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# ARTICLE III AND THE SCOTTISH ENLIGHTENMENT

James E. Pfander\* & Daniel D. Birk\*\*

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## ABSTRACT

*Historically-minded scholars and jurists invariably turn to English law and precedents in attempting to recapture the legal world of the framers. Blackstone's famous Commentaries on the Laws of England offer a convenient reference for moderns looking backwards. Yet the generation that framed the Constitution often relied on other sources, including Scottish law and legal institutions. Indeed, the Scottish judicial system provided an important, but overlooked, model for the framing of Article III. Unlike the English system of overlapping original jurisdiction, the Scottish judiciary featured a hierarchical, appellate-style judiciary, with one supreme court sitting at the top and an array of inferior courts of original jurisdiction down below. What's more, the Scottish judiciary operated within a constitutional framework -- the so-called Acts of Union that combined England and Scotland into Great Britain in 1707 -- that protected the role of the supreme court from legislative re-modeling.*

*This Article explores the influence of the Scottish judiciary on the language and structure of Article III. Scotland provided a model for a single "supream" court and multiple inferior courts, and it defined inferior courts as subordinate to, and subject to the supervisory oversight of, the sole supreme court. Moreover, the Acts of Union entrenched this hierarchical judicial system by limiting Parliament to "regulations" for the better administration of justice. Practice under this precursor to Article III's Exceptions and Regulations Clause establishes that a supreme court's supervisory authority over inferior courts would survive restrictions on its as-of-right appellate jurisdiction. The Scottish model thus provides important historical support for the scholarly claim that unity, supremacy, and inferiority in Article III operate as textual and structural limits on Congress's jurisdiction-stripping authority.*

## I. INTRODUCTION

Jurists and scholars often view Article III of the Constitution through the lens of the eighteenth-century English legal system, particularly as refracted by William Blackstone's *Commentaries on the Laws of England*.<sup>1</sup> Supreme Court Justice Felix

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<sup>1</sup> First published in England between 1765 and 1769, when Blackstone held the Vinerian chair at Oxford, the *Commentaries on the Laws of England* enjoyed remarkable success in America. On the appearance and publication of the *Commentaries* in America, see M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM

Frankfurter gave voice to this preoccupation with England when he drew on the practice of the courts of Westminster in defining the judicial power of the United States.<sup>2</sup> Generations of American lawyers, before and since, have turned to the *Commentaries* for insights into the content of the common law and the structure of the English court system that was familiar to the framers of the Constitution.<sup>3</sup> Today, as a result, Blackstone and English legal structure provide essential starting points for scholars attempting to explain the framing of Article III.<sup>4</sup>

Although inquiries understandably begin with Blackstone's England, we hope to show that they should not end there. As participants in an Atlantic marketplace with ties to the commercial nations of the British Empire and Europe, the citizens of the newly independent states were exposed to a broad range of ideas and influences.<sup>5</sup> Among these many influences, we have found evidence that the legal system of Scotland provided an important—and thus far overlooked—model for the creation of Article III's one supreme Court, with jurisdiction in law, equity, and admiralty, protection from legislative control, and a hierarchical superiority over inferior courts.<sup>6</sup> Unlike the English court system, which parceled out judicial power to multiple superior courts with overlapping and

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AMERICA 26, 131-34 (2010) (2010) (describing the model of sale by subscription that was used in marketing the *Commentaries* and treating its appearance as the beginning of the growth of a national market for law books in antebellum America). On Blackstone's life, before and after the *Commentaries* appeared, see WILFRID PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN EIGHTEENTH CENTURY ENGLAND (2008). On his jurisprudence as a judge of Common Pleas, see Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553 (2009). On the place of the *Commentaries* in English legal history, see generally 12 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1938). For a nicely balanced account of Blackstone's work and influence in America, see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 545-49 & n.104 (2005) (collecting commentary on the *Commentaries*).

<sup>2</sup> See *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting). See also Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969) (arguing that "it is hardly to be doubted that the framers contemplated resort to English practice for elucidation" of Article III).

<sup>3</sup> See, e.g., WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACTS OF 1789, at 32 (Wythe Holt & L.H. Larue eds., 1990).

