

Is the “Arising Under” Jurisdictional Grant in Article III Self-Executing?

David R. Dow

Repository Citation

David R. Dow, *Is the “Arising Under” Jurisdictional Grant in Article III Self-Executing?*, 25 Wm. & Mary Bill Rts. J. 1 (2016), <https://scholarship.law.wm.edu/wmborj/vol25/iss1/2>

IS THE “ARISING UNDER” JURISDICTIONAL GRANT IN ARTICLE III SELF-EXECUTING?

David R. Dow*

INTRODUCTION

Article III of the U.S. Constitution states the judicial power of the United States “shall” extend to certain categories of cases.¹ Despite that mandatory language, numerous commentators and the handful of judges who have addressed the issue have agreed for centuries that the federal courts have only the jurisdiction Congress gives them.² This consensus bridges both time and ideology, yet I will argue this widespread agreement rests on a faulty understanding of constitutional history. The conventional wisdom, though long-held, is wrong. Properly understood, the federal courts obtain their power to hear cases directly from the Constitution itself, without the need for congressional enabling.

In part, the conventional wisdom relies on the language of the first Judiciary Act of 1789, which vested the federal courts with rather limited jurisdiction.³ By and large, Congress expected even those litigants with actions grounded in federal law to seek redress initially in state courts.⁴ The existing federal courts did not register any disagreement with Congress, perhaps because the occasion to do so did not arise.

Additionally, Congress did not vest the federal courts with wide-ranging federal question jurisdiction until after the Civil War.⁵ The first Civil Rights Act and its successors began an era where the scope of federal jurisdiction to adjudicate federal rights violations consistently expanded, and this expansion was paralleled by the

* Cullen Professor, University of Houston Law Center; Rorschach Visiting Professor of History, Rice University. Many colleagues and students have helped me over several years to develop and refine the thesis of this Article. I thank especially Paul Mansur, Walt Cubberly, and Caite Tanner. Valuable research support, for which I am grateful, was provided by Dean Leonard Baynes, Associate Dean Marcilynn Burke, and the University of Houston Law Foundation.

¹ U.S. CONST. art. III, § 2.

² See, e.g., Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 IND. L.J. 309, 312 (2007) (“The federal judicial power created in Article III is not self-executing, and Congress must vest it in the lower federal courts by statute.”).

³ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85.

⁴ See *id.* See generally PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 960–61 (3d ed. 1988) [hereinafter HART AND WECHSLER]; FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 64 (1928).

⁵ See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction*, 36 STAN. L. REV. 895, 913 (1984).

broadening of jurisdiction elsewhere. Finally, the Judiciary Act of 1875 gave the federal circuit courts, subject to a \$500 amount in controversy requirement, concurrent jurisdiction over “all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority”⁶—in other words, “arising under” jurisdiction. Since that time, the history of “arising under” jurisdiction has been a history of expansion and contraction as Congress has reacted to the litigation trends spawned by the existing enabling legislation.⁷

Two propositions have however, remained constant: first, that in the absence of a statutory grant, the federal courts do not possess general federal-question jurisdiction; and second, that the scope of “arising under” jurisdiction pursuant to § 1331 is narrower than the allowable scope of such jurisdiction under Article III.⁸ Case law and scholarly commentary treat the language of Article III, Section 2 as the outer boundary of what Congress may do, but Congress is regarded as having the power to do less—i.e., to vest less than the whole of Article III’s “arising under” jurisdiction.⁹

I argue the first proposition is wrong, which means the second proposition is wrong *a fortiori*. Article III, Section 2, paragraph 1 of the U.S. Constitution says that the judicial power “shall” extend to certain cases.¹⁰ “Shall” is a mandatory word, and

⁶ Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

⁷ See HART AND WECHSLER, *supra* note 4, at 963–66.

⁸ See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 916 (1988) (“By nearly universal consensus, the most plausible construction of this language would hold that if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated in Article III.”); Freer, *supra* note 2, at 312 (“In other words, the federal judicial power created in Article III is not self-executing, and Congress must vest it in the lower federal courts by statute.”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004) (“Nearly everyone agrees that Article III defies literal application.”).

⁹ See, e.g., CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* 18 (1981); HART AND WECHSLER, *supra* note 4; CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3562, at 73–81 (3d ed. 2008); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 870, 870–71 (2011); John Harrison, *The Power of Congress to Limit the Jurisdiction of the Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997); Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Bussing*, 64 GEO. L.J. 839, 839–40 (1976). Professor Ritz’s explanation of the failure of the Judiciary Act of 1789 to vest the Court with the entirety of its Article III power is that the Federalists in control of Congress were seeking to appease the anti-Federalists. WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* (1990). That Article III reflects a compromise between Federalists and anti-Federalists is a proposition I do not dispute, but the further conclusion that this compromise also involved a decision that federal jurisdiction not be self-executing is not supported by the historical record. See also *infra* note 22.

¹⁰ U.S. CONST. art. III, § 2.

it was a mandatory word when the Constitution was drafted and ratified.¹¹ Conventional wisdom nevertheless holds that the constitutional grant of “arising under” jurisdiction to federal courts in Article III, Section 2 requires enabling legislation;¹² conventional wisdom thereby treats the word “shall” as if it means “may.” This conventional wisdom rests on a misreading of the historical record. As I will show, federal question jurisdiction flows directly from the Constitution to duly created federal courts. As a result, regardless of what action Congress takes (or fails to take), the Supreme Court possesses all the jurisdiction identified by the constitutional grant in Article III, Section 2; and it has possessed that jurisdiction since the Constitution was ratified.

Congress does have discretion with respect to the creation of lower federal courts;¹³ however, as I will also show, if Congress chooses to create them, the inferior federal courts acquire all the jurisdiction the Constitution allots from the moment of their creation, and they continue to possess that full scope of jurisdiction for so long as they exist.

If the statute that vests the federal courts with federal question jurisdiction were deemed to reach the outer limit of what the Constitution permits,¹⁴ the argument I make here might be entirely arcane. However, because the statutory jurisdictional grant has been deemed consistently to be narrower than the constitutional grant,¹⁵ the argument is in fact consequential, and the implication of my claim is that many decisions deeming some federal questions to lie outside the allotted jurisdiction of

¹¹ See, e.g., AKHIL R. AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 236 (2005) (“In the Article III vesting clause and roster, ‘shall’ and ‘all’ meant what they said.”); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 178–79 (2004). For a somewhat more nuanced view—which does not dispute directly that “shall” is a mandatory word in the context of Article III—see Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 *AM. J. LEGAL HIST.* 453, 454–56 (2008–2010) (warning against so-called presentism—i.e., believing without evidence that contemporary meaning of words was also their meaning in 1780). For a discussion of the relevance of the word “shall” to whether treaties are self-executing, see Jordan J. Paust, *Self-Executing Treaties*, 82 *AM. J. INT’L L.* 760, 760–64 (1988). See also generally Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 *S. CAL. L. REV.* 289 (1995) (discussing the ability of individuals to enforce the Constitution without state law and the role of the courts in enforcing the Constitution).

¹² “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” U.S. CONST. art. III, § 2. This clause is conventionally known as creating so-called “arising under” federal question jurisdiction. I refer to this jurisdiction as “arising under” jurisdiction.

¹³ U.S. CONST. art. III, § 1.

¹⁴ 28 U.S.C. § 1331 (2012).

¹⁵ See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 *U. PA. L. REV.* 1569, 1638 (1990); see also HART AND WECHSLER, *supra* note 4; Freer, *supra* note 2, at 312–13; Grove, *supra* note 9.

the federal courts are wrong. Put differently, to the extent the argument laid out here is sound, federal jurisdiction extends to a far broader universe of disputes than existing jurisdictional doctrine allows.

I. OVERVIEW OF THE ARGUMENT

Self-executing powers flow directly from the Constitution.¹⁶ In general, both congressional and presidential powers are self-executing. For example, the President may issue pardons without the requirement of any congressional action.¹⁷ Congress may coin money without executive involvement.¹⁸ Congress can even enact laws without presidential acquiescence if two-thirds of the members of each house vote to override the President's veto.¹⁹ I argue here that the power of Article III that gives courts the power to hear cases that arise under the Constitution or the laws of the United States (i.e., federal question jurisdiction) is also self-executing.²⁰ The power flows to the judicial branch directly from the language of the Constitution itself.

I of course recognize that, in putting forth this argument, I am taking issue with a piece of conventional wisdom that has endured for many years. The orthodox view holds that the power of the federal courts to hear federal question cases depends upon Congress's enactment of enabling legislation.²¹ This view is based on a single historical fact, taken out of context.²² But as I will show, the totality of the available historical evidence fits more harmoniously with the conclusion that the power of the judicial branch, like that of the President and the Congress, must be understood to be self-executing.

¹⁶ See, e.g., Banderes, *supra* note 11; Paust, *supra* note 11, at 760–61.

¹⁷ U.S. CONST. art. II, § 2.

¹⁸ U.S. CONST. art. I, § 8.

¹⁹ U.S. CONST. art. I, § 7.

²⁰ My argument is strictly limited to original federal question jurisdiction, and I therefore do not discuss ancillary (or pendent) jurisdiction, nor do I address related doctrines, including removal jurisdiction or the well-pleaded complaint rule.

²¹ See, e.g., Paul Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030–32 (1982) (discussing the purpose of Article VII and the power of Congress in connection with the judiciary).

²² As I discuss below, the key proponent to focus on this fact—that Congress did not statutorily vest the federal courts with “arising under” jurisdiction until 1875—as the pivotal fact regarding the relationship between congressional and judicial power with respect to federal jurisdiction is probably Paul Bator. See *generally id.* (arguing that Article III’s constitutional intention is extremely clear in regard to congressional power to govern federal judiciary power). Professor Gunther was also an influential proponent of this view. See Gunther, *supra* note 5, at 912–13. To some extent, the premise of this argument in favor of congressional control is the supposed “distinction between judicial power and jurisdiction.” See THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 30, 1952, at 511 (Edward S. Corwin ed., 1953) [hereinafter Corwin]. My argument disputes the coherence of this ostensible distinction.

As always in such analyses, the place to begin is with the text itself. Article III, Section 2 reads in part: “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”²³ Notwithstanding this language, however, the question of whether a federal court possesses jurisdiction over a particular dispute is currently resolved not by examining the constitutional text directly, but instead by interpreting 28 U.S.C. § 1331, which provides: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”²⁴

Historically, the strongest argument supporting the orthodox view is that although sections 2 and 3 of the Judiciary Act of 1789 (i.e., the first Judiciary Act) divided the nation into thirteen judicial districts and created a federal district court in each district, it was not until the 1875 amendments to the Act that Congress created the predecessor to the current § 1331.²⁵ In other words, it took nearly a century of our nation’s existence before Congress statutorily vested the “arising under” jurisdiction in the federal courts.²⁶ So, the argument goes, the fact Congress waited so long to vest this jurisdiction in the federal courts must prove that Congress could choose to do so or not.

Once it is assumed that whether the federal courts possess this jurisdiction turns on what Congress has done (rather than on what the Constitution says), then the breadth of “arising under” jurisdiction depends on the statutory language and congressional intent, rather than the constitutional text. And even though the language of the statute is essentially the same as the constitutional text, ever since the first version of the “arising under” statute was enacted, the language of § 1331 has been deemed to be narrower than the nearly identical language of Article III.²⁷ Consequently, because § 1331 has not been deemed to be coterminous with the constitutional language—i.e., because the statute has been deemed to confer a narrower jurisdictional reach than is permissible under the Constitution—my argument, if sound, entails that the federal

²³ U.S. CONST. art. III, § 2.

²⁴ 28 U.S.C. § 1331 (2012). On the supposed difference between jurisdiction and power, see Corwin, *supra* note 22, at 511–12.

²⁵ See Bator, *supra* note 21, at 1031–32.

²⁶ In addition to the historical weakness of this argument, which I address in detail below, the argument’s very factual predicate is also probably wrong. As Professor Engdahl has persuasively argued, the Judiciary Act of 1789 can indeed be understood as having vested all the jurisdiction Article III allows. See David E. Engdahl, *Federal Question Jurisdiction Under the Article III Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 521–22 (1989). I should emphasize, however, that Professor Engdahl also endorsed the conventional wisdom that congressional enabling legislation is required.

²⁷ See, e.g., *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 584 (1949) (describing Court decisions about the rights of individuals in the District of Columbia and whether such individuals were considered “citizen(s) of a state” under the Judiciary Act of 1789); see also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983); *Powell v. McCormack*, 395 U.S. 486, 515 (1969); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 379 n.51 (1959).

courts have a significant reservoir of power they have been anxious not to assume and of which they cannot be constitutionally deprived.

In arguing here that the conventional understanding of the relationship between the constitutional and statutory texts is wrong, I make two independent claims. The stronger claim is that powers identified in Article III are self-executing with respect to the only court created directly by the Constitution: the Supreme Court. Accordingly, no congressional action is required in order for the Supreme Court to have the power to exercise jurisdiction (either original or appellate) over all the cases identified in Article III.²⁸ The second, weaker, claim is that the judicial power of the lower courts is also self-executing. Although Congress may not be required to create lower courts, once Congress does so, those courts immediately and necessarily possess the power to hear all cases that arise under federal law, and that power cannot be diluted or withdrawn by Congress.²⁹ Thus, the Supreme Court has possessed the power to hear so-called federal question cases from the moment the Constitution was ratified; district courts (and courts of appeals) have held this power from the moment that Congress, acting pursuant to the Exceptions Clause of Article III, created them.³⁰ The former claim is stronger simply because the historical evidence supporting it is clearer, but the second weaker claim is also sound, even though the historical evidence surrounding it is somewhat mixed.³¹

The argument proceeds as follows: In Part II, I show how deeply rooted in jurisdictional doctrine the modern orthodoxy is, and I identify three related propositions embedded in that orthodoxy: that most exercises of federal jurisdiction require enabling legislation; that, in the absence of enabling legislation, federal courts lack the power to act; and that a federal court's power to act is defined by, and limited to, the enabling legislation. In Part III, I turn to the historical underpinnings of the current orthodoxy, in part to reveal how the historical evidence does not in fact support the weight that the modern view places on it. Finally, in Part IV, I lay out the argument for self-execution by examining the historical evidence anew, including records of the Constitutional Convention, the records from the state ratifying conventions, and the structure of the Constitution as a whole.

²⁸ Some support for this stronger claim can be found in Professor Pfander's examination of the Framers' attitude with respect to the power of the Supreme Court. See James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518–19 (2001).

²⁹ Cf. Grove, *supra* note 9, at 888–915 (noting history of expansion and contraction of federal jurisdiction owing to congressional control).

³⁰ This conclusion obviously entails that the Supreme Court errs when it reads § 1331 (the statutory grant of federal question jurisdiction) more narrowly than it reads the Constitution.

³¹ My argument has not gone entirely unnoticed. Concurring in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, Justice Harlan took note of the theory which holds “that a court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution.” 403 U.S. 388, 405 n.5 (1971). But neither Justice Harlan, nor any other, has endorsed that theory. *Id.* at 404. In the following pages, I argue in favor of the broad version of the theory referred to, but in the end avoided, by Justice Harlan.

II. A BRIEF SUMMARY OF THE DEPTH OF THE CURRENT ORTHODOXY

Current orthodoxy holds that Congress has significant, even controlling, power over federal court jurisdiction.³² This orthodoxy dominates both the case law as well as the academy. A typical expression of this idea occurs in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,³³ where the Supreme Court observed that “arising under” jurisdiction is not self-executing and that “it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction.”³⁴ The implication of this observation is that, until Congress vested the jurisdiction in the federal courts, the federal courts did not possess it.

The academic endorsement of this same orthodoxy was popularized by Professor Hart, who argued that Congress’s power under the so-called Exceptions Clause³⁵ is so vast that the only limitation on Congress’s power to define the scope of the federal courts’ jurisdiction is the will of the voters.³⁶ On this limited point, the scholarly consensus overwhelmingly endorses Hart’s contention.³⁷ The modern view, therefore, is that Congress has the authority to direct the flow of jurisdiction among courts (whether state or federal, trial or appellate),³⁸ as well as the far more significant power to determine whether a cause of action ostensibly within the constitutional grant of federal jurisdiction will be capable of being heard in federal court at all. In short, the modern view is that the constitutionally granted judicial

³² See, e.g., *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 8–12 (1983) (discussing federal court original jurisdiction over claims that concern state law); *Bivens*, 403 U.S. at 607 (Rutledge, J., concurring) (characterizing the view that the Article III jurisdictional grant is not self-executing as “elementary doctrine”); *Nat’l Mut. Ins. Co.*, 337 U.S. at 607; HART AND WECHSLER, *supra* note 4, at 11 (stating that the congressional control orthodoxy traced back to the framing of the Constitution). See generally *supra* note 9.

³³ 478 U.S. 804 (1986).

³⁴ *Id.* at 807–10.

³⁵ U.S. CONST. art. III, § 2, cl. 2 (stating that “with such exceptions and under such regulations as the Congress shall make”).

³⁶ See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1399 (1953) (“In the end we have to depend on Congress for the effective functioning of our judicial system, and perhaps for any functioning. The primary check on Congress is the political check—the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate.”).

³⁷ See, e.g., 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, 854 (1984) [hereinafter Clinton, *A Guided Quest*].

³⁸ See, e.g., *id.* at 749–54 (“[T]he so-called exceptions and regulations clause . . . to create inferior federal courts were intended by the framers to be construed in conformity with the overriding objective of the judicial article—to ensure that some federal court would have at least a discretionary opportunity to review each class of case enumerated in section 2 of article III . . .”). See generally *supra* note 9.

power to hear cases must flow first through the filter of the political branch before arriving at its judicial destination.³⁹

Not surprisingly, the view that Congress has significant power to limit federal jurisdiction is not entirely unconnected to the constitutional text. Two provisions of Article III confer specific yet limited powers on Congress. One of them, referred to briefly above (i.e., the so-called Exceptions Clause), provides as follows:

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.⁴⁰

In addition, Article III, Section 1 grants Congress the power either to create or to decline to create lower federal courts.⁴¹ The text provides: “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.”⁴²

Finally, Article I explicitly grants to Congress the power referred to in the first section of Article III; there the text provides that Congress shall have the power “[t]o constitute tribunals inferior to the Supreme Court[.]”⁴³

³⁹ See, e.g., Clinton, *A Guided Quest*, *supra* note 37, at 749–54 (stating that achieving the goal of uniform interpretation of laws was, for the most part, “left substantially to congressional discretion”). Of course, the exact contours of Congress’s power over federal courts as the jurisdictional grants flow through its domain are far from clear, and a great many commentators have endeavored to discern to what extent Congress may constitutionally control federal court jurisdiction. See, e.g., *id.* at 741–42 (stating that the “meaning of article III is not only far from evident, but has been made positively murky by judicial and scholarly misinterpretation”). *But see* Nat’l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (stating that few provisions of the Constitution are “more explicit and specific than those pertaining to the courts established under Article III”). The literature analyzing this topic is vast and demonstrates a broad diversity of opinion. See also Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206–10 (1985) [hereinafter Amar, *A Neo-Federalist View*] (putting forth Amar’s neo-federalist view and mapping the remainder of the article); Clinton, *A Guided Quest*, *supra* note 37, at 742 n.3 (listing commentaries prior to 1984). Compare Bator, *supra* note 21, at 1030 (providing a very strong argument in favor of Congress’s jurisdictional power), with Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 504–13 (1974) (providing a very limited version of Congress’s jurisdictional power).

