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Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III

Robert J. Pushaw, Jr.[*]

Article III of the Constitution[1] is so complex that its meaning has never been established conclusively, despite two centuries of intensive analysis. A perfect reading of the judiciary article will likely continue to prove elusive. Therefore, a more realistic goal is to determine which of the many competing interpretations of Article III best explains its text, structure, and history. This Article argues that the "Neo-Federalist" approach, developed originally by Akhil Amar[2] and revised by me,[3] provides an ac-

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* Associate Professor, University of Missouri School of Law. J.D., Yale, 1988. Two groups of people deserve special thanks. First, several scholars who have extensively analyzed Article III's meaning—Akhil Amar, Barry Friedman, Vicki Jackson, Dan Meltzer, and Jim Pfander—shared their considerable wisdom with me. Second, my colleagues Christina Wells, Tracey George, Bill Fisch, and Martha Dragich gave me prompt, detailed, and thoughtful critiques. I would also like to acknowledge the generous research support provided by the Missouri Law School Foundation and the John M. Olin Foundation at Yale Law School.

1. Article III has three major parts. First, Section 1 provides that federal judicial power "shall be vested" in a Supreme Court and (if Congress chooses) in inferior courts, and that all judges "shall . . . receive" life tenure and a salary that cannot be reduced. Second, Section 2, Paragraph 1 declares that "the judicial Power shall extend" to (1) "all Cases" arising under federal law, "all Cases" in admiralty, and "all Cases" affecting foreign ministers; and (2) "Controversies" in which the United States is a party, and "Controversies" between (a) states, (b) a state and citizens of another state, (c) citizens of different states, (d) citizens claiming lands under grants of different states, and (e) a state (or its citizens) and a foreign nation (or its citizens or subjects). Third, Paragraph 2 of Section 2 grants the Supreme Court original jurisdiction over "all Cases" affecting foreign ministers and state parties, as well as appellate jurisdiction over "all the other Cases" mentioned in Paragraph 1, subject to Congress's "Exceptions" and "Regulations."

2. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) [hereinafter Amar, *Neo-Federalist*]; Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter Amar, *Two-Tiered*]; Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651 (1990) [hereinafter Amar, *Reports*].

3. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

count of Article III that is more satisfying than John Harrison's recent modification of Henry Hart's dominant interpretation.[4]

I. THE RIVAL INTERPRETATIONS OF ARTICLE III

A. The Hart School

Professor Hart claimed that Article III grants Congress near-plenary control over federal jurisdiction.[5] He relied primarily upon the Supreme Court's construction of two constitutional provisions. First, *Ex parte McCardle* upheld Congress's broad discretion to make "Exceptions" and "Regulations" to the Court's appellate jurisdiction.[6] Second, the Court has long read the constitutional provisions authorizing Congress to establish inferior courts as implying absolute control over their jurisdiction.[7] By combining these two powers, Congress generally can strip the Court of appellate jurisdiction and not assign that jurisdiction to lower federal courts, thereby leaving the exempted matter to state tribunals.[8]

For three decades, the legal academy—most notably Professors Bator, Gunther, Ratner, Redish, Tribe, and Wechsler—accepted the premise that Congress has vast control over federal court jurisdiction.[9] The Hart school's reading of the

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4. *See* 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). Professor Harrison builds upon 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).

5. *See* Hart, *supra* note 4, at 1362-64.

6. 74 U.S. (7 Wall.) 506, 513-14 (1868) (citing U.S. CONST. art. III, § 2, cl. 2). *See* Hart, *supra* note 4, at 1363-64 (examining Congress's power over the Court's appellate docket).

7. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 697-98 (1992) (citing U.S. CONST. art. I, § 8, cl. 9, and U.S. CONST. art. III, § 1); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); *see also* Hart, *supra* note 4, at 1362-64 (discussing legislative power over lower federal courts).

8. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943); Hart, *supra* note 4, at 1372-74; *see also id.* at 1401 ("[S]tate courts . . . are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."). Professor Hart asserted, however, that Congress could not make exceptions that would "destroy the essential role of the Supreme Court in the constitutional plan"—an admittedly "indeterminate" test. *Id.* at 1365.

9. Of course, they disagreed over the precise contours of this power. Indeed, only Professor Ratner concurred wholeheartedly with Hart. *See* Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 200-02 (1960) (contending that Congress cannot use its substantial "exceptions" authority to undermine the Court's "essential functions" of ensuring the

"Exceptions" and "Inferior Courts" Clauses, while reasonable, does not fully account for other provisions in Article III or for its underlying history and political theory.

B. The Neo-Federalist Approach

To fill such gaps, Professor Amar presented his "Neo-Federalist" view in 1985. He sought to provide a "holistic" interpretation of Article III by parsing its language, examining its internal structure, and describing its relationship to broader constitutional principles such as separation of powers and federalism.[10]

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supremacy and uniformity of federal law).

Initially, Professor Wechsler appeared to share Hart's view: Hart credited Wechsler's collaboration on his seminal article, Hart, *supra* note 4, at 1363, which was immediately reprinted in HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1st ed. 1953). Later, however, Wechsler clarified that he regarded Congress's control over federal court jurisdiction as virtually unbounded, and thus he rejected Hart's claim that Congress could not make jurisdictional exceptions that would thwart the Court's special role in interpreting the Constitution. *See* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965). Several distinguished scholars endorsed Wechsler's position. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-31, 1038-39 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898-915 (1984).

Professor Redish agreed with the Wechslerian idea that Article III does not restrict Congress's authority over federal jurisdiction, but he argued that other constitutional provisions impose such limitations. For example, the Due Process right to an independent forum would be violated if Congress tried to prevent both the federal and state courts from reviewing claims of unconstitutional governmental conduct. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 24-45 (2d ed. 1990). For another attempt to identify non-Article III boundaries on Congress's power, see Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981) (claiming that Congress cannot selectively repeal jurisdiction over cases involving particular disfavored constitutional rights).

Finally, a few commentators have focused on structural constitutional restraints on Congress's power. *See, e.g.*, Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (concluding that the Constitution's text, structure, and history—especially Article III's tenure and salary guarantees and the necessity of federal judicial review of allegedly unconstitutional state conduct—prohibit Congress from exercising its power over jurisdiction to eliminate all federal court adjudication of constitutional claims against state and federal officials).

For a good discussion of the range of approaches within the Hart school, see Daniel J. Maltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 n.2, 1609 & n.144, 1613, 1619 & n.184, 1624 & n.210, 1628 nn.225-26 (1990).

10. *See* Amar, *Neo-Federalist*, *supra* note 2, at 206-08, 209 n.9, 211-59. Amar built upon 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) (arguing that the Framers intended to require Congress to allocate to federal courts

Furthermore, Amar exhaustively analyzed Article III's drafting, ratification, and implementation by the early Congress and Supreme Court, with a special focus on the five leading Federalist thinkers: James Madison, James Wilson, Alexander Hamilton, John Marshall, and Joseph Story.[11] Finally, Amar integrated this textual, structural, and historical evidence into a comprehensive theory that helped explain the evolution of the federal system.[12]

Amar argued that Article III creates two tiers of federal jurisdiction. First, it declares that federal judicial power "shall be vested" in independent federal courts and "shall extend" to "all Cases" involving federal law, admiralty, or foreign ministers. Amar labeled this tier "mandatory" because Congress "shall" (i.e., must) grant federal courts jurisdiction, either original or appellate, over "all" (i.e., every one) of these cases.[13] Thus, he rejected Hart's assumption that such matters could be committed ultimately to state courts, which lack the federal judiciary's independence and cannot always be trusted to enforce federal law.[14] Second, Article III omits the word "all" in denoting six types of "Controversies" involving specified parties (e.g., the United States, states, foreign nations, and citizens of these governments). Amar deemed this tier "permissive" because Congress could—but did not have to—grant federal courts jurisdiction over such disputes.[15]

Because Amar premised his textual argument on the presence and absence of "all," he discounted the significance of Article III's shift from "Cases" to "Controversies." Characterizing these terms as "legally synonymous," Amar suggested that "the

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every type of case and controversy listed in Article III, and that therefore Congress can make exceptions to the Supreme Court's appellate jurisdiction only if that jurisdiction is granted to a lower federal court). Although Professor Clinton made a significant intellectual contribution, I find Amar's refinement of his thesis more persuasive and thus will concentrate on defending that position here.

11. In developing this history, Amar relied primarily upon MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911); the essays of Madison and Hamilton in *The Federalist*; JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1901); the Judiciary Act of 1789, ch. 20, 1 Stat. 73; and the jurisdictional decisions of the Marshall Court, particularly Justice Story's opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See* Amar, *Neo-Federalist*, *supra* note 2, at 207-08 & n.7, 208-09 n.9, 210-15, 223-28, 230-31 n.86, 233-65, 271-72.

12. *See* Amar, *Neo-Federalist*, *supra* note 2, at 207, 247 n.134, 265-70.

13. *Id.* at 206, 209, 211-12, 215-19, 229-34, 239-45, 255-69, 272.

14. *See id.* at 221, 223-30, 233-38, 247-58, 262-63, 266.

15. *See id.* at 209-10, 218-19, 229-30, 239-69, 272.

different wording simply represents yet another way—in addition to the selective usage of 'all' and the distinction between party-defined and subject matter-defined jurisdiction—in which the first three jurisdictional categories were set off as structurally different from the last six."[16]

After several years of research, I concluded that Article III's drafters may have used "Cases" and "Controversies" to achieve this aim, but that their overriding purpose was to signify the discrete primary functions federal courts were to perform.[17] In federal question, admiralty, and foreign officer "Cases," the judiciary's main role would be to "expound" (i.e., interpret and apply) laws having national and international significance.[18] By contrast, in "Controversies," federal judges would serve chiefly as neutral umpires in resolving bilateral disputes involving the designated parties.[19] Furthermore, I found little evidence in the Convention or Ratification records to support the common claim that the Framers had employed the word "Cases" to encompass both civil and criminal proceedings and "Controversies" to include only civil suits.[20]

Combining Professor Amar's arguments with mine yields the following two-tiered theory. First, Congress must give jurisdiction over "all Cases" to federal courts, whose principal function therein is exposition. Second, Congress may grant jurisdiction over "Controversies," in which federal judges focus on dispute resolution.

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16. *Id.* at 244 n.128.

17. *See* Pushaw, *supra* note 3.

18. *See id.* at 449-50, 472-82, 487-92, 494-504.

19. *See id.* at 482-84, 487-89, 493-94, 504-11. The most important ramification of my thesis was that the justiciability doctrines—which focus on the resolution of disputes between adverse parties—make sense as applied to "Controversies," but should be reformulated in "Cases" to account for the expository function. *See id.* at 518-31.

Professor Harrison's sole comment on this argument is: "Why it would make sense to authorize advisory opinions in admiralty cases, but not when two States . . . have a legal disagreement is unclear." Harrison, *supra* note 4, at 229 n.74. Nowhere did I say that federal courts should render advisory opinions in admiralty cases; rather, I merely identified admiralty as one legal area where national and international concerns were paramount and hence committed ultimately to federal courts. *See* Pushaw, *supra* note 3, at 485 n.195, 492 n.226, 495 n.237, 497-98 nn.246-48, 502-03 & nn.272-77. Moreover, I conceded that while in most "Controversies" the law to be applied would be state law, in interstate disputes the development of some federal common law would be unavoidable. Nonetheless, I concluded that the need for an impartial umpire was paramount in the Framers' eyes. *See id.* at 505 n.283, 511 & n.305.

20. *See* Pushaw, *supra* note 3, at 461-64; *see also infra* notes 72-98 and accompanying text (discussing this issue).

C. Responses to the Neo-Federalist View

The Neo-Federalist reading has elicited criticism from Hart's followers. For example, Martin Redish rejected Amar's textual interpretation on the ground that Article III expressly grants Congress absolute control over lower federal courts and broad authority to make exceptions to the Supreme Court's appellate jurisdiction, without imposing any condition that these two powers cannot be exercised simultaneously.[21]

In a more detailed critique, Daniel Meltzer cast doubt on Amar's premise that the Framers selectively used "all" to cleave Article III into mandatory and permissive tiers, for two reasons.[22] First, during the Convention and Ratification debates, no one mentioned this point, but many expressed the view that the jurisdictional heads defined by parties were more important than those based on subject matter.[23] Second, Congress ignored this distinction in the Judiciary Act of 1789 by creating gaps in the supposedly mandatory tier.[24] Professor Meltzer tentatively hypothesized that "'all' was meant to reinforce the breadth of 'cases' [as extending to both civil and criminal litigation] rather than to suggest that the subject matter clauses are mandatory."[25]

Furthermore, Meltzer questioned Amar's view that "shall" was imperative, except perhaps in the "limited sense . . . [that] if the judicial power is exercised by the federal government, the exercise must be by article III courts."[26] Similarly, Meltzer claimed that the Framers might have used "shall extend" to signify those matters that federal judges had the capability (as

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21. *See* Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1636-38, 1648 (1990) (contending that these explicit congressional powers limit the potentially vast scope of federal judicial authority).

22. *See* Meltzer, *supra* note 9.

23. *See id.* at 1577-85.

24. *See id.* at 1585-1602, 1611-13.

25. *Id.* at 1575; *see also* William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST. COMMENTARY 89, 90 (1990) (similarly speculating that "the modifier 'all' could be read as a stylistic emphasis of this [criminal/civil] distinction" between "Cases" and "Controversies"). Thus, Professor Meltzer found this distinction to be more plausible than my proposed approach. *See* Meltzer, *supra* note 9, at 1575-76 (citing an early manuscript of Pushaw, *supra* note 3).

26. Meltzer, *supra* note 9, at 1573-74 n.14.

opposed to obligation) to hear and "shall be vested" to refer to the courts that may (rather than must) exercise that capacity.[27] Finally, he concluded that Amar's reliance on a "holistic" method of interpretation and on structural constitutional principles resulted in arguments that were framed too generally.[28]

In a recent article, John Harrison "develops and supports those possibilities [suggested by Meltzer] in greater detail."[29] Professor Harrison contends that "Article III proceeds in three steps, in descending order of generality."[30] First, Section 1 vests the federal "judicial power" to decide cases in a Supreme Court and (if Congress chooses) in inferior tribunals.[31] Second, Section 2's first paragraph extends this "judicial power" to a list of lawsuits, which constitute the maximum possible level of federal judicial authority.[32] Sections 1 and 2 use "shall" in a nonmandatory sense, and the word "all" appears before "Cases" to stress their comprehensive reach in (1) encompassing both civil and criminal matters, and (2) extending even to certain state criminal proceedings.[33] Third, Section 2's second paragraph explicitly specifies the Supreme Court's original jurisdiction and gives Congress power to make exceptions to the Court's appellate docket, and implicitly grants plenary legislative control over the jurisdiction of lower federal tribunals.[34] Hence, the Constitution leaves the actual sweep of federal jurisdiction largely to Congress's discretion.[35]

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27. *See id.* at 1573-74 nn.14-15, 1596-97. Meltzer also suggested that the "shall be vested" language might have been inserted simply to achieve symmetry with the opening words of Articles I and II. *See id.* at 1573-74 n.14.

28. *See id.* at 1614-23; *see also id.* at 1625-32 (arguing that Amar's principle of federal judicial parity and superiority does not resolve the hard questions that arise in interpreting and applying specific jurisdictional statutes).

Although Professor Meltzer raised many questions about Amar's thesis, he also acknowledged its explanatory power and originality. *See, e.g., id.* at 1623. Furthermore, Meltzer recognized many problems (especially historical) with Hart's "traditionalist" account. *See id.* at 1595-96, 1598 n.98, 1608 n.138, 1609-10, 1621-22. Indeed, Meltzer ultimately concluded that the choice of any particular theory of congressional power over federal jurisdiction would have few important practical consequences, and therefore he found it unnecessary to argue for the clear superiority of any approach (although in the end he leaned toward the standard view). *See id.* at 1623-25. Meltzer's detachment makes his article especially balanced, fair, and thoughtful.

29. Harrison, *supra* note 4, at 208.

30. *Id.* at 209.

31. *See id.* at 209-12.

32. *See id.* at 210, 212-20.

33. *See id.* at 211-47.

34. *See id.* at 210, 247-50.

35. *See id.* at 210, 255. Professor Harrison has two key original insights: first,

D. An Assessment of Professor Harrison's Methodology and Sources

Although Harrison's thesis is intriguing, his choice of methodology yields only meager supporting evidence. Like Professor Redish, Harrison "[f]ocus[es] on the language of the Constitution, and ignor[es] as much as possible the gloss that has developed."[36] Moreover, Harrison simply asserts that Amar invoked general principles of constitutional structure to distort specific constitutional provisions, instead of setting forth a competing structural account.[37] This text-centered approach creates three problems.

