwith v. Bean* was decided almost thirteen years after the end of the period to which the purported divestment applied, and such claims as the divestment might reach were subject to a valid two-year statute of limitations. *See Mitchell v. Clark*, 110 U.S. 633, 641-46 (1884).

258. *See, e.g., Raymond v. Thomas*, 91 U.S. 712 (1876).

259. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 106(b)(3)(E), 440(a), 110 Stat. 1214 (1996).

260. Immigration Responsibility Act of 1996, § 377 (amending 8 U.S.C. § 1255a(f)(4)(C)).

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might simply ignore them and proceed with such cases as they would have proceeded otherwise. For some conceivable situations, solutions might be less obvious but are not too difficult to fashion. For example, if Congress not only divested an element of jurisdiction but also abolished the only federal court or courts where that element of jurisdiction had theretofore reposed, it might be sufficient for the Supreme Court to review cases of that description decided in state courts, ignoring any exceptions that otherwise would place them out of its appellate reach.

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For much of this century, restriction or repeal of the federal courts' diversity jurisdiction has been a topic of earnest debate. There are constitutionally permissible ways to diminish the institutional costs of this anachronistic (to some) but beneficent (to others) branch of jurisdiction, if that should be desired. Divestment, however, is certainly not one of them.

The idea of diversity divestment appeals even to some who find the possibility of federal question divestment abhorrent. One of these—Professor Akhil Amar of Yale—advances a “two-tier” theory of Article III<sup>261</sup> to justify the one while foreclosing the other. Professor Robert Pushaw of Missouri propounds a variation of that view.<sup>262</sup> The “two-tier” theory of subject matter jurisdiction, however, cannot survive analysis.

Amar's theory turns on the fact that, in the first paragraph of Article III, Section 2, the adjective “all” appears in connection with some categories of subject matter (including federal questions) but not others (including diversity). Amar was not the first to try arguing from this verbal deviation. Two centuries ago, South Carolina Federalist Congressman Abraham Nott used the same teasing contrast to support the 1801 bill enlarging the federal judiciary. Nott argued that by extending the federal judicial power to “all” federal question

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261. See, e.g., Amar, *A Neo-Federalist View*, *supra* note 2, at 205; Akhil Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989). Amar's thesis was recently critiqued by a former student of his, Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997).

262. See, e.g., Pushaw, *supra* note 2.

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cases, the Constitution precluded state courts from considering *any* of them, and he argued that since state adjudication of such cases was foreclosed, the Congress must provide enough federal courts to bear the caseload.<sup>263</sup> Other Federalists supporting the same bill took pains to disavow Nott's dubious inference from the word "all";<sup>264</sup> but fifteen years later Justice Story revived it as his own dictum in *Martin v. Hunter's Lessee*.<sup>265</sup> There Amar found it and turned it to this different use. The argument, however, has grown no more credible with age.

Those subject matters attended by the word "all," Amar designates as the first tier. As to these, Amar credits Story's view that the duty to vest is mandatory; and this he finds to preclude any divestment of them. As to the others, however—the second tier—he finds otherwise:

Because Article III does not define with precision which of these cases must be heard by a federal court—in sharp contrast to the command that *all* mandatory-tier cases be so heard—the power to delineate the boundaries of federal jurisdiction over these penumbral cases rests with Congress, as part of its general constitutional power to "make all Laws which shall be necessary and proper for carrying into Execution . . . ."<sup>266</sup>

Amar supposes that this "power to delineate the boundaries" includes not only discretion to vest or decline to vest second-tier categories in the first instance, but also discretion to divest them at any time.

The first embarrassment to this theory should be obvious: there are differences among all, some, and none. When Article III says the judicial power "shall extend to" diversity cases, even though it does not specify "all," it certainly does not mean "none." If the imperative "shall extend to all" prohibits divestment of any of a first-tier category, the same "shall extend to," without the word "all," must at least prohibit complete divestment of a category in the second tier. Thus, even

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263. See 10 ANNALS OF CONG. 893-96 (1801).

264. See *id.* at 891, 896.

265. 14 U.S. (1 Wheat.) 304, 334 (1816).

266. Amar, *A Neo-Federalist View*, *supra* note 2, at 254-55 n.160; see also *id.* at 229-30.

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if most of a second-tier category (such as diversity) could be divested, some residue of it would mandatorily have to remain.

Of course, the Constitution provides no clue as to which or how many cases within each “second-tier” category are dispensable, and which or how many must remain. Amar’s attempt at escape from this embarrassment is his bald assertion that “the power to delineate the boundaries of federal jurisdiction over these penumbral cases rests with Congress.”<sup>267</sup>

However, the “power” which Amar thus posits is the same untrammelled discretion to pick and choose among jurisdictional categories that conventional opinion attributes to the Tribunals and Exceptions Clauses. The only difference is that Amar restricts this plenary discretion to “second-tier” cases, and attributes it instead to the Necessary and Proper Clause.

But the Necessary and Proper Clause cannot patch Amar’s leaky balloon. He plasters it there with no regard for its carefully chosen language,<sup>268</sup> or for the role which that language was crafted to play in preserving the separation of powers.<sup>269</sup>

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267. *Id.* at 254-55 n.160. Tacitly, Amar assumes that this purported “power” is sufficient to enable Congress not only to delimit, but to eliminate any residuum of any second-tier category. He does not explain, however, how this can be reconciled with Article III’s mandate: “shall extend to.”

268. John Harrison, too, treated the Necessary and Proper Clause too casually (if not flippantly), in *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*. See Harrison, *supra* note 2, at 211, 217, 248-49. He said, for example, “In establishing an inferior tribunal, it is necessary and proper to give it jurisdiction—say, jurisdiction over all cases between citizens of the same State. So much for enumerated judicial power.” *Id.* at 217. But while giving a federal court such non-diversity jurisdiction in non-federal question cases might conceivably be “necessary and proper” to something-or-other, it could not be considered necessary and proper “for carrying into execution” a judicial power limited to the Article III menu. The Necessary and Proper Clause does not empower Congress to do whatever seems like a good idea; the power granted by this clause is end-specific, and the end must be “within the scope of the constitution.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 420 (1819).

269. For an even more extreme misapplication of the Necessary and Proper Clause, see Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495 (1983).

The least of the Gressmans’ errors is in reviving, *see id.* at 508-09, the naive “tautology” view of the Necessary and Proper Clause which Alexander Hamilton propounded in *The Federalist No. 33*, and then (to his credit) quickly abandoned. The Gressmans employ that transient misunderstanding, instead of Hamilton’s mature understanding of the Necessary and Proper Clause set forth in his *Opinion on the Constitutionality of an Act to Establish a Bank*, *see HAMILTON, supra* note 196, at 97-134, and reiterated and approved for the Supreme Court by Chief Justice Marshall

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He misses the whole point of replacing Randolph's "shall organize" clause with Wilson's "necessary and proper" clause;<sup>270</sup> that point is the difference between Congress controlling the discretion of another branch and Congress facilitating another branch's exercise of its own discretion.

Amar seems not to have perceived—at least he does not explain—his mutation from statutorily "carrying into Execution" the Article III judicial power with its *constitutionally* delineated bounds, to *statutorily* "delineating the boundaries" instead. If this mutant rationale could survive, Congress could likewise exclude various offenses from executive

in *McCulloch v. Maryland*, 4 Wheat. 17 U.S. (4 Wheat.) 316 (1819). (Indeed, Marshall in that classic case specifically rejected Maryland's Gressman-like revival of Hamilton's naive earlier view. See 17 U.S. (4 Wheat.) at 412-13.)

More gravely, the Gressmans take the Necessary and Proper Clause as the basis not for laws effectuating "the judicial Power" contemplated by the Constitution, but rather for laws effectuating what they characterize as Congress' "authority over the judiciary." Gressman & Gressman, *supra*, at 510; see also *id.* at 511. This purported "authority over the judiciary" they attribute not to the Necessary and Proper Clause at all, but to the conventional misconstruction of the Tribunals Clause, see *id.* at 510-11, and the Exceptions Clause, see *id.* at 511. Thus, disregarding the intrinsic constraint the Necessary and Proper Clause was crafted to impose, the Gressmans use it instead to compound the limitless discretion they attribute to the familiar false premises of Congress' judiciary power!