<sup>4</sup> On Blackstone's importance to scholarly work on the federal judiciary, see RITZ, *supra* note 3, at 32; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (relying extensively on Blackstone and English legal authorities in exploring founding-era attitudes toward the separation of powers and the judicial role).

<sup>5</sup> For recent attempts to situate the framers in the context of their more cosmopolitan world, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, \_\_ N.Y.U.L. REV. \_\_ (forthcoming 2010) (describing the framers as aspiring to membership in the European community of civilized nations); see also Richard J. Ross, *Legal Communications and Imperial Governance: British North America and Spanish America Compared* in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA, 1580-1815 at 104, 108-09, 122-25 (Michael Grossberg & Christopher Tomlins eds., 2009) (describing a lively trade in law books and many points of contact between colonial governors, assemblies, and courts and their counterpart administrators in England).

<sup>6</sup> See U.S. CONST. art. III, § 1; *id.* art. III, § 2; *id.* art. I, § 8. We do not claim that Scottish legal thinking was more important to the framers than that in England, only that the Scottish legal system may have had a greater impact than has thus far been recognized in the scholarship on Article III. Cf. GORDON WOOD, THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY [##] (2008) (cautioning historians against too quickly proposing to isolate a single decisive influence on the thinking of the framers).

coordinate jurisdiction and aspired to a judicial hierarchy that it often failed to achieve,<sup>7</sup> the Scottish system had a single supreme civil court, the Court of Session, which presided over all inferior civil jurisdictions.<sup>8</sup> The Court of Session combined a supervisory authority with the power to hear cases on appeal in law, equity, and admiralty.<sup>9</sup> In describing their legal system, Scottish legal writers including the influential Henry Home (Lord Kames) consistently emphasized the importance of the supremacy of the Court of Session, its power to supervise and correct the decisions of inferior tribunals, and the hierarchical relationship between the supreme court and subordinate courts.<sup>10</sup>

Apart from its hierarchical structure, the Scottish legal system also differed from its English counterpart in its relationship to the British Parliament. English courts, though creatures of royal prerogative,<sup>11</sup> acknowledged the sovereign power of Parliament to remake the law and remodel English institutions.<sup>12</sup> Blackstone, in particular, spoke of Parliament's authority in sweeping terms.<sup>13</sup> By way of contrast, the Scottish courts operated within a constitutional framework that was meant to shield them from parliamentary control and alteration. Indeed, when between 1706 and 1707 the separate nations of England and Scotland negotiated and adopted a Treaty of Union that would dissolve their respective Parliaments and form a single, united Parliament and nation of Great Britain,<sup>14</sup> they included in their resultant Acts of Union included a series of

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<sup>7</sup> See 3 WILLIAM BLACKSTONE, COMMENTARIES \*30 (distinguishing between “courts of common law and equity . . . and courts maritime.”); 1 HOLDSWORTH, *supra* note 1, at 194–264, 395–465 (1922); DAVID M. WALKER, THE SCOTTISH JURISTS 229. See generally 3 BLACKSTONE, *supra*, at \*\*37–56, 68–70 (describing the superior courts of law, equity, and admiralty). Despite the coordinate quality of the superior courts, England displayed some interest in judicial hierarchy. Thus, King's Bench enjoyed relatively broad supervisory authority over inferior tribunals; the Court of Exchequer Chamber sat as a college of all the superior court judges to clarify difficult legal questions; and the House of Lords exercised appellate jurisdiction over all the superior courts. See generally JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 39–41 (2009) (describing the comparative contribution of these tribunals in clarifying the law of England). But England lacked a single superintending supreme court until October 2009, when the House of Lords gave way to the new Supreme Court under the Constitutional Reform Act of 2005. [cite]

<sup>8</sup> See HENRY HOME, LORD KAMES, HISTORICAL LAW-TRACTS 329 (Edinburgh, A. Kincaid, 1st ed. 1758); 5 DAVID M. WALKER, A LEGAL HISTORY OF SCOTLAND 455–65 (1998); *Sketch of the History of the Court of Session*, 16 J. JURISPRUDENCE (T.T. CLARK) 561, 561 (1872). As discussed in greater detail below, the High Court of Justiciary exercised supreme judicial authority in criminal matters.