⁴⁰ U.S. CONST. art. III, § 2.

⁴¹ U.S. CONST. art. III, § 1.

⁴² *Id.*

⁴³ U.S. CONST. art. I, § 8. The same section includes the Necessary and Proper Clause, which provides that Congress has the power “[t]o make all laws which shall be necessary and proper

Yet, despite Article III’s clear creation of some congressional power over the federal courts, none of these provisions expressly or manifestly allows Congress to reduce the total quantum of constitutionally conferred federal jurisdiction. What, then, is the source of the modern orthodoxy that maintains that Congress may do precisely that?

The prevalent theory rests on a commonly invoked hermeneutic: the idea that the greater power logically includes the lesser.⁴⁴ The argument goes roughly as follows: because Congress has the power to decline to create courts altogether, it must therefore also have the lesser power to create them while strictly controlling their jurisdiction. Further, and similarly, Congress’s power to create exceptions and regulations to the Supreme Court’s appellate jurisdiction must include the power to refuse to vest the Court with all the constitutionally identified jurisdiction. Or, put somewhat differently, because the lower federal courts depend for their very existence on acts of Congress, Congress can, when creating those courts, also precisely define their power.

In other contexts, of course, both courts and commentators have rejected the idea that the constitutional allocation of a given power to one branch carries with it all of the logically subsumed lesser powers.⁴⁵ Thus, for example, although Congress can choose either to create executive agencies or not to create them, it cannot create them while also maintaining for itself a so-called legislative veto over their actions.⁴⁶ Similarly, Congress can authorize the executive to appoint inferior federal officers, but Congress cannot thereafter control the executive’s power to remove them.⁴⁷ Yet this same idea that has been rejected in other contexts persists with regard to congressional power over federal jurisdiction; and although, as one might suppose, the scholarly elaboration of this view is often nuanced and careful, it never strays far from the foundation that the greater power includes the lesser.⁴⁸

For example, Professor Bator argued that Congress’s power flows logically from the Philadelphia Convention compromise, first proposed by James Madison⁴⁹ (and therefore commonly known as the Madisonian Compromise), which established the important idea that constitutional principle should not determine the structure or power of inferior federal courts, but that such questions should instead be left to

for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.” *Id.*

⁴⁴ See Bator, *supra* note 21, at 1030–31.

⁴⁵ See, e.g., *INS v. Chadha*, 462 U.S. 919, 957–59 (1983).

⁴⁶ See *id.* at 956–59 (explaining that to take legislative action Congress must abide by the procedures set forth in the Constitution, rather than imply congressional authority).

⁴⁷ E.g., *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935); *Myers v. United States*, 272 U.S. 52, 176 (1926); *In re Hennen*, 38 U.S. 230, 260–61 (1839). All of which discuss the appointment and removal power of the President and the extent of its limitation.

⁴⁸ Further, as I discuss below, it may also be a mistake to view the power to allocate jurisdiction as a lesser power contained in the power to create federal courts—the former power might well be greater. *Cf. Rotunda, supra* note 9, at 842–43.

⁴⁹ See Bator, *supra* note 21, at 1030; Gunther, *supra* note 5, at 912.

“political and legislative judgment.”⁵⁰ Bator cites as authority for his compromise thesis the Hart and Wechsler treatise, of which he was an editor.⁵¹ This treatise stated, without any further support, that it “seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary.”⁵²

Of course, this assertion from the estimable Hart and Wechsler text does nothing more than restate the presumption; it is therefore perfectly question-begging. Moreover, as I show below, such evidence as there is of original intent on this question reveals that the Framers themselves did not believe Congress would enjoy the power Bator seems to have believed those same Framers placed in the legislative branch.⁵³

Nevertheless, despite being both question-begging and contradicted by the weight of the available historical evidence, Bator’s view undoubtedly represents the scholarly consensus. Most academic commentary therefore assumes, either expressly or implicitly, that virtually all federal jurisdiction is discretionary—i.e., Congress can either confer or withhold it.⁵⁴

There are, to be sure, some prominent commentators who depart from this consensus, but even they do so only partially. Professors Eisenberg and Sager, for example, have argued that other provisions of the Constitution (and, perhaps, the very structure of the Constitution itself) impose limits on Congress’s exercise of this power;⁵⁵ and at least two other scholars, including Professors Amar and Clinton, have rejected at least a portion of this conventional wisdom and argued that Congress must vest some or all of the federal judicial power in federal courts.⁵⁶

⁵⁰ Bator, *supra* note 21, at 1030; Gunther, *supra* note 5, at 912. In fact, as I argue more fully below, Professor Bator reads into the Madisonian Compromise more than is actually appropriate. Nowhere in the debates over whether Congress would have the power to create inferior courts was the grand principle he relies on explicitly discussed or expounded.

⁵¹ See Bator, *supra* note 21, at 1030 n.2.

⁵² See HART AND WECHSLER, *supra* note 4, at 11.

⁵³ See Clinton, *A Guided Quest*, *supra* note 37, at 766 (“It seems, therefore, that the framers did not assume that with the power to establish inferior federal courts necessarily went the power to control their jurisdiction.”); *id.* at 779–82 (providing a theory of the originally intended meaning of the Exceptions Clause); see also Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 32–34 (1981) (discussing attempts to place restrictions on Congress’s power to make exceptions to the Supreme Court’s appellate jurisdiction).

⁵⁴ See Fallon, *supra* note 8, at 916; Freer, *supra* note 2, at 312; Pfander, *supra* note 8, at 646.

⁵⁵ See, e.g., Eisenberg, *supra* note 39, at 518–30; Sager, *supra* note 53, at 37–42. Of course, all these commentators work from the basic premise that Congress’s jurisdictional power is discretionary. In addition, as I discuss below, an examination of how the Scottish judiciary behaved in the late eighteenth century may also lend support to the idea the Framers expected federal courts to exercise the same strength and independence as Scottish courts. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1615 (2011).

⁵⁶ See Amar, *A Neo-Federalist View*, *supra* note 39, at 206–10 (arguing that the jurisdictional power is mandatory for federal question, admiralty, and public ambassador cases);

To summarize, then: under the current conventional wisdom, a federal court must locate its power to hear a federal question case in both the Constitution *and* a statute.⁵⁷ If the lower, more limited, statutory source is lacking, the court does not have subject matter jurisdiction, regardless of whether the constitutional language itself appears to create it.

III. THE ORIGIN OF THE CURRENT ORTHODOXY

As I have suggested, the essence of the argument that enabling legislation is required in order to implement the Article III jurisdictional grant is a form of “the greater includes the lesser.” Different scholars have traced this simple argument to different historical periods. Professor Engdahl, for example, traces it to the second generation after the founding, noting that the first Congress vested the whole of the constitutionally allotted “arising under” jurisdiction.⁵⁸ In other words, in Engdahl’s view, the proposition that Congress could control the jurisdiction allotted to the federal courts grew more potent over time. In contrast, Professor Harwood has suggested that the presumption that “arising under” jurisdiction is not self-executing had its birth in the Judiciary Act of 1789 itself and was already fully formed when the Constitution was ratified.⁵⁹

Clinton, *A Guided Quest*, *supra* note 37, at 749–54 (arguing that the entirety of federal court jurisdiction is mandatory). Even Professor Amar’s so-called mandatory thesis, however, the most radical (and creative) proposal in the area of federal jurisdiction in half a century, accepts unquestioningly, as does the more conventional so-called discretionary theory, that some act of Congress is required before a federal court may act upon a case within its constitutionally delineated jurisdiction.

⁵⁷ After the passage of the Judiciary Act of 1875 granting federal courts general “arising under” jurisdiction, the Court was confused about the extent of the statutory grant. *See* CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* 90–98 (4th ed. 1983); *see also* HART AND WECHSLER, *supra* note 4, at 960–66, 995–97 (discussing statutory jurisdiction and the effect of the Judiciary Act of 1875 on tracking the constitutional “arising under” language). Interpretations did not easily distinguish between the Constitution and the statute. *See* WRIGHT, *supra*, at 92–93. It was not until later that the dichotomy emerged, and the Court interpreted the statute as conferring a narrower grant of “arising under” jurisdiction. *See* WRIGHT, *supra*, at 90–98; *see also* HART AND WECHSLER, *supra* note 4, at 960–66, 995–97.

⁵⁸ Engdahl, *supra* note 26, at 536 n.74 (“The impression that discretion to divest jurisdiction once it has been vested flows *a fortiori* from the discretion given Congress to constitute ‘inferior’ courts traces only to the *second* generation under the Constitution.”). Professor Engdahl concludes that the first Congress vested the entire “arising under” jurisdiction with the Judiciary Act of 1789. *Id.* at 521. However, his thesis clearly rests on the congressional control presumption; that is, in his view, Congress could have declined to vest the federal courts with this jurisdiction.

⁵⁹ *See, e.g.*, Anthony J. Harwood, Note, *A Narrow Eleventh Amendment Immunity for Political Subdivisions: Reconciling the Arm of the State Doctrine with Federalism Principles*, 55 *FORDHAM L. REV.* 101, 111 n.80 (1986) (stating that “the first Congress established the principle that under article III Congress has the discretion to grant or withhold original

In point of fact, neither Engdahl nor Harwood is precisely correct. The available historical record points to a very different conclusion: namely, the presumption that an act of Congress is required in order for federal courts to possess jurisdiction over cases that arise under the Constitution developed much later in our constitutional history than the conventional wisdom assumes—the Framers themselves did not hold this view; and it developed largely as an outgrowth of judicial dereliction of duty.

A. The Judiciary Act of 1789

The first edition of the venerable Hart and Wechsler casebook asserted that the “judiciary article of the Constitution was not self-executing”; and the authors supported this claim by pointing to the first Congress’s passage of the Judiciary Act of 1789.⁶⁰ Charles Allan Wright’s treatise on federal jurisdiction expresses the same view.⁶¹ These are legendary scholars, but their shared conclusion rests on two related observations—both of which, when examined, turn out to be far less probative than the conventional wisdom allows.

The first observation is that the first Congress was made up of many of the delegates to the Philadelphia Convention.⁶² The second is that the first Congress did not expressly vest all the jurisdiction contained within the constitutional grant.⁶³ The conclusion said to follow is that because the members of the first Congress, many of whom were also involved in the framing of the Constitution, passed the first Judiciary Act, that proves that they believed that the Act was necessary; and if the Act was necessary, the judicial power cannot be self-executing.

The two underlying factual observations are correct, of course, but the syllogism built on top of them is infirm, for the issue is not whether the Act was necessary. To some extent it clearly was: an act of Congress, for example, was needed to create those federal courts that Congress has the power either to create or not to create. Nevertheless, the power to create courts does not necessarily carry with it the power to control their jurisdiction. Moreover, a closer look at the debate over the first Judiciary Act reveals that the members of Congress who argued in favor of congressional limitation on jurisdiction may have been thinking less about whether the jurisdictional grant was self-executing and more about fighting a rear-guard action

federal question jurisdiction”); *see also* Fallon, *supra* note 8, at 916; Freer, *supra* note 2, at 312; Pfander, *supra* note 8, at 646.

⁶⁰ *See* HART AND WECHSLER, *supra* note 4, at 30–31; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1523–24 (1986) [hereinafter Clinton, *Early Implementation*].

⁶¹ WRIGHT, *supra* note 57, at 90–98.

⁶² *But see* Clinton, *Early Implementation*, *supra* note 60, at 1524–27 (showing that the first Congress was not so predominated by the supporters of the Constitution in the Philadelphia Convention and in the ratification debates as believed).

⁶³ *But see id.* at 1523 (“[S]upporters of the Judiciary Act of 1789 thought they had vested all of the constitutionally authorized ‘judicial power of the United States’ in the federal judiciary . . .”); Engdahl, *supra* note 26, at 522–24.

to preserve the power of the state governments vis-à-vis the newly created national one. In short, there were many in the first Congress who unquestionably viewed the jurisdictional grant as self-executing, and the fact they voted in favor of the first Judiciary Act does not reveal that they backed away from that position.⁶⁴

Perhaps the most important point to stress about the first Judiciary Act is that, like nearly all legislation, it was a compromise measure, and both those who supported it and those who opposed it had different understandings of its significance. For the moment, the point of disagreement I want to explore in connection with the statute involves whether members of Congress believed that federal jurisdiction was self-executing (as opposed to, for example, whether Congress was obligated to create lower federal courts), and regardless, how they understood the power of Congress to control or limit the federal judicial power.⁶⁵

The Bill originated in the Senate. Oliver Ellsworth was its primary draftsman, and there is evidence he believed district courts and courts of appeal would possess only the jurisdiction Congress allotted to them.⁶⁶ In contrast, an anonymous letter published in several newspapers in the summer of 1789 depicted a much more powerful judicial department—one where the federal circuit courts were to “take cognizance of all cases of Federal Jurisdiction, whether in law and equity above the value of 500 dollars (inferior matters to be left to the State Courts), and of all criminal cases not within the jurisdiction of the Admiralty Judges.”⁶⁷ The same theme was articulated by Pennsylvania Senator William Maclay, who explained: “the Constitution expressly extended [federal jurisdiction] to all cases, in law and equity, under the Constitution and laws of the United States; treaties made or to be made, etc. We already had existing treaties, and were about making many laws. These must be executed by the Federal judiciary.”⁶⁸

Professor Warren argues that the anonymous letters outlining a robust federal judicial power—the same view Senator Maclay subsequently expressed—reflected

⁶⁴ See, e.g., Clinton, *Early Implementation*, *supra* note 60, at 1523–24.

⁶⁵ Because there are records of the House debates, but not of the Senate debates, there is far more documentary evidence as to what members of the House thought, but I know of no reason to suspect the views of senators would have been significantly different. The best sources are chapter three (“The Judiciary Bill”) of Maclay’s Journal, JOURNAL OF WILLIAM S. MACLAY 85–133 (Edgar S. Maclay ed., A.M. 1890), <http://www.constitution.org/ac/maclay/journal.htm> [<https://perma.cc/MGN7-ZR6V>] [hereinafter MACLAY], and Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

⁶⁶ Warren, *supra* note 65, at 60–61.

⁶⁷ *Id.* at 61 n.29. The letter added:

In cases of concurrent jurisdiction, the plaintiff may sue either in the State or Federal Court, but having made his option, he shall abide by it. A defendant sued in a State Court, in a matter of federal jurisdiction, may remove the cause to the Federal Court before trial but will not be allowed to appeal.

Id.

⁶⁸ MACLAY, *supra* note 65, at 85.

the early stages of the draft bill.⁶⁹ Obviously, the final bill was different, and Warren concludes that the less robust final product “undoubtedly represent[s] the price which Ellsworth paid to secure the concurrence of Richard Henry Lee in reporting the Bill.”⁷⁰ As Warren describes the warring factions in the Congress, one faction “took the position that Congress had no power to withhold from the Federal Courts which it should establish any of the judicial power granted by the Constitution” while the other believed federal questions could be addressed by “the State Courts, in the first instance[.]”⁷¹ Viewed through this prism, the question of self-execution embodied the classic federalist-versus-anti-federalist theme of how to allocate power between the federal and state sovereigns.⁷²

If the congressional debate over the Act itself proves something of an impasse, other parallel actions and debates are somewhat more revealing. In particular, in the House, among the seventeen proposed constitutional amendments offered by Representative Samuel Livermore were several that would have dramatically weakened the federal courts. Initially he wanted to prevent Congress from even creating lower courts with broad jurisdiction, and so he proposed limiting Congress’s power under Article I, Section 8, clause 9; instead of having broad authority to constitute inferior tribunals, Livermore argued Congress should be able to do nothing more than constitute courts of admiralty.⁷³ Livermore’s efforts obviously failed,⁷⁴ but they nonetheless appear to reflect his assessment that many of his colleagues viewed the jurisdictional grant as self-executing, and the only way to keep the federal courts from exercising that power, therefore, was not to create them.

The attitude Livermore’s proposed amendments aimed to counter was epitomized perhaps by South Carolina Congressman William Smith, who opposed efforts like Livermore’s to limit the jurisdiction of the lower federal courts by quoting the language of the Constitution itself. Speaking of Article III, Representative Smith observed:

It is declared by that instrument that the judicial power of the United States shall be vested in one supreme, and in such inferior courts as Congress shall from time to time establish. Here is no discretion, then, in Congress to vest the judicial power of the United States in any other than the Supreme Court and the inferior courts of the United States. It is further declared that the

⁶⁹ Warren, *supra* note 65, at 61–62.

⁷⁰ *Id.* at 62.

⁷¹ *Id.* at 67.

⁷² Viewing the debate over the Judiciary Act as a sort of proxy fight over the broader question of state versus federal power is a theme that has been laid out in detail by, among others, Clinton, *A Guided Quest*, *supra* note 37, at 849–50, and Engdahl, *supra* note 26, at 532 (discussing federal judiciary jurisdiction over private federal law claims).

⁷³ 1 ANNALS OF CONG. 796–97 (Joseph Gales, Sr. ed., 1834) [hereinafter CONGRESS].

⁷⁴ *Id.* at 834.

judicial power of the United States shall extend to all cases of a particular description. How is that power to be administered? Undoubtedly by the tribunals of the United States; if the judicial power of the United States extends to those specified cases, it follows indisputably that the tribunals of the United States must likewise extend to them.⁷⁵

To be sure, the debate was contentious, and there were many members who believed Congress did indeed have power to limit federal jurisdiction, but the evidence demonstrates two propositions unequivocally: first, that many in the first Congress believed Congress was without power to restrict the jurisdiction of the federal courts because it had already been provided for by the Constitution; and second, that many, if not most, who took a contrary view did so not because they believed the Article III power was not self-executing, but because they wanted to limit federal power in general in order to preserve state power.⁷⁶

Moreover, it is possible that some members of the first Congress who voted for the Judiciary Act despite its arguable limitation on the exercise of federal jurisdiction did so precisely because they believed any such limits would be deemed unconstitutional. For example, when Elbridge Gerry responded to the prospect of restricting the jurisdiction of the lower federal courts following their creation, he pointed out that, faced with an attempt to limit their jurisdiction, the lower federal court judges “would then inquire what were the Judicial powers of the Union, and undertake the exercise thereof, notwithstanding any Legislative declaration to the contrary; consequently their system would be a nullity, at least, which attempted to restrict the jurisdiction of inferior courts.”⁷⁷

Gerry clearly anticipated that inferior federal courts would look directly to the Constitution itself for the purpose of defining their jurisdiction. Consequently, if a statute restricted federal jurisdiction to less than that provided for by the Constitution, the

⁷⁵ *Id.* at 801. The same view was echoed by Egbert Benson of New York, who explained: “It is not left to the election of the Legislature of the United States whether we adopt or not a judicial system like the one before us; the words in the constitution are plain and full, and must be carried into operation.” *Id.* at 804.

⁷⁶ Or, as Professor Warren wrote:

[T]he Judiciary Act was a measure in the nature of a compromise between the extreme Federalist view that the full extent of judicial power granted by the Constitution should be vested by Congress in the Federal Courts, and the view of those who feared the new Government as a destroyer of the rights of the States, who wished all suits to be decided first in the State Courts, and only on appeal by the Federal Supreme Court.

Warren, *supra* note 65, at 131.