But the flaws in the Gressmans' analysis do not end even there. Utilizing the unfortunate "pretext" dictum from *McCulloch v. Maryland*—which confounded judicial analysis in some pre-New Deal cases like *Hammer v. Dagenhart*, 247 U.S. 251 (1918)—the Gressmans assert that Congress may not, "under the pretext of executing its powers, . . . pass laws for the accomplishment of objects not entrusted to the government." Gressman & Gressman, *supra*, at 514 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 423). On this ground they assert that laws to "thwart or undo the enforcement of prevailing constitutional doctrines, developed by the Supreme Court," *id.*, and laws designed "to destroy or render unenforceable a particular constitutional right or claim recognized by the Supreme Court," *id.* at 515, as well as laws that "destroy or weaken any part of the Supreme Court's jurisdictional function and ability to achieve and maintain the supremacy and uniformity of the federal Constitution," *id.* at 519, would be unconstitutional because of the "illegitimacy" of those ends. See *id.* at 513, 514.

The Necessary and Proper Clause, however, does not restrict Congress' exercise of any power conferred by *another* provision, whether that is the commerce power or the power (if any) regarding the judiciary attributable to the Tribunals and Exceptions Clauses. Instead, the Necessary and Proper Clause gives *additional* power to Congress, limiting *only that additional power* in terms of the ends to be served. That is why *Hammer v. Dagenhart* was overruled more than half a century ago. See *United States v. Darby*, 312 U.S. 100 (1941). Consequently, if either the Tribunals Clause or the Exceptions Clause really did give power to Congress to control the courts or their jurisdiction, the Gressmans' archaic "pretext" argument could not constrain it at all.

270. See 2 FARRAND, *supra* note 61, at 147, 168.

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clemency: The President has power to “grant Reprieves and Pardons for Offenses against the United States,” but the text does not say for “*all*” such offenses,<sup>271</sup> and by Amar’s mutant logic it must therefore follow that Congress, “as part of its general constitutional power to ‘make all Laws which shall be necessary and proper for carrying into Execution’”<sup>272</sup> the President’s powers, may “delineate the boundaries” of clemency. Surely, however, that would be recognized as a plainly unconstitutional intrusion into another branch’s domain. Amar’s supposed power to “delineate the boundaries” of so-called second-tier jurisdiction, however, exhibits the same logical flaw.

Moreover, Amar’s “two-tier” conception is refuted by the surviving records of the drafting process, which make it evident that the use or omission of “all” in Article III’s subject matter list is merely a variation of style, having no substantive import.

The adjective “all” was used once in the ninth Randolph Resolution as proposed to the Convention: only in the first of the several phrases constituting the proposed subject matter list. That list was a melange of phrases, some linked by conjunctives and some by disjunctives but some not linked at all, and some separated by semicolons but others separated merely by commas. It specified:

all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.<sup>273</sup>

It seems highly unlikely that Randolph and his fellow Virginians, by specifying “all” with respect to piracies, meant to provide only for “some” captures from enemies, “fewer than all” cases respecting national revenue collection, and “some but not all” of the possible impeachments of national officers. Perhaps the “all” at the head of the list was intended to apply to *every* ensuing phrase, notwithstanding the contrast of conjunctives

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271. U.S. CONST. art. II, § 2, d. 1.

272. Amar, *A Neo-Federalist View*, *supra* note 2, at 254-55 n.160.

273. 1 FARRAND, *supra* note 61, at 22.

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and disjunctives, and regardless of the vagaries of punctuation. It seems much more likely, however, that “all” was unnecessary (and superfluous as to piracies), because the intent to embrace those categories completely was quite plain enough without it.

That first list of subject matters was superseded on June 13, when the delegates amended the Ninth Resolution to provide, “that the jurisdiction of the national Judiciary shall extend to cases, which respect the collection of the National revenue, impeachments of any national officers, and questions which involve the national peace and harmony.”<sup>274</sup> Here the word “all” was nowhere used. Perhaps “any” made it unmistakable that *every* impeachment was intended, but there is no reason to think that this amended resolution contemplated only “some” of the revenue or “national peace and harmony” cases.

After further amendments (including deletion of the impeachment jurisdiction), in July this resolution was referred to the Committee of Detail. As referred, it provided, “[t]hat the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony.”<sup>275</sup> Again, the word “all” nowhere appeared.

Just as it used enumeration to detail the generalities about national legislative power, so the Detail Committee undertook to specify for the judiciary what “other Questions” might “involve the national Peace and Harmony.” The word “questions” was dropped, probably because peace and harmony “questions” would also arise in legislative and executive contexts; and since centuries of usage had given the word “case” specialized connotations in the judicial context,<sup>276</sup> that word

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274. 1 *id.* at 232.

275. 2 *id.* at 132-33.

276. The widespread recognition of this narrower connotation of “case” was illustrated a few weeks later when Dr. Johnson moved to add jurisdiction over cases arising under the Constitution. Neglecting the narrower connotation of the word as commonly understood in this context, Madison

doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

2 FARRAND, *supra* note 61, at 430. But Madison himself informs us that the narrower connotation was amply clear to others, reporting that “[t]he motion of Doctr. Johnson

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was used instead. Thus, Randolph's outline for the Committee enumerated several categories of "cases . . . involving the national peace and harmony"<sup>277</sup> in a list.

Wilson's draft arranged Randolph's list of peace and harmony categories into one compound clause—a series of parallel prepositional phrases sharing in common a single noun. The noun Wilson used, however, was not "cases," but "controversies".<sup>278</sup> Randolph's most notable "peace and

was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." *Id.*

277. 2 *id.* at 147. The other categories on Randolph's "peace and harmony" list were "the collection of the revenue," "disputes between citizens of different states," "disputes between different states," and "disputes, in which subjects or citizens of other countries are concerned." Emendations in Rutledge's handwriting added "disputes between a State & a Citizen or Citizens of another State," and "Cases of Admiralty Jurisdn." *Id.*

278. Article III's use of the two different words "cases" and "controversies" has occasioned other attempts at explanation. Some commentators have asserted—rather too confidently, that "case" is a broader term including both criminal and civil matters, while "controversy" includes only civil matters. *See, e.g.,* William A. Fletcher, *The 'Case or Controversy' Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265-67 (1990); Harrison, *supra* note 2, at 220-47; Meltzer, *supra* note 2, at 1575; James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in States-Party Cases*, 82 CAL. L. REV. 555, 604-09 (1994). I find the evidence assembled for this thesis unconvincing. No such specialized and technical usage of the term "controversy" has been shown to have been common as early as 1789; indeed, it appears to have been quite uncommon even later.

Robert Pushaw, in his article entitled *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994), uncovered the more credible explanation; but I am not sure he knew what he had found, because he went on to confound the case/controversy dichotomy with an entirely different distinction. "Controversy" is the broader term, including not only those disputes which are "cases" in the technical sense—disputes resolvable by application and exposition of existing (or arguably existing) law—but other arbitrable disputes as well. As Pushaw noted, "[a] paradigmatic 'controversy' was a dispute between governments," *id.* at 483; and as to many such disputes, there would be no established law to apply. The same might be said, for example, of disputes "between citizens of the same State claiming Lands under Grants of different States."

Pushaw went awry, however, when he associated the terms "case" and "controversy" with the late twentieth-century dichotomy of "law-declaration" and mere "dispute resolution" roles. Thus he said the "distinguishing feature" of a "case" was that it involved "a legal question that transcended the interests of the immediate litigants," while "a 'controversy' was an adversarial proceeding in which resolution of the dispute between the parties—not the law involved—was critical." *Id.* at 480, 483. This fit nicely with Pushaw's Amarian "neo-Federalist" view that federal jurisdiction is expendable as to "controversies" because only the parties' interests are involved, while jurisdiction over "cases" cannot be divested because it's really important to have federal judges expounding federal law for all to obey. Pushaw added that judicial exposition (and elaboration) of federal law is so important that it should not be constrained with doctrines of justiciability suited to merely inter-party disputes.

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harmony” category, “disputes between different states,” had been provided for by Article IX of the Articles of Confederation, which had used the word “controversies.” When Wilson assembled that and the other categories<sup>279</sup> in parallel prepositional phrases, he arrayed them all under the noun “controversies” used in that Confederation Article IX.

In addition to these peace and harmony categories, Wilson and the Committee proposed adding two other categories of jurisdiction, one involving diplomats (ambassadors, public ministers, and consuls) and the other involving admiralty and maritime matters. Rather than arraying these with the peace and harmony categories in parallel prepositional phrases, however, they placed them in separate clauses parallel to the clause about cases arising under federal laws. Thus there came to be three parallel clauses each separately using the noun “cases.”<sup>280</sup>

No one ever has supposed that *this* variation of style—a series of parallel clauses each using the same noun but modifying it with different descriptive phrases, contrasted with one compound clause<sup>281</sup> in which a single noun is modified by a series of parallel prepositional phrases—has any substantive meaning. The use or disuse of the word “all,” however, is likewise a meaningless variation of style.