First, it avoids the need to analyze fully the history of Article III's framing, ratification, and early implementation and to explain how structural principles like federalism and separation of powers relate to Congress's power over the judiciary. Unfortunately, no member of the Hart school has presented such a unified narrative.[38]

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that Article III's text moves from the general to the specific; and second, that the Framers inserted "all" before "Cases" to signify that cases may include state criminal prosecutions. The rest of his argument largely amplifies Meltzer's position. *See id.* at 210, 220-43; *see also id.* at 229-30, 244, 251-52 (reiterating Meltzer's claim that matters designated "Controversies" were often more important than "Cases"). Whereas Meltzer found Professor Amar's arguments plausible if not always persuasive, Harrison believes that Amar is clearly wrong. *See, e.g., id.* at 208-09, 218-20, 233, 243-56.

36. *Id.* at 204; *see also* Redish, *supra* note 21, at 1634-43, 1647-49 (responding to Amar with arguments based on the language of Article III). Professor Redish did make a few historical references. *See id.* at 1644-47.

37. *See* Harrison, *supra* note 4, at 204, 253-56; *see also* Meltzer, *supra* note 9, at 1622-23 (arguing that Amar's holistic principle of constitutional interpretation might not be desirable because it results in an unacceptably high level of generality). *See generally infra* Part III (discussing issues of constitutional structure).

38. *See* Amar, *Reports*, *supra* note 2, at 1671-72 (noting the cursory treatment of constitutional history and structure by Professors Hart, Wechsler, Bator, Gunther, Meltzer, and Redish); *see also* Meltzer, *supra* note 9, at 1623-24 (largely conceding this point).

This deficiency raises two additional concerns. First, like Meltzer and Redish, Professor Harrison repeatedly refers to Hart's theory as "orthodox" or "traditional." *See, e.g.*, Harrison, *supra* note 4, at 204-06, 212-13, 216, 218 n.38, 220, 229, 248, 250, 252 n.135; Meltzer, *supra* note 9, at 1569, 1596-98, 1602-03, 1608 n.138, 1610, 1613, 1618, 1621, 1628; Redish, *supra* note 21, at 1634. This choice of terminology is unfortunate insofar as it implies that the Neo-Federalist view (which relies upon conventional tools of constitutional interpretation such as text, structure, history, and precedent) is "unorthodox," whereas Hart's modern theory (which largely ignored such evidence) is "traditional." More likely, these commentators use the "orthodox" label merely to convey that Hart's premise of broad congressional control went virtually unchallenged for decades and still enjoys widespread support. *See supra* note 9 and accompanying

Second, despite his stated methodology, Professor Harrison often does support his textual arguments with references to the "gloss" placed on Article III. However, he relies primarily on Antifederalists[39] and obscure figures who wrote long after the Constitution had been adopted.[40] Again, Harrison's critique would have been far more forceful if he had seriously engaged—rather than ignored or discounted—the Federalists' interpretation.[41]

Third, even if one accepts Harrison's invitation to focus on Article III's language, his textual arguments do not refute the Neo-Federalists as decisively as he imagines.[42] To illustrate this point, I will evaluate in detail the competing interpretations of each of Article III's principal parts.

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text.

Second, several key points in Harrison's interpretation were not made by Hart and thus appear to be *post hoc* rationalizations. For example, Harrison asserts that the "orthodox" view divides Article III into two tiers, although Hart said nothing of the sort. *See* Harrison, *supra* note 4, at 210, 220-47. Of course, it is perfectly acceptable to build upon a seminal work such as Hart's. *See supra* note 9 (describing the illustrious scholars who have done so). It is quite a different matter, however, to adopt the major premise of Hart's chief rival (Amar's two-tier thesis) and claim that it is part of the "orthodox" approach.

39. *See infra* notes 97, 102-04, 110-11 and accompanying text (discussing Harrison's citations to St. George Tucker, Robert Whitehill, "Brutus," "Centinel," and "Agrippa").

Although Antifederalist views should not be disregarded entirely, the Federalist explication of the Constitution has always been accorded a privileged status by legal figures, historians, and political scientists. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE (1991); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969). Thus, in determining the original intent behind the constitutional provisions concerning congressional power over the judiciary, both Amar and I weight the opinions of Federalists far more heavily than those of their opponents.

40. For example, to support his claim that "all" appears before "Cases" to stress that federal courts could enforce even state criminal law in first-tier lawsuits, Harrison cites an 1880 opinion by Justice Strong, an 1833 remark by Senator Wilkins, two obscure state court decisions from 1816 and 1820, and treatises from the 1820s and 1830s. *See infra* notes 164-73, 182 and accompanying text (critically examining these sources).

41. *See supra* notes 11, 38-39 and accompanying text; *infra* notes 49-53, 69, 71, 75, 81-100, 112-14, 122, 124, 128, 130-53, 183, 206-17 and accompanying text.

42. *See* Harrison, *supra* note 4, at 208-10, 255-56.

II. COMPARING THE NEO-FEDERALIST AND "ORTHODOX" APPROACHES TO EACH PROVISION OF ARTICLE III

A. Vesting Federal Judicial Power in Independent Courts

1. The Vesting Clause

Section 1 of Article III begins as follows: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Harrison concurs with Professor Amar that this Vesting Clause (1) empowers federal courts—and no other governmental institution—to exercise the nation's "judicial Power," (2) requires the existence of a Supreme Court, and (3) gives Congress discretion to create lower federal tribunals.[43] Amar has emphasized that this standard interpretation implicitly reflects the Hart school's understanding that federal judicial power "shall" (i.e., must) be vested in the Supreme Court, whereas it "may" (i.e., can but need not) be granted to inferior courts created by Congress.[44] Harrison sidesteps this issue. In-

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43. *See id.* at 211; *see also* Amar, *Neo-Federalist*, *supra* note 2, at 206-07, 215 n.41, 229-34, 240 n.118, 251-52; Amar, *Two-Tiered*, *supra* note 2, at 1504-08, 1523-25, 1548-55.

44. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 215 n.41, 231-34, 240 n.118; Amar, *Two-Tiered*, *supra* note 2, at 1523-25, 1543.

Although Professor Amar simply assumed that "shall" means "must," many sources confirm his understanding. For example, the *Oxford English Dictionary*, which contains a detailed historical analysis of every English word, defines "shall" as "expressing necessity" and as synonymous with "must," and it cites such usage by Shakespeare, Scott, and others. 9 THE OXFORD ENGLISH DICTIONARY 607, 609 (1961) [hereinafter OED]. More significantly, eighteenth-century lawyers and jurists followed the interpretive canon that, in legal documents such as statutes and constitutions, the term "shall" was "to be construed imperatively" as meaning "must." *See, e.g.*, Attorney General v. Lock, 3 Atk. Ch. Cases 164, 166 (1744) (Hardwicke, Lord Chancellor). This rule of construction still applies. *See, e.g.*, BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory . . . . [I]n its ordinary signification, the term 'shall' is a word of command, and one which has always . . . be[en] given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion.").

Admittedly, however, "shall" has several alternative definitions, two of which are relevant here. The first and most common is to express the future tense (i.e., "will"). 9 OED, *supra*, at 609-10. This meaning appears to have been intended in two provisions of Article III: Section 2, Paragraph 1's extension of judicial power to (1) "Treaties made, or which shall be made, under the[ ] Authority [of the United States]," and (2) those Controversies "to which the United States shall be a Party." *See* REDISH, *supra* note 9, at 35 (noting the latter example). Second, "shall" is sometimes used as equivalent to "may" or "should." *See* 9 OED, *supra*, at 607. Professors Harrison and

stead, he contends that the Vesting Clause is "mandatory" only in the sense that the *Constitution* itself vests the federal judicial power, and therefore dismisses as "histrionics" Justice Story's claim (accepted by Amar) that Article III commands *Congress* to vest that power in federal courts.[45]

But Amar cheerfully admitted that the Constitution directly establishes the Court and vests it with certain power, because that fact buttressed his argument that Congress has a constitutional duty to provide for (at minimum) a Court with such jurisdiction.[46] Who else could the Constitution be addressing here, if not Congress? Surely a group of lawyers could not get together, denominate themselves the "Supreme Court," and start exercising jurisdiction. Rather, the Constitution (particularly the Necessary and Proper Clause) entrusts Congress to set up the machinery of government—sometimes by strictly implementing its commands (for example, by ensuring that each department has the resources needed to discharge its constitutional functions), and sometimes by giving Congress discretion.[47] Thus, Harrison is

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Meltzer prefer this meaning, although they do not cite any supporting reference works. *See, e.g.*, Harrison, *supra* note 4, at 210-20; Meltzer, *supra* note 9, at 1573-74 n.14, 1596-97. This definition, however, clearly applies to only a single clause of Article III: Section 2, Paragraph 2's grant to the Supreme Court of appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make" (although "shall" here might simply be conveying the future tense). Furthermore, in legal documents "shall" is construed as permissive only when necessary to carry out legislative intent or in cases where no right depends on its being taken in a mandatory sense. *See, e.g.*, BLACK'S LAW DICTIONARY, *supra*, at 1375.

In the Vesting Clause, the presumption that the Framers intended "shall" to be given its usual imperative meaning is strengthened considerably by their contrasting usage of "shall" and "may." In my view, neither Harrison nor Meltzer has presented evidence sufficient to rebut that presumption.

45. *See* Harrison, *supra* note 4, at 212; *see also id.* at 206-07. For a more thorough discussion of Justice Story's argument and Professor Amar's adaptation of it, see *supra* note 11 and *infra* notes 143-45 and accompanying text.

46. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 211-15, 221 n.60, 224, 229, 231-35, 239 n.118, 240 n.118, 253-54 & nn.158-60, 257-58 & n.168, 264-65 n.194; Amar, *Two-Tiered*, *supra* note 2, at 1522-25, 1538-39, 1548, 1554-55; Amar, *Reports*, *supra* note 2, at 1655 & nn.20-22.

47. Article I, Section 8, Clause 18 of the Constitution empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution . . . in any [United States Government] Department." Consequently, Congress can enact legislation as needed to ensure that the Judiciary can exercise the judicial power vested in it by Article III—for example, by organizing and funding the courts and delineating their jurisdiction. All such decisions, however, are subject to certain constitutional mandates, such as the requirement that a Supreme Court be established. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 229-30, 240-43, 254-55 n.160; Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 480-83

correct that Congress does not "vest" federal "judicial Power" in the Supreme Court, but rather merely enables that tribunal to exercise the authority already granted to it by the Constitution.[48] The enactment of such enabling legislation, however, is mandatory on Congress. That is, I think, Amar's limited claim.

2. *The structural parity and superiority of federal courts*

The soundness of Professor Amar's reading of "shall be vested" is reinforced by the usage of "shall" in the next sentence of Section 1, which provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Those repeated references to "shall" have always been construed to mean "must" and accordingly to oblige Congress not to remove judges at its pleasure or reduce their salaries, even though Congress is not mentioned explicitly.[49]

More importantly, these tenure and salary guarantees apply equally to all federal judges, as do the Constitution's rigorous appointment and impeachment processes.[50] Consequently, Neo-Federalists conclude that federal courts are structurally superior to their state counterparts, which lack similar independence and national accountability.[51] Although the Framers recognized that

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(1989) [hereinafter Amar, *Marbury*]. Indeed, Justice Iredell made this precise argument in his dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432-33 (1793), which Harrison cites as a cornerstone of his thesis. *See* Harrison, *supra* note 4, at 221-29.

48. *See* Harrison, *supra* note 4, at 211-12. Perhaps the best articulation of this position is by WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 230 (2d ed. 1829) (contending that Congress does not *grant* power to the judiciary, but merely acts as an agent in deciding which courts will *receive* the powers already vested in them by the Constitution).

49. As leading Federalists emphasized, Article III's tenure and salary provisions bind Congress and are necessary to preserve separation of powers. *See, e.g.*, THE FEDERALIST NOS. 78-79 (Alexander Hamilton); Amar, *Neo-Federalist*, *supra* note 2, at 235-38 (explaining the Framers' concern with protecting judicial independence). Professor Amar did not focus on the usage of "shall" in this part of Section 1, perhaps because he (like everyone else) assumed that its meaning is obvious. By contrast, the logical implication of Professor Harrison's argument that "shall" means "may" in Section 1 is that Congress may remove judges at its whim and may diminish their compensation.

50. All judges are appointed by the President with the Senate'a advice and consent and can be impeached for misconduct. *See* U.S. CONST. art. II, § 2.

51. For discussion of the constitutional parity and superiority of federal judges and the related requirement that an independent federal court must finally decide "all Cases," see Amar, *Neo-Federalist*, *supra* note 2, at 221, 223-30, 233-38, 247-58, 262-63, 266; *see also* Amar, *Two-Tiered*, *supra* note 2, at 1509-11, 1535-39, 1549, 1556 n.206,

the new federal system would allow state judges *initially* to exercise concurrent jurisdiction over most of Article III's subjects, experience under the Articles of Confederation had demonstrated the folly of entrusting to state tribunals *ultimate* power to decide cases of vital national and international importance.[52] Thus, Congress had discretion to give final jurisdiction (original or appellate) over federal question, admiralty, and foreign minister "Cases" to either the supreme or inferior federal courts (which were equally independent), but not to state judges.[53]

Professor Harrison's treatment of the principle of structural parity and superiority strikes me as inconsistent. On the one hand, he echoes Professor Redish in accusing Amar of "disdain" and "contempt" for state courts, whose reliability the Constitution purportedly assumes.[54] On the other hand, Harrison invokes Neo-Federalist reasoning when it furthers his argument that "all Cases" include state criminal matters. Specifically, he asserts that Congress can grant federal courts original jurisdiction over state criminal prosecutions involving federal defenses because "[a] state judiciary hostile to some federal program might so manipulate the trial process as to make appellate review inadequate, or the cost of trial on a charge that should have been dismissed might prejudice federal interests."[55] By admitting that state judges cannot always be trusted to enforce federal law, Harrison undermines the idea of federal-state court equivalence that anchors the Hart thesis.[56]

1559-63; Amar, *Reports*, *supra* note 2, at 1669-70; Pushaw, *supra* note 3, at 468-70, 485-86, 492-93 & nn.227-29, 497-504.

52. For more detailed treatment of this distinction between original and final judicial authority, consult the sources cited *supra* note 51; *see also infra* note 54.

53. For further elaboration, see the authorities cited *supra* note 51.

54. *See* Harrison, *supra* note 4, at 252-53; *see also* Redish, *supra* note 21, at 1644-46 (arguing that the Framers did not share Madison's distrust of state courts and instead assumed that they would be equally competent to decide federal question cases). This criticism confuses initial and final judicial power. Neo-Federalists acknowledge that state courts have always had concurrent original jurisdiction to decide most Article III "Cases" and "Controversies." Ultimately, however, if state courts get federal law wrong, independent national courts must be available to correct them.

55. Harrison, *supra* note 4, at 234.

56. Professor Hart maintained that Congress can effectively commit any federal question case to state courts for final resolution. *See supra* note 8. If Congress exercised this power in the circumstances Harrison describes, such a case would have to be decided ultimately by a state tribunal, even though doing so might prejudice or defeat federal rights. Harrison accepts this possibility, but suggests that Congress will avoid such a scenario. *See* Harrison, *supra* note 4, at 209-10, 234-35, 252-56.

Viewed in their most favorable light, Professor Harrison's arguments are not

B. The Extension of Federal "Judicial Power" to "All Cases" and "Controversies"

The most hotly contested language of Article III is contained in the first paragraph of Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

I will closely examine the three most debated parts of this passage: (1) the meaning of "[t]he judicial Power shall extend," (2) the distinction between "Cases" and "Controversies," and (3) the use of the word "all" before "Cases" but not "Controversies."

1. The meaning of "judicial Power" and "shall extend"

Neo-Federalists interpret the parallel opening phrases of Sections 1 and 2 to mean that federal "judicial Power" (i.e., the authority to render a final judgment after applying the law to particular facts)[57] "shall" (i.e., must) be vested in federal courts

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necessarily contradictory: It is plausible to believe that Article III does not *require* Congress to give federal courts jurisdiction over federal question cases, but merely *authorizes* Congress to do so when it concludes that state judges might be unreliable in particular situations (e.g., in enforcing federal law defenses to state criminal proceedings). *See id.* at 234, 252-55. Similarly, Professor Meltzer has contended that "parity" involves two distinct issues: (1) Article III, which assumes the equality of federal and state courts because it does not mandate that the former resolve all cases within the federal judicial power, and (2) Congress's subconstitutional policy choices, which may include the determination that federal judges are superior to their state counterparts in adjudicating certain cases. *See* Meltzer, *supra* note 9, at 1627-31.

Although this position is credible, I do not agree with the proposition that the Constitution gives Congress discretion over the vindication of constitutional rights, for reasons set forth at length in Amar, *Neo-Federalist*, *supra* note 2, at 223-30, 246-50, 255-59, and Sager, *supra* note 9, at 21-80.

57. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 212, 215, 229-30, 233-35, 239-40; Amar, *Two-Tiered*, *supra* note 2, at 1506-08. For historical Anglo-American definitions of "judicial power" as expounding the law in a fact-specific case, see Pushaw,

and "shall" (again, must) extend to "all" (i.e., every one) of the "Cases" listed, but not necessarily to all of the "Controversies."[58]

Professor Harrison offers an alternative, two-step interpretation. First, in a Constitution of enumerated powers, the "Extending Clause" performs the vital function of setting out the maximum possible scope of federal judicial power by extending it to a list of lawsuits that *may* be decided by federal courts.[59] Second, while the Vesting and Extending Clauses describe the general "judicial Power" held by the entire Judiciary, the second paragraph of Section 2 addresses the separate question of determining the actual "jurisdiction" of specific federal tribunals—the matters they *will* be able to decide.[60] Harrison concludes that this two-stage formulation, moving from "judicial power" to "jurisdiction," is a "clear and elegant way" of accommodating the Madisonian compromise that left lower federal courts to Congress's discretion.[61]

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supra note 3, at 471 n.130, 474-78, 489-92.

58. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 209-12, 215-19, 229-34, 239-69; Amar, *Two-Tiered*, *supra* note 2, at 1505-08, 1518, 1543; Amar, *Reports*, *supra* note 2, at 1652.

59. *See* Harrison, *supra* note 4, at 210, 212-14. In paraphrasing the Extending Clause to mean that federal judicial power "may be used to decide" or "shall be capable of deciding," *id.* at 212, Professor Harrison reiterates Meltzer, *supra* note 9, at 1573-74 nn.14-15.

To support his assertion that "a reference to the *extent* of a governmental power is a natural way to set out the power's maximum potential use," Harrison, *supra* note 4, at 213 (emphasis added), Harrison quotes a sentence in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 275 (1827), in which Justice Washington purportedly construed Article I as describing the subjects to which Congress's power might extend. *See* Harrison, *supra* note 4, at 214. Actually, it was Justice Johnson who set forth the cited language in a separate opinion. In any event, it is difficult to see how a brief statement by a minor Justice writing about Article I three decades after the Constitution was drafted explains the Framers' understanding of Article III. That is not to say, however, that Harrison's purely textual interpretation of the Extending Clause is unreasonable. *See infra* notes 64-65 and accompanying text.

60. *See* Harrison, *supra* note 4, at 210, 212-15; *see also id.* at 207, 218 (rejecting the equation of the phrase "the judicial Power shall extend" with "federal court jurisdiction must include"); Meltzer, *supra* note 9, at 1573-74 nn.14-15. Professor Harrison does not mention that Amar also recognized that "the judicial Power of the United States" was a broader term that subsumed the "jurisdiction" to decide certain cases. *See* Amar, *Neo-Federalist*, *supra* note 2, at 231 n.88, 233.

According to Harrison, Paragraph 2 conclusively determines the Supreme Court's original jurisdiction but empowers Congress to define its appellate jurisdiction and to create (and thus control the jurisdiction of) inferior federal courts. *See* Harrison, *supra* note 4, at 209, 213-14; *see also* Redish, *supra* note 21, at 1635-41 (making a similar point). *See generally infra* Part II.C (analyzing these issues).

61. Harrison, *supra* note 4, at 215-16.

The usage of "all" and the import of Section 2's second paragraph will be considered more fully later.[62] For now, it is enough to note that Harrison's analysis, while original and sensible, has four flaws.

First, his paraphrase of the opening words of Section 2 as "'[t]he judicial power *may* be used to decide'"[63] and his definition of "all" as "some" seem a bit strained, because ordinarily "shall" means "must," and "all" signifies "every one."[64]

Second, although Harrison's observation that the Extending Clause imposes a ceiling on federal jurisdiction is unassailable, it does not necessarily follow that Amar was wrong in contending that this clause serves the additional purpose of setting a floor on such jurisdiction.[65]

Third, even if Harrison is correct that "judicial power" is a more general and abstract term than "jurisdiction,"[66] the Neo-

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62. *See infra* Parts II.B.3, II.C.

63. Harrison, *supra* note 4, at 212 (emphasis added).

64. *See supra* notes 44, 49, 58 and accompanying text (discussing the meaning of "shall"); *infra* notes 118-21, 129 and accompanying text (examining the definition of "all"). It is certainly plausible to interpret "shall extend" as equivalent to "can decide." On balance, however, I agree with Professor Amar that the Framers intended "shall" to be imperative in the Extending Clause, given the normal meaning of "shall," its usage throughout Article III, and the drafting history of the judiciary article. *See supra* notes 13-15, 44-49, 58 and accompanying text; *infra* notes 131-36, 143-46, 149, 185, 187, 200, 204 and accompanying text.

65. *But see* Harrison, *supra* note 4, at 219-20 (characterizing Amar's argument on this point as "implausible," "unnatural," "obscure," and "barely intelligible"); Casto, *supra* note 25, at 90-91 (deeming "unacceptable" Amar's claim that Paragraph 1 of Section 2 performs such a "double service").

Reading the Extending Clause as a whole, Professor Amar construed it as saying that the judicial power "shall" (i.e., must) extend to "all" (i.e., every one of) the enumerated "Cases," but not necessarily to the entire number of "Controversies" listed, because the word "all" is omitted before "Controversies." Therefore, although Congress must assign federal courts jurisdiction over at least some portion of each type of controversy, it need not do so for all of them. *See supra* notes 13-15, 57-58 and accompanying text; *infra* notes 114, 129-36, 139-46, 149, 183 and accompanying text. Professor Harrison rightfully questions Amar's attachment of a precise meaning to the absence of the word "all" before "Controversies" (such as "some" or "at least some"), particularly because doing so assertedly rewrites the Extending Clause to say that "the jurisdiction of federal courts must extend to, and may extend only to . . . some controversies." Harrison, *supra* note 4, at 219. Amar has admitted that his interpretation of the "Controversies" language is awkward. *See* Amar, *Reports*, *supra* note 2, at 1654. However, Harrison's explanation for why "all" was omitted is at least as awkward, for reasons I will detail in Part II.B.3.

66. Harrison never explains this assertion, but it should be qualified to account for the multiple possible meanings of "jurisdiction." For example, this term is sometimes broader than "judicial power": Only courts can exercise "judicial power," whereas an authoritative positive law can confer "jurisdiction" over a particular legal matter on any governmental department or agency. In another sense, however, judicial

Federalist response is that, to fulfill Article III's mandate that "[t]he *judicial Power* shall extend to all Cases," Congress must grant *jurisdiction* to hear all those cases to a federal court. Section 2's second paragraph merely gives Congress the option to allocate that jurisdiction to either the supreme or inferior courts, in either original or appellate form.[67] Furthermore, Harrison seems to assume that "jurisdiction" has only one possible meaning—the competence of a specific tribunal (e.g., the Supreme Court's original jurisdiction).[68] But "jurisdiction" can also denote a particular legal subject area, as in Article III's reference to "Admiralty and Maritime Jurisdiction." This alternative meaning makes Amar's argument even more convincing: The "judicial Power" must extend to "all Cases" concerning certain subject matter "jurisdictions," such as admiralty and federal questions.

Fourth, to support his contention that the Framers employed the phrase "judicial Power" at the beginning of Sections 1 and 2 to achieve greater lucidity and elegance, Harrison relies solely upon a comparison of Article III with the Committee of Detail's final draft article, which used only the term "jurisdiction" and thus supposedly suffered from stylistic problems.[69] Even if one

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"power" is more inclusive than judicial "jurisdiction": For example, an adjudicatory body (such as an administrative agency) can have "jurisdiction" over a subject but lack the "judicial power" to issue a final, binding order, which can be done only by an appellate court. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551-52, 554-57, 701-06 (1988). Finally, "jurisdiction" literally means "speaking the law," and in that sense is quite close to the essence of judicial power. For discussion of these and related issues, see Pushaw, *supra* note 3, at 471 n.130, 474 n.139, 494 n.234.

67. For further elaboration of these ideas, consult the sources cited *supra* notes 64-65.

68. *See* Harrison, *supra* note 4, at 212-16.

69. *See id.* at 215-16 & n.34 (citing 2 FARRAND, *supra* note 11, at 186-87). *See infra* notes 135-36 and accompanying text (reproducing and analyzing this document). In my opinion, the Committee's draft proceeds in clear and logical fashion. First, it extends the Supreme Court's "Jurisdiction" to various "Cases" and "Controversies." Second, it allocates that jurisdiction into original and appellate categories. Third, it authorizes Congress to assign any of this jurisdiction to inferior courts that the legislature chooses to create. *See* 2 FARRAND, *supra* note 11, at 186-87.

Professor Harrison contends, however, that the appearance of the inferior courts at the end of this draft surprises the reader, who has assumed all along that it deals only with the Supreme Court. By contrast, Article III associates the jurisdictional heads with the abstract federal "judicial Power," which it already has stated is vested in the supreme and inferior courts. Thus, Harrison concludes that Article III is stylistically more elegant because it avoids the need to mention inferior courts. *See* Harrison, *supra* note 4, at 215-16.

Although Harrison's argument is plausible, the desire for internal clarity does not necessarily explain the shift from "jurisdiction" to "judicial power." In fact, this change more likely was intended to bring the opening words of Article III into conformity with

were to accept Harrison's dubious claim about the stylistic awkwardness of this document,[70] it and other drafts actually provide the surest evidence that the Framers deliberately created a two-tiered structure and used "shall" and "all" in a mandatory sense, as explained below.[71]

2. The case/controversy distinction

Professor Harrison's entire argument hinges on establishing that the Framers utilized the word "Cases" to encompass both civil and criminal proceedings and "Controversies" to include only civil suits.[72] Unfortunately, he has added few primary sources beyond those collected by Professors Fletcher, Meltzer, and Pfander (who embraced this idea) and Amar and me (who downplayed it).[73] Not surprisingly, I continue to believe that the "criminal vs. civil" distinction was at best a minor aspect of a broader meaning: The federal courts' principal function in Article III "Cases" was to expound laws having national and interna-

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those of Articles I and II. *See, e.g.*, Pushaw, *supra* note 3, at 512-13 n.307; Meltzer, *supra* note 9, at 1573-74 n.14; *cf.* Amar, *Neo-Federalist*, *supra* note 2, at 241-42 n.120 (arguing that the substitution of "judicial power" for "jurisdiction" was designed to allow Congress to exercise discretion in transferring the final resolution of "Cases" from the Supreme Court to inferior federal tribunals).

70. *See* Harrison, *supra* note 4, at 215-16 & n.34.

71. *See infra* notes 131-36 and accompanying text.

72. *See infra* note 113 and accompanying text.

73. The first commentator to note the criminal/civil distinction was Amar. *See* Amar, *Neo-Federalist*, *supra* note 2, at 244 n.128 (citing, for example, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J., dissenting)). Professor Fletcher found further support for this proposition in 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 420-21 (1803). *See* William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 131, 133 (1990). Professor Meltzer relied upon Fletcher and added a reference to the "Letter of Agrippa to the Massachusetts Convention," *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 96-97 (Herbert J. Storing ed., 1981). *See* Meltzer, *supra* note 9, at 1575 nn.18-19. *But see* Pushaw, *supra* note 3, at 460 n.72 (explaining that Agrippa nowhere suggests that "Cases" includes both civil and criminal matters). Professor Pfander discovered many more authorities. *See* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 607-10 (1994) (adding citations to, among others, Samuel Chase, Peter DuPonceau, Samuel Jones, Joseph Story, and the Antifederalists Luther Martin, George Mason, "The Federal Farmer," and "Brutus"). I evaluated this evidence and found sources that cast doubt on the "criminal vs. civil" distinction. *See* Pushaw, *supra* note 3, at 460-64.

Professor Harrison credits our work and adds a few other sources. *See* Harrison, *supra* note 4, at 221-30. None of them are very illuminating, for reasons that will be set forth below.

tional significance, whereas their main role in "Controversies" was to act as an impartial arbitrator.[74]

Harrison's rejection of my thesis is somewhat puzzling because he agrees, explicitly or implicitly, with many of my major conclusions. Moreover, although Harrison does not accept my other arguments, he never seriously challenges their underlying foundation, which consists of thousands of citations to primary sources (e.g., English and American lexicons, treatises, cases, statutes, and correspondence, as well as Convention and Ratification records).[75] Our divergent views can best be appreciated by comparing our respective treatment of evidence from eighteenth-century England, the Framing and Ratification debates, and the early Republic.

a. English usage. I documented the English understanding of "controversy" as a dispute between two parties (often governments) that was resolved by a neutral umpire, usually (but not always) a judge.[76] By contrast, the more general term "case" meant a cause of action (or appeal) requesting a remedy for the alleged violation of a legal right, in which a court's chief task was applying the law in light of precedent and the facts presented.[77] Often this law was of public interest, either because (1) the issues in a private suit transcended the parties' disagreement, or (2) no dispute existed, and the action was brought solely to ensure the government's compliance with the law.[78]

Professor Harrison says nothing about this evidence, offers no alternative British definitions of "case" or "controversy," and frankly admits that the "criminal vs. civil distinction" did not exist in England.[79] Thus, if one applies the hoary interpretive rule that common-law words in the Constitution should be given their usual English legal meaning,[80] Harrison cannot be right.

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74. *See* Pushaw, *supra* note 3, at 449-50, 460-511, 518-32.

75. *See id.* at 465-511. Harrison's inadequate response is to assert, rather than demonstrate, that "Pushaw's evidence for framing-era usage is based on statements seemingly driven by or consistent with his distinction." Harrison, *supra* note 4, at 229-30.

76. *See* Pushaw, *supra* note 3, at 450, 482-84.

77. *See id.* at 449-50, 472-82.

78. *See id.* at 480-82.

79. *See* Harrison, *supra* note 4, at 221-22, 227.

80. *See* Pushaw, *supra* note 3, at 466 & n.103 (citing sources). Harrison thus bears a heavy burden in proving his claim that the Constitution incorporated not the familiar English usage of "case" and "controversy," but rather a newly emerging American understanding. *See infra* Part II.B.2.b-c (arguing that Harrison has not carried this burden).

b. The Framing era. If Article III employed "Cases" and "Controversies" in their well-established senses, it is not surprising that no one expressly contrasted their respective meanings during the Convention and Ratification debates.[81] Participants were similarly silent about many other obvious terms in Article III, such as "courts" and "trial."

Conversely, if Professor Harrison is correct that the Framers intended to capture a new American usage of "Cases" and "Controversies,"[82] one would expect the sort of clarifying discussion that accompanied other such incorporations of fresh American understandings of traditional British terms. For example, the available records contain lengthy dialogue about the American transformation of the English idea of "popular sovereignty," as expressed in the Preamble.[83] Harrison, however, has cited no explicit statement in the Framing or Ratification debates that Article III used "Cases" and "Controversies" to convey an emerging criminal/civil distinction.[84]

Moreover, had that been the drafters' aim, they could have simply substituted the phrase "civil Cases" for "Controversies," as Congress did in the First Judiciary Act.[85] By contrast, it would have been more verbose to have said "in 'Cases' a federal court's primary function is expounding the law, whereas in 'Controversies' its main role is unbiased dispute resolution." Such a provision might also have seemed unnecessary, because this functional distinction underlies Article III's structure. Its first tier focuses judicial attention on the law to be applied because the word "Cases" is repeated three times and always introduces

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81. Although no one in 1787-88 directly contrasted the meanings of the two words "Cases" and "Controversies," people routinely used each term individually in the way I have described. *See* Pushaw, *supra* note 3, at 484-511 (citing sources).

82. *See* Harrison, *supra* note 4, at 221-23.

83. *See, e.g.*, Pushaw, *supra* note 3, at 470 & nn.124-26, 479 n.165. Similarly, the Constitution's adaptation of English "impeachment" practice provoked widespread comment. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 429-30 & nn.166-67 (1996) [hereinafter Pushaw, *Justiciability*].

84. *See* Pushaw, *supra* note 3, at 460 (noting this absence of contemporaneous support). Harrison mentions some equivocal circumstantial evidence, but acknowledges that the first express recognition of this distinction came in 1793. *See* Harrison, *supra* note 4, at 221-30. I do not consider this lack of direct evidence dispositive, however, because all theories of Article III (including mine) can be criticized on this ground. *See infra* notes 92-94 and accompanying text.

85. *See, e.g.*, Pushaw, *supra* note 3, at 460 & n.70 (citing statute); Amar, *Reports*, *supra* note 2, at 1656-57.

jurisdictional categories based on legal subject matter (federal questions, admiralty, and the law affecting diplomats). Conversely, the second tier highlights umpiring by employing the term "Controversies" (i.e., disputes) to denote the six jurisdictional heads defined by parties (governments or their citizens).[86]

Perhaps most tellingly, I demonstrated that leading Federalists did *not* share Harrison's belief that the word "controversies" was inherently limited to civil suits. For instance, James Wilson referred to the courts' "readiness to determine every controversy, criminal and civil."[87] Harrison speculates that Wilson might not have fully adopted new American legal idioms because he spent his youth in Scotland.[88] That strains credulity, for it was Wilson who created several of the novel American adaptations of English legal concepts (most importantly, popular sovereignty) that were embodied in our Constitution.[89] Moreover, Wil-

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86. *See* Pushaw, *supra* note 3, at 449, 471-72, 494-95. Professor Harrison claims that "[t]he case-denominated heads of jurisdiction are not all based on subject matter, unless a great deal of stress is placed on 'affecting' in the foreign officer jurisdiction." Harrison, *supra* note 4, at 244 n.118. However, Article III stresses precisely this word: It does not say "Cases in which foreign ministers are parties," but rather any Cases "affecting" such personnel. *See* Pushaw, *supra* note 3, at 504 n.279 (citing Federalists who made this point); Amar, *Neo-Federalist*, *supra* note 2, at 246 & n.132 (same).