<sup>9</sup> See KAMES, *supra* note 8, at 327–28, 391–395; HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 50 (1760).

<sup>10</sup> See *infra* Part IV. These texts include *Historical Law-Tracts*, KAMES, *supra* note 8, *Principles of Equity*, KAMES, *supra* note 9, JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND (Edinburgh, new ed., James Badenach Nicholson ed., 1871) (1773), ANDREW MACDOWALL, LORD BANKTON, AN INSTITUTE OF THE LAWS OF SCOTLAND (1751), and JOHN DALRYMPLE, AN ESSAY TOWARDS A GENERAL HISTORY OF FEUDAL PROPERTY IN GREAT BRITAIN (Dublin, 4th ed. 1759) (1757).

<sup>11</sup> 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 386 (Charles Edward Dodd & Henry Gwillim eds., 7th ed. 1832) (1730).

<sup>12</sup> See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37–45, 58–68 (6th ed. 1902).

<sup>13</sup> See 1 BLACKSTONE, *supra* note 7, at \*\*49, 156, 160-61.

<sup>14</sup> See ROBIN M. WHITE & IAN D. WILLOCK, THE SCOTTISH LEGAL SYSTEM 26–28 (4th ed. 2007). For most of the seventeenth century, England and Scotland were ruled by the same monarch but were otherwise separate countries with separate Parliaments and administrative systems. The Acts of Union of 1707 united both Parliaments as a new Parliament of Great Britain, which sat in London but legislated for all of the

provisions aimed at ensuring the constitutional status of the Court of Session as the supreme civil court of Scotland.<sup>15</sup> Although scholars debate the degree to which one can regard the Acts of Union as a constitution in American terms,<sup>16</sup> it was certainly meant to provide a lasting framework that would protect the Court of Session (and the hierarchical Scottish legal system) from parliamentary remodeling.<sup>17</sup>

In language remarkable for its similarity to Article III of the United States Constitution, the nineteenth article of the Acts of Union first provided that the Court of Session would remain “in all time coming” one of two supreme courts of Scotland (along with the High Court of the Justiciary, the supreme criminal court).<sup>18</sup> Second, the Acts of Union declared that “all Inferior Courts within the said Limits do remain subordinate, as they are now to the Supreme Courts of Justice within the same in all time coming”; the Acts achieved this in part by forbidding any English court from reviewing the judgments of the lower courts in Scotland, thereby securing the Court of Session’s place at the top of a judicial hierarchy.<sup>19</sup> Third, the Acts of Union expressly insulated the Court of Session from any further review by the English courts at Westminster, thus equating that court’s supremacy with finality.<sup>20</sup> Finally, the Acts of Union adopted an early precursor to the Exceptions and Regulations clause of Article III,<sup>21</sup> declaring that the Court of Session was to remain as “now constituted” by the laws of Scotland, subject to “such regulations for the better administration of Justice as shall be made by the Parliament of Great

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island. *Id.* For background on the negotiation and adoption of the Treaty and Acts of Union, see generally J.D. Ford, *The Legal Provisions in the Acts of Union*, 66 CAMBRIDGE L.J. 106 (2007).

<sup>15</sup> See Union with Scotland Act, 1706, 6 Ann., c. 11, art. XIX (Eng.); Union with England Act, 1708, c. 7, art. XIX (A.S.P.) [collectively hereinafter Acts of Union (1707)]; Ford, *supra* note 14, at 118–28.

<sup>16</sup> Under the American conception of constitutionalism, the written Constitution represents the nation’s highest law and invalidates any inconsistent enactments by state and federal legislatures. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). By contrast, British courts were understood to possess no such power of judicial review; the British “constitution” consists merely of the laws that define the institutions of the British government, as well as certain fundamental laws and guarantees that are important but that cannot be entrenched against later parliamentary revision. See, e.g., DICEY, *supra* note 12, at 21–31. The constitutional status of the Acts of Union in the British system of government has largely escaped the attention of American scholars. For one notable exception, see John O. McGinnis & Michael Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 401–02 (2003) (observing that the Acts of Union could more readily be regarded as having entrenched its norms if viewed as a treaty binding both England and Scotland than as domestic legislation binding future Parliaments).