The use of the word “all” in Randolph’s outline for the Committee might have carried a meaning like Amar would suppose, for although he proposed extending jurisdiction “to all

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The problem with Pushaw’s view is that, until decades (or generations) after the framing, nothing quite like what the modern “law declaration” model connotes was countenanced for any court in any kind of case. *See generally* Engdahl, *supra* note 204. At bottom, impatience with justiciability doctrines is impatience with the distinction between judicial and legislative work.

279. Wilson’s list included controversies “between States,” “between a State and a Citizen or Citizens of another State,” “between Citizens of different States,” and between a state or citizens and a foreign state or citizens. 2 FARRAND, *supra* note 61, at 173. Randolph’s list had included revenue collection as well, but that was redundant to “cases, arising under laws” of the national legislature. 2 *id.* at 147. The provision for disputes “between a State and a Citizen or Citizens of another State” had been added to Randolph’s list by Rutledge. *See* 2 *id.* at 137 n.6 & 147. Rutledge also had suggested the provision for cases of admiralty and maritime jurisdiction. *See id.*

280. 2 *id.* at 172-73, 186.

281. The separate “controversies” clause covering those “to which the United States shall be a Party” was later added by floor amendment. *See* 2 *id.* at 423, 430.



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cases, arising under laws passed by the general legislature,”<sup>282</sup> for his peace and harmony categories Randolph proposed extending jurisdiction only “to *such* other cases, as the national legislature may assign.”<sup>283</sup> That, however, is the very feature of Randolph’s outline that defied the Convention’s June 13th resolve against legislative control of jurisdiction—the resolve that the Convention later insistently reaffirmed, repelling any inference of legislative discretion to pick and choose.

Wilson’s draft and the Committee’s Report also used the word “all.” In them, as in the finished Constitution, the word appeared in each parallel phrase that used the noun “cases,” but did not appear in the single compound clause employing the noun “controversies.” In these drafts, however, the use or disuse of “all” cannot be given Amar’s meaning, because both *also* omitted “all” from their clauses extending jurisdiction “to the trial of impeachments of Officers of the United States.” Legislative discretion to omit federal jurisdiction over some federal officer impeachments<sup>284</sup> cannot have been contemplated; but that is the conclusion to which Amar’s thesis—if it were valid—would lead.

Moreover, although the Committee’s Report provided for the Supreme Court to have original jurisdiction in “cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party,” unlike the comparable clause in the finished Constitution, this was not prefaced with the word “all.”<sup>285</sup> Presumably Amar would therefore suppose that the Committee considered such original jurisdiction dispensable whether or not other federal courts existed; but in fact, the perceived

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282. Randolph omitted the word “all” as to “impeachments of officers,” a matter he proposed restoring to the subject matter list. It seems unlikely, however, that by this omission he intended to provide that some impeachments should be left to other tribunals.

283. 2 FARRAND, *supra* note 61, at 147.

284. The Committee Report did provide that the legislature could assign any of the contemplated jurisdiction—including impeachments, except of the President—to *federal* courts other than the “supreme” one. *See 2 id.* at 186-87. If it troubled thus to provide explicitly for other *federal* courts doing so, surely the Committee could not have meant to silently leave some federal officer impeachments to *state* tribunals by simply omitting to preface “impeachments” on the federal jurisdictional menu with the word “all.”

285. *See 2 id.* at 186.

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impropriety of leaving *any* such case without *some* federal forum was the whole reason for including the original jurisdiction provision!

Convention actions following the Detail Committee's Report make any attribution of significance to the word "all" even more indefensible. Jurisdiction over impeachments was deleted again when the decision for Senate trial of impeachments was made,<sup>286</sup> and then, as additional subject matter categories were suggested and approved, they were placed wherever in the subject matter list the movant happened to propose. For example, Dr. Johnson moved to insert the words "this Constitution and the" before the word "laws"; the word "laws" happened to be in a clause which did include "all."<sup>287</sup> Mr. Rutledge moved to include "treaties" in the same clause;<sup>288</sup> therefore matters arising under treaties are covered by that adjective, too. Mr. Sherman moved to insert "between Citizens of the same State claiming lands under grants of different States" immediately following the phrase "between Citizens of different States";<sup>289</sup> that phrase was located in the long, compound clause which lacked the word "all." There seems to have been no discussion about any possible consequence from placing any of these new categories in one clause rather than another, by virtue of its having or lacking the word "all."

Likewise, Madison and Gouverneur Morris proposed inserting the words "to which the United States shall be a Party" after the word "controversies"; this "was agreed to nem: con.," without recorded discussion.<sup>290</sup> Of course the only place in the resolution at that time where the word "controversies" appeared was in the long, compound clause omitting the word "all,"<sup>291</sup> yet no one seems to have supposed that this category

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286. *See 2 id.* at 547, 550-52, 572, 576. Earlier, the impeachment clause had been postponed. *See 2 id.* at 423, 424.

287. *See 2 id.* at 423, 430.

288. *See 2 id.* at 423-24, 431.

289. *See 2 id.* at 425, 431-32.

290. *See 2 id.* at 423, 430.

291. Although the motion was to insert the new phrase after "controversies" in the preexisting compound clause, without explanation (or consequence) it got transcribed as a separate "controversies" clause rather than another parallel phrase in the preexisting one. Therefore, the resolution as later referred to the Committee of Style already contained the two separate "controversies" clauses that appear in the finished Constitution. *See 2 id.* at 576. This, too, is surely just a meaningless fortuity

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should include only “some” litigation matters to which the United States is a party. Indeed, the Convention deemed this category so important that for a while it was included in the select group of categories designated for Supreme Court original jurisdiction;<sup>292</sup> yet even then, the word “all” was not used.

The jurisdiction provisions were not discussed any more before referral to the Committee of Style for final revision;<sup>293</sup> and that Committee made no change except to delete one exception in the interstate controversies provision.<sup>294</sup> No subsequent discussion of the judiciary occurred at the Convention, except with regard to civil jury trial.<sup>295</sup>

On this record, it is sheer fancy to attribute even the slightest significance to the use or omission of “all” in Article III’s subject matter list.<sup>296</sup> Without the support of the inconsequential “all,” Amar’s “two-tier” structure falls flat, for there is no other reason to consider Congress’ duty to vest as any less mandatory (or its capacity to divest any greater) for some categories of jurisdiction than for others.

The same “shall extend” mandate applies to *each* category prescribed in Article III; and Congress’ only power regarding judicial branch jurisdiction is to make laws appropriate “for carrying into Execution” a “judicial Power” having the extent so prescribed. Thus, the federal courts in the 1870’s acted appropriately in disregarding and ignoring Congress’ attempts at stripping jurisdiction. While Congress may create or abolish inferior tribunals and may shuffle assignments among such federal courts as exist, no category of subject matter jurisdiction, once vested, may be divested from the judiciary as a whole, except by constitutional amendment. This brigading of the judicial power against legislative discretion is a function of the *intrinsic* limits of Congress’ power, not any *extrinsic* limits like those in the Bill of Rights. And it is not a matter of inference; it is explicit on the face of the constitutional text.

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of style.

292. *See 2 id.* at 424.

293. *See 2 id.* at 576.

294. *See 2 id.* at 600-01.

295. *See 2 id.* at 628.

296. For additional critique of Amar’s reliance upon this fortuity of drafting style, see Casto, *supra* note 2, at 89, and Meltzer, *supra* note 2, at 1573-82.

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One need only be careful enough to look in the right place. Among its other functions, the carefully crafted Necessary and Proper Clause is a fundament of our Constitution's separation of powers.

*B. Discretion as to System Design*

Congress has discretion to constitute inferior tribunals (and reconstitute them) "from time to time." For "carrying into Execution" the judicial power, Congress has discretion to allocate (and reallocate) the mandated subject matter jurisdiction. Congress thus may revamp the judicial branch's structure as experience might suggest: so long as the requisites of the Necessary and Proper Clause are met, Congress can make laws to vary the number of tribunals, to differentiate them by venue, to specialize them by subject matter, to designate some for trials and others for appeals, and to organize and reorganize the system in other ways.