Harrison questions my thesis by arguing that the main purpose of such jurisdiction was to ensure impartial dispute resolution by national judges and by claiming that an American court's exposition of the law of nations regarding diplomats "would [have been] of little interest to the principal law-makers, the Powers of Europe." Harrison, *supra* note 4, at 230. I carefully noted, however, that in "Cases" courts often both resolve a disputs and declare the law; the issue is which function is primary. *See* Pushaw, *supra* note 3, at 450 n.14. I concluded that the principal significance of this category to the Framers was that federal courts would have to apply international law (as Harrison concedes), which would be done better by a national rather than a stata tribunal. *See id.* at 504 & nn. 278-81 (citing sources). Moreover, even if Harrison could show (rather than assert) that European courts would not have cared about an American tribunal's opinion on the law of nations, the Supreme Court would still be putting a uniform American gloss on the law of nations, which would be federal law binding on all courts in the United States.

87. Pushaw, *supra* note 3, at 460 (citing 2 THE WORKS OF JAMES WILSON 451 (Robert Green McCloskey ed., 1967)).

88. *See* Harrison, *supra* note 4, at 227-28. Professor Harrison also argues that Wilson might have been using English terminology to refer to English practice. *See id.* at 227. But Harrison concedes that during Ratification debates about Article III, Wilson again used language that undermines the criminal/civil distinction. *See id.*

89. Considered "the most learned and profound legal scholar of his generation," Wilson was the first to articulate the ideas that became the foundation of American constitutionalism: that sovereignty was vested not in governments but in "the People" collectively; and that tha People should delegate some of their sovereign power to the states and some to a national government consisting of a bicameral legislature, an elected executive, and an independent judiciary. *See* Pushaw, *Justiciability*, *supra* note 83, at 397 n.10, 410 n.83, 411 & n.88, 412 & n.92, 412-44.

son was the principal draftsman of Article III, so his comments are perhaps the best evidence of its intended meaning.[90] Similarly debatable is Harrison's assertion that Marshall's use of the word "Controversies" at the Ratification debates to include criminal proceedings reflected his typical carelessness with constitutional text.[91]

The preceding analysis suggests that, although Harrison's major criticism of me—"Pushaw . . . lacks direct evidence for his claim"[92]—has some force, it applies at least equally to him.[93] This charge, which Professors Redish and Meltzer have leveled at Amar,[94] is also something of a red herring, because the relevant

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Wilson also set forth the earliest version of the argument used to justify the Declaration of Independence, teamed with Madison in dominating the Philadelphia Convention, convinced Pennsylvania to ratify the Constitution with arguments similar to those that Madison and Hamilton would later crystallize in *The Federalist*, became the nation's first law professor, delivered the most important lectures on American law in the 18th century, and served as one of the original Supreme Court Justices. *See id.* at 397 n.10.

90. *See* Pushaw, *supra* note 3, at 487-88.

91. *See* Harrison, *supra* note 4, at 228 (noting that in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-402 (1821), Marshall had to repudiate dicta in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also* Redish, *supra* note 21, at 1642 n.31 (rejecting the interpretations of Article III by Marshall and Story as lacking textual support).

Although Marshall's constitutional opinions are not without flaws, he is generally regarded as America's greatest and most careful expositor of the Constitution's text. Recently, a distinguished historian has demonstrated that Marshall consciously followed a principled jurisprudence and exercised judicial review with restraint, contrary to the revisionist view that Professors Redish and Harrison apparently hold. *See* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996).

92. *See* Harrison, *supra* note 4, at 230; *see also id.* at 247 (criticizing Amar on the same ground). I conceded this shortcoming. *See* Pushaw, *supra* note 3, at 465.

93. For example, I can explain the absence of such evidence far more easily than he can. *See supra* notes 80-86 and accompanying text. Furthermore, although Harrison dismisses the statements of Wilson and Marshall as only marginally relevant, *see* Harrison, *supra* note 4, at 227-28, they actually provide direct evidence that key Federalists did *not* adopt the criminal/civil distinction. Harrison can point to no such evidence contradicting my position. *Cf.* Amar, *Two-Tiered*, *supra* note 2, at 1543-46 (directing similar criticism at Meltzer and Redish).

94. Professors Redish and Meltzer have emphasized that no one at the Convention or Ratification debates explicitly stated that Article III means what Professor Amar says it does. *See, e.g.*, Redish, *supra* note 21, at 1634, 1640 n.28, 1642-43, 1648; Meltzer, *supra* note 9, at 1584-85, 1621; *see also* Amar, *Two-Tiered*, *supra* note 2, at 1543-46, 1566 (admitting the absence of such a "smoking gun," but arguing that the Hart school has failed to produce affirmative evidence that any eighteenth-century figure disputed Amar's reading of Article III).

Again, a lack of such direct evidence also plagues opponents of Neo-Federalism, who have not cited any statement from 1788-89 indicating that either (1) Article III's Inferior Courts and Exceptions Clauses can be exercised so as to defeat federal jurisdiction over "Cases" (the Hart/Redish thesis), or (2) the "all Cases" vs. "Controversies" language was intended to distinguish criminal and civil actions (the

evidence is almost entirely circumstantial. Although drawing precise inferences from such evidence is hazardous, I maintain that the available materials favor my interpretation.

Indeed, Harrison himself implicitly concedes the correctness of my conclusion that the Framers used "Controversies" synonymously with "disputes."[95] Furthermore, he does not challenge my documentation on the Framers' usage of "Cases." Most remarkably, Harrison apparently agrees with my central theme that these two terms related to different judicial functions:

> There is reason to believe that at the time of the framing, the word "controversy," in a legal context, connoted a disagreement between jural equals, and in particular a dispute over private rights. The word "case," by contrast, seems to have applied more generally to include situations in which the courts, rather than arbitrating disputes, acted as organs for the application of public power.[96]

Finally, as support for his "criminal vs. civil" distinction, Harrison relies mainly on Antifederalists, and even their statements are equivocal.[97] The Federalists he does invoke were discussing

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idea that Meltzer offered tentatively and Harrison adopted). Indeed, Professor Meltzer has acknowledged that there is little direct evidence about Article III generally (especially at the Convention) and that the available materials often do not fit well with any theory of Article III. Meltzer, *supra* note 9, at 1578-79, 1584-85, 1604, 1609-10, 1621.

95. Harrison, *supra* note 4, at 224 nn.52-54. Professor Harrison reaches the same conclusion and relies upon many of the sources that I did. *See* Pushaw, *supra* note 3, at 482-84, 487-89, 493-94.

96. Harrison, *supra* note 4, at 222-23. Professor Harrison cites nothing here, but he is obviously reiterating my thesis. *See supra* notes 17-19, 74-78, 81, 86, 95 and accompanying text. Harrison explicitly agrees with my related point that, because a controversy is a dispute between two equals, the word does not fit well with criminal proceedings, in which the government has far superior power to the individual being prosecuted. *See* Harrison, *supra* note 4, at 225 & n.56 (citing Pushaw, *supra* note 3, at 464).

97. For example, Professor Harrison identifies as a "revealing usage[ ] of 'cases' and 'controversies'" the amendment proposed by the Antifederalist Robert Whitehill that would have limited judicial power

> "to cases affecting ambassadors, other public ministers and consuls, to cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more states—between citizens claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, and in criminal cases, to such only as are expressly enumerated in the Constitution."

Harrison, *supra* note 4, at 223 (citation omitted). This passage could just as easily support my thesis, for Whitehill carefully aligned "cases" with subject matter and "controversies" with parties. In any event, Whitehill seems only to have been advancing

"Cases" in the context of jury trials, not the meaning of "Cases" and "Controversies" in Article III.[98]

In short, I think that the Framing and Ratification records, while not dispositive, support my reading more than they do Harrison's.

c. The early Republic. Considerable evidence from this era reflects a general understanding of the discrete judicial functions of exposition in Article III "Cases" and dispute resolution in "Controversies."[99] Conversely, other sources—particularly the Judiciary Act of 1789—undercut the criminal/civil distinction.[100]

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the common Antifederalist goal of eliminating diversity and federal question jurisdiction (except perhaps for federal crimes).

Similarly, Professor Harrison interprets the Antifederalist Brutus's statement that " '[federal] jurisdiction comprehends all civil causes . . . and . . . all cases in law and equity arising under the constitution' " as evidence that he equated "civil causes" with "controversies." *Id.* at 223 (citing source). An equally plausible interpretation, however, is that Brutus was using "causes" as a synonym for "cases." *See* Pushaw, *supra* note 3, at 473 n.134, 483 n.183, 496 n.241, 518 n.334 (demonstrating the equivalence of "cases" and "causes"). If so, then Brutus may have been objecting to the broad sweep of the first tier to include all legal and equitable cases arising under the Constitution as well as "all civil cases" in admiralty and affecting ambassadors—an interpretation that would undermine Harrison's thesis.

Finally, Harrison concedes that two Antifederalists, Centinel and Agrippa, argued that "Controversies" include criminal actions, but he contends that they had to distort the constitutional text to reach that conclusion. Harrison, *supra* note 4, at 225-27.

Again, while I do not consider Antifederalist statements worthless, I think the understanding shared by the Constitution's supporters deserves far more weight. *See supra* note 39.

98. *See* Harrison, *supra* note 4, at 223-24 (citing "A Native of Virginia"); 225 & n.57 (quoting Randolph and Pendleton); 225 & n.59 (citing constitutional amendments considered in Virginia and Pennsylvania).

Of course, contemporaneous references to "Cases" involving jury trials might illuminate the meaning of that same word in Article III's Extending Clause. Nonetheless, that provision uses "Cases" precisely in conjunction with jurisdictional heads defined by subject matter and in contradistinction to the word "Controversies." *See supra* notes 17-19, 86 and accompanying text.

99. *See* Pushaw, *supra* note 3, at 495-511 (discussing pertinent Federalist Court opinions, jurisdictional statutes, and commentary).

100. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, uses "civil" in every instance where Congress intended to limit jurisdiction to civil matters. *See* Amar, *Reports*, *supra* note 2, at 1665 (citing sources). For example, Congress's explicit restriction of Supreme Court jurisdiction in section 13 to "controversies of a *civil* nature, where a state is a party" and Circuit Court jurisdiction in section 11 to "suits of a *civil* nature . . . [where] the United States are plaintiffs" would have been redundant if "controversies" were inherently civil. *See* Pushaw, *supra* note 3, at 461 n.77 (citing the Judiciary Act of 1789 §§ 11, 13 (emphasis added)). Although Professor Meltzer argues that the Judiciary Act of 1789 generally gives federal courts criminal jurisdiction in "Cases" but not "Controversies," he admits that several of the statute's sections concerning "controversies" could include criminal matters. *See* Meltzer, *supra* note 9, at 1576 n.23 (citing the Judiciary Act of 1789 §§ 9, 11-12).

Professor Harrison concurs with me that the earliest explicit mention of that distinction was in Justice James Iredell's dissenting opinion in *Chisholm v. Georgia*[101] in 1793, and that this idea next appeared a decade later in St. George Tucker's annotations to *Blackstone's Commentaries*.[102] I argued that this interpretation arose as a practical means of avoiding federal court interference with state criminal law.[103] Harrison concedes that Iredell and Tucker might have created this definition and that it then became accepted because of their status, but nonetheless concludes that they merely crystallized a meaning that already had been developed.[104] His evidence for the prior existence of this criminal/civil distinction, however, consists of the Convention and Ratification statements that I have previously shown are inadequate to establish the widely shared understanding that Harrison suggests.[105]

Professor Harrison contends that if courts were supposed to focus on exposition in Article III "Cases," Congress set up a poor system because it required neither written opinions nor an official reporting system. *See* Harrison, *supra* note 4, at 230. The absence of such a legislative mandate, however, does not necessarily vitiate the courts' law-declaration function. For example, Parliament did not require written decisions or an official reporter, but rather allowed private reporters to publish significant opinions. *See* 12 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 101-62 (1938) (describing the case reporting system in 18th century England). The early Supreme Court had informal written reports, for it often cited its own precedent in decisions issued before the official reporting system had begun. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 573 & n.130 (1993) (noting that in 1790 and 1799, Dallas published Supreme Court decisions). Moreover, from the beginning important Court opinions were republished in newspapers and thus entered the public arena. Finally, in a poor fledgling nation, Congress may have decided that scarce resources could not be diverted to a public reporter system. Indeed, other early legislative decisions, such as requiring Justices to hear appeals of cases they had previously decided while sitting on circuit, also sacrificed constitutional ideals for financial realities. *See* Pushaw, *supra* note 3, at 516 n.328; Amar, *Two-Tiered*, *supra* note 2, at 1538.

In any event, I will spend little time on the Judiciary Act of 1789, for two reasons. First, I do not think it contains the best evidence of the Framers' intent. *See* Pushaw, *supra* note 3, at 461 n.77. Second, the implications of the Act for the Neo-Federalist thesis have already been analyzed at great length. *See* Amar, *Two-Tiered*, *supra* note 2; Meltzer, *supra* note 9; Redish, *supra* note 21.

101. 2 U.S. (2 Dall.) 419, 431-32 (1793) (Iredell, J., dissenting).

102. 1 TUCKER, *supra* note 73, app. at 420. *See* Harrison, *supra* note 4, at 221-22, 224, 228-29 (stressing that Iredell and Tucker were the main developers of the criminal/civil distinction); Pushaw, *supra* note 3, at 461-63 (same).

103. *See* Pushaw, *supra* note 3, at 461-64.

104. *See* Harrison, *supra* note 4, at 222.

105. *See id.* at 221-25; *see also supra* notes 73, 81-98 and accompanying text (critically evaluating that Framing-era evidence). Because Professor Harrison is claiming a new American meaning, I think he bears an enhanced burden of proof, which he has not met. *See supra* note 80.

Moreover, the remarks of Iredell and Tucker are not as persuasive as they might first appear to be. In *Chisholm*, Justice Iredell presumed that Congress, by using "civil" to qualify "controversies" in section 13 of the Judiciary Act, sought to restrict the Court's original jurisdiction[106] in order to (1) preserve the states' general jurisdiction over "local" criminal law, and (2) honor the law-of-nations principle that one sovereign (the United States) ordinarily could not enforce the criminal laws of another (a state).[107] Thus, Iredell did not differentiate "Cases" from "Controversies" as used by the *Framers* in *Article III's Extending Clause*. Rather, he merely placed a limiting construction on the word "controversy" as employed by *Congress* in a statutory provision implementing the *Supreme Court Jurisdiction Clause*; he did not explore the meaning of "Cases."[108] Furthermore, Iredell's presumption that congressional acts should be construed to avoid federal encroachment with state criminal law should apply as well to statutes concerning "Cases," and should be rebuttable only when Congress has expressly made an exception to general principles of governmental control over its criminal law.[109]

Like Iredell, Tucker simply asserted that "Controversies" related only to civil disputes, without providing any supporting authority.[110] In any event, Tucker was an Antifederalist states'-rights advocate who used the criminal/civil distinction to bolster

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106. *See Chisholm*, 2 U.S. (2 Dall.) at 431 (Iredell, J., dissenting) (citing the statutory grant to the Supreme Court of original jurisdiction over "all controversies of a civil nature . . . between a state and citizens of other states"). Unlike the majority, Iredell concluded that this provision could not be applied where a state was a defendant without violating sovereign immunity. *See id.* at 429-50.

107. *See id.* at 431-32 ("The act of congress more particularly mentions *civil* controversies, a qualification of the general word in the constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that relate to criminal cases, which . . . are uniformly considered of a local nature."). *See* Pushaw, *supra* note 3, at 461-62.

108. *See* Pushaw, *supra* note 3, at 463.

109. *See id.* The two most eminent Federalists on the *Chisholm* Court, Wilson and Jay, did not mention the criminal/civil distinction. *See Chisholm*, 2 U.S. (2 Dall.) at 469-79 (Jay, C.J.); *id.* at 453-66 (Wilson, J.). Moreover, the Court's next citation to this part of Iredell's dissent did not occur until 1911. *See* Pushaw, *supra* note 3, at 463 n.89 (citing case).

As Professor Harrison emphasizes, the Constitution contemplated some state court adjudication of federal criminal law and (more controversially) federal enforcement of stata criminal law. *See* Harrison, *supra* note 4, at 232-43. Whether that scheme explains the use of "all Cases" and "Controversies" is the $64,000 Question. *See infra* Part II.B.3-4.