<sup>17</sup> See, e.g., J.D.B. MITCHELL, *CONSTITUTIONAL LAW* 95–96 (2d ed. 1968); Ford, *supra* note 14, at 128–34; Denis J. Edwards, *The Treaty of Union: More Hints of Constitutionalism*, 12 LEGAL STUD. 34 (1992); Neil MacCormick, *Does the United Kingdom Have a Constitution? Reflections on MacCormick v. Lord Advocate*, 29 N. IRELAND LEGAL Q. 1 (1978).

<sup>18</sup> Acts of Union (1707), *supra* note 15, art. XIX.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* In an important omission, the Acts of Union did not foreclose review of the judgments of the Session by the British House of Lords. Historians debate the reason for the omission; some argue that the English commissioners wished to downplay the issue to avoid a renewal of an English controversy over the Lords’ power to hear appeals from courts of equity. See A.J. Maclean, *The 1707 Union: Scots Law in the House of Lords*, 5 J. LEG. HIST. 50 (1984). Others note that the Scots themselves could not agree on whether to permit House of Lords review. See Ford, *supra* note 14, at 124. Importantly, historians do agree that a relatively vibrant practice of seeking parliamentary review had arisen in Scotland in the late seventeenth century, just prior to the Treaty of Union. See J.D. Ford, *Protestations to Parliament for Remedy of Law*, 88 SCOTTISH HIST. REV. 57 (2009). In all events, shortly after the Union, the British House of Lords began accepting appeals from Scotland. See *id.* at 99–107.

<sup>21</sup> U.S. CONST. art. III, § 2.

Britain.”<sup>22</sup> Taken together, these provisions specify that although Parliament enjoys the power to organize and regulate the Scottish court system, its regulations cannot alter the traditional “authority and privileges” of the Court of Session or undermine its role at the top of the Scottish judicial hierarchy.<sup>23</sup>

We think the Acts of Union and Scottish legal architecture deserve a more central place in the ongoing scholarly debate over the origins and meaning of Article III. For starters, the Acts of Union provided an important precedent for the creation of entrenched limitations on the power of the legislative branch to re-model the judiciary. Such entrenched or constitutional limitations were unknown in England; although the courts arose through the exercise of royal prerogative, Parliament had long claimed the power to alter the English central courts by ordinary legislation.<sup>24</sup> In England, as a result, judicial independence under the Act of Settlement was understood to mean independence from the Crown rather than independence from Parliament.<sup>25</sup> Understanding this precedent, Scottish commissioners secured treaty-based protection against similar re-modeling of their Court of Session.<sup>26</sup> The Acts of Union thus provided the framers with a model for how to craft fundamental protections for judicial structure and judicial independence.

In addition to establishing a general model of judicial independence from legislative tinkering, the Scottish experience under the Acts of Union makes clear that an evidently hierarchical and pyramidal judicial system was available as a model to the framers of Article III. Not only were lower courts in Scotland bound to comply with the decisions of the Court of Session, but they were also subject to that court’s ongoing supervisory oversight and control.<sup>27</sup> Even where the Court of Session lacked the power

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<sup>22</sup> *Id.*

<sup>23</sup> See 5 WALKER, *supra* note 8, at 455; Ford, *supra* note 14, at 119; John W. Cairns, *Attitudes to Codification and the Scottish Science of Legislation*, 22 TUL. EUR. & CIV. L.F. 1, 27 (2007).

<sup>24</sup> Consider, for example, the fate of the prerogative Courts of Star Chamber and High Commission, which wielded the judicial power of the Privy Council and were abrogated by acts of Parliament in 1640–42. For an account, see HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON WESTERN LEGAL TRADITION* 309–15 (2006).

<sup>25</sup> The Act of Settlement (1701) set the terms of royal succession and specified that the judges of the English superior courts were to have their salaries “ascertained and established,” and were to serve during good behavior, subject to removal upon parliamentary address and royal assent. For an overview, see James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1235–36 (2007). This provision substituted life tenure and parliamentary control of judicial removals for the seventeenth century practice of subjecting superior court judges to removal at the pleasure of the Crown. See generally Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 621–23 (1977) (describing seventeenth-century developments as a change from judicial mastery by the Crown to that by Parliament).