Congress' discretion over judicial branch design has been recognized from the beginning. As already noted, twelve years after the original Judiciary Act, Congress, by the Judiciary Act of 1801, replaced the existing circuit courts with a new set of differently constituted ones; then it changed its mind the next year and reinstated the previous regime. The Supreme Court in 1803 upheld the statutory reassignment of cases from the new and substantially different circuit courts to the original ones that were restored by the 1801 Act's repeal, observing that "Congress have constitutional authority . . . to transfer a cause from one such tribunal to another."<sup>297</sup>

This point is also illustrated by the noted Civil War era case, *Ex parte McCardle*.<sup>298</sup> While Article III mandates that a federal forum be available for each case within its terms, it certainly does not require that any case be afforded more federal hearings than one. Adjudication with no possibility of appeal is almost unheard of today, but it was the norm in some of the original states, and the Constitution permits Congress to

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297. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

298. 73 U.S. (6 Wall.) 318 (1868). *McCardle*, a journalist, was confined during Reconstruction by a military district commander in Mississippi and sought release by writ of habeas corpus. His petition was denied by the Circuit Court for the District of Mississippi, and he sought Supreme Court review.

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follow that pattern with the federal courts, whether wholesale or piecemeal.<sup>299</sup> One federal court had already heard *McCardle's* habeas corpus petition, and therefore cutting off his recourse to another court was no offense to the Constitution. In any event, however, Congress had left open another avenue of review that *McCardle* could have employed;<sup>300</sup> and certainly if Congress could have foreclosed *any* appeal, its elimination of just one alternative was constitutionally inoffensive. *McCardle* did not involve a divestment of jurisdiction from the judiciary as a whole; it rather illustrates Congress' discretion to restructure the system so long as at least one federal forum is available for each constitutionally eligible case.

The framers denied Congress discretion over subject matter jurisdiction, but their June 5th compromise about "inferior" courts did give it discretion over the judicial system's size. Moreover, what made that compromise seem tolerable to those who wanted just one federal tribunal was Madison's argument that "unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals [to the one 'supreme' court] would be multiplied to a most oppressive degree."<sup>301</sup> Not only would the single court's caseload become excessive, but also, unless the court itself were peripatetic, litigants from all over would have to travel to one, usually very distant, place, even though travel conditions were primitive. Nonetheless, no law *terminating* cases at an inferior federal court level could have passed muster as "carrying into Execution" Article III's jurisdictional terms, but for the

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299. In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), Chief Justice Chase wrote that Congress "may confer or withhold the right of appeal from" decisions of "inferior" federal courts, and if the statute being considered in *Klein* had done

nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

*Id.* at 145. Chase's assumption that the Exceptions Clause is the *source of that power* was mistaken, but otherwise his understanding of the effect of the clause was correct.

300. The *McCardle* opinion itself emphasizes this. *See* 73 U.S. (6 Wall.) at 515; *see also* Van Alstyne, *supra* note 178, at 246. Someone else did employ this alternative a few months later, bringing before the Supreme Court some of the same issues *McCardle* had tried to press. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

301. 1 FARRAND, *supra* note 61, at 124.

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Exceptions Clause qualifying the Article III mandate of Supreme Court appellate jurisdiction in non-original cases.

The purpose and function of the Exceptions Clause are therefore evident. Certainly it is not a grant of power; however, it does enlarge Congress' discretion beyond what the language of the Appellate and Necessary and Proper Clauses would otherwise allow. The judicial power must be vested to its full subject matter extent, but the Exceptions Clause makes it immaterial whether the full range of subject matter is vested in any one tribunal, even on appeal. Because and only because of the Exceptions Clause, Congress' power to curtail *Supreme Court* review of any (or even of all) Article III subject matter comports with the Necessary and Proper Clause, *so long as*, and *to the extent that*, there is some other federal court where the "excepted" matter can be heard.<sup>302</sup>

The most important ramification of its discretion over system design is that Congress can choose whether and to what extent the judicial branch should be pyramidal in form. We take our hierarchical judiciary for granted because it is familiar, but

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302. Robert Clinton reached a similar conclusion in *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, *supra* note 2, at 749-50, 754-57.

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it is *not* something the Constitution ordains;<sup>303</sup> it is just an organizational form entirely optional with Congress.

In the eighteenth century, the label “supreme” as applied to courts connoted a relative generality of competence more often than hierarchical authority. Among the original states, North Carolina had two “supreme” courts and Virginia had four; Georgia had a “supreme” court in every county, each one a trial tribunal from which there was no appeal; and Delaware had a “supreme” court with no appellate role, but the court’s rulings were subject to appellate review.<sup>304</sup> Thus it was neither accident nor anomaly when the Ninth Randolph Resolution (drafted by Virginians) proposed that the federal judiciary have “one *or more* supreme tribunals,” *in addition to* “inferior” ones,<sup>305</sup> or when Madison (a Virginian) argued for *several* courts having

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303. See generally Engdahl, *supra* note 69.

Justice Story, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), argued that Congress’ discretion regarding judicial system design is constrained. His argument combined several premises: first, that the categories “original” and “appellate” for the Supreme Court are mutually exclusive; second, that to some extent at least, the federal judicial power is exclusive; third, that Congress cannot vest the federal judicial power in states; and fourth, that “the duty to vest the *whole judicial power*” is mandatory. *Id.* at 330. From these he concluded that “congress are bound to create some inferior courts.” *Id.* at 331.

Only the last of Story’s four premises, however, was sound. The Constitution itself does not exclude state courts from any category specified in Article III; states do not need to be invested with the *federal* judicial power, because they each have *their own* (in the exercise of which the Supremacy Clause requires that they apply applicable federal law); and conceiving “original” and “appellate” as mutually exclusive ignores both the reason for that distinction and its application in practice. The provision for “original” jurisdiction originated as part of the Paterson Plan, which authorized only one national court and left virtually all litigation to begin in the states. It thus was conceived not to inhibit reallocation of workload among federal tribunals, but only to ensure that *some* national tribunal would be available in the first instance for cases thought inappropriate for consideration by states (even if not prohibited to them). The original/appellate “mutual exclusivity” view was employed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); but even then it was contrary to the Court’s own prior practice, as documented in Engdahl, *supra* note 211, at 540 n.88. From the very outset it was acknowledged that Congress may assign Supreme Court “original” cases to other federal courts instead, with “appellate” jurisdiction in the Supreme Court; and in this regard even John Marshall himself later acknowledged the error of his *Marbury* premise. See *id.* at 541 nn.90-91.

Thus, although Story was correct in perceiving that Congress has a mandatory duty to vest all the Article III *jurisdiction*, he was wrong in thinking that this limits Congress’ discretion regarding judicial *structure*.

304. See Engdahl, *supra* note 69, at 468-72.

305. See 1 FARRAND, *supra* note 61, at 21.

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“*final* jurisdiction in *many* cases”<sup>306</sup> even though not labeled “supreme.”

The first Congress in fact *rejected* the pyramidal model when establishing the judiciary in 1789. Most cases beginning in the single-judge district courts were made reviewable in a multi-judge circuit court, but only those involving admiralty or maritime matters could continue thence to the Supreme Court. Congress made the circuit courts the principal trial tribunals and allowed no appeal from them in any criminal case. Even in civil cases, Congress restricted Supreme Court review by a very large amount in controversy prerequisite established specifically to make appellate recourse rare; and there was no mechanism to ensure that decisions of the several federal tribunals would be consistent or uniform.<sup>307</sup> So far did the structure established in 1789 ignore the pyramidal “rules of judicial architecture” espoused in his lectures<sup>308</sup> that original Associate Justice James Wilson described it as a “very uncommon establishment.”<sup>309</sup>

Pyramidization evolved gradually from a combination of inadvertence and choice;<sup>310</sup> and now that we have such a structure, it remains discretionary with Congress whether and how far to change it. It might be preferable to leave this structure as is, but radically different arrangements are equally permissible constitutionally. If it seems desirable to terminate some (or even all) non-original cases at the court of appeals level, or to create some new national court for appeals, Congress certainly can do that. Any notion that the

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306. 1 *id.* at 124.

307. For documentation and further detail, see the discussion of the 1789 Act in Engdahl, *supra* note 69, at 493-501.

308.

According to the rules of judicial architecture, a system of courts should resemble a pyramid. . . . [I]ts summit should be a single point. . . . [O]ne supreme tribunal should superintend and govern all others. . . .

. . . . [Otherwise] different courts might adopt different and even contradictory rules of decision; and the distractions, springing from these different and contradictory rules, would be without remedy and without end.

2 THE WORKS OF JAMES WILSON, *supra* note 62, at 495-96.

309. 2 *id.* at 458.