110. *See* Pushaw, *supra* note 3, at 463 & n.91.

his crabbed view of federal jurisdiction, and his opinion tells us nothing about the Framers' intent.[111]

Regardless of what transpired in the years after the Constitution was adopted, its framers and ratifiers apparently did not understand that Article III used "Cases" to denote civil and criminal proceedings and "Controversies" to signify civil actions only.[112] If that is true, then Harrison's entire argument collapses, because his central claim is that the word "all" was inserted before "Cases" to emphasize that distinction.[113]

3. *The selective usage of "all"*

According to Professor Amar, Article III's drafters provided that federal judicial power "shall" (i.e., must) extend to "all" (i.e., every one) of the first-tier "Cases," but then omitted "all" before "Controversies" to indicate that Congress has discretion to determine the scope of federal jurisdiction over such disputes.[114] Professor Harrison offers two different explanations for the selective usage of "all." First, he suggests that "all" emphasizes and clarifies the comprehensive reach of "Cases" to cover criminal matters in every first-tier head of jurisdiction—and, correspondingly, the restriction of "Controversies" to civil proceedings.[115] Second,

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111. *See id.* at 463-64 & n.92.

112. I previously concluded that my theory could coexist with the Meltzer/Harrison approach:

> [T]his civil/criminal distinction complements, rather than contradicts, my thesis that "Controversies" involve dispute resolution and "Cases" entail legal exposition. The dispute resolution model assumes a civil rather than criminal suit, so that limitation of "Controversies" to civil matters would have assured that federal courts would act like private umpires. Moreover, criminal law is quintessentially public law that requires definitive interpretation by courts in "cases."

Id. at 464 (footnotes omitted). Further research, however, has led me to doubt my initial assumption that criminal law was paradigmatically public in the eighteenth century. For discussion of the Anglo-American heritage of private criminal prosecution, see, for example, Stephanie A. J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olsen and the Framers' Intent*, 99 YALE L.J. 1069, 1071-88 (1990), and William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450 (1967).

113. *See* Harrison, *supra* note 4, at 220, 231-43.

114. *See supra* notes 13-15 and accompanying text; *see also* Amar, *Two-Tiered*, *supra* note 2, at 1507-08, 1543, 1549-59.

115. *See* Harrison, *supra* note 4, at 231-32. Professor Meltzer was the first to allude to this possibility, but he conceded that inclusion of the word "all" would not have been "strictly necessary" if its purpose had been merely to reinforce the criminal/civil distinction between "Cases" and "Controversies." *See* Meltzer, *supra* note 9, at 1575. Professor Redish contended that if the "shall be vested" and "shall extend"

"all" purportedly highlights that "Cases" may sometimes include criminal prosecutions under *state* law, thereby rebutting the background presumption that one sovereign cannot enforce another's criminal laws. By contrast, the absence of "all" before "Controversies" means that this maxim applies in the second tier.[116]

In my view, the superiority of Amar's approach becomes evident when one closely examines Article III's text, its drafting and ratification history, its early implementation by Congress and the judiciary, and contemporaneous commentary by prominent legal figures.

a. A common-sense reading of "all." Professor Harrison concludes that "few if any readers of Article III would reach Amar's interpretation, because his reading does not reflect the way 'all' is used, either today or . . . in 1787. One very common use of that word is for clarity or emphasis. . . . Article III uses it to clarify a statement."[117] On the contrary, according to the *Oxford English Dictionary* (which traces the development of our language), the primary definition of "all," both in 1787 and today, is "[t]he entire or unabated amount or quantity of; the whole extent, substance, or compass of; the whole."[118] Other listed meanings are similar.[119] None of the twelve definitions provided (or any of their hundreds of accompanying citations) support Harrison's claim that "all" is used to elucidate or accentuate a subsequent word.[120]

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language is mandatory, it covers every type of case and controversy listed in Article III, and thus renders the selective usage of "all" insignificant. *See* Redish, *supra* note 21, at 1639, 1641 n.29, 1647; *see also id.* at 1640 n.28 (acknowledging that his argument that "the framers meant nothing by ['all'] . . . violates normal canons of interpretation"). *But see* Amar, *Reports*, *supra* note 2, at 1657 (concluding that the *Martin* Court properly "read 'all' as adding something above and beyond whatever case/controversy distinction may exist"). Professor Harrison attempts to make this vice of redundancy a virtue by claiming that "all" is inherently redundant because it is merely used for emphasis.

116. *See* Harrison, *supra* note 4, at 220, 232-43; *see also id.* at 233 (arguing that "all" highlights the fact that the general plural noun ("Cases") includes a particular subclass); Redish, *supra* note 21, at 1640 n.28 (making a similar point).

117. Harrison, *supra* note 4, at 244; *see also id.* at 247 ("No one uses English [Amar's] way.").

118. 1 OED, *supra* note 44, at 225.

119. For example, the second definition is "[t]he entire number of; the individual components of, without exception"; the third is "[e]very"; the fourth is "[a]ny whatever"; the sixth is "[t]he entire amount, every part, the whole"; the eighth is "[e]verything." *Id.* at 225-26.

120. Similarly unpersuasive is Harrison's argument that the Constitution always

Nor need one peruse tedious English tomes to appreciate the correctness of Amar's reading. To take an everyday example, when I tell my three daughters (ages 3, 5, and 7) "all you girls will go to bed now," they clearly understand that every one of them must proceed to bed immediately. I am not using "all" to clarify or emphasize that I have three girls or to suggest that they include crimes or states.[121]

Furthermore, both of Harrison's specific proffered usages of "all" defy common sense. First, had the Framers sought to clarify that "Cases" included criminal matters, they would likely have done so by adding the word "criminal," not "all." Indeed, that is precisely what they did later in Article III by declaring that "[t]he trial of *all Crimes* . . . shall be by Jury."[122] By contrast, using "all" to make clear and stress a term that does not even appear ("criminal") would have been needlessly confusing.

Equally implausible is Harrison's corollary assertion that Article III's drafters deleted "all" before "Controversies" to reinforce its limitation to civil suits, instead of simply inserting the word "civil." To support his claim, Harrison declares that most Article III Controversies "would be between individuals, so the term that underlines the private nature of such disputes would fit best."[123] In fact, most "Controversies" are not between individuals—namely, those in which the U.S. is a party and those between (a) two states, (b) a state and an out-of-state citizen, (c) a state and a foreign nation, (d) a state and a subject of another country, and (e) a foreign nation and an American citizen.[124] Al-

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uses "all" for clarity and emphasis. *See* Harrison, *supra* note 4, at 245-46 & n.119 (citing numerous constitutional clauses). In most of these instances, "all" means "the entire amount of," as when Congress is vested with "[a]ll legislative powers." *See* U.S. CONST. art. I, § 1, cl. 1; *see also* U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.") The most pertinent usage of "all" is in Article III itself, which provides in Paragraph 3 of Section 2 that "[t]he Trial of all Crimes . . . shall be by Jury." The most straightforward reading of that sentence is that every single criminal trial must be by jury.

121. Note also that in the example given I am using "will" as a command (as Article III uses "shall"). I am not suggesting that my daughters may go to bed now or later, at their discretion.

122. U.S. CONST. art. III, § 2, cl. 3 (emphasis added). This phrase also reveals that the Framers knew how to use the word "all" to modify "crimes" directly. Moreover, in the quoted language, "shall" is mandatory: Criminal trials must be by jury.

123. Harrison, *supra* note 4, at 232.

124. Professor Harrison makes strained arguments about these jurisdictional categories. For example, he contends that the Constitution's drafters used the term "Controversies" to denote interstate disputes to avoid the "bizarre possibility" that one state could criminally prosecute another. *Id.* at 232. But no reasonable person would

though private law often applies to such "Controversies,"[125] they usually involve governments. Moreover, the "Controversies" that do concern private individuals (most notably diversity jurisdiction)[126] might have been construed in 1789 to include criminal matters, because several states followed English tradition in allowing private citizens to prosecute crimes.[127]

Second, Harrison argues that the Framers used "all" selectively to mean that the maxim that one sovereign could not administer another's criminal laws applies in the second tier but not in the first, thereby signaling that federal courts can enforce state penal laws only in "Cases."[128] Again, it seems exceedingly unlikely that the single word "all" would have been employed to convey such a complex, novel, and critical idea.[129] Using "all" to

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have supposed that a state could commit a crime, so it would have been pointless to have protected against such an interpretation.

Similarly, Harrison claims that "to the extent that Article III was designed to eliminate jurisdictional barriers to lawsuits by private people against States," such suits "would be civil actions." *Id.* Again, I doubt the Framers needed to clarify that out-of-state citizens and foreigners could not prosecute a state criminally.

Finally, Harrison speculates that, in including "Controversies" that pit a state against out-of-state citizens and foreigners, the Founders recognized that state court partiality would be especially pronounced in civil proceedings, in which a defendant would not enjoy the full legal protections accorded accused criminals. *See id.* I had always thought, however, that local bias was a more serious problem in *criminal* cases because of the threatened deprivation of life or liberty, which is why so many notorious crimes are tried in a different venue. Indeed, the Framers might have afforded foreigners a federal criminal forum to avoid such possible tainted convictions and the resulting international repercussions.

125. *See infra* note 130 and accompanying text (arguing that state law typically governs "Controversies").

126. Other types of purely private "Controversies" in Article III are suits between a state citizen and a foreigner and those between two citizens claiming lands under grants of different states.

127. *See supra* note 112.

128. *See* Harrison, *supra* note 4, at 232-43. One scholar suggests, however, that federal judges could have applied state criminal law in "Controversies." *See* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 8-12, 98-148 (Wythe Holt & L.H. LaRue eds., 1990) (arguing that the purpose of the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 94, was to allow federal courts in all categories of Article III jurisdiction (except certain federal questions) to apply a uniform American common law of crimes based upon the existing "laws of the several states," until Congress had time te enact a criminal code).

129. Professor Harrison asserts that the "obvious way" for the Framers to have conveyed Amar's understanding would have been to write "all Cases" and "some Controversies." Harrison, *supra* note 4, at 247. Professor Amar's meaning, however, can easily be deduced because most people would naturally assume that "all" signifies "every one," and they can infer that the absence of "all" before "Controversies" indicates that not all of them must be included in federal jurisdiction.

By contrast, no rational reader, then or today, would think that the word "all"

stress that "Cases" included both federal and state proceedings would also have been strange because "Controversies" likewise extended to state law.[130]

As a matter of text and common sense, therefore, it is doubtful that Article III used "all Cases" and "Controversies" to convey the meaning that Harrison ascribes to them.

b. The Convention and Ratification debates. Of the many entries in the Convention records that support the Neo-Federalist view, the most illuminating are the drafts of the Committee of Detail, which transformed a skeletal resolution into Article III.[131] The first draft, written by Edmund Randolph and edited by John Rutledge, provides:

> The jurisdiction of the supreme tribunal shall extend
> 1. to all cases, arising under laws passed by the general <Legislature>
> 2. to impeachments of officers, and
> 3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony,
>
> in the collection of the revenue
> in disputes between the citizens of different states
> <in disputes between a State & a Citizen or Citizens of another State>
> in disputes between different states; and
> in disputes, in which subjects or citizens of other countries are concerned
> <& in Cases of Admiralty Jurisdn>.[132]

Randolph and Rutledge established a two-tiered structure by distinguishing the jurisdiction that "shall" extend to "all cases"

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means "civil and criminal" or that it relates to the presumption that one sovereign could not enforce the penal laws of another. Thus, an "obvious way" for the Framers to have conveyed the meaning Harrison suggests would have been to say "all Cases, civil and criminal, federal and state."

130. Indeed, I demonstrated that legal exposition was secondary in "Controversies" precisely because they usually involved state law; the federal courts' interpretation of that law did not bind state courts. *See* Pushaw, *supra* note 3, at 450 n.14, 504-11.

131. The Convention gave the Committee a resolution that "the jurisdiction [of the national judiciary] shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony." 2 FARRAND, *supra* note 11, at 132-33. This resolution anticipates Article III's two-tiered approach by providing that federal jurisdiction "shall extend" to "all cases" arising under federal laws, but not necessarily to other questions. *See* Amar, *Reports*, *supra* note 2, at 1659. For other pertinent evidence from the Convention, see, for example, Amar, *Neo-Federalist*, *supra* note 2, at 241-46, and Pushaw, *supra* note 3, at 484-95.

132. 2 FARRAND, *supra* nota 11, at 146-47. Rutledge's editing is in brackets.

arising under federal law from "disputes" that the legislature "may" assign (the prototypes of Article III "Controversies").[133] As Amar has emphasized, this draft admits of but one interpretation: "shall" means "must," and "may" means "can but need not"; "all" refers to "the whole"; and the national legislature has discretion over the second tier but not the first.[134]

Wilson's subsequent draft (with Rutledge's emendations) preserved this "mandatory vs. permissive" bifurcated structure:

> The Jurisdiction of the Supreme (National) Court shall extend to all Cases arising under Laws passed by the Legislature of the United States; to all Cases affecting Ambassadors (and other) <other> public Ministers <& Consuls>; to the Trial of Impeachments of Officers of the United States; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies between <States—except those wh. regard Jurisdn or Territory,—betwn> a State and a Citizen or Citizens of another State, between Citizens of different States and between <a State or the> Citizens (of any of the States) <thereof> and foreign States, Citizens or Subjects.[135]

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133. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 241-43; Amar, *Reports*, *supra* note 2, at 1660; *cf.* Pushaw, *supra* note 3, at 487 (noting the embryonic distinction between "cases" arising under federal statutory and admiralty law and "disputes" that were of national significance (e.g., those between parties such as states, state citizens, and foreigners)).

134. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 241-43; Amar, *Reports*, *supra* nota 2, at 1661. *See also* Casto, *supra* note 25, at 92-93 (conceding that this draft created contrasting tiers of required and optional jurisdiction, but arguing that the final version of Article III did not, as confirmed by later statements of the members of the Committee of Detail). Professor Harrison does not mention the Randolph/Rutledge draft.

135. 2 FARRAND, *supra* note 11, at 172-73. Rutledge's corrections are in brackets; words in parentheses were crossed out by Wilson. *See id.* at 163 n.17. Professor Harrison does not directly address Amar's argument that the Wilson draft selectively used "all Cases" to distinguish mandatory and permissive tiers of jurisdiction. *See* Amar, *Neo-Federalist*, *supra* note 2, at 244-45. Instead, Harrison simply asserts that this draft was inelegant and unclear because it used the word "jurisdiction" instead of "judicial power." *See supra* note 69 and accompanying text (questioning this argument).

Wilson's deletion of the phrase "as the legislature may assign" might be viewed as supporting Harrison, although he does not mention this bit of editing. Wilson changed the quoted phrase (and the subsequent language in Randolph's draft) simply to "Controversies." Simultaneously, he moved "Cases of Admiralty Jurisdiction" to the first tier and inserted the word "all" before "Cases," added the phrase "all Cases affecting Ambassadors," and did not use "all" before "Controversies." Considering all these changes together, Amar surmised that Wilson had intended to continue Randolph's scheme of confining Congress's power to assign jurisdiction to the second tier. *See* Amar, *Neo-Federalist*, *supra* note 2, at 241-45. Hart's followers, by contrast, believe that this assignment authority applies indiscriminately to both "Cases" and "Controversies" (except for the Supreme Court's original jurisdiction).

Wilson's precise reorganization of the jurisdictional heads under the rubrics "all Cases" and "Controversies" remained intact in the final version of Article III, and other editorial changes at the Convention indicate an awareness of the significance of this phraseology.[136]

Professor Pfander has recently reinforced Amar's thesis by demonstrating that the Framers made suits against federal officers "part of [the] mandatory ('all cases') federal-question jurisdictional grant," but allowed Congress to determine the scope of jurisdiction over "Controversies" where the United States Government as an entity was a litigant.[137] Especially critical is Pfander's conclusion that the Convention modified the obligatory language of Pinckney's proposal—that federal jurisdiction "shall be extended to all [U.S. party] Controversies"—by dropping the word "all" in order to give Congress discretion over this jurisdictional category.[138]

Overall, the evidence from Philadelphia undermines the Harrison/Meltzer theme that "the judicial Power shall extend to all Cases" really means that it "may" extend to "some" cases, if Con-

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Although neither side is clearly right or wrong, the point is that any conclusion must rest on inference, because Article III's Extending Clause does not expressly grant or deny Congress any assignment power.

136. For example, the delegates modified the Supreme Court's Original Jurisdiction Clause by adding the single word "all" before Ambassador "Cases" but not those involving States, thereby bringing this clause into strict conformity with the usage of "all" in the jurisdictional menu. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 242-43, 254 n.159; Amar, *Reports*, *supra* note 2, at 1660, 1663.

137. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 953 (1997); *see also id.* at 899-903, 953-90 (arguing that these two Article III bases of jurisdiction laid the foundation for the First Amendment's Petition Clause, which guaranteed the right to pursue judicial remedies for unlawful governmental conduct).

138. *Id.* at 949-50 (citing sources); *see also id.* at 950 & n.187 (contending that the Convention's intent to grant Congress discretion over the suability of the United States is confirmed by the delegates' rejection of a proposal to add United States-party matters to the Supreme Court's mandatory original jurisdiction).