⁷⁷ CONGRESS, *supra* note 73, at 829 (discussed in Clinton, *Early Implementation*, *supra* note 60, at 1539).

federal court could ignore the statute and treat it as an unconstitutional restraint on the constitutionally defined federal judicial power—a mirror image of the Court’s decision in *Marbury v. Madison*⁷⁸ to forbid Congress from expanding the Supreme Court’s original jurisdiction beyond what the Constitution conferred.

Madison’s view was essentially the same as Gerry’s. Addressing concerns about the restrictions provided in the Act, Madison pointed out that they were inconsequential because the judiciary would correct discrepancies between the Act and the Constitution and thereby render the two texts coterminous.⁷⁹

Finally, though it is clear that the Framers differed amongst themselves as to how to allocate power between the federal and state judiciaries, as well as where to draw the line between judicial independence and congressional control, Madison’s notes from the Constitutional Convention identify two resolutions the Framers rejected, and those rejections further buttress the conclusion that the majority of the Framers understood “arising under” jurisdiction to be self-executing.⁸⁰ First, in debating Article XI of the Committee of Detail’s report concerning the judiciary—what would become the jurisdictional menu in Article III of the Constitution—the Framers overwhelmingly rejected a provision that would have been inserted into Article III following the enumeration of the Supreme Court’s original jurisdiction, perhaps as an alternative to what became the so-called Exceptions Clause. That rejected language would have provided: “In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct[.]”⁸¹ Next, the Convention unanimously deleted a provision that would have given to Congress the power to “assign any part of the jurisdiction abovementioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.”⁸²

In short, notwithstanding the obvious diversity of opinion surrounding the passage of the first Judiciary Act, the weight of authority regarding the intent of the Framers themselves is that no congressional action was necessary to vest the federal courts with the full menu of constitutional “arising under” jurisdiction. Defenders of the orthodox view, however, make a second historical claim; they argue that the best

⁷⁸ 5 U.S. (1 Cranch) 137 (1803).

⁷⁹ See Clinton, *Early Implementation*, *supra* note 60, at 1539.

⁸⁰ See *infra* notes 81–82.

⁸¹ THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 475–76 (Gallard Hunt & James Brown Scott eds., 1920) [hereinafter FEDERAL CONVENTION OF 1787]. The Committee of Detail reported to the convention on August 6, and the debate over the Committee’s proposed judicial article began thereafter, with attention turning to Article XI of the report—the relevant provision here—on August 27. *Id.* at 337, 347–51, 473–76. For a superb examination of the work of the Committee of Detail, and its relevance to understanding the Framers’ intentions in general—and with respect to Article III in particular—see William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 235–46, 278 (2012).

⁸² FEDERAL CONVENTION OF 1787, *supra* note 81, at 476.

argument supporting the conventional wisdom, wholly apart from what the Framers may have believed, is simply that the first Judiciary Act did not, on its face, fully vest the constitutionally granted jurisdiction;⁸³ it did not contain a general grant of “arising under” jurisdiction to the inferior courts.⁸⁴ Coupled with evidence that Congress expected much federal question litigation to take place in the state courts, the argument goes, the decision not to expressly vest the jurisdiction in the lower federal courts must demonstrate that Congress had the power to limit the jurisdiction of those lower courts.

This argument, which infers the meaning of Article III based largely on what the first Congress did, suffers from three primary defects. First, it may well be wrong as a matter of fact. Professor Engdahl has argued that the first Congress *did* vest lower federal courts with the full scope of the “arising under” jurisdiction as to laws of the United States.⁸⁵ He focuses on the Act’s grant to district courts of jurisdiction to entertain “all suits for penalties and forfeitures incurred, under the laws of the United States.”⁸⁶ Engdahl explains that “‘forfeiture’ of a sum as damages to the claimant was the remedy routinely afforded private persons seeking redress for injuries claimed to have resulted from other private persons’ violations of federal laws.”⁸⁷ In other words, Congress, through this provision, did direct the enforcement of its laws in federal courts in the first instance through the device of the forfeiture.⁸⁸

Second, as a logical matter, the argument that focuses on what Congress did is question-begging, because what Congress did can support either of two competing conclusions. If Congress believed that it had the power to restrict federal jurisdiction to less than that specified in the Constitution, then it may well have enacted a statute like the first Judiciary Act. However, it is also true that if Congress did not believe it had this power, it might also have enacted a statute just like the first Judiciary Act. If Congress expected that the courts created pursuant to the Exceptions Clause would read the Constitution in order to define their jurisdiction, then Congress would not include a general “arising under” jurisdictional grant in the statute. It would be unnecessary. The language of the first Judiciary Act, therefore, supports either the view that enabling legislation is required, or the view that legislation is self-executing.

⁸³ *But see* Akhil F. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1515–41 (1990); Clinton, *Early Implementation*, *supra* note 60, at 1540–52; Engdahl, *supra* note 26, at 522–33.

⁸⁴ *See* HART AND WECHSLER, *supra* note 4, at 31–33.

⁸⁵ Engdahl, *supra* note 26, at 525–29.

⁸⁶ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

⁸⁷ Engdahl, *supra* note 26, at 532.

⁸⁸ *Id.* Engdahl’s argument is fully consistent with the self-executing thesis, for the thesis does not intrude on Congress’s power to determine, at least in part, whether its statutes provide private rights of action. Professor Engdahl demonstrates that Congress frequently included jurisdictional provisions with much of the laws it passed in the early years of the nation. *Id.* at 533–34 & nn.58–68 (listing legislation). He also makes some interesting observations about the passage of the Judiciary Act of 1801 and its repeal in 1802. *See id.* at 535–38.

Finally, it is significant for purposes of originalist analysis that the first Congress did nothing inconsistent with the self-executing thesis. The proponents of the Act believed that they were operating within constitutional limitations when they established the federal judiciary.⁸⁹ If the “arising under” jurisdiction is indeed self-executing, the Act did nothing to interfere with that jurisdictional grant. If the jurisdictional grant is self-executing, then it is not necessary for Congress to provide a general jurisdictional grant to the inferior courts. The Act did not specify that the inferior courts could *not* exercise jurisdiction over constitutional or federal claims—something Representative Livermore wanted to say; quite the contrary, the lower courts were empowered to provide a specific remedy—the remedy of forfeiture—for the violation of the laws of the United States.⁹⁰

B. Early Cases Interpreting Article III

A handful of early Supreme Court cases from the founding generation touch on the question of whether federal jurisdiction flows directly from the Constitution or whether it requires congressional enabling legislation.⁹¹ Like the evidence of the intentions of the Framers and of the authors of the first Judiciary Act, the data from the early court cases are mixed. Some dicta support the self-execution thesis; others suggest the need for congressional action. What is clear is that the language in these early cases that hinted at strong congressional power ripened in subsequent generations into the present conventional wisdom. It is equally clear, however, that the contemporary conventional wisdom was far from conventional in the generation after the founding.

One of the first cases to provide the Supreme Court with an opportunity to discuss Congress’s power over federal jurisdiction was *Wiscart v. Dauchy*.⁹² The central issue in *Wiscart* was whether the statement of facts from the circuit court limited the Supreme Court’s factual inquiry on appeal or whether the Court could inquire into all the evidence presented at the trial below.⁹³ This question arose because of a provision in the Judiciary Act allowing appeal of “civil actions” from the circuit courts to the Supreme Court by means of the writ of error.⁹⁴ The Supreme Court had to determine whether “civil actions” included admiralty cases.⁹⁵ If not, the

⁸⁹ See Clinton, *Early Implementation*, *supra* note 60, at 1540.

⁹⁰ Judiciary Act § 9, 1 Stat. at 76–77.

⁹¹ See *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838); *M’Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *Turner v. President of the Bank of N.-Am.*, 4 U.S. (4 Dall.) 8 (1799); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796).

⁹² 3 U.S. (3 Dall.) 321 (1796).

⁹³ *Id.* at 322.

⁹⁴ *Id.* at 326 (opinion of Wilson, J.).

⁹⁵ *Id.* at 327–29 (opinion of Elsworth [sic], J.).

Judiciary Act did not provide another means by which an appeal could be taken to the Supreme Court.⁹⁶ The Court assumed that the Judiciary Act’s language pertaining to civil actions did not include admiralty cases.⁹⁷ Nevertheless, in an opinion by Justice Wilson, the Court reasoned that because appeal was a natural course for a case like this one, the Constitution provided the jurisdictional authority for the Court to take cognizance of it.⁹⁸ Further, the power to entertain the appeal included this power to conduct a full factual inquiry (rather than being limited to the facts from the court of appeals).⁹⁹ According to the Court:

It is true, the act of Congress makes no provision on the subject; but, it is equally true, that the constitution (which we must suppose to be always in the view of the Legislature) had previously declared that in certain enumerated cases, including admiralty and maritime cases, “the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.” *The appellate jurisdiction, therefore, flowed, as a consequence, from this source*; nor had the Legislature any occasion to do, what the Constitution had already done. The Legislature might, indeed, have made exceptions, and introduced regulations upon the subject; but as it has not done so, the case remains upon the strong ground of the Constitution, which in general terms, and on general principles, provides and authori[z]es an appeal; the process that, in its very nature . . . implies a re-examination of the fact, as well as the law.¹⁰⁰

Although the Court recognized that Congress possessed some power pursuant to the Exceptions Clause, the Court also understood that the Supreme Court’s appellate jurisdiction flowed directly from the Constitution and did not necessitate enabling legislation.¹⁰¹ Indeed, Justice Wilson went further, observing “if a positive restriction [to the Court’s power to entertain appeals over admiralty cases] existed by law, it would, in my judgment, be superseded by the superior authority of the constitutional provision.”¹⁰²

To be sure, Wilson’s view was not unanimous. Justice Ellsworth, for example, concluded that “[i]f Congress has provided no rule to regulate our proceedings, we

⁹⁶ *Id.* at 327 (opinion of Ellsworth [sic], J.).

⁹⁷ *Id.* at 330 (opinion of Ellsworth [sic], J.).

⁹⁸ *Id.* at 325 (opinion of Wilson, J.).

⁹⁹ *Id.* at 326–27 (opinion of Wilson, J.).

¹⁰⁰ *Id.* (opinion of Wilson, J.) (emphasis added).

¹⁰¹ *Id.* at 326 (opinion of Wilson, J.).

¹⁰² *Id.* at 325 (opinion of Wilson, J.).

cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it.”¹⁰³ Ellsworth’s position reveals a dispute among the Founders themselves as to whether federal jurisdiction is self-executing. The debate continued in several other cases.

Three years after *Wiscart*, the Court decided *Turner v. President of the Bank of North-America*.¹⁰⁴ *Turner* involved the anti-assignment provision of the Judiciary Act of 1789.¹⁰⁵ The Bank had become the assignee of a promissory note made by Turner in favor of Biddle & Co., a legal resident of the same state as Turner.¹⁰⁶ The Bank, however, enjoyed diverse citizenship with Turner and attempted to bring suit in the circuit court of North Carolina.¹⁰⁷ Counsel for the Bank, William Rawle, argued that Congress had no power to limit the diversity jurisdiction of the circuit courts because that jurisdiction was guaranteed by the constitutional grant.¹⁰⁸ According to the reporter’s notes, counsel stated:

It is, then, to be remarked that the judicial power, is the grant of the constitution; and congress can no more limit, than enlarge, the constitutional grant. In the 2d section of the 3d article, the constitution contemplates the parties to the controversy, as alone raising the question of jurisdiction; and if the existing controversy is “between citizens of different states,” the judicial power of the United States expressly extends to it.¹⁰⁹

At this moment, Chief Justice Ellsworth interrupts Rawle, and asks “[h]ow far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal Courts may exercise a jurisdiction, without the intervention of the legislature, to distribute, and regulate, the power?”¹¹⁰ Justice Chase then jumps in to observe:

¹⁰³ *Id.* at 327 (opinion of Ellsworth [sic], J.). It is worth noting here that some scholars believe Ellsworth was the principal draftsman of the first Judiciary Act, in which case his view as a justice can be seen as reflecting his view as a member of Congress. See James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 640 n.3 (1942).

¹⁰⁴ 4 U.S. (4 Dall.) 8 (1799).

¹⁰⁵ See *id.* at 11 (opinion of Ellsworth, J.); see also Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (prohibiting any circuit court or district court from trying “any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made”).

¹⁰⁶ *Turner*, 4 U.S. at 10–11 (opinion of Ellsworth, J.).

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.* at 9–10.

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Id.* at 10 n.1.

The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the *political truth* is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.¹¹¹

Neither Ellsworth’s nor Chase’s statements made their way into the opinion of the Court; nevertheless, they are among the strongest expressions in support of the current orthodoxy: that Congress controls federal jurisdiction.

There are, however, three caveats to placing too much weight on either of these two observations. First, Chase was explicitly making a point about “political truth”—which might not have anything to do with what the Constitution actually means or what the Framers intended.¹¹² Second, Ellsworth’s opinion for the Court focuses narrowly on inferior courts,¹¹³ and therefore applies at most to the weak version of my thesis. Finally, the Court did not uphold the provision of the Act on the basis of the congressional control presumption;¹¹⁴ it therefore reveals something about the views of two Justices, but does not represent legal authority for the modern orthodoxy. *Turner* is still quite important, because subsequent courts relied on it heavily, if not exclusively, as support for the congressional control presumption.

Three other cases from this era warrant brief mention. First is *United States v. Hudson and Goodwin*,¹¹⁵ which addressed the question of whether circuit courts could “exercise a common law jurisdiction in criminal cases.”¹¹⁶ Writing for the Court, Justice Johnson concluded:

Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be

¹¹¹ *Id.* at 10 n.1 (emphasis added).

¹¹² *Id.*

¹¹³ *Id.* at 10–11 (opinion of Ellsworth, J.).

¹¹⁴ *Id.* at 11 (opinion of Ellsworth, J.).

¹¹⁵ 11 U.S. (7 Cranch) 32 (1812).

¹¹⁶ *Id.* at 32.

vested with none but what the power ceded to the general Government will authorize them to confer.¹¹⁷

The Court then refused to rule on the question of whether the jurisdiction was within the constitutional grant but dismissed the case for lack of statutorily conferred subject matter jurisdiction. Had the Court concluded that the Constitution did provide for federal jurisdiction over the matter but that Congress had taken it away, then the Court would have been forced to address the issue of self-execution versus congressional control. But it did not, and so the case only weakly supports the conventional view.

Second is *M'Intire v. Wood*,¹¹⁸ where the Court addressed whether the circuit court had authority to issue a writ of mandamus under section 14 of the Judiciary Act, which created such power if the court had jurisdiction over the underlying dispute. The dispute arose under federal law, because the plaintiff argued he was entitled to land based on federal statute.¹¹⁹ Nevertheless, in an opinion by Justice Johnson, the Supreme Court concluded that the circuit court could not issue the writ of mandamus, because "the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases."¹²⁰ Notably, however, Johnson's conclusion was predicated on the power of the Supreme Court to review the judgment of a state court, where he believed this issue should be litigated in the first instance, yet a few years later, Chief Justice Marshall explicitly rejected this very notion when he argued that Supreme Court review of state court decisions dealing with federal statutory questions was insufficient to vindicate federal law.¹²¹

Finally, in *Kendall v. United States*,¹²² a sort of mirror image of *M'Intire*, the Supreme Court upheld the authority of the D.C. Circuit Court to issue a writ of mandamus, precisely because that court had statutorily created jurisdiction.¹²³

C. Joseph Story and John Marshall on the Federal Judiciary

Perhaps the best known early exposition of Article III is contained in Justice Story's opinion in *Martin v. Hunter's Lessee*.¹²⁴ The case arose when Virginia's highest court refused to abide by an order of the Supreme Court of the United States.¹²⁵ The Virginia court's refusal was based on that court's belief that the Constitution did not authorize appellate jurisdiction to the Supreme Court from its judgments.¹²⁶ In

¹¹⁷ *Id.* at 33.

¹¹⁸ 11 U.S. (7 Cranch) 504 (1813).

¹¹⁹ *Id.* at 505.

¹²⁰ *Id.* at 506.

¹²¹ *Osborn v. President of the Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822–23 (1824).

¹²² 37 U.S. 524 (1838).

¹²³ *Id.* at 526–27.

¹²⁴ 14 U.S. (1 Wheat.) 304 (1816).

¹²⁵ *Id.* at 323.

¹²⁶ *Id.* at 323–24.

rejecting the state court’s view, Justice Story put forth his own view of Article III.¹²⁷ His view amounts to a powerful rejection of the congressional control paradigm.

In short, although Justice Story viewed congressional action as necessary, he also viewed it as mandatory: that is, Congress was obligated to act.¹²⁸ The Constitution directed the flow of jurisdiction through Congress, but the Constitution also dictated that Congress do what was necessary to vest that jurisdiction.¹²⁹ As Justice Story put it, Congress is required to place in the federal courts “the whole judicial power.”¹³⁰ As part of this discussion of mandatory duty, Justice Story put forward the assertion (made famous by Professor Amar’s two-tier thesis) that, notwithstanding the permissive language of the Exceptions Clause, Congress is obligated to create some inferior courts; otherwise, some jurisdiction mandatorily required to be vested in the federal judiciary would not reach its constitutional destination.¹³¹ Justice Story wrote:

The same expression, “shall be vested,” occurs in other parts of the constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares that “all legislative powers herein granted shall be vested in a Congress of the United States.” Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that “the executive power shall be vested in a president of the United States of America.” Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?¹³²

In certain respects, Justice Story’s view of Article III was forgotten or overlooked until Professor Amar explored it. In any case, Justice Story’s understanding

¹²⁷ *Id.* at 324 (“The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself.”).

¹²⁸ *Id.* at 328.

¹²⁹ *Id.* at 328–31 (“The language of the article throughout is manifestly designed to be mandatory upon the legislature.”). Justice Story’s view comports with—and is among the primary historical evidence for—the mandatory theories of Professors Amar and Clinton. See Amar, *A Neo-Federalist View*, *supra* note 39, at 206–10; Clinton, *A Guided Quest*, *supra* note 37, at 749–54.

¹³⁰ *Martin*, 14 U.S. (1 Wheat.) at 331.

¹³¹ *Id.* at 330–31.

¹³² *Id.* at 329–30.

has undoubtedly attracted fewer adherents than the arguably competing view put forward by Chief Justice Marshall, who is fairly viewed as the father of the congressional control presumption.¹³³ Speeches Marshall made at the Virginia ratification convention presaged those influential opinions he later wrote, opinions which in some cases embrace a robust judicial power, but in others quite significantly restricted the power of the federal judiciary.¹³⁴

Chief Justice Marshall's view, however, as I will show, is far less categorical than is commonly believed. Moreover, while he was certainly of the founding generation, Marshall himself cannot be said to have articulated the beliefs of the Constitution's Framers. Indeed, Marshall did not actually attend the Philadelphia Convention.¹³⁵ And his apparent rejection of the self-executing thesis in fact reflects an insensitivity to several critical structural issues discussed at the convention.