310. See 2 *id.* at 501-03.



Constitution requires a particular hierarchy—or any judicial hierarchy at all—is simply uninformed.

Congress' discretion over system design also enables it to alter the flow of Article III cases from state to federal courts. Under current practice, eligible cases may be removed from state to inferior federal courts early in their proceedings; but if not so removed, they must proceed to finality in the state system, after which—in cases involving federal questions—an improbable federal review in the one overburdened “supreme” federal court may be sought. It would be equally constitutional, however, to make state court dispositions of Article III cases reviewable by one or more courts of appeals (or other *inferior* tribunals) instead. Whether that would be wise or foolish, of course, is for Congress to judge.

If federal trial dockets are overburdened by diversity cases, Congress' discretion over system design makes possible other and arguably better solutions than jurisdictional divestment (which, of course, is unconstitutional). For example, diversity cases could be afforded federal court *appellate review*, rather than a federal court trial; that should sufficiently serve the original purposes of diversity jurisdiction (albeit not all the advantageous purposes that modern lawyers might muster in its defense). Because federal courts do not have the last word on questions of state law anyway, federal review of diversity cases could be capped at the district court or court of appeals level—or entrusted to some new court or courts specialized for diversity cases. Whether to exercise diversity jurisdiction where no prejudice or other special circumstance is shown, may be left for judicial branch discretion.

Certainly changes in the judicial branch structure should only be undertaken after mature and practical deliberation. Nonetheless, arrangements unfamiliar enough to seem at first quite radical still are constitutionally allowed. Imagination and creative deliberation should not be inhibited by notions falsely attributed to the Constitution, but actually rooted in misunderstanding or habit.

### *C. Laws Effectuating Judicial Potency*

It has been generally recognized from the beginning of our constitutional jurisprudence that in major respects, at least, as to judicial potency (in contrast to jurisdiction and structure),

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Article III *is* self-executing. This difference makes it necessary to consider some features of Necessary and Proper Clause analysis that were of little or no consequence in the contexts of jurisdiction and structure, but matter a great deal as to some elements of judicial potency.

First, the Necessary and Proper Clause supports more than just those laws which are *indispensable* to effectuating other powers. The prevailing understanding since the beginning has been that the word “necessary”

imports no more than that one thing is convenient, or useful,

or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

. . . .  
 . . . [I]t cannot be construed . . . to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.<sup>311</sup>

Consequently, in order for laws regarding judicial potency to be valid it is *not* necessary that the courts be unable to proceed without them. Congress is not limited to doing for the judiciary what the judiciary cannot do for itself. Laws can qualify as any of the following: “useful, or conducive to,”<sup>312</sup> “plainly adapted,” “really calculated,”<sup>313</sup> or “reasonably adapted to,”<sup>314</sup> carrying into execution the federal courts’ judicial potency—and thus be constitutional—even if the judiciary could manage quite well without them.

Second, in every context, the Necessary and Proper Clause gives Congress *discretion to choose among* those means which are appropriate for effectuating the targeted end. Therefore, if it qualifies as appropriate “for carrying into Execution” the

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311. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412, 420 (1819); *see also* *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396-97 (1804).

312. Hamilton used these words in his 1791 bank opinion. *See* Hamilton, *supra* note 196, at 102.

313. Chief Justice Marshall used these phrases in *McCulloch v. Maryland*, 17 U.S. at 423.

314. This phrase was used in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964).

Article III judicial power, a law regarding judicial potency can be valid *even if the judges would prefer a different rule instead*. Indeed, Congress may legislate a rule of its choice which is just minimally apt, even if a different rule would effectuate the judicial power *better*. The Necessary and Proper Clause never requires that Congress choose the best means.

Third, because of the Supremacy Clause,<sup>315</sup> a law which qualifies as necessary and proper for carrying into execution the judicial power *supersedes* any discretion the judges might otherwise exercise for themselves in that regard.<sup>316</sup> Probably this is why Attorney General Randolph in 1793, while arguing in *Chisholm* that the Justices themselves could prescribe forms of process and modes of service without statutory authorization, conceded that the Justices could *not* have done so if process and service had been “otherwise prescribed by law.”<sup>317</sup> Four of the Justices agreeing with Randolph (Paterson, Ellsworth, Blair, and Wilson) had been present with him at the Convention six years earlier; and Wilson apparently was the author of the Necessary and Proper Clause. Probably they all remembered that one function that clause was specifically calculated to perform was empowering Congress to address any details requisite to effectuating the judicial power that were left unaddressed in the Constitution itself. They could not have failed to understand the application of the Supremacy Clause to legislation premised on the Necessary and Proper Clause.<sup>318</sup>

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

Reflecting its origin in the Paterson Plan (under which only one federal court would exist and virtually all litigation would commence in state courts) the *second* part of the Supremacy Clause specifies *state* judges only. Beyond evidencing that origin of the Clause, this specific address to state courts demonstrates that even the finished Constitution contemplates state courts handling federal questions as a regular part of their routine. The *first* part of the clause, however, is sufficient as a statement of the supremacy principle, which of course is equally binding on the federal courts.

316. In certain states, a separation of powers provision in the state constitution may give court rules precedence over statutes when they conflict. *See, e.g.*, PA. CONST. art. 5, § 10(c) (suspending statutes in conflict with court rules). In the federal Constitution, however, the Supremacy Clause establishes the opposite rule—provided, of course, the requisites of the Necessary and Proper Clause are satisfied.

317. “The mode [of service of process] *if it be not otherwise prescribed by law*, or long usage, is in the discretion of the Court.” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 428-29 (1793) (emphasis added).

318. Justice Iredell’s disagreement in *Chisholm* over the *scope* of the power that inheres in the judiciary without legislation does not suggest any disagreement either

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It by no means follows, however, that *every* statute regarding judicial potency supersedes judicial discretion. Here, just as with subject matter jurisdiction, the Necessary and Proper Clause operates as a one-way ratchet: it only authorizes “Laws . . . for carrying into Execution” the “Powers vested by this Constitution . . . in any Department or Officer,” not for diminishing those powers or interfering with their independent exercise by the respective branches.

It is harder to apply this ratchet concept to judicial potency than to jurisdiction, however, because some laws might assist in certain respects while hindering in others. Furthermore, opinions might differ as to whether a law hinders or helps, or as to whether a particular hindrance inhibits judicial potency materially. In addition, the *intrinsic* Necessary and Proper Clause issue of whether a law effectuates (or instead debilitates) judicial potency can easily be obscured when vague notions of the separation of powers are discussed as an *extrinsic* constraint.<sup>319</sup>

Given these complications, determining whether a particular law sufficiently effectuates judicial potency to pass muster under the Necessary and Proper Clause requires the application of judgment. Moreover, because the relevant considerations are numerous and complex, differences in judgment must be expected, and the question therefore becomes: whose judgment is to control, and how far?

Generally, courts defer to *congressional* judgments under the Necessary and Proper Clause. The classic rule is that Congress' finding of a telic relation to some end within an enumerated power prevails even if it can be proven wrong, so long as it is rationally based.<sup>320</sup> However, this “rational basis”

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as to the *source* of Congress' relevant power, or as to its *supremacy* over judicial preferences when exercised.

319. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

320. This “rational basis” test under the Necessary and Proper Clause, however, is very different from the “rational basis” test applied at the low-end of equal protection and due process review. In those contexts—because the law is one that the government otherwise has power to make—it is sufficient “if there is any reasonably conceivable state of facts that could provide a rational basis,” regardless of what the legislature had in mind. *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The situation is quite different where the very existence of congressional power is at issue and a telic judgment is the indispensable requisite of that power. Under the classic rule the legislature itself must actually

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rule developed, and is most often employed, where the Necessary and Proper Clause operates *in the context of Congress' own* other powers (such as the commerce power). In such contexts, of course, the discretion over means given to Congress by the Necessary and Proper Clause is compounded by the discretion Congress itself enjoys over the ends by virtue of those other power grants. It is because of Congress' plenary power *over the ends* that no review of the chosen means more exacting than "rational basis" is appropriate. Closer scrutiny, for example, could displace Congress' choice of *less effective* means (preferred for political reasons) for achieving ends as to which Congress has plenary discretion, and therefore free choice whether to achieve much or little or nothing at all. This would curtail Congress' power over the end by constraining its choice of means.