<sup>26</sup> The Treaty of Union represented the culmination of a series of negotiations between Scottish and English commissioners that began shortly after the accession of Scotland’s James V to the English crown (as James I in 1603) and continued, by fits and starts, through the seventeenth century. See Ford, *supra* note 14, at 122–23 (evaluating the meaning of the Treaty of Union of 1707 by reference to unsuccessful negotiations that took place in 1604 and 1670). For an overview, see B.P. LEVACK, *THE FORMATION OF THE BRITISH STATE: ENGLAND, SCOTLAND, AND THE UNION, 1603–1707* (1987) (highlighting such considerations as religious turmoil, the English conquest of Scotland during the commonwealth period, the restoration of Scottish rule, and the question of royal succession that followed the abdication of James II and the Glorious Revolution).

<sup>27</sup> See *Countess of Loudon v. Trustees*, May 28, 1793, M. 7398, reprinted in *DECISIONS OF THE COURT OF SESSION, NOVEMBER 1792–JULY 1796*, at 115, 117–18 (Robert Davidson & David Douglas eds., 1798); KAMES, *supra* note 8, at 395. Indeed, the best-known exponent of this conception of the Scottish judiciary,

to review lower court decisions by way of appeal, its supervisory powers allowed the Court of Session to correct serious errors and to prevent lower courts from exceeding the boundaries of their own jurisdiction.<sup>28</sup> The Scottish judiciary thus exemplified the hierarchical and pyramidal model of judicial structure that no less a figure than James Wilson—himself a Scottish native—described as inherent in Article III. An able lawyer, an active participant in the Philadelphia convention that framed the Constitution, and one of the first Justices of the Supreme Court, Wilson argued in his 1791–1792 Lectures on Law that a properly constituted judicial system should resemble a pyramid, with a broad base of inferior jurisdictions and a single supreme court on top.<sup>29</sup> Wilson evidently believed that the Article III he had helped to craft as a member of the Philadelphia Committee of Detail met this standard.<sup>30</sup>

Notwithstanding Wilson’s careful explication, American scholars have doubted that Article III establishes an inherently hierarchical relationship between the Supreme Court and any inferior tribunals Congress chooses to establish. Perhaps the most ardent exponent of such a view, Professor David Engdahl, rejected the claim that Article III requires Congress to fashion a judicial pyramid and derided any “notion that the Constitution requires a particular hierarchy—or any judicial hierarchy at all” as “simply uninformed.”<sup>31</sup> Anticipating Engdahl, Professor Wilfred Ritz has questioned whether Americans, operating without an obvious English hierarchical model to guide them, would have understood Article III’s provision for a single supreme court as a significant feature of a hierarchical judicial system.<sup>32</sup> More likely, Ritz argues, the framers were drawing on horizontal judicial models, such as those in England, in which superior courts exercised primarily a trial rather than an appellate jurisdiction.<sup>33</sup> Engdahl argues that Congress could have implemented Article III by creating separate supreme courts of law, equity, and admiralty in keeping with the English conception that a judicial system might have multiple supreme courts of overlapping jurisdiction, dismissing Wilson’s pyramidal model as chimerical and unprecedented.<sup>34</sup>

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Lord Kames, explained that the power of ongoing supervisory control resulted from the Court of Session’s supremacy. See KAMES, *supra* note 8, at 327–28, 429.

<sup>28</sup> See *infra* Part III.

<sup>29</sup> 2 THE WORKS OF JAMES WILSON 149 (Robert Green McCloskey ed., 1967). On Wilson’s fascination with the pyramid, see John Fabian Witt, *The Pyramid and the Machine: Founding Visions in the Life of James Wilson*, in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 47–59 (2007).

<sup>30</sup> For an account of Wilson’s many contributions to the Constitution’s framing, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008) [hereinafter Ewald, *Drafting*]. See also William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1051 (2010) [hereinafter Ewald, *Scottish Enlightenment*] (describing Wilson’s education in Scotland and his exposure to leading figures in the Scottish enlightenment).

<sup>31</sup> David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 157–58.

<sup>32</sup> RITZ, *supra* note 3, at 33, 41.

<sup>33</sup> *Id.* at 35, 44.