It is of course well-known that the dominant political model prevalent in the colonies prior to the drafting of the Constitution was a model of legislative supremacy.¹³⁶ In this model, the power of the judicial branch is not on par with the legislature's power, and in view of the colonial experience with the British monarchy, this affinity for legislative supremacy is not surprising. In time, the Framers would invent the idea of three co-equal branches, but their first attempt to replace the British model from which they had fled was one where the legislature was dominant.¹³⁷

The pre-constitutional mode of governance is significant because it strongly influenced Chief Justice Marshall's view of how the United States Constitution was supposed to operate. Indeed, although one of Marshall's most famous lines is "it is a Constitution we are expounding,"¹³⁸ Marshall's major opinions touching on the question of jurisdiction reveal that he stubbornly viewed courts as creations of either the common law or the legislature. In other words, the proposition that they were created directly by the Constitution appears not to have occurred to him. Thus, in *Ex parte Bollman*,¹³⁹ where the Court considered whether it could issue a writ of habeas corpus pursuant to a statutory grant,¹⁴⁰ Marshall observed: "Courts which originate in the common law possess a jurisdiction which must be regulated by the

¹³³ See Clinton, *A Guided Quest*, *supra* note 37, at 847–48 (citations omitted) ("The Court's current doctrinal assumptions rest primarily on the uninformed views of Chief Justice Marshall, who has neither attended the Convention nor, so far as we can tell, seen Madison's notes of the debates."); Engdahl, *supra* note 26, at 527 (discussing the unorthodox latent ingredient theory adopted by Marshall in *Osborn v. President of the Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822 (1824)).

¹³⁴ See *infra* note 243.

¹³⁵ *America's Founding Fathers: Delegates to the Constitutional Convention*, U.S. ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_founding_fathers.html [<https://perma.cc/S9LZ-5N7E>].

¹³⁶ See *infra* notes 237–41.

¹³⁷ See *infra* notes 237–41.

¹³⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

¹³⁹ 8 U.S. (4 Cranch) 75 (1807).

¹⁴⁰ *Id.* at 94.

common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”¹⁴¹ This binary view (common law versus legislation) manifestly influenced Marshall’s construction of the Constitution’s Exceptions Clause, which he addressed in several later opinions.

For example, in *United States v. More*,¹⁴² he approached the question of whether the federal courts had a given power by focusing entirely on ascertaining what Congress had done. In Chief Justice Marshall’s words: “[A]s the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.”¹⁴³

Finally, in *Durousseau v. United States*,¹⁴⁴ Chief Justice Marshall’s traditional view began to take shape as a theory that would later become the congressional control presumption. The basic facts of *Durousseau* are as follows: Durousseau and other ship owners were set to sail from New Orleans to Charleston.¹⁴⁵ Before they left they got a bond from the federal government that required them to repay the debt on the bond if they did not get their cargo to Charleston; they were excused from payment on the bond, however, if they were prevented from landing in Charleston by dangers of the sea.¹⁴⁶ During the voyage, a storm came up forcing them to dock in Havana.¹⁴⁷ While in port, the Spanish government seized the ship and its cargo.¹⁴⁸ The United States brought an action on the bond and the ship owners claimed they fell into the dangers of the sea exception.¹⁴⁹ The Federal Court of Louisiana, which had been created by an 1804 act of Congress, had the power of both a district court and a circuit court.¹⁵⁰ Sitting as a district court, the federal court in New Orleans found for the government.¹⁵¹ The ship owners appealed to the Supreme Court.¹⁵²

Before the Supreme Court, the Attorney General argued that the Court did not have jurisdiction to hear the case because “[t]he courts of the United States can exercise no jurisdiction not expressly given by statute,” and the Act of 1804 had not given the Supreme Court jurisdiction over writs of error from the District Court of Louisiana.¹⁵³ Rather, the Act of 1804 only gave the Supreme Court appellate review

¹⁴¹ *Id.* at 93.

¹⁴² 7 U.S. (3 Cranch) 159 (1805).

¹⁴³ *Id.* at 173.

¹⁴⁴ 10 U.S. (6 Cranch) 307 (1810).

¹⁴⁵ *Id.* at 308.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 308–09.

¹⁴⁹ *Id.* at 308.

¹⁵⁰ *Id.* at 309–10.

¹⁵¹ *Id.* at 309.

¹⁵² *Id.*

¹⁵³ *Id.* at 309–11.

over writs of error heard by circuit courts.¹⁵⁴ Chief Justice Marshall's response to this argument was an embrace of the congressional control presumption.¹⁵⁵ He said:

Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. *They are given by the constitution.* But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.¹⁵⁶

As important as *Durousseau* is to the congressional control presumption, it is certainly not one of Chief Justice Marshall's most persuasive or coherent opinions. In the first place, Marshall concluded the Supreme Court did in fact possess jurisdiction over the dispute, suggesting that the entire jurisdictional power discussion is dicta.¹⁵⁷ In the course of that prolonged dicta, Marshall went so far as to suggest that Congress could have even decided not to create the Supreme Court at all, and thereby control even the Court's original jurisdiction¹⁵⁸—a proposition that virtually no one accepts (despite that it is logically dictated by his understanding of the potency of the Exceptions Clause). Elsewhere, Marshall intimated (perhaps paradoxically) that the Supreme Court's original jurisdiction is self-executing.¹⁵⁹ Those shortcomings notwithstanding, *Durousseau* proved to be historically significant, for it is the first robust statement that Congress's power includes the power to regulate federal jurisdiction; moreover, Marshall's view rests quite firmly on the premise that Congress has the power to regulate jurisdiction precisely because it has the power to create lower federal courts—that is: the greater power to create includes the lesser power to control defined jurisdiction.¹⁶⁰

¹⁵⁴ *Id.* at 310.

¹⁵⁵ *Id.* at 313–14.

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ *Id.* at 318.

¹⁵⁸ Marshall calls attention to the fact that it was Congress that created the Court. *Id.* at 313–14.

¹⁵⁹ See WRIGHT, *supra* note 57, at 33.

¹⁶⁰ In *Ex parte McCordle*, which involved the question of whether Congress could by statute strip the Court of jurisdiction over habeas actions that had been granted by an earlier statute, Justice Chase relied heavily, if not entirely, on *Durousseau*. 74 U.S. 506, 513–14 (1869). The case is commonly cited for the proposition that the Exceptions Clause gives Congress the power

Chief Justice Marshall’s next significant contribution to the subject, and the single case most responsible for laying the foundation for the congressional control presumption was, of course, *Osborn v. President of the Bank of the United States*.¹⁶¹ As I will suggest, however, the *Osborn* opinion is porous and far from categorical; indeed, I will show that the opinion itself, and certainly the subsequent use to which it has been put, are perfectly consistent with the self-executing thesis.

The facts of *Osborn* are well-known and uncomplicated: The Bank of the United States, a creature of federal statute, sued in federal court to enjoin Osborn, the Ohio state auditor, from acting in accordance with an act of the Ohio legislature, which directed Osborn to levy and collect a tax on certain banks, of which the Bank of the United States was one.¹⁶² Although an injunction issued, Osborn’s ostensible agent, Harper, forcefully took some \$100,000 from the Bank, which the circuit court directed be returned.¹⁶³

In the Supreme Court, Osborn made two arguments. First, he challenged the existence of federal jurisdiction on statutory grounds, arguing that the words of the statute that created the Bank did not vest it with power to sue; second, he maintained that even if the words of the statute did vest the Bank with that ability, such a grant of authority exceeded Congress’s power and was therefore unconstitutional.¹⁶⁴ This latter argument is evocative of Marshall’s own argument in *Marbury v. Madison*.¹⁶⁵

Chief Justice Marshall spent little time on the former argument; the bulk of the opinion in *Osborn* is directed at the second, constitutional, claim. Marshall wrote: “The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law.”¹⁶⁶ This crucial sentence seems capable of two plausible interpretations. The first construction, seized on by defenders of the congressional control presumption, would be that the judicial department may decide every case that the legislature authorizes it to decide, but only such cases as the legislature explicitly authorizes it to decide. This construction would be akin to the congressional control presumption. The second construction, however, fits more comfortably with the self-executing thesis. This construction would be that the judicial department may decide any case that arises by virtue of something the legislature has done. Under this second view, the legislature must act for there to be a case, but having enacted the statute that gives rise to the case, the judicial department’s power with respect to that case is plenary.

to strip the Supreme Court of appellate jurisdiction, even over constitutional issues. *See, e.g.,* *South Carolina v. Regan*, 465 U.S. 367, 396 (1984); *Flast v. Cohen*, 392 U.S. 83, 109 (1968).

¹⁶¹ 22 U.S. (9 Wheat.) 738 (1824).

¹⁶² *Id.* at 739–40.

¹⁶³ *Id.* at 741–44.

¹⁶⁴ *Id.* at 744–95.

¹⁶⁵ 5 U.S. (1 Cranch) 137 (1803).

¹⁶⁶ *Osborn*, 22 U.S. (9 Wheat.) at 818.

Chief Justice Marshall's opinion in *Osborn* is not entirely unambiguous as between these views. For example, in discussing the meaning of the phrase "arising under," Marshall wrote:

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. *It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.*¹⁶⁷

Marshall seems to suggest in this passage that although Congress often has the power to determine whether an individual has suffered an injury such that there is a constitutional case, if there is a case that arises under federal law, then the Constitution itself vests the federal court with the power to resolve it. Moreover, in a passage discussing Congress's power to control jurisdiction of the lower courts, Marshall again uses language consistent with the idea that the Supreme Court's jurisdiction is self-executing.¹⁶⁸ He wrote:

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.¹⁶⁹

Chief Justice Marshall understood Article III, as a whole, as designed to ensure that the federal judicial power be sufficient to enable it to engage in the "construction of all [the federal government's] acts, so far as they affect the rights of individuals"¹⁷⁰—an objective that could be assured only if federal jurisdiction is self-executing.

In the contemporary jurisprudence of jurisdiction, *Osborn* is less known for its connection to the congressional control presumption than it is for its definition of "arising under." In perhaps the case's most famous sentence, Chief Justice Marshall concluded that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the

¹⁶⁷ *Id.* at 819 (emphasis added).

¹⁶⁸ *Id.* at 823.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 820.

power of Congress to give the Circuit Courts jurisdiction of that cause[.]”¹⁷¹ Yet this very statement—meant to define whether a case arises under federal law—has become a central pillar of the congressional control orthodoxy. It stands for the proposition that although constitutional “arising under” jurisdiction is virtually unlimited,¹⁷² it is within Congress’s power to vest federal courts with all, or any part, of this jurisdiction. Because Congress has never been deemed to have vested the entire constitutional grant,¹⁷³ a gap is presumed to exist between the statutory meaning of “arising under” and its constitutional definition, and federal courts do not have the power to adjudicate cases that reside in that gap. The idea that such a gap is permissible, that it can exist, represents a rejection of the self-executing thesis, and the idea has its basis in *Osborn*.

But *Osborn* cannot bear the weight the current orthodoxy places on it. As a contemporary matter, the case is commonly associated with what is now known as supplemental jurisdiction (which encompasses what were previously known as the distinct categories of pendent and ancillary jurisdiction). Because the Bank’s charter included a provision allowing it to sue or be sued in any federal circuit court, Chief Justice Marshall reasoned that this provision meant that any suit involving the Bank would arise under federal law—for it was federal law (i.e., the charter) that permitted the Bank to be a litigant in federal court in the first place.¹⁷⁴ This idea generated the so-called latent ingredient theory of federal jurisdiction, but it is important that the language in *Osborn* which gave rise to the latent ingredient theory immediately followed a discussion of pendent jurisdiction in which Marshall described two alternative views. In the first alternative:

If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction.¹⁷⁵

This analysis, which provides the foundation for what has become the modern law of pendent and ancillary jurisdiction,¹⁷⁶ rests comfortably with the self-executing

¹⁷¹ *Id.* at 823.

¹⁷² See Engdahl, *supra* note 26, at 526–29; *cf.* *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507–09 (1900).

¹⁷³ See HART AND WECHSLER, *supra* note 4, at 995–97 (discussing, *inter alia*, writs of habeas corpus, certiorari, and mandamus).

¹⁷⁴ *Osborn*, 22 U.S. (9 Wheat.) at 817–18.

¹⁷⁵ *Id.* at 822.

¹⁷⁶ See, e.g., *Finley v. United States*, 490 U.S. 545, 547 (1989); *United Mine Workers v. Gibbs*, 383 U.S. 715, 720–21 (1966). The paragraph following this discussion contains the infamous “ingredient” language; however this assertion was couched in the terms of a conclusion. *Osborn*, 22 U.S. (9 Wheat.) at 822–23.

thesis. Thus, in discussing the relationship between pendent jurisdiction and judicial power, Justice Brennan explained:

Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim “arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,” and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional “case.” The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff’s claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.¹⁷⁷

Further, the threshold question for any court considering whether to exercise jurisdiction is whether there is a constitutional “case,” and Chief Justice Marshall’s analysis of that issue is also compatible with the self-executing thesis. He wrote:

This [arising under] clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.¹⁷⁸

Under this analysis, Congress retains the power to define statutory rights that may be asserted in federal court. However, once Congress does so, and once a party asserts those rights, a case exists, and once a case exists, it is the Constitution itself that vests the federal court with jurisdiction to decide it.

In sum, the modern orthodoxy, the congressional control presumption, rests on a series of opinions authored by Chief Justice Marshall. But Marshall himself was not a participant at the Philadelphia Convention, and his understanding of jurisdiction seems trapped in the legal structure that saw all judicial power as having either

¹⁷⁷ *Gibbs*, 383 U.S. at 725 (internal citations and footnotes omitted).

¹⁷⁸ *Osborn*, 22 U.S. (9 Wheat.) at 819.

common law or statutory roots—which is to say, he did not yet appreciate the possibility that power could stem directly from the Constitution. Finally, despite the embrace of these several Marshall opinions by advocates of the congressional control presumption, the holdings themselves, as well as the language, are by and large consistent with the self-executing theory.

D. Further Manifestations of the Presumption in the Nineteenth Century

Whatever ambiguity may have resided at the core of *Osborn* itself regarding the weak version of my thesis was eradicated in the mid-nineteenth century, principally by dicta in *Cary v. Curtis*¹⁷⁹ and *Sheldon v. Sill*.¹⁸⁰ In *Cary*, for example, the Court expressed no uncertainty at all about whether inferior federal courts had only the jurisdiction Congress expressly gave to them, holding:

[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in nowise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the Legislature.¹⁸¹

To be sure, this passage addresses only the weak version of the self-executing thesis, leaving the stronger version intact. Moreover, the Court’s defense of the congressional control presumption was apparently triggered by two dissenting opinions—by Justice Story and Justice McLean—that expressed a contrary view. The dissenters envisioned a much less potent congressional power.¹⁸² Justice Story quite directly intimated that “the judicial power [is] given by the Constitution”¹⁸³—presumably without any need for congressional enabling. Nevertheless, principally because of

¹⁷⁹ 44 U.S. (3 How.) 236 (1845).

¹⁸⁰ 49 U.S. (8 How.) 441 (1850).

¹⁸¹ *Cary*, 44 U.S. (3 How.) at 245.

¹⁸² See, e.g., *id.* at 253 (Story, J., dissenting) (“I deny the constitutional authority of Congress . . . to take away all right of action for an admitted wrong . . .”). Likewise, although Justice McLean did not perceive a conflict between the constitutional grant of jurisdiction and the relevant statute, he also argued that if there was such a conflict, the Constitution would prevail—meaning that the Constitution would provide federal jurisdiction in the federal court even if Congress attempted to take it away. *Id.* at 263–64 (McLean, J., dissenting).

¹⁸³ *Id.* at 256 (Story, J., dissenting).

this passage, *Cary* is routinely cited for the proposition that Congress has authority to restrict the flow of jurisdiction to inferior federal courts.¹⁸⁴

By the time of *Cary*, therefore, what had begun in *Turner v. President of the Bank of North-America*¹⁸⁵ as a dictum pertaining to a so-called political truth had insinuated itself into the case law as an unremarkable constitutional article of faith. Even so, self-executing arguments continued to be asserted before the Court from time to time. A particularly powerful example is the case of *Sheldon v. Sill*.

Both the factual predicate and legal question presented were akin to *Turner*, and the Court addressed whether section 11 of the Judiciary Act's restriction on diversity jurisdiction through assignment was unconstitutional.¹⁸⁶ Counsel for Sill argued that because jurisdiction flowed directly from the Constitution, Congress did not have the power to divert it.¹⁸⁷ Justice Grier's opinion acknowledged that the matter turned on whether the Constitution itself "ordained and established the inferior courts, and distributed to them their respective powers."¹⁸⁸ But on that issue, the Supreme Court's rejection of that argument was emphatic:

Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment.¹⁸⁹

Justice Grier's reasoning epitomized the "greater includes the lesser" analytic, and although the facts of the case dealt specifically with diversity jurisdiction, the

¹⁸⁴ See HART AND WECHSLER, *supra* note 4, at 382.

¹⁸⁵ 4 U.S. (4 Dall.) 8, 10 (1799).

¹⁸⁶ 49 U.S. (8 How.) 448, 448–50 (1850).

¹⁸⁷ *Id.* at 446–48 ("This judicial power, therefore, to take cognizance of this case, is, by the Constitution, vested in the Circuit Court . . .").

¹⁸⁸ *Id.* at 448.

¹⁸⁹ *Id.* at 449.

Court’s sweeping language has widely been relied upon to buttress the proposition that Congress may broadly regulate the jurisdiction of all courts of its creation.¹⁹⁰

So, for example, in *Railroad Co. v. Mississippi*,¹⁹¹ a case involving the federal question jurisdiction grant in the Judiciary Act of 1875, the first Justice Harlan observed that whether a dispute was properly removable “depend[ed] altogether upon the construction and effect of an act of Congress.”¹⁹² *Osborn*, of course, while suggesting Congress had power to restrict federal jurisdiction, had not upheld that proposition, nor had Chief Justice Marshall deemed the statutory grant to be narrower than the constitutional grant, so the issue of whether the statutory language was coterminous with the constitutional language did continue to arise from time to time. In the *Pacific Railroad Removal Cases*,¹⁹³ for example, the Court upheld a decision permitting removal to federal court by construing the federal question language in the 1875 statute as roughly coterminous with the constitutional grant, relying on Marshall’s opinion in *Osborn* as authority.¹⁹⁴ On the other hand, Chief Justice Waite (joined again by Justice Miller) concluded that Congress had not intended the statutory grant to reach the outer limit of what the Constitution allowed, that Marshall had been incorrect in *Osborn* in so believing, and that Congress was not obligated to vest the entirety of the permissible jurisdictional menu.¹⁹⁵

E. The Early Twentieth Century and the Entrenchment of the Orthodox View

Whatever one might say about the views expressed in the cases from the last quarter of the nineteenth century, the first cluster of cases addressing the need for and meaning of the 1875 Act, it is clear that Justice Cardozo and Justice Frankfurter

¹⁹⁰ See, e.g., *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

¹⁹¹ 102 U.S. 135 (1880).

¹⁹² *Id.* at 139–40. Although Justice Harlan acknowledged the power of Congress to regulate jurisdiction, he did not address whether the statutory and constitutional grant were coterminous. Justice Miller, however, in dissent, explicitly viewed the statutory grant as narrower than the constitutional provision; he therefore appears to have seen the Constitution as delimiting the outer limit of what Congress could do, rather than a menu Congress was obligated to enable. *Id.* at 142–44 (Miller, J., dissenting). In any event, the precise questions presented in the case would later be superseded by the well-pleaded complaint rule line of decisions, including *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

¹⁹³ 115 U.S. 1 (1885). In response to the decision, Congress eventually took steps to preclude federal jurisdiction in similar cases. See generally FRANKFURTER & LANDIS, *supra* note 4; Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 509–11 (1916).