Where the end is constitutionally confided not to Congress' discretion, however, but to that of another branch—for example, where Congress acts to effectuate the independent power of the judicial branch—it seems highly appropriate for the judiciary to make its own judgment whether the power contemplated by the Constitution is *actually* facilitated, or

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make this crucial judgment, and a reviewing court must not substitute its own judgment instead. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819).

Thus, as Justice Jackson put it, under the Necessary and Proper Clause "[t]he predominant consideration is that we should be sure Congress has intentionally put its power in issue by the legislation in question," and should only defer "to deliberate judgment by . . . Congress . . . when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved." *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953). To the same effect, Justice Black observed:

[T]he federal government may find that regulation of purely local and intrastate commerce is "necessary and proper" to prevent injury to interstate commerce. In applying this doctrine to particular situations this Court properly has been cautious . . . . It has insisted upon "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

*Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 652-53 (1944) (Black, J., concurring) (citations omitted).

The dissenting Justices in *United States v. Lopez*, 514 U.S. 549 (1995), utterly failed to grasp this distinction, mistaking "rational possibility" and "a merely implicit congressional judgment" as sufficient to satisfy the "rational basis" requirement of the Necessary and Proper Clause just because they suffice for purposes of due process and equal protection. *See id.* at 603-04, 614 (Souter, J., dissenting); *id.* at 615, 618-19 (Breyer, J., dissenting).

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instead impeded, by any congressional act purporting to help. There is no reason for the judiciary to indulge rational mistakes by Congress when the power encumbered is the constitutionally independent power of the judiciary itself.

Moreover, the "rational basis" standard under the Necessary and Proper Clause developed in "federalism" cases as a standard for reviewing the telic justification for federal laws reaching matters which otherwise are for governance by states. Of course the Constitution does not reserve any activity *exclusively* for state legislation,<sup>321</sup> and therefore a closer scrutiny of Necessary and Proper Clause enactments could not be justified as protecting the states' "turf." In contrast, however, the Constitution does certainly contemplate a high degree of distinctness and relative exclusivity among the three branches of the federal government. Therefore, although mere "rational basis" review of Congress' perceptions of telic relations between extraneous means and enumerated power ends might be sufficient for federalism cases, it seems inadequate to ensure the greater distinctness, independence, and relative isolation of functions required by the separation of powers.

Federal judges rightly insist that they must determine the meaning of constitutional words and phrases for themselves, rather than yield to interpretations by a coordinate branch.<sup>322</sup> "The judicial Power of the United States" is a constitutional phrase, and the courts must not defer to Congress' view of what this language means; it would be anomalous to compromise the cardinal feature of judicial independence where the judiciary's own power is at stake. Of course "carrying into Execution" is distinguishable from ascertaining meaning;<sup>323</sup> but when the power a law purports to carry into execution belongs to the

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321. The Tenth Amendment affirms popular sovereignty and the default competence of the states, but it says nothing to curtail or delimit the powers that *are* "delegated to the United States by the Constitution" (including, of course, the power delegated by the Necessary and Proper Clause). See David E. Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 94-100 (1985); see also Gardbaum, *supra* note 97.

The notion of mutually exclusive state and federal spheres was a hallmark of the discredited "dual federalism" error. See Engdahl, *supra* note 89, at 761-64.

322. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Nixon v. United States*, 506 U.S. 224, 228 (1993); see also *Powell v. McCormack*, 395 U.S. 486, 519 (1969).

323. Cf. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

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judicial branch, *even a rational mistake* by Congress as to whether the law *actually* effectuates that power might result in the judicial power being diminished or defeated in fact.

Thus, to undertake nothing more than “rational basis” review of laws purportedly enacted “for carrying into Execution” the judicial power would leave the judiciary vulnerable to being impeded, crippled or disempowered by congressional inadvertence or mistake (not to suppose mischief). For this reason, while the practical insights and deliberations of Congress certainly merit thoughtful attention, the judicial branch must decide for itself whether any act of Congress regarding the judicial branch *actually does* help effectuate the judicial power. Judiciary laws must not be disregarded simply because they are less useful than alternatives the judges might prefer; but when the judges find such a law *detrimental to* judicial potency, they may disregard it as beyond Congress’ power.

If this is true, the difference between supposing that Congress has plenary power to regulate the judicial branch and recognizing instead that Congress’ relevant power derives from the Necessary and Proper Clause is potentially profound. The difference is quite substantial and practical, however, even if nothing more rigorous than a rational basis test should be employed. A small handful of examples will serve to illustrate the point.

### 1. Prudential standing

For almost forty years now, the law of “standing” has been an index of the controversy over the “public law” model<sup>324</sup> of litigation. One might have expected that once a tenuous hegemony had been attained by those most insistent that “[t]he federal courts were simply not constituted as ombudsmen of the general welfare,”<sup>325</sup> standing law would return toward pre-Warren court conceptions; and for a time, at least, that seemed to be the direction.<sup>326</sup> Indeed, the return might have been

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324. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

325. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982).

326. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see also Allen

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thought accomplished when Justice Scalia, writing for a unanimous Court in 1997, turned what had been a dichotomy since 1970<sup>327</sup> into an apposition, saying standing requires “that the plaintiff have suffered an ‘injury in fact’—an invasion of a judicially cognizable interest.”<sup>328</sup>

But judicial doctrine about standing had come to distinguish between principles attributed to Article III’s “case or controversy” requirement and principles considered rules of prudence instead.<sup>329</sup> Because one of those “prudential” considerations involved looking to “the zone of interests to be protected . . . by the statute . . . in question,”<sup>330</sup> it became easy to equivocate between prudence exercised judicially in adjudication and discretion exercised by Congress in legislation. Thus, Chief Justice Rehnquist, who had written in 1982 that federal courts are not “ombudsmen of the general welfare,”<sup>331</sup> casually conceded in a 1997 footnote for the Court that a statute saying, “[a]ny Member of Congress or any individual adversely affected”<sup>332</sup> may sue, “eliminates any prudential standing limitations.”<sup>333</sup> The same Chief Justice in 1998, in the *Akins* case, joined in finding no “prudential standing” barrier where Congress had “intended to authorize this kind of suit.”<sup>334</sup>

However, the notion that Congress has *carte blanche* to broaden or restrict standing within the bounds of Article III, is unsustainable. Prudence is part of what *judging* is about, and the power to make judgments about cases and controversies within the parameters of Article III—including whether it is prudent to hear them—is constitutionally confided to the judiciary as an aspect of “the judicial Power.” If a court undertook, for example, to determine what regulations of

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v. Wright, 468 U.S. 737 (1984).

327. “The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact . . . . The ‘legal interest’ test goes to the merits. The question of standing is different.” *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 152-53 (1970); *see also* discussion *supra* note 6.

328. *Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997).

329. *See, e.g., Warth v. Selden*, 422 U.S. 490, 498-502 (1975).

330. *Association of Data Processing*, 397 U.S. at 153; *see also* National Credit Union Admin. v. First Nat’l Bank & Trust Co., 118 S. Ct. 927 (1998).

331. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982).

332. *Raines v. Byrd*, 117 S. Ct. 2312, 2315 (1997).

333. *Id.* at 2318 n.3; *see also* discussion *supra* note 6.

334. *Federal Election Comm’n v. Akins*, 118 S. Ct. 1777, 1784 (1998).



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interstate commerce are prudent, that immediately would be perceived as usurping *legislative* power; and at least as a general rule, the reciprocal seems equally true.

In fact, no attempt seems ever to have been made to articulate any rationale supporting a *general* power of Congress to dictate or dispense with prudential standing rules.<sup>335</sup> One might conceivably assert it as another “necessary implication” of the Tribunals Clause, like the supposed plenary power of Congress over jurisdiction; but that “necessary implication” theory has already been shown untenable. Or, if the Exceptions Clause were a grant of power, one might argue that statutes on standing are among “such Regulations as the Congress shall make”; but that clause, of course, does not reach *inferior* courts. Thus, unless materialized from thin air by some jurisprudential magic, any power in Congress to legislate about prudential standing must be traced to (and delimited by) the Necessary and Proper Clause—or one of the “enforcement” clauses that are modeled after the Necessary and Proper Clause but adapted for effectuating rights instead of powers.<sup>336</sup>

This can be done to justify the compromise of prudential standing rules by the Fair Housing Act of 1968,<sup>337</sup> for example. That statute was part of the Civil Rights Act of 1968, enacted pursuant to Congress’ enumerated power to enforce the Thirteenth Amendment “by appropriate legislation.”<sup>338</sup> Other civil rights laws, enforcing the Fourteenth Amendment for example, arguably could compromise prudential standing in much the same way.