<sup>34</sup> David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 463, 466–68, 491, 504 (1991). See also Akhil Reed Amar, *A Neo-Federalist Approach to Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that Congress could implement Article III by assigning jurisdiction to lower federal courts and largely depriving the Supreme Court of appellate jurisdiction). Professor Van Alstyne echoed this view in memorable language:

Not only does it provide an entirely unchimerical precedent for hierarchy, Scottish experience under the Acts of Union may have also provided a template on which the framers relied in choosing words and phrases to secure the role of the Supreme Court of the United States as the head of the judicial system. Just as Article III vests the judicial power in one supreme court,<sup>35</sup> so too do the Acts of Union guarantee the authority and privileges of the Court of Session as the “supream” court of Scotland. Just as Article III allows Congress to ordain, establish, and constitute only courts and tribunals that remain inferior to the one Supreme Court,<sup>36</sup> so too do the Acts of Union specify that inferior courts must remain “subordinate” to the Scottish supreme court. Just as Article III contemplates finality,<sup>37</sup> so too do the Acts of Union foreclose judicial review of the decisions of the Court of Session. The close similarity of the concepts and implementing language suggests that the Acts of Union and the Scottish legal system provided the framers with a precedent for how to use such concepts as supremacy and inferiority to structure, and afford constitutional protection to, a hierarchical judicial system.<sup>38</sup>

Perhaps most provocatively, the Acts of Union and Scottish legal experience may shed important new light on the ongoing debate over the power of Congress to curtail the Supreme Court’s appellate jurisdiction. Although the Court derives its jurisdiction, both original and appellate, from the Constitution, Article III confers appellate jurisdiction with “such exceptions, and under such regulations as the Congress shall make.”<sup>39</sup> Conventional wisdom views this Exceptions and Regulations Clause as a plenary grant of authority to Congress to curtail virtually any aspect of the Court’s appellate role (subject to the requirement that Congress not overstep any other external constitutional limitations).<sup>40</sup> Until now, scholars have been unable to chart the origins of the Exceptions and Regulations Clause, to identify any historical precursors in English law, or to explain based on the clause’s sparse drafting history why the framers included it or

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By reposing finality of such decisions in a number of other courts, [Congress] might thereby give the Constitution a number of different heads on the order of the mythical Hydra, however peculiar we might think the result to be in the dimming twilight of federalism.

William W. Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229, 269 (1973).

<sup>35</sup> U.S. CONST. art. III, § 1.

<sup>36</sup> *Id.*

<sup>37</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995); *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 165–67, at 125–27 (1833). As a formal matter, Article III vests the entire judicial power in federal courts and seemingly forecloses the assertion of such power by other institutional actors. But the task of defining the essential features of the judicial power has proven elusive. Compare *Northern Pipeline v. Marathon*, 458 U.S. 50 (1982) (prohibiting non-Article III bankruptcy judges from hearing common law claims), with *CFTC v. Schor*, 478 U.S. 833 (1986) (permitting administrative agencies to hear such claims). See generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) [hereinafter Pfander, *Article I Tribunals*].

<sup>38</sup> On the importance of the Scottish political experience to the founding generation, see ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 24–29, 87–88, 120–124 (2010); David Thomas König, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of “the Right of the People to Keep and Bear Arms,”* 22 LAW & HIST. REV. 119 (2004).

<sup>39</sup> U.S. CONST. art. III, § 2.

<sup>40</sup> See, e.g., Herbert Wechsler, *The Courts and the Constitution*, 37 HARV. L. REV. 1001 (1965); Van Alstyne, *supra* note 34.



how they expected it to operate.<sup>41</sup> Without any precursors to provide guidance, adherents of the orthodox account have simply assumed that the text confers an unqualified exceptions and regulations power.