Professor Pfander's endorsement of Amar's theory is especially troubling for Harrison, because Pfander in another article has provided the most extensive support for the "criminal vs. civil" distinction between "Cases" and "Controversies," which is the bedrock of Harrison's thesis. *See generally* Pfander, *supra* note 73. Thus, unlike Harrison, Pfander believes that this distinction can coexist with the Neo-Federalist view of federal jurisdiction, although he disagrees with Amar on the narrow issue of the Supreme Court's original jurisdiction over state-party cases. *See infra* note 194. Moreover, Pfander's opinion rests on extensive primary-source research, whereas Harrison's depends almost exclusively on textual analysis.

gress chooses.[139] Harrison ignores this material, and he cites nothing from the Convention or Ratification debates that even hints at his proposed meaning of "all."[140]

c. The Judiciary Act of 1789. Professor Amar has demonstrated that this statute closely conforms with his thesis.[141] By contrast, Professor Harrison offers virtually no evidence from the Act's text or legislative history to support his criminal/civil distinction.[142]

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139. *See* discussion *supra* Part I.C. (summarizing the arguments of Harrison and Meltzer). Perhaps Professor Meltzer's strongest historical point is that Hamilton in *The Federalist No. 80* does not use "all Cases" and "Controversies" to convey the meaning that Amar suggests. *See* Meltzer, *supra* note 9, at 1580-83.

140. For similar criticism of Professors Redish and Meltzer, see Amar, *Two-Tiered*, *supra* note 2, at 1566 n.245, and Amar, *Reports*, *supra* note 2, at 1661-64.

141. For example, Congress gave federal courts virtually plenary jurisdiction (original or appellate) over "Cases," but made major exceptions to "Controversies" (e.g., by imposing dollar thresholds). *See* Amar, *Neo-Federalist*, *supra* note 2, at 259-65; Amar, *Two-Tiered*, *supra* note 2, at 1515-67. Subsequent jurisdictional statutes followed this pattern. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 265-69; Amar, *Two-Tiered*, *supra* note 2, at 1534 n.114, 1550-51 (analyzing the Federalist-influenced Judiciary Act of 1801, 2 Stat. 89).

Professor Meltzer, however, has argued that the Judiciary Act of 1789 created gaps in the supposedly "mandatory" tier. *See* Meltzer, *supra* note 9, at 1585-99. Most significantly, ha has contended that section 25 limited the Supreme Court's appellate federal question jurisdiction to state court decisions that *denied* federal rights, thereby leaving state judgments *upholding* federal law unreviewable. *See id.* at 1585-93 (citing the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86); *see also id.* at 1590 (identifying Congress's fear that state courts would underprotect federal rights as an "obvious explanation" for section 25).

Professor Amar has responded that any such deviation is minimal or nonexistent, for three reasons. First, section 25 might reflect the First Congress's understanding that a state court decision would "arise under" federal law for Article III purposes only if the federal claim remained alive on appeal because it had been rejected below. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 262; Amar, *Two-Tiered*, *supra* note 2, at 1529. Second, section 25 fulfills Article III's structural goal of securing individual federal rights by assuring review by an independent federal court when those rights allegedly have been infringed. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 263; Amar, *Two-Tiered*, *supra* note 2, at 1529. Third, any perceived gap is largely illusory because "[i]n virtually every case in which one party argues for a federal 'right,' the other side can argue that it has a federal 'immunity'—which is simply another way of saying that one's opponent has no federal right." Amar, *Two-Tiered*, *supra* note 2, at 1530.

Although Amar's legal points may seem overly technical and strained, they make good sense when the historical background of section 25 is considered. Following a decade of state judicial defiance of the national government, the drafters of the "arising under" provisions of Article III and the First Judiciary Act likely did not contemplate (or did not take seriously) the possibility that state courts would uphold federal rights too vigorously, and in any event they would not have viewed such overenforcement as a problem that had to be resolved by the exercise of the Court's appellate jurisdiction. *See* Pushaw, *Justiciability*, *supra* note 83, at 407-12, 421-25.

142. Professor Harrison cites only sections 9 and 13 of the Act, and his

d. Federalist Court precedent. Amar's "smoking gun" for his theory is *Martin v. Hunter's Lessee*,[143] which contains the Court's earliest and fullest discussion of Congress's authority over federal "judicial power" as a whole.[144] Justice Story explicitly argued that Article III uses "shall" as a command and "all Cases" and "Controversies" to divide federal jurisdiction into mandatory and permissive tiers.[145] Every subsequent major Marshall Court decision on federal jurisdiction reaffirmed *Martin*.[146]

Harrison simply dismisses Story's argument as "histrionics"[147] and ignores the cases following *Martin*. Moreover, he identifies not one Federalist Justice who said that "all" signifies that "Cases" extend to criminal and civil proceedings, federal and state.[148]

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interpretation of those two provisions is both cursory and dubious. *See infra* notes 160-61, 163, 174-80 and accompanying text. He also fails to mention Professor Meltzer's concession that the Act undercuts this distinction. *See supra* note 100 and accompanying text.

143. 14 U.S. (1 Wheat.) 304 (1816); *see* Amar, *Neo-Federalist*, *supra* note 2, at 210-15, 271-72 (discussing *Martin*).

144. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 265-69; Amar, *Two-Tiered*, *supra* note 2, at 1501-05. Earlier cases focused on specific aspects of federal jurisdiction. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Supreme Court's original jurisdiction); Brown v. Van Braam, 3 U.S. (3 Dall.) 344 (1797) (diversity jurisdiction); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (Controversies "between a State and Citizens of another State").

145. *See Martin*, 14 U.S. (1 Wheat.) at 334-36, 347. Although Chief Justice Marshall had to recuse himself, he "concurred in every word" of Story's opinion. *See* Amar, *Reports*, *supra* note 2, at 1667 n.70 (citing source). In fact, Marshall may have helped Story write the opinion. *See* Amar, *Two-Tiered*, *supra* note 2, at 1514 n.39.

Although Story played no role in the Constitution's drafting or ratification, his opinion in *Martin* accurately captures the Framers' intent to split Article III into mandatory and permissive tiers.

146. *See, e.g.*, American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 821-22 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821). This approach was continued by the Taney Court. *See* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 672-73, 721 (1838) (invoking the Necessary and Proper Clause to conclude that Congress has the power to assign Article III "Controversies" as it sees fit). For further discussion, see Amar, *Reports*, *supra* note 2, at 1653 nn.14-15, 1666 & nn.64-65, and Amar, *Two-Tiered*, *supra* note 2, at 1513 n.37. *But see* Meltzer, *supra* note 9, at 1628-29 n.228 (arguing that these opinions do not clearly support Amar's thesis).

147. Harrison, *supra* note 4, at 212.

148. The lone authority Professor Harrison cites is *Chisholm*, 2 U.S. (2 Dall.) at 431-32 (Iredell, J., dissenting). *See* Harrison, *supra* note 4, at 221-22, 224, 228-29. But Justice Iredell merely construed the word "controversy" and said nothing about why "all" appeared before "Cases." *See supra* notes 106-08 and accompanying text. Moreover, Iredell's criminal/civil distinction was never again mentioned by the Marshall or Taney Courts. *See* Amar, *Reports*, *supra* note 2, at 1666.

e. Other evidence. Professor Amar cited distinguished extrajudicial commentary from the early nineteenth century which powerfully confirms that the "all Cases" and "Controversies" language separates Article III into two tiers.[149] In addition, Professor Pfander has shown that Henry Wheaton, a prominent lawyer and scholar who officially reported most of the key Marshall Court decisions, vigorously defended Story's bifurcated approach.[150] According to Wheaton,

> [T]he language of the constitution is imperative. It speaks in the unequivocal tone of command. "The judicial power *shall* extend to *all* cases arising under this constitution," &c. Congress cannot, without violating the constitution, disregard this mandate. . . .[151]

> [Article III] declares that "the judicial power shall extend to *all cases* in law and equity arising under this constitution," &c. "to *controversies* to which the United States shall be a party," &c. The terms applied to the first class comprehended every possible case of the character described; and those applied to the second, may, in the discretion of the national legislature, be

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149. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1696 (1833) (explaining that the Constitution, by declaring that federal judicial power "shall extend to '*all* cases,'" obliges Congress to grant the national courts such jurisdiction); John Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 204, 212-14 (Gerald Gunther ed., 1969) (quoting the Extending Clause to "deny that the word 'some' can be substituted for 'all,' or that the word 'all,' can be satisfied if any one case can be withdrawn from the jurisdiction of the court"); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 298 (1st ed. 1826) (to similar effect). *But see* Meltzer, *supra* note 9, at 1592-93 (arguing that (1) the comments of Story and Marshall about cases in which Congress had given jurisdiction to federal courts in the mandatory tier do not show their understanding that Article III *required* Congress to make such grants, and (2) the early Court repeatedly upheld congressional limitations on federal question jurisdiction).

Perhaps the most ringing endorsement of Story's opinion occurred in 1831, when then-Representative James Buchanan wrote a minority report dissenting from the House Judiciary Committee's vote to repeal section 25 of the Judiciary Act of 1789, which would have given state courts final jurisdiction over many federal question cases. Relying solely on *Martin* and *Cohens*, Buchanan emphasized the phrase "all Cases" four times and also stressed that "shall" means "must." Buchanan's dissent was so persuasive that the full House overwhelmingly rejected the bill. *See* H.R. Rep. No. 43, 21st Cong., 2d Sess. 11-20 (1831).

For discussion of the aforementioned sources, see Amar, *Two-Tiered*, *supra* note 2, at 1513-14, and Amar, *Reports*, *supra* note 2, at 1666-67 n.68.

150. *See* Henry Wheaton, *The Dangers of the Union* (1821), *reprinted with editing and introduction by* James E. Pfander, 12 CONST. COMMENTARY 249, 249-51 (1995). Wheaton wrote a series of pseudonymous essays defending *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), a decision that relied heavily upon *Martin*.

151. Wheaton, *supra* note 150, at 364 (emphasis added).

> applied to all or to some controversies only as shall seem expedient.[152]

f. Summary. Professor Harrison rarely mentions—much less adequately responds to—the overwhelming textual and historical evidence that undergirds Amar's explanation of the meaning of the word "all." Instead, Harrison resorts to asserting that Amar's reading presumes that the Constitution's drafters played "an intricate word game" and engaged in "secret writing."[153] More importantly, Harrison cites little to indicate that the Constitution's drafters, ratifiers, or early judicial and congressional interpreters understood that "all" clarified and emphasized that

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152. *Id.* at 358; *see also id.* at 362-69 (emphasis added) (repeating the language highlighted in the quoted passages in endorsing Story's opinion that Congress had discretion to restrict jurisdiction over "Controversies" but not "Cases"); *id.* at 270-72 (arguing that every case or controversy listed in Article III provides an independent ground of federal court jurisdiction, and that the first category "give[s] jurisdiction in *all cases* coming within the description, containing no exception of any party whatever").

Wheaton contended that federal question cases were paramount because every government must have the means of enforcing its own laws, and that this "vital principle" of self-preservation explained why "the constitution declares that 'the judicial power SHALL extend to ALL' these [federal question cases] without exception." *Id.* at 362. Thus, Congress had to grant such jurisdiction, although it could choose which federal court (supreme or inferior) would exercise this jurisdiction and what form (original or appellate) it would take. *See id.* at 367-68.

153. Harrison, *supra* note 4, at 247. Professor Harrison's suggestion that Amar "makes Article III a piece of secret writing, comprehensible only with magnifying glass, Rosetta Stone, and a powerful imagination," *id.* at 208, fails to recognize that Article III *is* "secret writing" in the sense that the Convention delegates decided to keep their debates confidential. *See* Pushaw, *supra* note 3, at 467 n.108 (citing sources). Fortunately, we have the Rosetta Stone that helps decode Article III—Farrand's three-volume collection of the Convention's records, FARRAND, *supra* note 11, which Harrison essentially ignores.

Harrison echoes Professor Redish in contending that a Constitution cannot be so obscure that its true interpretation takes centuries to emerge, and that therefore the Convention would have written Article III differently if it had intended to convey the meaning Amar suggests. *See* Harrison, *supra* note 4, at 247; *see also* Redish, *supra* note 21, at 1636, 1641-42 (claiming that no rational drafter who sought to achieve the goals of the two-tier thesis would have chosen the language of Article III, and particularly would not have relied exclusively on the selective and cryptic usage of the word "all"). As Professor Meltzer has pointed out, however, such criticisms of Amar are unpersuasive because Article III's text was inartfully drafted and does not unambiguously support any particular account of its meaning (including Hart's). *See* Meltzer, *supra* note 9, at 1574, 1610. Moreover, the implication that no one before Amar had discerned his reading of Article III is ludicrous. On the contrary, his theory builds upon Federalist writings that have long been ignored by the self-styled "traditionalists."

"Cases" would encompass every proceeding—civil and criminal, federal and state.

4. Concurrent criminal jurisdiction over "Cases"

It does not necessarily follow, however, that Professor Harrison is wrong in concluding that the new constitutional system contemplated departures from the principle that one government cannot enforce another's criminal laws. Indeed, Professor Amar himself acknowledged that the Framers, by empowering Congress to decline to create inferior federal courts, necessarily realized that federal penal laws could be prosecuted in the first instance in state courts[154]—an arrangement implemented by Congress and upheld by the Court in 1820.[155] Conversely, he argued that federal courts could apply state criminal law, even originally—a proposition the Court initially resisted[156] but eventually accepted in 1880.[157] In Amar's view, this concurrent criminal jurisdiction reflected the logic of federalism, as embodied in several constitutional provisions—Article III's implicit recognition of the state courts' general jurisdiction, Article I's grant to Congress of the power to make law (including criminal statutes) and its Necessary and Proper Clause, and Article VI's Supremacy Clause.[158]

Harrison devotes considerable space to reiterating that federal courts may enforce state criminal law, and vice versa.[159] He

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154. *See* Amar, *Neo-Federalist*, *supra* note 2, at 212-13. Many state courts, however, followed traditional principles and declined to exercise concurrent federal criminal jurisdiction. *See, e.g.*, RAWLE, *supra* note 48, at 229.

155. *See* Amar, *Neo-Federalist*, *supra* note 2, at 213 (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820)); *see also id.* at 212-13 (demonstrating the error of statements to the contrary in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-31, 337 (1816)).

156. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821). One author upon whom Professor Harrison heavily relies also did not believe that federal courts could adjudicate state crimes. *See* 1 TUCKER, *supra* note 73, app. at 420.

157. *See* Amar, *Neo-Federalist*, *supra* note 2, at 213-14 (citing *Tennessee v. Davis*, 100 U.S. 257, 271 (1880), which upheld a federal statute authorizing the removal of a state criminal prosecution into a federal court). The validity of *appellate* jurisdiction over state decisions (criminal or civil) to ensure their compliance with the Constitution was more readily accepted, although this point was downplayed during the Ratification effort. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (providing for Supreme Court review of state decisions that defeated federal rights).

158. *See* Amar, *Neo-Federalist*, *supra* note 2, at 212-14, 229-30, 241-42 n.120, 248-50.

159. *See* Harrison, *supra* note 4, at 232-43. Professor Harrison correctly recognizes that federal jurisdiction (especially original) over state criminal proceedings was

attributes this scheme almost entirely to the careful usage of the word "all" before "Cases" in Article III, despite his failure to identify a single Federalist who expressed this view. The weakness of his other supporting evidence becomes apparent upon closer scrutiny of the historical treatment of foreign minister, admiralty, and federal question jurisdiction.

a. Foreign ministers. It seems unlikely that "all" signaled the broad extension of "Cases affecting Ambassadors . . . [and] public Ministers" to state criminal proceedings, because those dignitaries generally enjoyed immunity from such prosecutions.[160] Professor Harrison asserts, however, that consuls (the other type of foreign official mentioned in Article III) were subject to ordinary state laws (civil and criminal) and thus were granted an independent national tribunal to apply such laws.[161] He acknowledges, however, that a respected nineteenth-century writer argued that general federal common law should govern proceedings involving consuls.[162]

Moreover, Harrison's three key supporting authorities are equivocal at best. First, he interprets the phrase "all suits" in sections 9 and 13 of the Judiciary Act of 1789 to include state criminal matters, even though state law is never mentioned and the word "suits" ordinarily connotes civil actions.[163]

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controversial; indeed, he cites no statement endorsing such jurisdiction at the Convention or Ratification debates. *See id.* at 234. Rather, he argues that this understanding evolved over a century. *See id.* at 234-43.

Curiously, Harrison nowhere acknowledges Amar's similar analysis of concurrent criminal jurisdiction. Nor does he mention Professor Pfander's research showing that many early legal analysts (e.g., Iredell, Tucker, and DuPonceau) argued that "Controversies" should be limited to civil actions to honor the doctrine that courts cannot execute the penal laws of another sovereign, whereas "Cases" had a broader scope and could include state criminal prosecutions. *See* Pfander, *supra* note 73, at 607-10.

160. *See, e.g.*, Judiciary Act of 1789 § 13 (providing that the Supreme Court's exclusive jurisdiction over all proceedings against ambassadors and other foreign ministers had to be exercised "not inconsistent with the law of nations"); Pushaw, *supra* note 3, at 504 nn. 280-81 (discussing diplomatic immunity). Professor Harrison concedes this point, but raises the possibility that the United States might waive such privileges. *See* Harrison, *supra* nota 4, at 232 n.79.