But this is very different from positing power in Congress to dispense at will with prudential standing. The enforcement clauses authorize only such laws as are “appropriate,” and that word subsumes not only the telic (“necessary . . . for”) but also the “proper” requisite explicit in the Necessary and Proper Clause. “Proper,” and hence “appropriate,” import more than

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335. See discussion *supra* note 6.

336. See U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 1, cl. 5; *id.* amend. XV, cl. 2; *id.* amend. XIX (second paragraph); *id.* amend. XXIII, § 2; *id.* amend. XIV, § 2; *id.* amend. XXVI, cl. 2.

337. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

338. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 439 (1968).

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just the telic adaptation to an end: as Chief Justice Marshall said, the law must “consist with the letter and spirit of the constitution.”<sup>339</sup>

So, far from reposing in Congress plenary discretion, a statutory provision on standing must pass two different screens. First, it must conduce to some civil rights or enumerated power end; and on this question, Congress' rational judgment merits deference. In addition, however, it must comport with the “spirit” as well as the letter of the Constitution. This calls upon judges to exercise for themselves the same kind of prudence that generated the prudential standing rules in the first place. In the light of Congress' rational choice of means and political commitment to a particular civil rights or enumerated powers end, judicial prudence might suggest relaxing a requirement that judicial prudence in other circumstances might enforce; but the prudence ultimately must be the judiciary's own.<sup>340</sup>

The result under something like the Fair Housing Act should probably be the same. In other instances, however, recognizing that both the Necessary and Proper and the Enforcement Clauses call for important *judicial* judgments could easily lead to different conclusions than might be drawn from the assumption that Congress may dispense with prudential standing at will. In 1998, for example, the vote in *Akins* might have been different had the Justices conceived of this middle ground between capitulating to Congress and racing to the ramparts of Article III.<sup>341</sup>

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339. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

340. This is analogous to the contrast between considering Congress' practical judgment as relevant to judicial assessments of equal protection and yielding to Congress' judgment. See *Katzenbach v. Morgan*, 384 U.S. 641, 665-71 (1966) (Harlan, J., dissenting); see also *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

341. The three dissenters in *Akins* found unsatisfied the *constitutional* requisites of standing. The other six disagreed with that; but had it occurred to them to doubt Congress' power to displace the judges' own prudence in the exercise of their “judicial Power,” some of those six might have voted the other way even without asserting a constitutional standing problem.

There is, however, another credible way to explain *Akins*. Breyer's opinion for the Court seems to characterize the statute not as authorizing suits by zealots with no legal rights at stake, but rather as conferring a substantive legal right upon individuals (albeit upon many individuals at once)—a substantive right, in fact, “directly related to voting, the most basic of political rights” (which also belongs to many individuals at once). As Breyer put it, “there is a statute which . . . does seek

## 2. *Abstention*

No less than equity courts in our historical tradition, federal courts have the discretion requisite to doing justice—and to doing it responsibly in our complex federal system. John Marshall's hyperbole that for federal courts to decline exercising their jurisdiction would be "treason to the constitution"<sup>342</sup> might have measured his own disinclination, but it is mistaken as a proposition of law. (When Congress for a century declined substantially to exercise its jurisdiction over interstate commerce, was that treason to the Constitution?) In a number of circumstances the federal judiciary has deemed it appropriate to abstain.<sup>343</sup>

In fact, the earlier notion that abstention is permissible only in highly "exceptional circumstances"<sup>344</sup> has been yielding in the face of expanding experience, in certain instances even to the point of permitting trial court discretion.<sup>345</sup> If abstention doctrine has grown ungainly to the point of uncertainty and confusion, a legislative "restatement" in something like the manner suggested by a former Solicitor General in 1990<sup>346</sup> might be useful as guidance; but an attempt at legislative

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to protect individuals such as respondents from the kind of harm they say they have suffered." *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777, 1784 (1998). "[W]e conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit." *Id.* at 1786. This language is reminiscent of the Court's statement in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), that "Congress has thus conferred on all persons' a legal right to truthful information about available housing." *Id.* at 373. So understood, the majority opinion in *Akins* could readily be joined even by an unreconstructed adherent of the pre-1970 "legal interest" test for standing (if he were willing to indulge "legal interests" that are very widely shared).

342. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

343. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Younger v. Harris*, 401 U.S. 37 (1971); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

344. See *Colorado River Water Conservation Dist.*, 424 U.S. 800.

345. See *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); see also *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978). But see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

346. See *Lee & Wilkins*, *supra* note 4, at 361, 364, 366, 371, 374.

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prescription or proscription would be vain. Legislation attempting to curtail or delimit judicial abstention does not seem supportable as necessary and proper to carry into execution the judiciary's own discretion (i.e., power) in this regard. By structuring the judiciary in hierarchical form, Congress has made it possible for the Supreme Court to oversee and govern abstention by the other federal courts; but Congress lacks power itself to constrain or divest not only subject matter jurisdiction but any dimension of the judicial power, including discretion to abstain.

For the same reason, it seems impossible to uphold the Anti-Injunction Act.<sup>347</sup> Why Congress in 1793 enacted this provision is unclear, but in modern times the only constitutional ground intimated for it has been the specious inference of plenary congressional discretion drawn from the Tribunals Clause. Justice Sutherland for the Court in 1922, applying the Act to foreclose enjoining an equivalent state proceeding commenced after a federal proceeding had begun, said that Congress, "may give, withhold or restrict such jurisdiction at its discretion. . . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part."<sup>348</sup> Justice Frankfurter for the Court in 1941 alluded to the same faulty premise when applying the Act to preclude enjoining state court relitigation of an already federally adjudicated claim.<sup>349</sup>

With that Tribunals Clause premise discredited, however, no constitutional support for the Anti-Injunction Act can be found. However laudable its aim may be, a statute attempting to foreclose a remedy otherwise judicially deemed suitable to the circumstances of a case within the court's jurisdiction cannot be considered a law "for carrying into Execution" the power (hence discretion) of the judicial branch.

In some cases, without actually impugning its validity, the Supreme Court has countenanced compromising the Anti-Injunction Act or broadening its exceptions.<sup>350</sup> Perhaps judicial

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347. 28 U.S.C. § 2283.

348. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

349. "We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 141 (1941).

350. *See, e.g., Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518 (1986);

power, like truth, eventually will prevail; the Act is supported only by a false impression of Congress' power.

However, the policy considerations seeming to underlie the Act are certainly appropriate for courts to consider in making *their own* judgments on the appropriateness of an injunction (or any other remedy).<sup>351</sup> Thus, the Act might only be a gratuitous instruction to do what the courts would do anyway. Therefore, while in terms of constitutional principle the Anti-Injunction Act seems unsustainable (and so should not be taken as "precedent" or as a model for other legislation), its validity might never be confronted if their own good judgment leads the judges to exercise their discretion the same way.

### 3. Remedies

Courts in our tradition are forums for *redress*, not just the airing of gripes. English courts were fashioning remedies long before the primordial legislature took form: the significance of statutes dates to the reign of Edward I in the later thirteenth century, but by then the Court of Common Pleas had been remedying injustice through its writ system for about a hundred years, and Glanville and Bracton had already written their accounts of common law remedies. Surely "remedy" is the most fundamental and essential element of judicial power. Chief Justice Marshall asserted, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."<sup>352</sup>

Insofar as this "first duty" falls upon courts, the "protection of the laws" owed to those proving their claims is, precisely, a sufficient *remedy* or *relief*. To ensure fulfillment of this duty,

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Mitchum v. Foster, 407 U.S. 225 (1972); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

The American Law Institute in 1969 proposed a revision of the Act to codify judicial compromises that already had been made by that time. See AMERICAN LAW INSTITUTE, STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 51-52 (1969). For a more recent proposal, see Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 319-20.

351. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

352. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

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the Constitution provides for an *independent* branch competent to exercise “the judicial Power of the United States” without leave of any political body. Giving relief *as deemed appropriate by the courts* is an inherent and indispensable part of the federal judicial power.<sup>353</sup> It therefore is not credible to maintain that federal courts cannot remedy violations of legal right unless and until Congress creates a cause of action enabling them to do so.