¹⁹⁴ *Pac. R.R. Removal Cases*, 115 U.S. at 14.

¹⁹⁵ *Id.* at 24 (Waite, C.J., dissenting). Years later, Justice Cardozo would look back on the cases from this era and conclude the Court had not been perspicuous either in parsing the jurisdictional requirements of the statute, or in analyzing the fit between the statute and the constitutional language. See generally *Gully v. First Nat’l Bank*, 299 U.S. 109 (1936). I think Cardozo’s assessment is a fair one and it would therefore be a mistake to read too much into the cases from this era in exploring the self-executing thesis.

were correct when they intimated that these cases were not beacons of clarity.¹⁹⁶ But finally, in the first half of the twentieth century, the view that there was a gap between the statutory grant and the constitutional grant, and that the existence of such a gap did not present a constitutional difficulty, became entrenched.

Perhaps the most prominent illustration of the orthodox view is Justice Rutledge's concurring opinion in *National Mutual Insurance Co. v. Tidewater Transfer Co.*¹⁹⁷ The issue concerned Congress's amendment of the diversity statute, providing that citizens of the District of Columbia were to be treated as citizens of a state for diversity purposes, and whether Congress had authority to vest the federal courts with jurisdiction over these cases.¹⁹⁸ There was no majority opinion, but the case is presently important because Justice Rutledge deemed it a matter of "elementary doctrine that the words of Article III are not self-executing grants of jurisdiction to the inferior federal courts."¹⁹⁹ Rutledge viewed this proposition as uncontroversial and well-established, going so far as to suggest "[i]t has never heretofore been doubted that the constitutional grant of power is broader than the general federal-question jurisdiction which Congress has from time to time thought to confer on district courts by statute."²⁰⁰ The dissenters, too, embraced the same conception of the power of Congress to control lower federal court jurisdiction.²⁰¹ Thus, Chief Justice Vinson, joined by Justice Douglas, repeated that "Congress need not have established any such [inferior federal] courts";²⁰² and that greater power perforce dictates those courts possess "only such authority as is vested in them by the Congress."²⁰³ By the second half of the century, there can be no doubt that the orthodox view, whatever its analytical and historical limitations, had become hornbook law.²⁰⁴ As a result, in a case like *Verlinden B.V. v. Central Bank of Nigeria*,²⁰⁵ Chief Justice Burger could

¹⁹⁶ See, e.g., *Skelly Oil Co. v. Phillips*, 339 U.S. 667, 671 (1950) (discussing how the early cases lacked exacting analysis of the Judiciary Act of 1875); *Gully*, 299 U.S. at 113–14. See generally Frankfurter, *supra* note 193.

¹⁹⁷ 337 U.S. 582 (1949).

¹⁹⁸ *Id.* at 583 (plurality opinion).

¹⁹⁹ *Id.* at 607 (Rutledge, J., concurring). While Rutledge's opinion undoubtedly conflicts with the weak version of the self-executing thesis, Rutledge simultaneously endorsed the strong version of the thesis with his citation to *United States v. Hudson & Goodwin*, where the Court noted that "the Supreme Court [does] possess [] jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it." 11 U.S. (7 Cranch) 32, 33 (1813).

²⁰⁰ *Tidewater*, 337 U.S. at 613–14 (Rutledge, J., concurring) (citing, *inter alia*, Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 *YALE L.J.* 393, 405 n.47 (1936)).

²⁰¹ *Id.* at 626–27 (Vinson, C.J., dissenting).

²⁰² *Id.* at 627.

²⁰³ *Id.*

²⁰⁴ See, e.g., *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 494–95 (1983) (stating that § 1331 had been continuously construed to provide different limitations on federal courts than the Constitution).

²⁰⁵ *Id.* at 480.

fairly observe: “Although the language of § 1331 parallels that of the ‘Arising Under’ Clause of Art. III, this court never has held that statutory ‘arising under’ jurisdiction is identical to Art. III ‘arising under’ jurisdiction. Quite the contrary is true.”²⁰⁶

As we have seen, despite the mandatory language in Article III—the use of the words *shall extend*—the jurisdictional menu came to be viewed as a sort of buffet from which Congress could pick and choose. Although the Supreme Court did not ever reject the self-execution thesis at any length, and although there are occasional statements suggesting it is only with respect to the lower federal courts that Congress’s power is plenary, it is also fair and accurate to say that the Court also never seriously entertained the notion that the jurisdictional grant might be self-executing.²⁰⁷ As I show in the next section, however, the self-executing theory is in fact far more harmonious with sentiments expressed by the Framers in Philadelphia and in the state ratification debates than is the congressional control presumption. It is also more harmonious with the basic structure of the Constitution.

IV. THE HISTORICAL EVIDENCE REVISITED,²⁰⁸ AND THE SELF-EXECUTING NATURE OF ARTICLE III

The orthodox view of congressional power sees Congress’s control over the judicial branch as akin to the volume control on a television. Congress can “turn on” the federal courts by creating them, and then set the dial to any position between “off” and “maximum volume,” where louder volume corresponds to a broader jurisdictional grant. My thesis offers a competing metaphor that is more faithful to the historical record and constitutional structure. Congress does not have a volume control; it has a light switch. Congress has some power not to create inferior courts (it can leave the lights off), but a decision to create them is akin to throwing a switch. The lights are on. The courts, once created, possess all the power allotted by the Constitution.²⁰⁹ Advocates of the

²⁰⁶ *Id.* at 494.

²⁰⁷ *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (“The [self-executing theory] has never been asserted, and could not be defended with any show of reason . . .”).

²⁰⁸ On the relevance of the work of the Committee of Detail to understanding the historical records, see generally Ewald, *supra* note 81.

²⁰⁹ Although there has not been a great deal of scholarly support for the self-executing thesis, there has been some that is compatible with it. Probably the two leading examples are Chadbourn & Levin, *supra* note 103, at 640, and Ray Forrester, *The Nature of a “Federal Question,”* 16 TUL. L. REV. 362, 376–77 (1942). Professor Forrester, in particular, argues persuasively that the 1875 statute was intended to be coterminous with the constitutional language, such that if enabling legislation is required at all, the 1875 Act enabled all of the constitutionally allotted jurisdiction. See Forrester, *supra*, at 375–76. This view of the relationship between congressional and judicial power accords with the accepted relationship between congressional and executive power where Congress has the ability to grant power to the executive

orthodox view have mistakenly inferred that because Congress has a light switch, it also has a dimmer button; that inference is not supported by the historical record. The sounder conclusion is that Congress's power is much more circumscribed.

"The evident aim of the plan of the Convention," wrote Alexander Hamilton in the Federalist No. 82, "is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union."²¹⁰ Hamilton's characterization of the Framers' intentions strongly suggests that Article III was understood by the Framers to be self-executing.²¹¹ In this section, I examine the historical materials, which by and large support the self-executing thesis.

*A. Pre-Constitutional Judicial Systems*²¹²

Early American experiences with the judicial function help shed light on what the Framers hoped to accomplish by drafting Article III as they did.²¹³ This section explores these systems.

By the time of the revolution in the colonies, the common law had taken on the status of fundamental law.²¹⁴ In the view of the colonists, having recourse to the

branch, but not the further power to circumscribe that power once ceded. *See supra* notes 46–48 (discussing legislative veto and presidential removal power).

²¹⁰ THE FEDERALIST NO. 82, at 355 (Alexander Hamilton) (Thompson & Homans eds., 1831).

²¹¹ *Id.*

²¹² The history of this era has been well-plowed. I merely address the highlights relevant to the self-executing thesis, relying on authoritative historical examinations of the period. There is, however, one comparatively recent analysis warranting specific mention. *See Pfander & Birk, supra* note 55, at 1658. Professors Pfander and Birk make two important observations: first, that the Scottish courts in this era were significantly more immune from parliamentary control than were their English counterparts; second, that the Framers were well aware of the Scottish system and practice. Indeed, although largely ignored for two centuries following the ratification of the Constitution, the Scottish influence on the major American political thinkers and theorists—including Jefferson, Hamilton, and Madison—is now well-known and widely accepted. *See, e.g.,* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981) (examining the influence of the Scottish Enlightenment on Hamilton, Madison, and the Federalist Papers); GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978) (examining the influence of Scottish Enlightenment on Jefferson and the Declaration of Independence). As Pfander and Birk show, the Scottish influence on James Wilson was also notable. In general, the Framers' familiarity with the Scottish legal architecture accords far better with the self-executing thesis than with the current congressional control presumption. *See Pfander & Birk, supra* note 55, at 1619–20, 1627–42, 1649–56. Professor Grove also notes internal disagreement among the Framers regarding the role the inferior federal courts would play and the power they would possess once created. Grove, *supra* note 9, at 888–89 & nn.94–98 (although she aligns herself with the view that the compromise between the nationalists and the states-rights advocates resulted in the congressional control presumption).

²¹³ For a complete discussion of state judicial systems in this era, see 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 1–195 (1971).

²¹⁴ *See id.* at 89 (listing "common law precedents, the ancient rule that this law was their birthright, the more recent doctrine that an Englishman carries this law with him, and the

protections provided by common law was a primary element of their birthright.²¹⁵ The judicial power was therefore understood by the colonists, and later by the states, to play an instrumental role in the development and vindication of the fundamental law under which the people lived.²¹⁶

A corresponding development, reaching its apex with the formation of the various state constitutions, was the ever-increasing power of the legislatures. Significant legislative power, however, meant that common law principles were vulnerable to legislative encroachment. By the time the Constitutional Convention commenced, various state legislatures were so powerful that the threat they posed to individual rights was a widespread concern.²¹⁷

Consequently, when the Framers met in Philadelphia, these twin developments—courts as protectors of common law rights coupled with legislatures as overwhelmingly powerful—had created a powerful tension between the judicial and legislative functions. In addition to being called upon to address the vertical tension created by national and state relations, therefore, the Framers, in formulating a national judiciary, had to resolve this horizontal tension between different aspects of the sovereign.

B. The Colonial Experience

The colonists carried with them to the new world their common law inheritance.²¹⁸ The salient principles of the common law paradigm included several

guarantees of the rights and liberties of Englishmen granted in the charters” as constitutional standards contained in the imperial constitution).

²¹⁵ *See id.*

²¹⁶ This conclusion follows from the fact that the common law is exclusively a creature of the judicial branch. *See, e.g.*, DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 165–86 (1990) (discussing the history and development of English common law). “From the outset English law seemed to be the joint creation of the ‘reasonable men’ of the sworn neighborhood assembly and the professional judges . . .” *Id.* at 166. Because Parliament originally was deemed a high court, its statutes were merely written manifestations of the common law’s “immemorial custom.” *Id.* at 166–68. In sum, the common law was the primary element in the English legal tradition and was a central structural principal of English government; neither the King, nor, arguably, the Parliament was immune from its workings. *See* GOEBEL, *supra* note 213, at 59 (discussing the judicial protection of common law rights held by individuals from oppressive corporate bylaws permitted by royal grant); *id.* at 89–95 (discussing the peculiar colonial conception that viewed parliamentary acts repugnant to common law right void as against the imperial constitution); *id.* at 167 (suggesting that justice could be sought even against the King); *id.* at 168 (stating that courts had wide discretion in the interpretation of parliamentary acts).

²¹⁷ *See* GOEBEL, *supra* note 213, at 142 (discussing the impotence of constitutional safeguards to protect against legislative encroachment of constitutional rights).

²¹⁸ *See id.* at 9–18, 25–35 (discussing the various colonial judiciaries at some length); KELLEY, *supra* note 216, at 185 (“The British legal tradition left its mark, too, on colonial America, which carried out a ‘revolution’ against a government but in no sense against the legal system—and which indeed might claim to be even more faithful to the principles of common law than the Parliament of George III.”); Edward C. Surrency, *The Courts in the*

interconnected concepts: first, the idea that law is something that is found, not made;²¹⁹ second, that these discovered common law norms are grounded in particular communities, but have their origins in “custom immemorial”;²²⁰ and finally, that these norms formed part of their heritage as Englishmen because they were part of the fundamental law.²²¹ In short, colonists viewed principles of common law much as we today view the concepts of individual rights—the common law *was* their individual rights.²²²

Because the common law occupied such a central place in the colonists’ belief matrix, they understood the judicial function to be critically important, for it was the judicial branch that safeguarded these values from legislative encroachment. As is well-known, a major element of the Bill of Particulars identified by the colonists in the Declaration of Independence was the Crown’s nonadherence to various common law protections, including trial by jury.²²³ The colonists complained that although the King had the exclusive authority to create courts,²²⁴ he refused to do so.²²⁵

American Colonies, 11 AM. J. LEGAL HIST. 253, 266–76 (1967) (also discussing the various colonial judiciaries at some length). Furthermore, the transportation of the common law to the colonies was a process that occurred over a great period of time. Professor Goebel premises his discussion of the early colonial judiciaries on the colonists’ experiences of the England they left. Many of the colonists understood the administration of justice from their experiences in the common law “backwaters” of England. GOEBEL, *supra* note 213, at 5. In other words, their day-to-day experience was centered in their native rural jurisdictions, with the “myriad inferior courts that administered local enactments and a variety of usages, some of great antiquity, some reflecting, oftentimes clumsily, central court law.” *Id.* This experience was far removed from the more polished common law procedure found in Westminster Hall. *Id.* He states that this experience with the law more than any other factor primarily shaped early colonial attitudes about the judiciary. *Id.* But see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 35 (2d ed. 1985) (providing a view that the exigencies of colonial life played a major role in shaping colonial attitudes). Only later, as experienced lawyers expatriated to the colonies, did the more formal procedures of the common law become introduced. See GOEBEL, *supra* note 213, at 6–7. But never did the colonists lose the notion of the common law as their inheritance and their right as Englishmen. See GOEBEL, *supra* note 213, at 25–35; KELLEY, *supra* note 216, at 167; *cf.* RITZ, *supra* note 9, at 28–30.

²¹⁹ See GOEBEL, *supra* note 213, at 25–35; KELLEY, *supra* note 216, at 167; *cf.* RITZ, *supra* note 9, at 28–30.

²²⁰ See KELLEY, *supra* note 216, at 165–69 (discussing the common law’s roots in custom and how it was a form of second nature); *cf.* RITZ, *supra* note 9, at 28–30 (explaining that the essential trial function was to find the true rule of law).

²²¹ See GOEBEL, *supra* note 213, at 89.

²²² *Id.*

²²³ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); see also GOEBEL, *supra* note 213, at 87–95.

²²⁴ See Surrency, *supra* note 218, at 257–63 (“The power to establish courts in the beginning of the seventeenth century in England was the exclusive prerogative of the king.”). For a more exhaustive discussion of the evolution of colonial judicial systems see GOEBEL, *supra* note 213, at 3–18.

²²⁵ *E.g.*, THOMAS JEFFERSON, AUTOBIOGRAPHY, reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 23–29 (Adrienne Koch & William Peden eds., 1944)

The power of the King to create courts manifested itself in the colonies by placing this erstwhile judicial power into the executive branch.²²⁶ Thus, while the original charters of the colonies addressed the power to make laws (much the same way that corporate charters grant corporations the power to create bylaws),²²⁷ they rarely mentioned the power to create judiciaries, nor did they create distinct judiciaries.²²⁸ In the colonial experience, therefore, the judicial power was effectively a dimension of the executive power, for all aspects of the administration of justice flowed directly from the King to the colonial governors.²²⁹ Consequently, governors resolved what we today would view as legal disputes subject to litigation,²³⁰ and only later, as the number and complexity of these disputes increased, were courts formed.²³¹ Many colonial assemblies enacted statutes codifying the then-existing judicial systems.²³²

C. State Judicial Systems

Prior to the constitutional period, the model of state judicial systems was legislative supremacy.²³³ One objective the states sought to achieve when they formed their respective constitutions, therefore, was to legislatively reduce principles of fundamental law to a writing that was clear and complete.²³⁴ Yet how to safeguard these constitutions and their fundamental principles from future legislative encroachment was unclear and untested.²³⁵ To be sure, the notion of separated powers

(stating that the King “refus[ed] his assent to laws for establishing judiciary powers” and charging the King with obstructing justice by failing to establish a system of courts); *see also* GOEBEL, *supra* note 213, at 97.

²²⁶ GOEBEL, *supra* note 213, at 91.

²²⁷ *See id.* at 3–4.

²²⁸ *Id.*

²²⁹ *Id.* at 4 (“As respects anything on which there was no specific legislation, the colonists were initially left to their own devices. As it turned out, a truly impressive mass of detail—forms, modes of procedure and rules of substance—was put into effect without any legislative direction whatever.”).

²³⁰ *See* Surrency, *supra* note 218, at 253, 259–61 (stating that the lack of separation of powers in early colonial governments permitted the governors and the assemblies to act as courts).

²³¹ *Id.* at 259.

²³² *See id.* at 262. In other words, colonial legislation dealing with courts was not, in the executive sense, enabling. The judicial systems already existed when these assemblies acted, and the legislation merely maintained the status quo. *See* GOEBEL, *supra* note 213, at 12–16 (discussing the King’s intolerance of tinkering with the judicial systems by colonial legislatures).

²³³ *See* GOEBEL, *supra* note 213, at 136–42; *cf.* RITZ, *supra* note 9, at 27–52 (discussing the structural aspects of late eighteenth-century state judicial systems and comparing them to today’s courts).

²³⁴ *See* GOEBEL, *supra* note 213, at 96–102 (“Because they and their forebears had lived for generations according to the terms of the written instruments establishing or regulating the structure of their governments, the conviction had been bred that only through matter of record could the metes and bounds of the fundamental law be secured.”).

²³⁵ *See id.* at 105–22 (discussing means other than judicial review in which legislative power was kept in check).

was well-known, but how precisely this concept would operate to safeguard fundamental law was not well understood, and states lacked mechanisms to implement it.²³⁶ Most significantly, the judicial branch could not be relied upon to police the separation of powers and other fundamental principles, because the courts were entirely subordinate to the legislature.

For example, one important way in which the judicial function was subordinate to the legislative was that the courts derived all their power from legislation.²³⁷ State legislatures had, for the most part, plenary power over the judicial function, and no evidence exists that the states envisioned or had any beliefs about the notion of a self-executing judiciary. Indeed, state legislatures even possessed the power to deprive the courts of various forms of jurisdiction.²³⁸ Some legislatures actually tried cases themselves, and some drafted rules of decision.²³⁹

Even the emerging institution of judicial review had but limited effect in altering the distribution of power between the judicial and legislative spheres.²⁴⁰ The ostensible reason is that the colonial belief in legislative supremacy was so deeply entrenched that it far outweighed the desire to vest the judicial branch with the responsibility of protecting fundamental law. As Professor Goebel has written:

[T]he inexorable tide of democracy, had blunted the edges of certain pronouncements of principle in the constitutions Such provisions had been embodied without foresight as to the effects of the inflation of legislative authority, although the object lesson of Parliament was fresh in everyone's mind. It very soon became evident that theoretical limitations had as a practical matter been

²³⁶ *See id.* at 98–99. Some state constitutions made explicit reference to separation of powers, but this homage was largely toothless. Other states attempted to achieve judicial independence through salary and tenure provisions. *See id.* at 98. But legislative encroachment of the judicial function persisted even in the face of these provisions. *See id.*

²³⁷ *See id.* at 97–98 (discussing the “deep-rooted and pervasive belief that the ordering of the judicial system should be committed to the legislative branch”). Colonial legislatures often attempted to experiment with judicial structure, but the King, in preserving his prerogative, largely prevented these attempts at change. *See id.* The pervasiveness of legislative supremacy over the judicial branch during early statehood may have been a backlash response to this experience.