161. *See* Harrison, *supra* note 4, at 232 n.79, 236 & nn.90-91.

162. *See id.* at 239 n.102 (citing RAWLE, *supra* note 48, at 265-66); *see also* Harrison, *supra* note 4, at 236 n.90 (noting that Vattel had endorsed consular immunity from criminal prosecution).

163. *See* Harrison, *supra* note 4, at 237 (citing statute, but acknowledging that these legislative provisions are not clear); *cf.* Meltzer, *supra* note 9, at 1576 & n.22 (stating although section 13 granted federal courts jurisdiction over criminal cases, it remained "uncertain" whether they "would have entertained a state law prosecution

Second, Harrison identifies Peter DuPonceau as the first person to argue explicitly that federal courts have jurisdiction over prosecutions of consuls for violations of state criminal laws.[164] However, one case DuPonceau invoked for this proposition is inconclusive, as Harrison recognizes.[165] The other decision DuPonceau cited was *Commonwealth v. Kosloff*,[166] in which a Pennsylvania court dismissed the criminal prosecution of a consul on the ground that federal jurisdiction was exclusive, but hinted that state law should govern if the case were refiled in federal court.[167] Such a dictum by an obscure tribunal does not seem relevant in ascertaining the Framers' intent. Moreover, DuPonceau's objectivity is suspect because (1) he served as an attorney in both cases upon which he relied,[168] and (2) he dedicated his book to *Kosloff*'s author, Justice Tilghman, his "venerable patron."[169]

Third, Harrison cites a case in which the South Carolina legislature broke a three-to-three deadlock in its Supreme Court by approving the opinion that state courts could exercise crimi-

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against . . . ambassador[s]" given the rule that "one sovereign [would] not enforce another's penal laws"); *see also supra* note 100 (arguing that section 13's references to "controversies of a civil nature" would have been redundant if "controversies" were inherently civil).

As I read the Act, section 9 grants federal district courts original jurisdiction over all civil suits against consuls and over all petty federal law crimes (including those involving consuls); section 13 gives the Supreme Court original jurisdiction over civil suits in which consuls are plaintiffs and (by implication) major federal crimes, with the latter criminal jurisdiction concurrent with that of the circuit courts. Although I concede the possibility that the Supreme Court's original jurisdiction over consuls might encompass state criminal law, I am reluctant to draw this implication without other evidence. *Cf.* Amar, *Neo-Federalist*, *supra* note 2, at 261 n.183 (suggesting that section 13's grant of nonexclusive original jurisdiction may have been designed to allow consuls and other foreign ministers to choose whether to bring civil suits in a federal or state forum).

164. *See* Harrison, *supra* note 4, at 237-38 (citing PETER S. DUPONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 32-34 (Arno Press 1972) (1824)).

165. *See id.* at 238 nn.97-100 (citing sources).

166. 5 Serg. & Rawle 545 (Ct. Oyer & Terminer, PA 1816).

167. *See id.* at 551 (recognizing that it was "not necessary" to reach this question); *see also* Harrison, *supra* note 4, at 238-39 (discussing *Kosloff*).

168. *See* Harrison, *supra* note 4, at 237-38. Professor Harrison also concedes that DuPonceau's political agenda may have influenced his legal analysis. *See id.* at 241 n.107.

169. *See* DUPONCEAU, *supra* note 164, at 44. Interestingly, Harrison omits DuPonceau's citation of Chief Justice Marshall's statement in an 1807 case that "'no man can be condemned or prosecuted in the federal courts on a state law.'" *Id.* at 42 (citing case). *But see id.* at 39-43 (claiming that this sentence was inaccurate dicta).

nal jurisdiction over consuls.[170] In dissent, Justice Abraham Nott argued that federal court jurisdiction over consuls was exclusive because Article III extends federal judicial power to "all Cases" (including those involving consuls), but not all "Controversies."[171] The dissent explicitly followed *Kosloff*'s holding, although not its dictum that state law should be applied.[172] Harrison's criticism of Nott is odd, because elsewhere he agrees with Nott's position that federal courts have sole criminal jurisdiction over consuls; Harrison's point is that they must follow state substantive law.[173]

In short, Harrison does not persuade me that Article III uses "all" before "Cases" involving foreign officers to clarify and emphasize that such cases encompass state criminal prosecutions.

b. Admiralty. Professor Harrison's principal authority for his claim that "state criminal laws [would be] enforced in federal admiralty courts" is section 9 of the Judiciary Act of 1789.[174] Initially, he declares that section 9 "extended the admiralty jurisdiction to events taking place on waters within States, including for example seizures made on 'waters which are navigable from the sea by vessels of ten or more tons burthen [sic].'"[175] He fails to mention, however, that the quoted statutory language about seizures is prefaced by the phrase "all *civil* causes of admiralty and maritime jurisdiction."[176]

Harrison also invokes the clause in section 9 conferring on federal district courts exclusive jurisdiction over all civil admiralty and maritime cases, "saving to suitors, in all cases, the right of a common law remedy."[177] But this provision denies state courts any federal admiralty jurisdiction; instead, it grants a litigant the option, when a transaction gives rise to both a federal admiralty claim and a state "common law remedy" (presumably civil), to bring the latter action in state court and forgo the federal forum.[178]

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170. *See* State v. De La Foret, 2 Nott & McC. 217, 217-26, 233 (Const. Ct. S.C. 1820), *cited in* Harrison, *supra* note 4, at 239 n.101.

171. *See De La Foret*, 2 Nott & McC. at 226-33 (Nott, J., dissenting).

172. *See id.* at 232 (Nott, J., dissenting).

173. *See* Harrison, *supra* note 4, at 236-39.

174. *Id.* at 240 (citing Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77).

175. *Id.*

176. Judiciary Act of 1789 § 9 (emphasis added).

177. *Id.*; *see* Harrison, *supra* note 4, at 240.

178. *See* Amar, *Two-Tiered*, *supra* note 2, at 1525-26. *But see* Meltzer, *supra* note 9, at 1593-95 (acknowledging the plausibility of Amar's argument, but noting that

Finally, section 9 does not give federal admiralty courts jurisdiction to decide state criminal matters. On the contrary, it explicitly provides "[t]hat the district courts shall have, exclusively of the courts of the several States, cognizance of all [petty] crimes and offences that shall be cognizable *under the authority of the United States*."[179] And nothing in section 9 or its legislative history suggests that Congress was acting upon its understanding that Article III employed "all" to indicate that, in admiralty "Cases," federal courts could apply state criminal laws.[180]

c. Federal questions. Of the three most contemporaneous sources that Professor Harrison relies upon for the idea that federal courts must have jurisdiction to ensure the effectiveness of federal-law defenses in state criminal prosecutions, none mentions the significance of "all."[181] Two other statements provide firmer support, although they were made by undistinguished figures long after the Constitution had been ratified, and they focused more on the comprehensive reach of "all Cases" to include criminal matters than on the linkage of "all" to state crimes.[182]

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section 9 might create a gap in the mandatory tier because federal courts could not review state common-law admiralty decisions that implicated national or international concerns).

179. Judiciary Act of 1789 § 9 (emphasis added). Moreover, section 11 grants federal circuit courts concurrent jurisdiction over such minor offenses and exclusive power over all other federal crimes. *See* Amar, *Two-Tiered*, *supra* note 2, at 1526 n.82 (citing statute).

180. Similarly unavailing is Professor Harrison's reliance upon *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818). *See* Harrison, *supra* note 4, at 240 n.105. The *Bevans* Court held that a federal statute punishing crimes committed on waterways outside a state's boundaries did not apply to a murder in a harbor located within a state, and therefore dismissed for want of jurisdiction in deference to the state court's competence over the case. *See Bevans*, 16 U.S. (3 Wheat.) at 386-91. The Court nowhere stated that federal courts should apply state substantive criminal law.

181. *See* Harrison, *supra* note 4, at 234-35 (citing the Judiciary Act of 1789 § 25; Attorney General Randolph's 1790 Report to the House of Representatives on the Judiciary; and the Nonintercourse Act of 1815, ch. 31, § 8, 3 Stat. 195, 198, which provided for the removal of state prosecutions against federal officials).

182. *See* Harrison, *supra* note 4, at 235 (citing Sen. Wilkins's remark about a provision in the Force Act of 1833, 4 Stat. at 633, and Justice Strong's opinion in *Tennessee v. Davis*, 100 U.S. 257, 265-67 (1880)). Professor Harrison rejects any "implication" in *Davis* that "only federal courts could finally determine questions within the federal jurisdiction." Harrison, *supra* note 4, at 236 n.89 (citing *Davis*, 100 U.S. at 266-67). But he neglects to quote Justice Strong's *express* recognition of this basic Federalist principle:

> The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection

In sum, Harrison appears to be citing any source—no matter how obscure, equivocal, or remote in time from the Framing—to justify his novel thesis that Article III's drafters inserted "all" before "Cases" to make clear that "Cases" reached globally to cover state criminal proceedings. By contrast, Amar has demonstrated that many leading Federalists recognized that the presence and absence of "all" divides Article III into mandatory and permissive tiers.[183]

C. The Supreme Court's Original and Appellate Jurisdiction

The second paragraph of Section 2 of Article III provides:

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

Professor Harrison concedes that "[this] paragraph does not use 'all' to reinforce the point that cases include both civil and criminal proceedings,"[184] thereby undercutting his central thesis. By

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> shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution?

Davis, 100 U.S. at 266.

183. *See supra* notes 11-14, 131-36, 143-46, 149 and accompanying text; *see also* Amar, *Reports*, *supra* note 2, at 1657-58 (arguing that, even if the "Cases" and "Controversies" language does reflect a criminal/civil distinction, that fact still would not overcome Article III's command that federal judicial power "shall be vested" in independent federal courts and "shall extend" to "all Cases" in the first tier, civil or criminal).

Interested readers might wish to compare Harrison's primary-source materials with those collected by Amar and me. For our treatment of foreign-minister jurisdiction, see Amar, *Neo-Federalist*, *supra* note 2, at 244 n.129, 253-54; Amar, *Two-Tiered*, *supra* note 2, at 1513, 1522-25; and Pushaw, *supra* note 3, at 485 n.196, 492 n.226, 497 n.246, 497-98 n.248, 503-04 & nn.278-81. For our analysis of admiralty, see Amar, *Neo-Federalist*, *supra* note 2, at 253, 261 & n.182; Amar, *Two-Tiered*, *supra* note 2, at 1512-13, 1525-29; and Pushaw, *supra* note 3, at 485 & n.195, 492 & n.226, 495 & n.237, 497-98 & nn.246-48, 502-03 & nn.272-277. For our discussion of federal questions, see Amar, *Neo-Federalist*, *supra* note 2, at 246-52; and Pushaw, *supra* note 3, at 470, 472, 489-93, 495-502.

184. Harrison, *supra* note 4, at 249; *see also id.* at 248 (acknowledging that "'all' is doing little if any work"). Professor Harrison rationalizes this inconsistency by asserting that it would have been redundant for the Framers to have used "all Cases" in Paragraph 2 to convey the criminal/civil distinction of Paragraph 1. *See id.* at 249. But Paragraph 2 itself uses the redundant phrase "all Cases," and the Framers likely

contrast, Professor Amar is consistent in arguing that, once again, "all" signifies "every one" and "shall" means "must."[185] An analysis of each part of Paragraph 2 reveals that Amar's approach, despite certain flaws, is more satisfying than Harrison's.

1. The Original Jurisdiction Clause

Everyone agrees that Article III grants the Supreme Court irreducible original jurisdiction over all cases affecting foreign ministers.[186] As Amar pointed out, this consensus necessarily reflects an understanding that federal judicial power "shall" (i.e., must) be vested in at least one Supreme Court, which "shall" (i.e., must) have original jurisdiction over "all" (i.e., every one of) those cases.[187] Thus, Hart's disciples seemingly contradict themselves by maintaining that "all" and "shall" mean something different in Paragraph 1's phrase "the judicial Power shall extend to all Cases"—particularly the terminology "all Cases affecting Ambassadors, other public Ministers and Consuls," which was deliberately repeated verbatim in Paragraph 2.[188] This in-

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did so deliberately to highlight that it has the same meaning as in Paragraph 1. *See* Amar, *Marbury*, *supra* note 47, at 480-81; *see also infra* notes 185-88 and accompanying text.

185. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 254-59; Amar, *Two-Tiered*, *supra* note 2, at 1507-08.

186. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 214, 221 n.60, 231-32, 239-42, 253-54 & nn.158-60, 257-58 n.168, 264-65 n.194; Amar, *Two-Tiered*, *supra* note 2, at 1513, 1523-25. Professor Harrison concurs that Congress cannot tamper with the Court's original jurisdiction over foreign-officer cases, but he applies that same analysis to state-party cases, unlike Amar. *See* Harrison, *supra* note 4, at 248. Other "traditionalists" such as Professors Hart, Redish, and Meltzer also have argued that the Supreme Court's whole original jurisdiction is mandatory and irreducible. *See* Meltzer, *supra* note 9, at 1596-97, 1602 (citing sources).

187. *See supra* notes 44-46 and accompanying text; *see also* Amar, *Two-Tiered*, *supra* note 2, at 1522-25, 1554-55; Amar, *Reports*, *supra* note 2, at 1655 & nn.20-22.

188. *See* sources cited *supra* note 187; *see also supra* note 136 (showing that the Convention inserted the word "all" before Ambassadors, but not before state-party lawsuits, to bring this sentence into conformity with the Extending Clause). In Professor Meltzer's view, however, "shall" need not always be defined as "must," but rather can have different meanings depending on the phrase and context in which it appears in Article III. *See* Meltzer, *supra* note 9, at 1596; *see also supra* note 44 (discussing several definitions of "shall"). For example, in Section 2 "shall be vested" could refer to matters that federal courts have the capability (but not the duty) to decide, and in Section 1 "shall be vested" could signify the courts that may exercise that capability. *See* Meltzer, *supra* note 9, at 1596-97; *see also supra* notes 26-27 and accompanying text. Meltzer asserts that, by contrast, "shall" has "a more imperative ring" in the Original Jurisdiction Clause—especially because of the absence of any congressional power to make exceptions to the Court's original docket (as contrasted with the appellate jurisdiction). *See* Meltzer, *supra* note 9, at 1596.

consistency is especially glaring for Harrison, because he bases his entire theory on a peculiar translation of "all Cases" in the Extending Clause, but then claims that these identical words no longer have the same meaning in the Supreme Court Jurisdiction Clause.[189]

Amar further argued that the Court's original jurisdiction does not necessarily extend to state-party lawsuits because, as in the preceding paragraph, the word "all" is dropped before "those in which a State shall be Party"—a phrase that incorporates the prior reference to "Controversies" between a state and (a) another state, (b) out-of-state citizens, and (c) a foreign nation or its citizens.[190] Harrison replies that Congress has no express power to make exceptions to the Supreme Court's original jurisdiction, and that therefore Amar cannot justify his claim that state-party "Controversies" are permissive.[191]

Although this criticism draws blood, Harrison's interpretation also has its defects. Like Amar and almost everybody else, Harrison assumes that the first sentence of Paragraph 2 means that the Court has original jurisdiction over all foreign minister "Cases" and "those [Controversies] in which a State shall be Party," and that the latter phrase cross-references the three state-party Controversies listed in Paragraph 1.[192] This construction, however, conflicts with the most natural grammatical reading of the opening sentence, which is that "those" refers to the

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189. *See* Harrison, *supra* note 4, at 248-49.

190. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 244 n.128, 254 n.160, 261 & n.183; Amar, *Two-Tiered*, *supra* note 2, at 1538 & n.136, 1560-61 n.222; Amar, *Marbury*, *supra* note 47, at 444, 479-93. Thus, Amar contended that Congress's power to restrict the Court's jurisdiction over state-party matters derives not from the Original Jurisdiction Clause itself, but rather "from the two-tiered language of the jurisdictional menu of Article III, § 2, read in light of the Necessary and Proper Clause." Amar, *Marbury*, *supra* note 47, at 482-83. For a similar analysis, see Amar, *Neo-Federalist*, *supra* note 2, at 254-55 n.160.

191. *See* Harrison, *supra* note 4, at 249; *see also id.* (rejecting Amar's argument that Congress has implied power to restrict state-party Controversies); Meltzer, *supra* note 9, at 1597-98 (criticizing Amar on the ground that the Judiciary Act of 1789 created gaps in the supposedly "mandatory" ambassador jurisdiction, yet fully vested the Court with original jurisdiction in the "permissive" state-party categories). Especially persuasive is Meltzer's claim that one subset of state-party controversies, those between states, cannot safely be left to the courts of one of the states involved. *See* Meltzer, *supra* note 9, at 1598, 1606.