As to rights claimed under federal statutes, the question of remedy can merge with the question of right; for whether any remedy is available depends ultimately on whether there is a right, and whether Congress created a right is sometimes inferred from what (if any) remedy Congress contemplated.<sup>354</sup> But there are rights that are not subject to congressional control. In particular, it seems anomalous to suppose that unconstitutional acts may be remedied only if and in such ways as Congress might provide.<sup>355</sup> Exercising its own judgment in light of other redress mechanisms the legislative branch might have put in place, the judiciary itself might opt to deny judicial remedies,<sup>356</sup> but this is a matter for the judiciary's own

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353. See *Bell v. Hood*, 327 U.S. 678 (1946); cf. *Burton v. Mayer*, 118 S.W.2d 547 (Ky. 1938) (dealing with state judicial power).

The same arguably is true as to certain defenses. In *Yakus v. United States*, 321 U.S. 414 (1944), the Supreme Court declined to countenance a constitutional challenge to the Emergency Price Control Act of 1942 in defense to a criminal prosecution under the Act, where the Act allowed challenges to the Act to be heard only on review of administrative proceedings which the defendant had foregone. The relevant section of the Act, § 204, however, was written in terms of “jurisdiction,” and the decision plainly rests on the false premise that Congress' power over jurisdiction is plenary. The actual operation of the Act, however, seems plainly distinguishable from jurisdiction, and equivalent to what was rejected in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). See also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Justice Rutledge's dissent in *Yakus* was less persuasive to his brethren than it might have been, because even he conceded plenary control over jurisdiction. The outcome in *Yakus* thus illustrates that the orthodox view entails mischief even for matters distinguishable from jurisdiction itself. See also *Plaut*, 514 U.S. 211.

354. See, e.g., *Thompson v. Thompson*, 484 U.S. 174 (1988); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986).

355. The Supreme Court's holding in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding that even without authorizing legislation a petitioner “is entitled to recover money damages for any injuries he has suffered as a result of [a government] agent's violation of the [Fourth] Amendment”), was therefore too tentative and modest. Indeed, it seems inappropriate even to *analogize* claims of constitutional violation to “implied causes of action” under statutes.

356. Cf., e.g., *Bush v. Lucas*, 462 U.S. 367 (1983).

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discretion. For a court to decline judicial relief for a violation of a constitutional right simply because Congress deems an alternative to be sufficient would be to abdicate an essential aspect of the "the judicial Power of the United States."<sup>357</sup>

Legislation adding or enhancing remedies, however, certainly can pass muster under the Necessary and Proper Clause. An example is the Declaratory Judgment Act,<sup>358</sup> supplementing the judicial arsenal with a new remedial device that helps to effectuate the judicial power without hobbling judicial discretion. The Act is compatible with traditional judicial practice although not historically a part of it.

#### 4. *Practice*

Rules of judicial practice and procedure cannot be thought to depend on statutory authorization. The earliest Justices made their own way concerning process in original actions, and doubtless would have done so on all manner of procedural matters even if the Judiciary Act had not authorized them to. As explained at the beginning of this section on "Laws Effectuating Judicial Potency," however, the Necessary and Proper Clause empowers Congress to make judiciary laws even if they are not indispensable because the courts could make do quite well without them, and the Supremacy Clause enables those laws to displace judicial preferences so long as the requisites of the Necessary and Proper Clause are met.

Nonetheless, the operation of the Rules Enabling Act<sup>359</sup> is subject to serious constitutional doubt. Enacted evidently on the false premise of plenary power under the Tribunals Clause, it postpones the effect of judicial rule changes to allow for congressional review and disapproval. This seems designed for constraining rather than "carrying into Execution" the rule-

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357. It might very well be that proliferation of purported "constitutional rights" compounds the social cost of this indefeasible judicial prerogative. That problem, however, must be dealt with by frankly and critically assessing what "rights" are truly of constitutional dimension, not by abrogating the independent judicial power.

358. 28 U.S.C. § 2201 (1994); *see* *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

359. 28 U.S.C. § 2072 (1994).

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making competence that is a self-executing aspect of the Article III “judicial Power.” The experience with the Federal Rules of Evidence is illustrative. Congress first blocked their implementation,<sup>360</sup> then enacted them legislatively with numerous amendments;<sup>361</sup> it then prohibited judicial rule-making about testimonial privilege<sup>362</sup> and directed federal judges to follow state practice rather than using their own judgment on matters of privilege, presumptions, and witness competency.<sup>363</sup> If nothing more rigorous than a “rational basis” standard were applied, these directives might possibly be sustained as congressional choices among various alternatives suitable for carrying the judicial power into execution. If, however, as I have urged, a “rational basis” standard is inappropriate here, it must be open to the judges themselves to determine whether the judicial power is facilitated by such constraints (in which case they must be followed, even if not to their liking), or instead is hobbled (in which case they may be ignored).

Had the Necessary and Proper Clause basis of Congress’ power regarding the judiciary been recognized sixty years ago, affected litigants might have thought to challenge some congressionally prescribed rules of practice before now. However, after decades of reliance and habit, pragmatic considerations might be persuasive against retrospective applications of this analysis to settled rules of practice. That, however, cannot justify obeisant compliance with comparable directives enacted in the future. Statutes prescribing or foreclosing inferences, creating presumptions, and allocating burdens of pleading, production, and persuasion, all merit scrutiny in terms of whether they help rather than hinder the courts in their own exercise of the “judicial Power of the United States.” Any such statute should only be followed insofar as the judges find it apt to facilitate, rather than to displace, their own sound discretion in matters of proof.<sup>364</sup>

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360. See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

361. See Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

362. See 28 U.S.C. § 2076 (1994).

363. See, e.g., FED. R. EVID. 302 (presumptions), 501 (testimonial privilege), 601 (witness competency) (1997).

364. Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, the Supreme Court invalidated a statute which declared that pardons accepted without



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Many other examples can be conceived. A law directing reinstatement of cases already finally dismissed, for example, could be found offensive to the *intrinsic* limit of the Necessary and Proper Clause by a line of reasoning not very different from that recently employed by the Supreme Court in the guise of an *extrinsic* "separation of powers" limit in the *Plaut* case.<sup>365</sup> Perhaps a law mandating the trial of cases within a prescribed period regardless of exigencies confronting the litigants or other demands on the judiciary's time<sup>366</sup> could be challenged as imperious interference, rather than assistance, with effectuating the judicial power. Now that devices like mistrial, new trial, and directed verdict have been long and routinely used by courts, laws restricting them<sup>367</sup> might be difficult to justify as "carrying into Execution" the judicial power.<sup>368</sup> The same might be said of laws circumscribing contempt procedures in ways found by the judges to interfere with the maintenance of courtroom order and decorum.<sup>369</sup>

## V. CONCLUSION

Once the true basis of Congress' power to legislate regarding the judiciary is perceived, and the intrinsic limits of that power are understood, consequences appear almost

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written disclaimer and protest, and reciting that the person pardoned had taken part in the Confederate rebellion, must be treated as "conclusive evidence" that the person had aided the rebellion and so was disqualified from recovering his captured property.

365. See *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995).

366. Cf. *Atchison, T. & S.F. Ry. v. Long*, 251 P. 486 (Okla. 1926).

367. Cf. *DeChastellux v. Fairchild*, 15 Pa. 18 (1850); *Lewis v. Webb*, 3 Me. 326 (1825).

A Connecticut act of this kind was upheld in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). At that very early date, however, Connecticut had no constitution reflecting a separation of powers; it still was operating under the surviving colonial charter and practice which gave to its legislature (called the "General Court") judicial as well as legislative powers. See *id.* at 395.

368. The first Judiciary Act recited that federal courts should grant new trials "for reasons for which new trials have usually been granted in the courts of law." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83. There is no reason to think, however, they could not have done so without that statutory authorization.

369. Section 17 of the 1789 Judiciary Act recited that federal courts "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." However, this statutory recognition was not deemed requisite to a power in those courts to sanction for contempt. Early Justices and commentators regarded the power to deal with contempts as inherent in the judiciary, as did their successor Justices a century later. See, e.g., *Michelson v. United States*, 266 U.S. 42, 65-66 (1924).

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everywhere one looks in the law of federal courts. The potential ramifications are too numerous to be listed, much less evaluated, in a single article or by a single commentator; but the examples suggested here—some as to jurisdiction, some as to structure, and some as to judicial potency—are sufficient to show the thesis of this article to be potentially quite unsettling. One of the most beneficent functions of a written constitution, however, is occasionally to impel some critical rethinking of conceptions which have come by long habit to prevail, but which cannot be squared with what had once been cardinal and still is fundamental. The Necessary and Proper Clause supplies a cogent rationale enabling Congress to do all that might be needed to help the judiciary do its job. The intrinsic limits it contains, however, preclude legislation subverting the judicial independence that is crucial to the justice our Constitution was designed to establish.