²³⁸ *See id.* (discussing how legislation was necessary in some states to alter the courts' jurisdiction).

²³⁹ *Id.* at 98–99.

²⁴⁰ *See id.* at 125–42. Even though the theory of constitutional supremacy became a rule of judicial action in the early states, the “primacy of state legislatures was so far advanced that any judicial rebuff of their expressed will had the appearance of a challenge to the established political order.” *Id.* at 126. Few courts directly challenged legislative enactments based on the principle of constitutional supremacy. *Id.* For a more complete discussion of the origins of judicial review, see ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 4–55 (1989), and William Michael Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 455 (2005).

displaced by the incompatible reality of legislative supremacy. As a result, legislatures assumed the prerogative of themselves judging whether or not they had strayed beyond the bounds fixed in the constitution, but the occasions of open admission that they had acted “contrary to the spirit of the constitution” were very rare indeed. In all the states the drift was toward subversion of the original design of limited constitutional government and its replacement by the unrestraint of English parliamentary hegemony. In the climate thus created, even the most candid and eloquent assertion of judicial duty was not effective to still charges of usurpation.²⁴¹

D. Judicial Experiments Under the Continental Congress

One striking feature of the Confederation was that the judicial function was an enclave reserved exclusively to the states;²⁴² there were no courts with jurisdiction across state boundaries. Exceptions were created from time to time, on an ad hoc basis,²⁴³ but they lacked permanence, and there was no mechanism for enforcing orders that emerged from these tribunals. The absence of any courts with national jurisdiction was troubling, because there were in fact problems of national importance. Perhaps the most important such issue taken up by the Continental Congress involved the proper disposition of captures at sea.²⁴⁴ Appeals from state court decisions disposing of these prize cases were made directly to the Congress,²⁴⁵ and as the case load increased, the appeals were referred to a standing committee.²⁴⁶ Later, the Continental Congress formed the Court of Appeals in Cases of Capture to hear these cases.²⁴⁷ This court was, for the most part, devoid of enforcement power,

²⁴¹ GOEBEL, *supra* note 213, at 142.

²⁴² *Id.* at 143.

²⁴³ *See id.* at 172–95 (discussing cases of capture and federal appellate courts); Clinton, *A Guided Quest*, *supra* note 37, at 754–57; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 6–9 (1948); *see also* GOEBEL, *supra* note 213, at 146 (“[E]fforts to make the jurisdiction properly effective very shortly revealed the formidable difficulties of exercising judicial authority on the Continental level in an atmosphere of reluctance.”). In the Virginia ratification convention, John Marshall recognized that Article III of the proposed constitution was “a great improvement on that system from which we are now departing.” 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 551 (J. Elliot ed., 1901) [hereinafter Elliot, DEBATES].

²⁴⁴ GOEBEL, *supra* note 213, at 147–82; Clinton, *A Guided Quest*, *supra* note 37, at 755–56.

²⁴⁵ *See* GOEBEL, *supra* note 213, at 147–82 (discussing the establishment of appellate jurisdiction).

²⁴⁶ *Id.* at 150.

²⁴⁷ *See id.* The Articles of Confederation were approved after the establishment of this court. The Articles provided for the establishment of a court with like jurisdiction. Article IX provided that:

The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for

and its decisions were frequently ignored by state courts or treated as mere recommendations.²⁴⁸ This situation led to many embarrassments for the fledgling nation in the area of international relations,²⁴⁹ and was instrumental in the development of the jurisdictional menu at the Constitutional Convention.²⁵⁰

After the success of the American Revolution, which obviously occasioned the loss of the overarching judicial system provided by England,²⁵¹ there was an immediate problem in the colonies resulting from the fact that there was no agreed-upon means (judicial or otherwise) for resolving interstate disputes. The Articles of Confederation purported to address this void by providing “[t]he United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following”²⁵²

But this provision proved cumbersome and largely ineffective.²⁵³ Thus, at the Constitutional Convention²⁵⁴ and during the subsequent ratification debates,²⁵⁵ few

receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

ARTICLES OF CONFEDERATION OF 1781, art. IX, § 1. However, the Court of Appeals continued to operate after approval of the Articles as it had before. *See* GOEBEL, *supra* note 213, at 172–74; Clinton, *A Guided Quest*, *supra* note 37, at 755.

²⁴⁸ *See* GOEBEL, *supra* note 213, at 172–82. Furthermore, the court was not in any way independent of Congress and was subject to no small amount of intermeddling. *See id.* at 178.

²⁴⁹ *See id.* at 165–82 (discussing many instances of state impropriety toward foreigners and pressures put on the national government by foreign powers to remedy the abuses and treaty violations).

²⁵⁰ *See* Clinton, *A Guided Quest*, *supra* note 37, at 757.

²⁵¹ Prior to the American Revolution, disputes between the states were resolved by the Privy Council. *See* GOEBEL, *supra* note 213, at 182.

²⁵² ARTICLES OF CONFEDERATION OF 1781, art. IX, § 2. The procedural “manner” referred to in this provision required that, upon petition to Congress by the aggrieved state, and following notice to the other state, both states should “appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question.” *Id.* If consent could not be achieved, the Articles provided for selection of judges by Congress with peremptory strikes by the states. *Id.* The judgment of the court was to be final and decisive, and the judgment was to be “transmitted to Congress, and lodged among the acts of Congress, for the security of the parties concerned.” *Id.*

²⁵³ *See* GOEBEL, *supra* note 213, at 182–95 (discussing controversies between states).

²⁵⁴ A provision for the resolution of controversies between states separate from the federal judiciary was originally conceived in the convention. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183–84 (Max Farrand ed., 1966) [hereinafter Farrand, RECORDS] (report of the committee of detail). However, the Framers felt that this class of controversy could be adequately addressed by the federal judiciary. *See id.* at 400–01.

²⁵⁵ *See* 3 Elliot, DEBATES, *supra* note 243, at 523 (comments by G. Mason), 532 (comments by J. Madison), 549 (comments by E. Pendleton); THE FEDERALIST NO. 80, at 342 (Alexander Hamilton) (Thompson & Homans eds., 1831).

questioned the need to extend federal jurisdiction to the resolution of disputes between states.

In addition, the Articles of Confederation provided Congress with no means of enforcing its enumerated powers. Its resolves were treated by the states as mere recommendations and could be freely ignored.²⁵⁶ The relative impotence of Congress in enforcing its will led to the unanimous opinion among the Framers that an independent, national judiciary was needed so that the states could be compelled to adhere to federal law.²⁵⁷ Only through federal judicial oversight could the horizontal tension created by the Articles of Confederation be resolved in favor of the predominance of federal power.

E. The Constitutional Convention

In May of 1787, the Constitutional Convention convened.²⁵⁸ Delegates from all the states met in Philadelphia, ostensibly to revise the Articles of Confederation.²⁵⁹ The delegates agreed, without exception, that some form of national judiciary was needed.²⁶⁰ Hence, the debates concerning the federal judiciary dealt not at all with whether there was a pressing need for one, but instead on what form it would take and what powers it would have.²⁶¹

The judicial system that emerged from the Convention was novel, and many scholars have admired and discussed many aspects of its novelty.²⁶² Yet one of its most important innovations has been largely ignored. This innovation involved the *source* of judicial power. Whereas the courts with which the Framers were familiar had

²⁵⁶ See GOEBEL, *supra* note 213, at 342 (stating that resolves having the legal effect of an act of assembly were used by the New England colonies, but this quality could hardly be claimed by the Continental Congress because of its “political constitution”).

²⁵⁷ See *id.* at 195; Clinton, *A Guided Quest*, *supra* note 37, at 757 (“The experience [under the Articles of Confederation] highlighted, among other things, the need to avoid the ponderous delay and inconvenience created by the ad hoc establishment of hearing tribunals, the importance of the national disposition of certain judicial cases to orderly diplomatic relations and to the domestic harmony of the states, the need for judges who could decide such questions independent of any obligations owed to the states that appointed them, and the extreme difficulty of enforcing national judgments affecting important state interests.”).

²⁵⁸ Clinton, *A Guided Quest*, *supra* note 37, at 757.

²⁵⁹ For a general discussion of the Constitutional Convention, see, e.g., Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891 (1990). For a discussion of the work of the critical Committee of Detail, see Ewald, *supra* note 81.

²⁶⁰ See Clinton, *A Guided Quest*, *supra* note 37, at 757.

²⁶¹ See *id.*

²⁶² As I suggest above, however, the extent to which some of this novelty grew out of the Framers’ familiarity with the Scottish legal system has only recently been examined, and no supporter of the congressional control presumption has discussed Congress’s power to control federal jurisdiction in the context of the Framers’ understanding of the relationship between Scottish courts and Parliament. See Pfander & Birk, *supra* note 55, at 1619.

derived their power from the legislature or the monarch, the federal courts created by the Framers drew their jurisdictional power directly from the Constitution itself.²⁶³

Governor Edmund Randolph of Virginia submitted the plan that became the working draft of the Convention with respect to the judicial branch.²⁶⁴ Randolph's proposal provided as follows:

[A] National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.²⁶⁵

In addition to Randolph's proposal, a competing judicial plan was offered by Charles Pinckney of South Carolina.²⁶⁶ Though the Pinckney Plan was not nearly so influential as the Virginia Plan, it is worth examining because it too gives some indication of the range of viewpoints among the Founders concerning the issue of the source of judicial power. Pinckney's Plan provided as follows:

The Legislature of the United States shall have the Power & it shall be their duty to establish such Courts of Law Equity & Admiralty as shall be necessary—the Judges of these Courts shall hold their Offices during good behaviour & receive a compensation which shall not be increased or diminished during their continuance in office—One of these Courts shall be termed the Supreme Court whose Jurisdiction shall extend to all cases arising under the laws of the United States or affecting ambassadors other public Ministers & Consuls—To the trial of impeachments of Officers of the United States—To all cases of Admiralty & maritime

²⁶³ *Id.* at 1647–48.

²⁶⁴ *See* 1 Farrand, RECORDS, *supra* note 254, at 20–23.

²⁶⁵ *See id.* at 21–22.

²⁶⁶ *Id.* at 23.

jurisdiction—In cases of impeachment affecting Ambassadors & other public Ministers the Jurisdiction shall be original & in all the other cases appellate—²⁶⁷

As is apparent, the most notable difference between the Pinckney and Randolph plans was that Randolph eschewed the language of legislative supremacy whereas Pinckney embraced it. Yet it was Randolph’s draft, not Pinckney’s, that the Convention, working through the Committee of the Whole,²⁶⁸ chose to use as the starting point in formulating the general principles that would later animate that became Article III. This choice is an important indication that the Framers, from the outset, understood the judicial power to exist irrespective of what the legislature chose to do.

Two central principles regarding the judicial branch came to be regarded by the Framers as indispensable. The first, agreed to by all members of the Convention, was that the federal judiciary must be independent of the other branches.²⁶⁹ Indeed, it is fair to say that almost all the debates that followed in the Convention centered on how best to assure and protect this principle. In part, the principle of judicial independence was viewed as an end in itself; but in part, it was viewed as well as a means to safeguard the second central principle, namely, the supremacy of federal law.²⁷⁰

During the course of the Convention, virtually all aspects of the federal judiciary were debated and put to a vote.²⁷¹ What I will focus on, however, are the issues that shed light on whether the Framers regarded the judicial power as self-executing. In this regard, it is useful initially to examine the debate over the council of revision. The Virginia Plan made provisions for just such a council.²⁷² The basic idea of the proposal was that a group consisting of members from both the executive and judicial branches would form a council that would review every legislative act prior to its going into effect; the purpose of this review would be to evaluate the act’s

²⁶⁷ 3 *id.* at 600. *See generally id.* at 595–609 (discussing the Pinckney Plan and the specific language it contained). Another plan was prepared by Alexander Hamilton, but was not submitted to the floor of the convention. *See id.* at 617–30 (discussing Hamilton’s plan and the specific language it contained). This plan was probably prepared in anticipation of a speech delivered to the convention. *See Clinton, A Guided Quest, supra* note 37, at 761 & n.49.

²⁶⁸ The Convention quickly transferred all work to the Committee of the Whole to facilitate debate. *See* 1 Farrand, RECORDS, *supra* note 254, at 29.

²⁶⁹ *See Clinton, A Guided Quest, supra* note 37, at 758. Alexander Hamilton believed that judicial independence was “essential in a limited constitution.” *See* THE FEDERALIST NO. 78, at 334 (Alexander Hamilton) (Thompson & Homans eds., 1831).

²⁷⁰ *See Clinton, A Guided Quest, supra* note 37, at 753–54 (“[T]he goal of assuring the supremacy of federal law and the supremacy of the federal government in areas of concern to more than one state was the central constitutional objective that the framers sought to implement through article III.”).

²⁷¹ For a chronological development of Article III through the Convention, *see id.* at 757–96.

²⁷² *See* 1 Farrand, RECORDS, *supra* note 254, at 21.

constitutionality.²⁷³ As we know, the Framers ultimately rejected the inclusion of any such council. Nevertheless, what the debates over this provision reveal is the critical importance, in the estimation of both proponents and opponents of the council, of judicial independence.²⁷⁴

For example, Elbridge Gerry opposed the council because he believed that a governmental group comprising representatives from both the executive and judicial branches would weaken the independence of the judiciary.²⁷⁵ Gerry and his allies further argued that members of the judiciary should have no part in making laws they might have to interpret.²⁷⁶ Likewise, Rufus King of Massachusetts believed that “Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”²⁷⁷ The overriding concern behind these arguments was judicial independence; opponents of the council concluded that the judicial branch, by cooperating with members of the other branches in enacting legislation, would become entangled with those branches, and would thereby become less independent.

Those who supported the idea of the council did not value judicial independence any less. On the contrary, their view (articulated, for example, by Wilson and Madison) was that, by participating in the legislative process, the judicial branch would become stronger.²⁷⁸ Supporters believed that the power vested in the legislature was

²⁷³ The Virginia Plan provided for a council of revision. *See id.* Under this provision, “the Executive and a convenient number of the National Judiciary, [composed] a council of revision with authority to examine every act of the National Legislature” *Id.* This provision was first considered on June 4 by the Committee of the Whole. *Id.* at 96–103, 108–09. Later that day, Gerry’s proposal to delete the judiciary from the council of revision was agreed to. *Id.* at 104. Though the subject was debated extensively throughout the Convention, the delegates never again included the judiciary in a revisory position.

Two days later, James Wilson, seconded by James Madison, moved that the judiciary be included in the council of revision. *Id.* at 138. This attempt failed. *Id.* at 140. These same proponents of the council of revision attempted its resurrection on at least two different occasions. *See 2 id.* at 73–80, 298–302.

²⁷⁴ *See* Clinton, *A Guided Quest*, *supra* note 37, at 71–77 (discussing the drafting of the judicial article at the convention).

²⁷⁵ *See 2 Farrand, RECORDS*, *supra* note 254, at 75 (comments by E. Gerry); *id.* at 76 (comments by L. Martin).

²⁷⁶ *See id.* at 76–79.

²⁷⁷ 1 *id.* at 98. A similar point was again made by Gerry and Caleb Strong. 2 *id.* at 75; *see also id.* at 298 (comments by C. Pinckney). Proponents of the council of revision responded that this was not improper because judges in England often had a hand in molding legislation. *Id.* at 75 (comments by G. Morris).

²⁷⁸ *See 1 id.* at 98 (comments by J. Wilson favoring the involvement of the executive and judiciary in an absolute negative on legislative act); 2 *id.* at 73, 300–01 (comments by J. Wilson), 74–75 (comments by J. Madison), 75–76, 299–300 (comments by G. Morris). Additional arguments in favor of the council of revision were that it would instill confidence in the executive and would give Congress additional insight into the nature and consistency of the laws they passed. *See id.* at 74 (comments by J. Madison).

so vast, that judicial participation in legislation would be one means to check that legislative dominance.²⁷⁹ Others, including most notably Alexander Hamilton, argued that judicial review would provide a sufficient check on the abuse of legislative power.²⁸⁰

Although the issue of self-execution was not specifically touched on in these debates regarding the council of revision, the Framers without recorded exception appear to have assumed that the federal courts would exist and exercise power irrespective of congressional action; they regarded the judiciary as springing into existence once the Constitution was ratified, just as they viewed the legislative and executive branches as springing into existence. In fact, in one crucial exchange, proponents of the council argued that the council might be necessary in order to prevent Congress from enacting measures that would immediately truncate federal jurisdiction.²⁸¹ This argument by the proponents is telling because it assumed federal courts would possess their power immediately upon creation and that Congress might thereafter attempt to circumscribe that power. Although this concern reveals nothing about whether such congressional action would be permissible, it does demonstrate that these same Framers assumed the judicial branch would acquire its power directly from the Constitution, without the need for congressional enactment. Further, in answering this argument, opponents of the council likewise assumed that the federal courts would possess jurisdictional power directly by virtue of the Constitution, but they concluded that the history of the relationship between the judicial and legislative branches in England demonstrated that a council was unnecessary in order for the judges to be able to preserve their power against congressional invasion.²⁸²

²⁷⁹ Madison asserted that even with the disputed alignment of the executive and the judicial branches, “the Legislature would still be an overmatch for them.” *Id.* at 74.

²⁸⁰ See 1 *id.* at 97–98 (comments by E. Gerry); 2 *id.* at 76 (comments by L. Martin). This power of the judiciary to protect itself by use of powers inherent in its institution was subsequently developed and defended by Alexander Hamilton. See THE FEDERALIST NO. 78, *supra* note 269, at 336–37 (Alexander Hamilton). Nevertheless, while others may have also held his view, some Framers clearly did not. See, e.g., 2 Farrand, RECORDS, *supra* note 254, at 298–99 (comments by J. Mercer and J. Dickenson).

²⁸¹ 2 Farrand, RECORDS, *supra* note 254, at 74 (comments by J. Madison).

²⁸² See *id.* at 73 (comments by N. Ghorum that “Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded”). Proponents of the council believed that the power of judicial review, while potent, was not potent enough. Thus, James Wilson argued:

Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.

Id. Moreover, as I indicate above, Wilson was probably influenced by the Scottish experience, where the courts were more independent of legislative control than was the case in

A second subject debated at the Convention which sheds some light on the issue of self-execution dealt with the role of inferior federal courts. Before examining this complicated subject, however, an important caveat is in order. At least four contemporary constitutional questions were adumbrated in the debates surrounding inferior federal courts. The first deals with the power of Congress to control the subject matter jurisdiction of the federal courts; the second deals with whether Congress was constitutionally required to create any inferior federal courts at all; the third deals with the question of so-called parity between state and federal courts; the fourth deals with the present subject, self-execution. Although each of the first three issues mentioned may have some connection to the matter of self-execution, the four issues are conceptually distinct from one another. For example, it would be coherent to say that Congress has the power to decline to create any inferior federal courts at all and also to say that if Congress does create them, their power derives directly from the Constitution. Further, in view of the fact that at least three different questions debated at the Convention in the context of inferior federal courts, there is a danger presented of simply transposing a statement made in one context to an entirely different one. With these concerns in mind, we can examine the debates surrounding the issue of inferior courts.