192. *See* Harrison, *supra* note 4, at 248-49; *see also* Pushaw, *supra* note 3, at 518 n.334 (describing, but questioning, the longstanding judicial and scholarly consensus that "those" refers to "Controversies").

antecedent noun "Cases."[193] If so, then the state-party lawsuits listed in the Extending Clause would include criminal proceedings, thereby eviscerating Harrison's thesis.[194]

2. *The Appellate Jurisdiction Clause*

Professor Harrison's theory breaks down when applied to the provision that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction." On the one hand, he follows the traditional view that "Cases" refers to the entire jurisdictional catalogue of Paragraph 1 (except perhaps those matters covered in the Original Jurisdiction Clause): not only federal question and admiralty "Cases," but also United States-party, diversity, land grant, and alienage "Controversies."[195] On the other hand, Harrison argues that the Constitution is again "using 'all' as a synonym for 'the' or a clarification that general language really is totally inclusive."[196]

Harrison never puts those two propositions together, however, because doing so inexorably leads to this conclusion: The

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193. *See* Pushaw, *supra* note 3, at 518 n.334.

194. Professor Harrison acknowledges, but does not analyze, a recent challenge to the conventional wisdom that he embraces. *See* Harrison, *supra* note 4, at 249 n.126 (citing Pfander, *supra* note 73). Professor Pfander has contended that the Framers used the word "Cases" deliberately to encompass those matters so designated in the jurisdictional menu—federal question and admiralty "Cases." *See* Pfander, *supra* note 73, at 560-61, 591-92, 598-617, 648-49, 658. This textual argument supports his theme that the Framers intended to confer on the Supreme Court original jurisdiction over all federal question and admiralty "Cases" in which a state was a party-defendent to assure state compliance with federal law. *See id.* at 558-60, 590-659.

Pfander also claims that the Original Jurisdiction Clause included Paragraph 1 "Controversies" in which a state was a party. He maintains that "Cases" was used as shorthand for both "Cases" and "Controversies" because the word "Cases" was more inclusive than "Controversies," which was limited to civil matters. *See id.* at 605, 614-17, 648, 655, 658. On this narrow point, I think that the better explanation for the broader meaning of "Cases" is that in the eighteenth century, both "Cases" and "Controversies" were brought originally in a "cause of action," a phrase sometimes shortened to "cause" or "case." *See* Pushaw, *supra* note 3, at 473 n.134, 483 n.183, 496 n.241, 518 n.334. Overall, however, I believe that Pfander's explanation of state-party matters is more persuasive than either Harrison's or Amar's.

195. *See* Harrison, *supra* note 4, at 248-50. Alienage jurisdiction consists of suits by a state citizen against a foreign nation or its citizens.

196. *Id.* at 250. Professor Harrison also asserts that this Appellate Jurisdiction Clause undercuts Amar's theory because "all" cannot possibly be contrasting with a parallel formulation from which "all" is missing. *See id.* at 249-50. Although the Appellate Jurisdiction Clause obviously does not repeat the parallel usage of "all Cases" and "Controversies" in the Extending Clause, it is difficult to discern why this affects Amar's thesis, which tries to make sense of each word of Article III as written by the Framers.

modifier "all" signifies that the "Cases" within the Court's appellate jurisdiction (including those previously labeled "Controversies") encompass civil and criminal proceedings, both state and federal.[197] Thus, Harrison cannot provide a coherent account of the meaning of "all Cases" in either the Appellate or Original Jurisdiction Clauses. More sensible is his interpretation of the final clause of Paragraph 2 as broadly empowering Congress to make "Exceptions" to the Court's appellate jurisdiction, so long as they are not so large that they no longer constitute exceptions.[198]

Professor Amar contended that the Exceptions Clause qualifies the otherwise mandatory language that the Supreme Court "shall have appellate jurisdiction" in "all" non-original jurisdiction cases.[199] In his view, the Exceptions Clause restricts only the Supreme Court's appellate jurisdiction—not "the judicial Power of the United States" as a whole—and hence does not limit Article III's earlier command that this power "shall be vested" in federal courts and "shall extend" to "all Cases."[200]

3. *Inferior federal courts*

Paragraph 2 explicitly addresses only the Supreme Court's jurisdiction.[201] Professor Harrison argues that, implicitly, the earlier grant of power to Congress to create inferior federal courts must include authority to determine their jurisdiction.[202] This control, coupled with Congress's significant power over the Court's appellate jurisdiction, leads Harrison to reaffirm the

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197. Perhaps anticipating this criticism, Professor Harrison contends that "when the text refers to all the other cases before mentioned, it includes only civil proceedings in the controversy-denominated heads of jurisdiction because the first paragraph included only civil proceedings." *Id.* at 249. But this statement cannot be reconciled with Harrison's theme that, consistent with the usage of "all" throughout the Constitution, in Article III it is used before "Cases" to clarify and emphasize their broad sweep to every lawsuit—civil and criminal, federal and state. *See id.* at 248-50.

198. *See id.* at 205, 209, 251.

199. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 217 n.50, 218 & nn.51-52, 221 & n.62, 229-30, 239-40 n.118, 242 & n.124, 257-59; Amar, *Reports*, *supra* note 2, at 1654, 1655-56 n.22.

200. *See, e.g.*, sources cited *supra* note 199. Thus, Congress can make "Exceptions" to the Supreme Court's federal question and admiralty jurisdiction only by shifting those "Cases" to another Article III court. *See* Amar, *Neo-Federalist*, *supra* note 2, at 255-59.

201. *See* Harrison, *supra* note 4, at 247-48.

202. *See id.* at 210.

Hart school dogma that the actual scope of federal jurisdiction is subject to near-absolute congressional discretion.[203]

Professor Amar acknowledged Congress's substantial power over federal courts, inferior and supreme. However, he denied that Congress can defy the Constitution's command that "the judicial Power of the United States shall be vested" in independent federal courts and "shall extend" to "all Cases" in the three specified categories.[204]

III. CONSTITUTIONAL STRUCTURE

Professor Harrison claims that Amar relied upon general, abstract principles of constitutional structure to resolve hard questions of detail instead of examining specific, concrete constitutional provisions that yield determinate rules.[205] This criticism distorts Amar's methodology, which invoked the Constitution's structure to *reinforce* (not substitute for) a detailed analysis of Article III's text.

Most importantly, Professor Amar demonstrated that the particular constitutional provisions concerning the appointment, removal, tenure, and salary of federal judges were designed to ensure their structural parity and superiority to state tribunals.[206] Similarly, he showed how broad Federalist separation-of-powers principles confirm constitutional language indicating that

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203. *See id.*; *see also supra* Part I.A. (describing the Hart camp's theory).

204. *See* Amar, *Neo-Federalist*, *supra* note 2, at 229-30, 240-59; Amar, *Two-Tiered*, *supra* note 2, at 1507-10.

205. *See* Harrison, *supra* note 4, at 250-56 (illustrating this point by noting that the Constitution's language authorizing the impeachment of judges, not the theoretical ideal *of* "judicial independence," must govern the decision of actual cases). Professor Harrison's assertion that Amar discounted specific constitutional provisions is hard to reconcile with his earlier criticism that Amar paid too much attention to the Constitution's language. *See id.* at 247 (accusing Amar of playing an "intricate word game").

Unlike Harrison, Daniel Meltzer has acknowledged the appropriateness of Professor Amar's reliance upon structural constitutional arguments to buttress his textual interpretations. Meltzer contends, however, that Amar's proffered structural principles are often debatable and that, even if one were to accept them, they do not firmly support Amar's thesis. *See* Meltzer, *supra* note 9, at 1614-32. For instance, Meltzer rejects Amar's claim that the Constitution creates a principle of federal court "structural superiority." *See id.* at 1615, 1627-31; *see also supra* note 56. He further argues that even if this principle existed, it would fail to explain why the availability of a "superior," independent federal judge is more important in Article III's first tier than in its second tier, where the risk of bias by a politically dependent state jurist is at least as great. *See* Meltzer, *supra* note 9, at 1615.

206. *See supra* notes 14, 49-53 and accompanying text.

Congress cannot destroy the vital role of independent federal courts in ultimately deciding "all Cases" involving federal questions, admiralty, and foreign ministers.[207] Finally, Amar concluded that in such cases (especially those arising under the Constitution), the Framers recognized that the political safeguards of federalism would be inadequate to assure that officials who were dependent on state legislatures (i.e., state judges and Congress) could resist short-term political pressures.[208]

Harrison tries, but fails, to discredit these structural arguments. His inconsistent treatment of structural parity and superiority has already been described.[209] Even more misguided is Harrison's objection to Amar's reliance upon the "coextensiveness principle"—the fundamental Anglo-American separation-of-powers tenet that any exercise of legislative power must be subject to the subsequent application of executive and judicial power.[210] Amar argued that because functional coordinacy was "an axiom—a rule-of-law condition of legitimacy—and could not be waived by Congress," Congress had to grant federal courts jurisdiction over cases arising under federal law.[211] To Professor Meltzer's contention that the coextensiveness principle cannot explain foreign-minister jurisdiction (because Congress has no substantive authority to enact a code governing such officials), Amar responded: "Coextensiveness is an absolute limit on congressional power—a *minimum* condition of legitimacy—but hardly the *only* constitutional limit. . . . I nowhere deny that *other* principles (e.g., re-

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207. *See, e.g.*, *supra* notes 10, 13-14, 49-53 and accompanying text; Amar, *Neo-Federalist*, *supra* note 2, at 205-06, 222-23, 231-34, 246 n.133, 250-52, 267; Amar, *Two-Tiered*, *supra* note 2, at 1501, 1511-12.

208. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 222-28, 247-48 n.134, 250, 253; Amar, *Two-Tiered*, *supra* note 2, at 1512-13, 1540-41, 1564-65.

209. *See supra* notes 54-56 and accompanying text.

210. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 231-34, 250-52; Amar, *Two-Tiered*, *supra* note 2, at 1511-12, 1539-40, 1557, 1563-65. For massive documentation of the universal acceptance of this principle in England and America, see Pushaw, *Justiciability*, *supra* note 83, at 403-04 & nn.43-45, 413 & n.99, 418 & nn.115-16, 424 & nn.146-48, 436 & n.193, 451, and Pushaw, *supra* note 3, at 403 nn.42-44, 413 n.99, 415-18 nn.106-17, 501-02 nn.269-70, 512-13 & n.307.

211. Amar, *Reports*, *supra* note 2, at 1669-70 (citing sources). For similar statements, consult the sources cited *supra* note 210. Congress has implicitly recognized this duty by never leaving final adjudication of federal questions to state courts. *See* Amar, *Neo-Federalist*, *supra* note 2, at 261-69.

spect for ambassadors) might require federal jurisdiction over *other* categories."[212]

Ignoring this point, Harrison asserts that coextensiveness is not a constitutional requirement because Article III jurisdiction extends to many cases in which Congress has no legislative power (e.g., foreign minister and diversity jurisdiction).[213] Correspondingly, he reasons, federal courts can be denied jurisdiction over cases in which Congress does have substantive lawmaking authority (e.g., federal questions).[214]

Again, Harrison subverts the coextensiveness principle, which posits that if Congress passes a general act, the statute must ultimately be subject to specific application and interpretation by the federal judiciary.[215] Amar nowhere claimed that the reverse is true (i.e., that if a federal court has jurisdiction, then Congress must have commensurate legislative power).[216] Moreover, Harrison's belief that Congress can deny the federal judiciary power over cases arising under federal law contradicts centuries of theory and practice.[217]

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212. Amar, *Reports*, *supra* note 2, at 1668-69 (citing Meltzer, *supra* note 9, at 1582 n.39, 1614-15). Put another way, Congress's exercise of its legislative power is a sufficient, but not necessary, condition of federal court jurisdiction.

213. *See* Harrison, *supra* note 4, at 241-42, 251-52, 254-55.

214. *See id.*

215. *See supra* notes 210-12 and accompanying text.

216. In fairness to Professor Harrison, he does concede that this reverse logic is an "extreme form" of coterminous power theory. *See* Harrison, *supra* note 4, at 241. Indeed, it was shaped primarily by Antifederalists such as "Brutus" and Tucker. *See* G. Edward White, *Recovering Coterminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases*, *in* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 69-85, 87-90 (Maeva Marcus ed., 1992) (cited by Harrison, *supra* note 4, at 241 & n.108).

217. *See* sources cited *supra* notes 210-12 and accompanying text. The coextensiveness principle strictly applies only to federal question jurisdiction. *See* Amar, *Two-Tiered*, *supra* note 2, at 1565. Professor Harrison is probably correct that the Framers anticipated that the two other types of Article III "Cases" (admiralty and foreign minister) would principally involve not federal statutes but the law of nations (and, in admiralty, general commercial law). *See* Harrison, *supra* note 4, at 251-52; *see also* Meltzer, *supra* note 9, at 1594 n.84, 1599, 1614 & nn.166-68 (to similar effect). *But see* Amar, *Two-Tiered*, *supra* note 2, at 1527 n.85 (pointing out that the Framers could not have predicted how much future Congresses would legislate in admiralty). Thus, different federal interests dictated the mandatory inclusion of admiralty and ambassador "Cases" in the federal docket. *See* sources cited *supra* notes 18, 74, 86, 160, 163, 183 and accompanying text; *see also* JOSEPH STORY, THE CONSTITUTIONAL CLASS BOOK § 224, at 132 (1834) (comparing the coextensiveness rationale for placing federal questions in Article III's mandatory tier with other reasons for the insertion of admiralty and ambassador cases).

Professor Amar plausibly argued, however, that the coextensiveness principle also can apply to admiralty. In his view, the Framers designed the admiralty clause to

IV. CONCLUSION

The adaptations of Hart's theory of plenary congressional control over federal court jurisdiction offered by Professors Meltzer and Harrison present plausible alternative interpretations of Article III. On balance, however, I believe that the Neo-Federalist view still makes best sense of all the available evidence concerning the Constitution's text, structure, history, underlying political theory, and judicial and legislative precedent.[218]

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complement federal question jurisdiction, which was limited to cases "in law and equity." Thus, Article III enshrined the classical eighteenth-century triad of law, equity, and admiralty. *See* Amar, *Neo-Federalist*, *supra* note 2, at 253; Amar, *Two-Tiered*, *supra* note 2, at 1527-28 n.85.

218. Shortly before this Article went to press, I discovered a recent article that closely parallels Professor Harrison's, even though it was written independently. *See* Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997). Velasco makes three key textual arguments.

First, he contends that Article III uses "shall" in a self-executing sense. Hence, "shall be vested" indicates that the Constitution itself confers "judicial Power" on the federal courts, not that Congress must grant such power. *See id.* at 697-700. Similarly, he asserts that "shall extend" defines the maximum possible reach of federal judicial power—the matters federal courts are capable of deciding. *See id.* at 702-04. Because Velasco's interpretation of "shall" in the Vesting and Extending Clauses is virtually identical to Harrison's, it is unnecessary to add to my earlier response. *See supra* notes 43-71 and accompanying text.

Second, Velasco reiterates that Article III uses "all" to emphasize that "Cases" encompass both civil and criminal proceedings, whereas "Controversies" include only the former. *See* Velasco, *supra*, at 705-09. Unfortunately, he does not mention my earlier article, which critiques that idea and demonstrates a functional distinction between "Cases" and "Controversies." *See supra* notes 72-113 and accompanying text. Nor does this claim that "all" is used for emphasis refute Professor Amar's explanation of the meaning of that term. *See supra* notes 114-52 and accompanying text.

Third, in Velasco's view, Article III distinguishes "judicial power"—the general adjudicatory authority that the Constitution vests in every federal court—from the "jurisdiction" to exercise that power in particular cases (with the assignment of such jurisdiction left to Congress). *See* Velasco, *supra*, at 709-13, 718, 732. As I have previously shown, however, any difference between "judicial power" and "jurisdiction" is relatively insignificant. *See supra* notes 60, 66-68 and accompanying text.

Velasco also sets forth three structural arguments that echo those of Professors Harrison and Meltzer: (1) congressional control over jurisdiction checks the federal judiciary from exceeding its legitimate authority and usurping the prerogatives of the political departments, (2) Amar's focus on the independence of federal judges devalues constitutional provisions (such as the Exceptions Clause) that limit such independence, and (3) Amar's two-tiered theory does not necessarily correspond to the importance of the "Cases" and "Controversies" listed in Article III. *See* Velasco, *supra*, at 690-91, 717-18, 751-58, 765.

Only the first structural objection has real force. It is true that, in general, Congress's power over federal courts is one element of the Constitution's system of

checks and balances. *See* Pushaw, *Justiciability*, *supra* note 83, at 404-05, 425-35. However, the notion that Congress can strip federal courts of jurisdiction over cases challenging the constitutionality of the acts of either the coordinate federal branches or the states must be rejected. Surely the Framers did not intend to allow Congress to render virtually meaningless the constitutional limitations on those political actors. *See supra* notes 9, 53, 56, 182, 205-07 and accompanying text.

Finally, unlike Professor Harrison, Velasco does cite considerable evidence from the Convention, Ratification debates, Judiciary Act of 1789, and Supreme Court precedent to support his thesis that Congress has near-absolute authority over federal court jurisdiction. *See* Velasco, *supra*, at 723-50. Virtually all of these sources have been examined in detail by Amar. *See, e.g.*, Amar, *Neo-Federalist*, *supra* note 2, at 207-15, 223-28, 230-72. Although Velasco's interpretation of history is tenable, I continue to find Amar's to be more credible.