The Virginia Plan as originally proposed did not contain an explicit requirement that inferior courts be established; the matter was left to the discretion of Congress.²⁸³ However, during the June 4 voting, the Convention mandated the creation of inferior courts.²⁸⁴ The next day, John Rutledge moved that this provision for inferior courts be removed. After debate, the convention voted to remove the provision.²⁸⁵ This development prompted Madison and Wilson to offer a compromise that would reinstate Congress's discretion over whether to create inferior courts.²⁸⁶ This Madisonian compromise was incorporated into Article III.

Commentators who argue that Congress has strong control over federal jurisdiction—including, perhaps most notably, Professor Bator—have viewed this

England. See Pfander & Birk, *supra* note 55, at 1625–42 (discussing the Scottish influence on early American formation of the federal judiciary). Madison made similar comments about the council of revision. 2 Farrand, RECORDS, *supra* note 254, at 74 (“It would moreover be useful to the Community at large as an additional check ag[ainst] a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities.”). Madison, of course, was also influenced by the Scottish experience. See WILLS, EXPLAINING AMERICA, *supra* note 212; Pfander & Birk, *supra* note 55, at 1625 & nn.54–55.

²⁸³ See 1 Farrand, RECORDS, *supra* note 254, at 21. The Pinckney Plan also did not provide for inferior courts. See 3 *id.* at 600.

²⁸⁴ See 1 *id.* at 95, 104. After the vote, the plan provided “that a National Judiciary be established to consist of one supreme tribunal, and of one or more inferior tribunals.” *Id.* at 104.

²⁸⁵ See *id.* at 125.

²⁸⁶ See *id.* at 124–25. The Framers who supported the existence of inferior courts believed that fixing their number in the Constitution would be inexpedient and cumbersome as the new nation grew and circumstances changed. See, e.g., THE FEDERALIST NO. 81, at 349 (Alexander Hamilton) (Thompson & Homans eds., 1831).

compromise as the source of Congress’s jurisdictional power over inferior courts.²⁸⁷ At the risk of unnecessary repetition, however, it is worth emphasizing that this conclusion is not originalist; it is grounded not on anything the Framers themselves said about the source of the judicial power to hear cases, but rather it is grounded entirely on the “greater includes the lesser” argument (which, as I have shown, is subject to a variety of both historical and analytical critiques).

In short, despite the conventional wisdom’s conflation of the two, the issue of congressional control over inferior federal court jurisdiction is distinct from the question of self-execution. Nevertheless, several of the issues presented by the debate over Congress’s power to control federal court jurisdiction are sufficiently related to the self-execution question as to merit brief attention.

Before turning to the specifics of the debate at the Constitutional Convention over what eventually became the Exceptions Clause, it is worth noting that the entire topic occupies less than two full pages in Farrand’s reports of the Constitutional Convention.²⁸⁸ There is, in other words, very little source material that directly illuminates this precise issue—which could of course mean that the issue was obvious, or even that the Framers did not deem it to be particularly important. In any case, because the two pages have spawned so much contemporary analysis, I set out the relevant passages from Madison’s notes in full:

Mr. Rutledge havg. obtained a rule for reconsideration of the clause for establishing *inferior* tribunals under the national authority, now moved that that part of the clause <in propos. 9.> should be expunged: arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts: that it was making an unnecessary encroachment on the jurisdiction <of the States,> and creating unnecessary obstacles to their adoption of the new system.—<Mr. Sherman 2ded. the motion.>

Mr. <Madison> observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a

²⁸⁷ See *supra* note 50 and accompanying text.

²⁸⁸ 1 Farrand, RECORDS, *supra* note 254, at 124–25.

new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.

Mr. Wilson opposed the motion on like grounds. he said the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, & to a scene in which controversies with foreigners would be most likely to happen.

Mr. Sherman was in favor of the motion. He dwelt chiefly on the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose.

Mr. Dickinson contended strongly that if there was to be a National Legislature, there ought to be a national Judiciary, and that the former ought to have authority to institute the latter.

On the question for Mr. Rutledge's motion to strike out "inferior tribunals"

Massts. divided, Cont. ay. N. Y. divid. N. J. ay. Pa. no. Del. no. Md. no. Va. no. N. C. ay. S. C. ay. Geo ay. [Ayes—5; noes—4; divided—2.]

Mr. Wilson & Mr. Madison then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add to Resol: 9. the words following "that the National Legislature be empowered to institute inferior tribunals". They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them. They repeated the necessity of some such provision.

Mr. Butler. The people will not bear such innovations. The States will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon who gave the Athenians not the best Govt. he could devise; but the best they wd. receive.

Mr. King remarked as to the comparative expence that the establishment of inferior tribunals wd. cost infinitely less than the appeals that would be prevented by them.

On this question as moved by Mr. W. and Mr. M.

Mass. ay. Ct. no. N. Y. divd. N. J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. no. Geo. ay. [Ayes—8; noes—2; divided—1.]²⁸⁹

Despite the efforts of contemporary theorists to locate, in this transcription, a source for the conclusion that Congress has the power to control federal court jurisdiction, neither the word “jurisdiction” nor the concept of judicial power is referred to by the Framers at all. Further, it is clear that none of the Framers explicitly assumed that the power to control jurisdiction is a lesser power included in the greater one to control the creation of a federal court in the first instance, and the Framers’ refusal to indulge in such a presumption was quite sound. Indeed, the power to control jurisdiction may in fact be the greater power, with the power to control the creation of the court being lesser. The reason this is so is that if Congress took no action at all to create lower federal courts, various types of cases would be heard in the first instance in state courts. Therefore, in order to protect federal power vis-à-vis the states, Congress might prefer to create lower federal courts so as to remove certain matters from the control or influence of state judiciaries. The power to control which cases the federal courts can hear (vis-à-vis the states) would vest Congress with the power to allocate certain heads of jurisdiction between state and federal judiciaries. That power would manifestly be “greater” than the power simply to “turn on” the federal courts. Or, to return to my analogy: someone who has a light switch has power only over whether the lights are on or off; one who has a rheostat has power over not only whether they are on or off, but also over when they are on and how brightly they burn. Giving Congress a rheostat would be giving it more power than merely handing it an on-off switch.

²⁸⁹ *Id.* at 124–25 (footnotes omitted). Dickinson’s statement might be construed to entail a latent jurisdictional power, but it does not explicitly do so. Given the tenor of the debate, one would be hard pressed to read into the provision ultimately agreed to such an expansive congressional power.

Professor Clinton’s liberal inference from these notes is typical. Initially he seems to acknowledge that the Madisonian compromise does not by its terms give Congress power to control jurisdiction. *See* Clinton, *A Guided Quest*, *supra* note 37, at 766 (“It seems, therefore that the framers did not assume that with the power to establish inferior federal courts necessarily went the power to control their jurisdiction.”). Yet he later asserts that the creation power *does* contain a jurisdictional power over inferior court jurisdiction. *See id.* at 822 (“It is evident from this discussion that the congressional discretion over whether to create inferior federal courts and, if created, the power over the scope of their jurisdiction was almost universally assumed and applauded by the federalists.”). He offers no support for this claim.

Given the paucity of support for the conventional wisdom in Madison's notes, it is not surprising that defenders of the current orthodoxy have an alternative basis for their conclusion, and that alternative basis is to look to the contemporary practices in the states. And indeed, state legislatures did in fact keep tight controls over their respective judicial branches by controlling the state judiciary's jurisdiction.²⁹⁰ But the notion that the Framers desired to copy the state mechanisms is not especially persuasive; on the contrary, the Framers were committed to correcting perceived defects in the states,²⁹¹ and one of those defects was an accumulation of excessive power in state legislatures. Consequently, the fact that state legislatures could exercise potent control over their own judiciaries, rather than being a reason to believe that the Framers vested the Congress with this same power, is precisely a reason to think that they did not. What the Framers cared about above all else was judicial independence, and what they would have known from observing state judiciaries is that they lacked independence precisely because they were subject to excessive legislative control.²⁹² In fact, to the extent we can reliably draw any conclusions from what the Framers did not do, the fact that they rejected an anti-federalist proposal to give Congress significant power over the lower federal courts—a power similar to the one state legislatures exercised over their own courts—suggests the Framers were repudiating the dominant paradigm, not replicating it.²⁹³

Although, as I have indicated, the lower federal courts did not receive a great deal of attention from the Framers at the convention, the Supreme Court did. In part, the Framers apparently regarded the issues surrounding the lower federal courts, if not those courts themselves, as less important than the Supreme Court; and in part, the Framers had a highly instrumental vision for the lower federal courts—regarding them as necessary and valuable primarily because they would ease the appellate load of the Supreme Court.²⁹⁴

²⁹⁰ See Clinton, *A Guided Quest*, *supra* note 37, at 814 & n.233.

²⁹¹ As discussed above, though some states employed measures to ensure judicial independence, such independence was largely illusory because of legislative tampering with jurisdiction.

²⁹² See Clinton, *A Guided Quest*, *supra* note 37, at 814 & n.233.

²⁹³ An explicit provision giving Congress plenary power over inferior court jurisdiction was added to the draft of the Constitution reported out of the Committee of Detail. See 2 Farrand, *RECORDS*, *supra* note 254, at 186. The Committee report provided that “[t]he Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.” *Id.* at 186–87. What seems more important than the fact this proposal was offered is that it went nowhere. It was not included in either the report of the Committee of the Whole or the report submitted by the Convention to the Committee of Detail. See 1 *id.* at 132–33; 2 *id.* at 231. Moreover, this report was probably strongly influenced by Edmund Randolph's attempts to limit federal jurisdiction—a battle he fought at the Convention and lost. See 2 *id.* at 430.

²⁹⁴ See 1 *id.* at 124 (comments by J. Madison); 3 Elliot, *DEBATES*, *supra* note 243, at 553 (comments by J. Marshall) (asserting that inferior federal courts were “necessary to the perfection of the system”); *THE FEDERALIST* NO. 81, *supra* note 286, at 349 (Alexander

In fact, to the extent the Framers explicitly considered curtailing the jurisdiction of any court, they did so when debating the Supreme Court—not, however, because they wanted to micromanage or prevent that Court from addressing matters of national importance, but instead because they believed some potentially federal questions were insufficiently important for the high Court.²⁹⁵ Basically, the Framers were content to leave the more insignificant cases to the inferior courts for final determination, and they considered achieving this objective through the exercise of the exceptions and regulations power.²⁹⁶ One idea was that state courts would decide certain matters in the first instance with final appeal lying to a lower federal court. As Hamilton wrote:

The plan of the convention, in the first place, authorizes the national legislature “to constitute tribunals inferior to the Supreme Court.” It declares, in the next place, that “the JUDICIAL POWER of the United States *shall be vested* in one Supreme Court, and in such inferior courts as Congress shall ordain and establish”; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are that they shall be “inferior to the Supreme Court,” and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court may be made to lie from the State courts to district courts of the Union.²⁹⁷

Hamilton) (“The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court, in every case of federal cognizance.”); *see also* THE FEDERALIST NO. 82, *supra* note 210, at 355–56 (Alexander Hamilton).

²⁹⁵ THE FEDERALIST NO. 82, *supra* note 210, at 355–56 (Alexander Hamilton).

²⁹⁶ *See id.* The Exceptions and Regulations Clause made its first appearance in the draft reported out of the Committee of Detail. *See* 2 Farrand, RECORDS, *supra* note 254, at 186.

²⁹⁷ THE FEDERALIST NO. 82, *supra* note 210, at 355–56 (Alexander Hamilton); *see also* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 552–53 (John P. Kaminski ed., 1981) (response of R. King and N. Gorham to E. Gerry’s objections).

As Hamilton's comment reveals, the idea here is that the Exceptions Clause would allow Congress to save the Supreme Court from being overburdened; Congress would do so by limiting the Supreme Court's appellate jurisdiction to cases of significant federal interest,²⁹⁸ giving the lower federal courts the final authority to review other (comparatively less important) state court decisions involving federal questions.

At no point during the debates in the Convention, however, did any Framers indicate in any way that Congress's exceptions and regulations power was sufficiently potent as to allow Congress to restrict the overall scope of federal jurisdiction, especially the "arising under" jurisdiction.²⁹⁹ Indeed, the best conclusion that can be drawn from the Framers' view of the utility of lower federal courts is that they believed the "arising under" jurisdiction must be heard by a federal court at some point during the litigation of the issue.

Madison himself proposed the language that ultimately became the "arising under" jurisdictional provision of Article III.³⁰⁰ Madison's viewpoint, apparently shared by all the delegates, was that, with respect to subject matter, the judicial power should be coterminous with the legislative power.³⁰¹ Consequently, if the legislature could act in an area, the judicial power necessarily reached that area as well. Reliance on either the executive alone or judicial review by state courts was deemed an insufficient safeguard of federal law. The Framers lacked confidence in state courts not only because of potential conflicts between state and national sovereigns (a fear which generated the Supremacy Clause), but also because state judges, unlike the plan for Article III judges, were generally subject to political pressures.³⁰² The federal courts, therefore, were also expected to test state laws against the Constitution.

²⁹⁸ See 3 Elliot, DEBATES, *supra* note 243, at 534 (comments by J. Madison). As a corollary to this power to protect the Supreme Court's integrity, the Framers gave Congress the power to shift appellate authority to inferior courts to reduce the burden on the parties. This power ensured that parties would not be subjected to vexatious appeals requiring them to travel great distances. See *id.* at 534 (comments by J. Madison), 547 (comments by E. Pendleton that inferior courts "may be accommodated to public convenience and utility").

²⁹⁹ See Clinton, *A Guided Quest*, *supra* note 37, at 776–77 ("These later drafts [of the Constitution] omit, however, any explicit grant of congressional power over the scope of federal court/jurisdiction.").

³⁰⁰ He proposed the language on July 18. See 2 Farrand, RECORDS, *supra* note 254, at 46 (providing that "the jurisdiction shall extend to all cases arising under the Nat'l laws: And to such other questions as may involve the Nat'l, peace & harmony"). On August 27, this jurisdiction was extended to cases arising under the Constitution and to cases arising under "treaties made or which shall be made under their authority." *Id.* at 431.

³⁰¹ See generally Farrand, RECORDS, *supra* note 254.

³⁰² See 2 *id.* at 54 (comments by J. Madison rejecting the use of force to enforce federal law); 1 *id.* at 124 (comments by J. Madison); 2 *id.* at 28 (comment by G. Morris). During the debate on whether Congress should be vested with a negative on all state laws, it was suggested that federal courts would be sufficient for this purpose. 2 *id.* at 28–29. At this time Luther Martin suggested a supremacy clause to ensure state court compliance with federal law. *Id.* This clause was agreed to and was the forerunner to the Supremacy Clause included in Article VI. *Id.* See also THE FEDERALIST NO. 81, *supra* note 286, at 349 (Alexander Hamilton).

As discussed briefly above, the jurisdictional menu in Article III received significant attention from the Framers.³⁰³ Initially, work in the Committee of the Whole and on the convention floor centered around defining the general principles that would animate federal jurisdiction.³⁰⁴ The report submitted to the Committee of Detail did just this,³⁰⁵ and it was left to this committee to hammer out the details of federal jurisdiction.³⁰⁶ Its work went through several steps and ultimately produced a jurisdictional menu similar to the one contained in Article III. The report which emerged from the committee provided as follows:

The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.³⁰⁷

Finally, on August 27, the Convention worked out the remaining details of federal jurisdiction to arrive at what is currently in the Constitution.³⁰⁸

Evidence pertaining to the issue of the legislature’s power to control federal jurisdiction is sparse, but not non-existent. For example, on two separate occasions, Edmund Randolph proposed that the legislature has the power to control the scope of the federal courts’ jurisdiction, but both proposals failed.³⁰⁹ In addition, a draft

³⁰³ See *supra* note 289 and accompanying text.

³⁰⁴ See 1 Farrand, RECORDS, *supra* note 254, at 211, 223, 230–32, 238; 2 *id.* at 39.

³⁰⁵ See 2 *id.* at 132–33.

³⁰⁶ See Clinton, *A Guided Quest*, *supra* note 37, at 772.

³⁰⁷ 2 Farrand, RECORDS, *supra* note 254, at 186–87.

³⁰⁸ See *id.* at 428–31.

³⁰⁹ See *id.* at 146–47, 431.

contained in the working papers of the Committee of Detail contained a provision that would have allowed Congress to assign to the Supreme Court's jurisdiction cases "involving the national peace and harmony."³¹⁰ This provision, of course, deals with congressional augmentation of federal jurisdiction (as distinguished from congressional circumscription), but it too failed to be included in the final committee draft.³¹¹

Randolph's second attempt to include an explicit provision granting Congress a broad jurisdictional power was offered on August 27, the same date the Convention finalized the jurisdiction menu in Article III.³¹² This attempt also failed.³¹³ The failure of the Framers to include an explicit provision for a jurisdictional power, even though one was offered on at least two different occasions, strongly suggests that the Framers did not intend for Congress to have such a power.³¹⁴ Moreover, the

³¹⁰ *See id.* at 147. This provision would have extended the Supreme Court's jurisdiction to: *such other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue in disputes between citizens of different states <in disputes between a State & a Citizen or Citizens of another State> in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned <& in Cases of Admiralty Jurisdn> . . .*

Id. (emphasis added). The appearance of this provision, coupled with Randolph's later criticisms of federal court jurisdiction, may explain the jurisdiction limiting provisions in the final committee draft. *See id.* at 186–87. As discussed above, the committee limited the jurisdictional menu to the Supreme Court and provided an assignment clause that presumably gave Congress wide discretion over inferior court jurisdiction. This dynamic suggests that the committee initially intended the Supreme Court's jurisdiction to be self-executing, while leaving the jurisdiction of the inferior courts to the discretion of Congress. However, the later extension of federal jurisdiction to the federal judiciary as a whole and the contemporary deletion of the assignment clause strongly suggest that this distinction evaporated in the minds of the Framers. *See id.* at 431.

³¹¹ *See id.* at 186 (showing the lack of a phrase regarding "national peace and harmony").

³¹² *See id.* at 430. Because this vote seems rather important, I set out the notes concerning it below:

Mr. Madison & Mr. Govr. Morris moved to strike out the beginning of the 3d sect. "The jurisdiction of the supreme Court" & to insert the words "the Judicial power" which was agreed to nem: con:

The following motion was disagreed to, to wit to insert "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct" <Del. Virga ay

N. H. Con. P. M. S. C. G no> [Ayes—2; noes—6.]

On a question for striking out the last sentence of sect. 3. "The Legislature may assign &c—"

N. H. ay—Ct ay. Pa. ay. Del—ay—Md ay—Va ay—S—C. ay—Geo. ay. [Ayes—8; noes—0.]

Id. at 431 (footnotes omitted).

³¹³ *See id.*

³¹⁴ *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J.,

timing of this decision by the Framers is also suggestive: By refusing to include an explicit jurisdictional power in favor of Congress immediately after taking action to specify the federal courts’ entire jurisdictional menu suggests that the Framers understood the jurisdictional grant to flow directly from the Constitution to the federal judiciary without the need for any congressional action. This unanimous vote to defeat the assignment clause indicates the Framers understood that inferior federal courts, like the Supreme Court, draw their jurisdictional power directly from the Constitution.

Finally, as indicated above, the committee’s original proposal contained a specific menu pertaining to the jurisdiction of the Supreme Court while leaving the jurisdictional ambit of the inferior federal courts to the discretion of Congress. In subsequent drafts, however, and in the Constitution itself, the jurisdictional menu delineated in Article III is extended to the federal courts simpliciter, without distinguishing between the Supreme and inferior federal courts.³¹⁵ The transformation from the committee’s initial proposal to the Constitution’s ultimate form suggests that the Framers rejected the notion that the Supreme Court’s power would be self-executing while that of the lower federal courts would require congressional action. The most sensible understanding of what transpired in the convention is that the Framers intended the federal judiciary to possess a self-executing “arising under” jurisdiction. Congress was not without enormous power, however. For Congress could choose either to create inferior courts or not to. Once created, however, these inferior courts derived their jurisdictional capacity directly from the Constitution.³¹⁶

F. The Ratification Debates

Much of what transpired at state ratification conventions also suggests that delegates to those conventions understood the Article III jurisdictional grant to be self-executing. Although the issue of whether enabling legislation was required to trigger the federal courts’ power was apparently not addressed directly in any of the state assemblies, debates concerning two other issues provide some illumination.

One issue dealt with whether the extension of Supreme Court appellate jurisdiction to fact questions obviated the use of juries; a second matter concerned whether the heads of jurisdiction, in conjunction with the creation of inferior courts, obliterated

concurring) (observing that a considered congressional decision not to vest the Executive with a particular power is tantamount to a denial of that power).

³¹⁵ U.S. CONST. art. III, § 1.

³¹⁶ The self-executing thesis proposed here, coupled with the mandatory creation thesis of Amar and Clinton, implies that Congress could except only insignificant federal cases away from the Supreme Court’s appellate jurisdiction. These cases might involve limited subject matters and require some minimum amount in controversy, but cases involving an important federal interest, such as cases involving the construction of the Constitution, could not be excepted. Limiting all of Congress’s powers over the federal judiciary to a facilitative means, as opposed to a destructive one, best supports the independent judiciary the Framers intended to create.

state judiciaries. Each of these debates reveals important aspects of the contemporary view toward self-execution.

To begin with the issue of juries, most of the opposition in the states to the judiciary article centered on the absence of a provision guaranteeing juries in civil cases (a concern later addressed by the Seventh Amendment).³¹⁷ This fear was further exacerbated by the extension of Supreme Court appellate jurisdiction to facts as well as law.³¹⁸ This fear led the proponents of the judiciary article to an interesting interpretation of Congress's exceptions and regulations power: They asserted that because civil juries varied from state to state, and because a precise constitutional provision was therefore impossible,³¹⁹ Congress could, through the exceptions and regulations clause, protect jury decisions by limiting Supreme Court review of facts in these cases.³²⁰

This interpretation of Congress's power offered in some states' ratifying conventions was consistent with the intention of the Framers at the Constitutional Convention. As will be recalled, the exceptions and regulations clause was designed to protect the integrity (i.e., independence) of the Supreme Court (and, to a lesser extent, to protect the parties to a case).³²¹ A mere shifting of the Supreme Court's review of fact questions would not violate this limited purpose. Consequently, the debate over juries revealed a view of Congress's Exceptions Clause power that was highly circumscribed, and there is no indication from the state conventions that

³¹⁷ See, e.g., 3 Elliot, DEBATES, *supra* note 243, at 540 (comments by P. Henry); 3 Farrand, RECORDS, *supra* note 254, at 156 (comments by L. Martin).

³¹⁸ See 3 Elliot, DEBATES, *supra* note 243, at 528 (comments by G. Mason), 540 (comments by P. Henry), 568 (comments by W. Grayson).

³¹⁹ See 2 Farrand, RECORDS, *supra* note 254, at 628; 3 *id.* at 150 (comments by J. McHenry); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 52–53 (Paul Leicester Ford ed., 1888 & republished 1968) [hereinafter Ford, PAMPHLETS] (comments by N. Webster).

³²⁰ See, e.g., 2 Elliot, DEBATES, *supra* note 243, at 495 (comments by J. Wilson); 3 *id.* at 520 (comments by E. Pendleton), 534 (comments by J. Madison), 560 (comments by J. Marshall), 572 (comments by E. Randolph). Several commentators have suggested that the exceptions and regulations clause is limited to the restriction of fact, and not law. See, e.g., Irving Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973) (arguing “the sole purpose of the Exceptions Clause was to permit Congress to limit appellate jurisdiction over questions of fact in cases at law”); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 61 (1962) (“This suggests that in common law areas, the Supreme Court would consider issues of law and in other areas . . . the Court would review issues of fact.”). Although the “law and fact” clause was inserted long after the exceptions and regulations clause, this interpretation is not so far fetched given the tenor of the debate over its insertion and the nature of appeals in the late eighteenth century. See 2 Farrand, RECORDS, *supra* note 254, at 431. The addition of “law and fact” was more in the nature of a clarification, rather than a substantive addition. *Id.* However, none of the debates over the exceptions and regulations clause, though suggesting the feasibility of this power to restrict Supreme Court review of fact, necessarily limit it to this interpretation.

³²¹ See Ford, PAMPHLETS, *supra* note 319, at 238 (comments by A. Hanson on the jurisdiction of federal judiciaries).

anyone believed Congress could safeguard the right to trial by jury by declining to vest the Court with subject matter jurisdiction.

Another area of concern in the ratification process was whether the federal judiciary would eclipse the state judiciaries.³²² Advocates of a robust federal judiciary argued that the broad jurisdictional grant encompassed by the “arising under” language was necessary to ensure enforcement of the legislative powers,³²³ but these proponents of a strong federal judiciary were sensitive to the concern that state courts could be threatened, so they emphasized that state court jurisdiction was left untouched and that the “arising under” grant occupied a separate sphere of concern from those protected by the state courts.³²⁴

Yet not all those with anti-federalist views were persuaded. Edmund Randolph, for example, continuing the position he had staked out at the Constitutional Convention, asserted that an expansive interpretation of the “arising under” jurisdictional grant—especially if it encompassed all constitutional issues—would swallow the jurisdiction of the state courts.³²⁵ The kind of fears expressed by Randolph and

³²² See, e.g., *id.* at 329–30 (comments by G. Mason) (“The judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several states; thereby rendering laws as tedious, intricate, and expensive, and justice as unattainable by a great part of the community, as in England; and enabling the rich to oppress and ruin the poor.”). However, James Madison asserted that:

[T]he far greater number of causes—out of a hundred—will remain with the state judiciaries. All controversies directly between citizen and citizen will still remain with the local courts. The number of cases within the jurisdiction of these courts is very small when compared to those in which the local tribunals will have cognizance.

3 Elliot, DEBATES, *supra* note 243, at 538.

³²³ See 2 Elliot, DEBATES, *supra* note 243, at 469 (comments by J. Wilson) (“I believe [the judicial power] ought to be coextensive; otherwise, laws would be framed that could not be executed.”).

³²⁴ See 3 *id.* at 532 (comments by J. Madison), 548 (comments by E. Pendleton), 553 (comments by J. Marshall), 570 (comments by E. Randolph); 4 *id.* at 145 (comments by J. Iredell), 156 (comments by W. Davie).

³²⁵ See 3 *id.* at 572; 3 Farrand, RECORDS, *supra* note 254, at 310 (“The judiciary is drawn up in terror—here I have an objection of a different nature.”). Though Edmund Randolph generally supported “arising under” jurisdiction, he feared the ambiguity of extending this jurisdiction to cases arising under the Constitution.

It extends to all cases in law and equity arising under the Constitution. What are these cases of law and equity? Do they not involve all rights, from an inchoate right to a complete right, arising from this Constitution? Notwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe, if it had been more clearly expressed. What do we mean by the words *arising under the Constitution*? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word *arising* will be carried so far that it will be made use of to aid and extend the federal jurisdiction.

others, coupled with the claim made by defenders of the strong federal judiciary that state courts would continue to possess most all the jurisdiction that they traditionally enjoyed, suggest two things: First, as the conventional jurisdictional wisdom recognizes, the “arising under” clause must be read with federalism concerns in mind; that is, for a case to “arise under” the Constitution, the balance of issues in a particular case must be sufficiently federal to merit federal court consideration.³²⁶ Second, Congress would have no role in protecting a separate sphere for state judiciaries, because the Constitution itself both empowered the federal courts but also preserved a wide realm for the state courts to operate.

The debates over the exceptions and regulations clause and the scope of federal jurisdiction reveal that the Framers intended a jurisdiction that was self-executing, and that their intention was correctly apprehended both by defenders of a strong federal judicial branch as well as its opponents. There are few if any contemporary expressions from either federalists or anti-federalists that Congress’s Exceptions Clause power would empower the legislature to control or circumscribe jurisdiction conferred by the constitutional grant. On the contrary, all contemporary indications are that the Exceptions Clause was a power that would permit Congress to ensure effective and efficient exercise of the judicial power. And, as the debates over the fate of state court judiciaries illuminate, one reason that the idea of self-execution caused no alarm is that the federal courts’ power over issues centrally involving federal questions—and constitutional questions in particular—did not threaten the traditional domains served by state courts.

CONCLUSION: THE CONTEMPORARY EMBEDDEDNESS OF A WRONG IDEA, AND A
NARROWER CONCEPTION OF CONGRESSIONAL POWER

In *Pennsylvania v. Union Gas Co.*,³²⁷ Justice Brennan chastised Justice Scalia for not acknowledging that the “Judiciary Act merely gave effect to the grant of

3 Elliot, DEBATES, *supra* note 243, at 572. Of course his interpretation proved to be right. John Marshall, a fellow member at the Virginia ratification convention and who probably heard these remarks, eventually gave this phrase the most expansive interpretation possible. *See Osborn v. President of the Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824); *supra* note 243 and accompanying text. This makes sense in the world of John Marshall, however. Instead of reading the “arising under” grant as containing a constitutional limitation to be interpreted by the courts, he believed in an equally extensive power vested in Congress to limit the jurisdiction of the federal judiciary.

³²⁶ *See, e.g., Gully v. First Nat’l Bank*, 299 U.S. 109, 117 (1936) (“What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation.”).

³²⁷ 491 U.S. 1 (1989).

federal-question jurisdiction under Article III, which was not self-executing.”³²⁸ This proposition was so obvious, it required no citation.³²⁹ As I have argued, however, what has long seemed obvious turns out to be wrong.

The self-executing model I suggest is more faithful to the historical record, the Framers’ intent, and the system of checks-and-balances. A federal court tasked with ascertaining its power to hear a dispute would proceed rather differently than it does currently. A federal court examining its own power to adjudicate a dispute would address all aspects of justiciability.³³⁰ The court would therefore ask whether the party suffered some injury and has standing to seek redress, whether the Constitution provides protection from that injury, and whether it provides some sort of remedy that the court can grant.³³¹ Nothing in my argument would get in the way of the court’s inquiry into questions like ripeness, mootness, and political question. All these inquiries reflect the need to ascertain the existence of the essential ingredients that comprise a constitutional “case.”³³² The court’s focus, however, would be entirely on the constitutional language. What a federal court would not do is seek to ascertain whether Congress intended in § 1331 to create federal jurisdiction over the dispute.

Nevertheless, even under a self-executing paradigm, Congress will continue to retain significant power to shape federal jurisdiction in other domains, including federalism cases (i.e., cases involving the boundary between federal versus state authority), as well as ostensibly federal-question cases that turn on whether Congress has entered a field, whether its actions are sufficient to establish a federal concern, and so on. In these and perhaps other similar cases, Congress will retain the power to influence the issue of whether federal-question jurisdiction is present. In addition, in exercising its Article I powers, Congress may take advantage of the constitutional “case” limitation on the federal judiciary by directing which government instrumentality may enforce its laws. It can do so by determining which laws create justiciable

³²⁸ *Id.* at 19.

³²⁹ *Id.*

³³⁰ *See, e.g.*, ERWIN CHERMERINSKY, FEDERAL JURISDICTION 39–166 (1994) (discussing both constitutional and prudential limits on the exercise of federal jurisdiction, including doctrines of standing, ripeness, mootness, and political question). I have elsewhere argued against the concept of prudential limits on standing. *See* David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195 (1987).

³³¹ *See* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

³³² When the Framers extended the judicial power to “cases,” they principally meant to limit the actions that federal courts can take. *See* WRIGHT, *supra* note 57, at 53–59. One example of this limitation is the principle that federal courts may not issue advisory opinions. *See* *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968). *See generally* CHERMERINSKY, *supra* note 330, at 43–48. The Framers clearly intended that the federal courts not engage in this type of activity by defeating several proposals to include the Supreme Court in a council of revision. *See supra* notes 213–18, 220 and accompanying text.

causes of action upon which federal courts may act.³³³ This provision provides Congress an important power over federal courts. It allows Congress, for example, to establish specialized Article I courts³³⁴ and otherwise to determine how its laws are enforced.³³⁵

Finally, Congress will also continue to possess two powers over federal jurisdiction explicitly granted by the Constitution. First, the Necessary and Proper Clause gives Congress power to pass all laws “which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution.”³³⁶ Congress may therefore pass laws that facilitate the execution of the judicial power even if those laws affect the scope of federal jurisdiction. This power (which probably includes, for example, the ability to create amount in controversy limitations for federal question cases),³³⁷ however, is merely protective and facilitative of the judicial

³³³ The distinction between justiciability and jurisdiction is different from the test for “arising under” jurisdiction posited by Justice Holmes. *See* *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”). Congress undoubtedly has the power to pass laws which confer special rights and which, when violated, become part of a cause of action justiciable in a federal court. Causes of action, however, may contain many elements, some of which arise under the laws of the United States. A well-known axiom of “arising under” jurisprudence is that federal law may be part of a cause of action though it does not create that cause of action. *See* *Smith v. Kan. City Title & Tr. Co.*, 255 U.S. 180, 199 (1921).

³³⁴ Of course, these principles are subject to the limitations of the *Northern Pipeline* progeny. *See* *N. Pipeline Constr. Co. v. Marathon Oil Co.*, 458 U.S. 50, 62 (1982); HART & WECHSLER, *supra* note 4, at 425–65. The basic and essential rule of this line of cases is that an appeal must be allowed to an Article III court. *Marathon*, 458 U.S. at 87. This rule preserves the principle of separated powers inherent in our constitutional system. However, it still allows Congress wide latitude to determine how its laws and regulations are enforced in the first instance and permits Congress to determine how issues are to be presented to federal courts.

³³⁵ The power to pass laws while manipulating the “case” limitation of Article III also allows Congress to direct enforcement power to specialized Article III courts. *See, e.g.,* *Lockerty v. Phillips*, 319 U.S. 182, 187–89 (1943) (upholding a legislative scheme that directed challenges to price controls to a special Emergency Court of Appeals with appeal to the Supreme Court). The Price Control cases addressed challenges to the constitutionality of price controls set on commodities during World War II. *Id.* at 184. Though the Court upheld the statutory scheme and dismissed the cases for lack of jurisdiction, it indirectly addressed the constitutional issue raised. *Id.* at 187–89. It held that the legislation provided the complainants with their procedural due process rights under the Constitution. *Id.* Because the legislation passed constitutional muster, it did not present the Court with a justiciable case; the statute conferred only a particularized means of challenging the price controls thus narrowing the rights grudgingly conferred by the statute. *Id.*

³³⁶ U.S. CONST. art. I, § 8.

³³⁷ Professor Eisenberg makes a similar argument, but he mistakenly locates the power to create jurisdictional amount limitations in Article III. *See* Eisenberg, *supra* note 39, at 516. He does not indicate which Article III provision grants this power. *Id.* My view is that the power to impose amount limitations on lower federal courts more nearly flows from Article I’s Necessary and Proper Clause than from the Article III power to create lower federal courts. Amount limitations on the Supreme Court’s appellate jurisdiction may arguably flow from either the Necessary and Proper Clause or the power to regulate appellate jurisdiction.

power; it is not destructive as some current jurisdictional power theories teach. Second, Congress may make exceptions and regulations to the Supreme Court’s appellate jurisdiction. Like the necessary and proper power, this power is limited to the protection and facilitation of the federal judiciary’s integrity.³³⁸ It also allows Congress to facilitate the enforcement of its own Article I powers.³³⁹

The Supreme Court, however, will be required under the self-executing paradigm to repudiate and overrule a broad range of cases and grapple directly with a proposition the Court has long taken for granted. Typical is the decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*.³⁴⁰ The question that gave rise to the litigation involved whether state authorities could collect unpaid state taxes from funds held in trust under an ERISA-covered vacation benefit plan.³⁴¹ The Supreme Court did not answer that question, however. Instead, in a unanimous opinion authored by Justice Brennan, the Court held there was no federal question jurisdiction.³⁴² In the Court’s view, whether a case arises under federal law is not simply a matter of asking what Article III means, but rather, the Court must ask what Congress thinks (and did), because whether a case arises under federal law implicates federalism concerns as well as the “proper management of the federal judicial system.”³⁴³ Conceding in a footnote that the legislative history does not support a construction of the statutory language that is narrower than the constitutional “arising under” language,³⁴⁴ Justice Brennan nonetheless reiterated the view that the meaning of § 1331 differs from that of the Constitution.

Cases like *Pennsylvania v. Union Gas* and *Franchise Tax Board* epitomize how deeply embedded the current orthodoxy is. The self-executing thesis will therefore run up against more than a century of *stare decisis*. *Stare decisis*, however, “is not an inexorable command,”³⁴⁵ and the argument in favor of adhering to precedent is unsound when the foundation of current doctrine rests on a fundamentally mistaken historical view.

Congress’s supposed power to control the lower federal courts’ “arising under” jurisdiction is a presumption that arose some time after the ratification of the

³³⁸ See *supra* note 282 and accompanying text.

³³⁹ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 331 (1819).

³⁴⁰ 463 U.S. 1 (1983).

³⁴¹ *Id.* at 3–4.

³⁴² The case was initially filed in state court by Franchise Tax Board (the state agency charged with enforcement of California’s state income tax laws) but was removed to federal court by the Trust, which invoked 28 U.S.C. § 1441 (the removal statute). Whether that removal was proper depended on whether the case fell within general federal question jurisdiction. *Id.* at 7, 19 n.18.

³⁴³ *Id.* at 8.

³⁴⁴ *Id.* at 8–9 n.8.

³⁴⁵ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

Constitution. That presumption is supported by neither the language of the Framers, the language of the text, nor the historical context in which Article III emerged. That this presumption has acquired its status as a truism owes more to accident than to reason or analysis.

Once the layers of this historically anomalous accretion are pulled back, a different and sounder conclusion emerges: The “arising under” jurisdictional grant flows directly from the Constitution to the federal judiciary. It does not need Congress to act as an intermediary. The operative scope of this constitutionally conferred jurisdiction, moreover, is to be interpreted by the federal courts, not Congress. The self-executing theory best comports with the preponderance of the historical evidence, including especially the Framers’ desire for an independent judiciary that would protect the supremacy of federal law. Only by interpreting Article III as conferring self-executing jurisdiction to the federal judiciary is the balance envisioned by the Framers achieved.

Congress will not become impotent under the model. It will continue to possess a variety of powers enabling the legislative branch to check the federal courts, including the Senate’s confirmation power, the power to create or eliminate lower federal courts, and the ability to manipulate the “case” limitation on federal courts. Even with self-executing jurisdiction, the courts will remain the least dangerous branch. But they will possess the power the Framers intended, and they will be authorized to exercise that power regardless of congressional action.