In contrast to the orthodox account, a growing chorus of scholars (including one of us) has argued that Article III's related requirements of unity, supremacy, and inferiority impose textual limits on Congress's court-stripping power by securing the Supreme Court's role at the top of the federal judicial hierarchy.<sup>42</sup> On this view, the Constitution requires Congress to ensure that all inferior courts remain subordinate to the one Supreme Court specified in Article III. This duty of subordination means that lower courts must respect the precedents of the Supreme Court and must remain subject to a degree of supervisory oversight sufficient to ensure lower court compliance with jurisdictional boundaries and federal law.<sup>43</sup> Under what one of us has dubbed the supervisory account, subordination does not require appellate review in every case; the Court must simply retain the power to spot check decisions. Congress can fashion exceptions and regulations to the Court's *as-of-right* appellate jurisdiction (in keeping with the terms of Article III), but it cannot deprive the Court of the *discretionary* oversight that inheres in its supremacy.<sup>44</sup> In other words, the Article III requirements of supremacy and inferiority operate as textual limits on Congress's power to curtail the Court's supervisory role.

The Acts of Union provide important support for this revisionist account of the Exceptions and Regulations Clause. Not only do the two provisions bear an obvious family resemblance, but the Court of Session was known to have conducted supervisory review of inferior tribunals in the wake of jurisdictional restrictions, and repeatedly voiced a conviction that Parliament's regulations power was circumscribed by the requirements of supremacy and inferiority in the Acts.<sup>45</sup> Drawing on a variety of

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<sup>41</sup> As Leonard Ratner explained, the "Committee of Detail kept no record of its proceedings, and there is no evidence apart from the draft itself as to how the language [of the Exceptions and Regulations Clause] originated." Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 172 n.69 (1960).

<sup>42</sup> For examples, see PFANDER, *supra* note 7; James E. Pfander, *Jurisdiction Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) [hereinafter, Pfander, *Jurisdiction Stripping*]; Pfander, *supra* note 37; James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction Stripping*, 101 NW. U. L. REV. 191 (2007) [hereinafter Pfander, *State Court Inferiority*]; Pfander, *Article I Tribunals*, *supra* note 37; Steven G. Calabresi & Gary R. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007). *But cf.* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 360 (2006) (concluding that neither constitutional text nor structure explicitly create a hierarchical relationship among federal courts).

<sup>43</sup> Pfander, *Jurisdiction Stripping*, *supra* note 42; Pfander, *State Court Inferiority*, *supra* note 42; PFANDER, *supra* note 7.

<sup>44</sup> *See* Pfander, *Jurisdiction Stripping*, *supra* note 42; Pfander, *State Court Inferiority*, *supra* note 42. On the distinction between appellate and supervisory jurisdiction, see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1532–49, 1560–74 (2001).

<sup>45</sup> In one well-known case, for example, the Court of Session intervened to overturn an inferior court decision that was inconsistent with its own earlier determination about the status of a particular public way. *See* Countess of Loudon v. Trustees, May 28, 1793, M. 7398, *reprinted in* DECISIONS OF THE COURT OF SESSION, *supra* note 27, at 115, 117–18; *see Excluded Jurisdiction*, 3 J. JURISPRUDENCE (T.T. CLARK) 14,

supervisory proceedings that bear some resemblance to the prerogative writs in England,<sup>46</sup> the Scottish Court of Session insisted throughout the eighteenth century that its power to correct the work of inferior tribunals survived parliamentary restrictions on its exercise of routine appellate review.<sup>47</sup> The Court of Session's willingness to maintain its supervisory authority in the face of legislation that curtailed its appellate jurisdiction illustrates how the constitutional requirements of supremacy and inferiority in Article III act to confine Congress's jurisdiction-stripping authority. Although we cannot quantify Scottish influence precisely, we do know that the Exceptions and Regulations Clause first appeared in an August 1787 Committee of Detail draft written by the Scottish-born James Wilson. If, as seems likely, the framers drew on Scottish practice under the clause after the Acts of Union, then the Court of Session's eighty years of experience may help to illuminate the framers' conception of an exceptions power circumscribed by the requirements of unity, supremacy, and inferiority in Article III and Article I. Far from an inexplicable aberration or an unqualified grant of power, we argue, the Exceptions and Regulations Clause was drawn from a vibrant legal culture, and can be better understood in light of its historical precedents.

In identifying the influence of Scottish thinking on Article III, this Article contributes to debates in jurisdictional, legal, and constitutional history.<sup>48</sup> First, and of central importance to our jurisdictional argument, we hope to show that the Acts of Union and Scottish notions of hierarchy informed the framers' view that Article III limits congressional control of the Supreme Court's appellate jurisdiction. In doing so, we offer a historical predicate for the unitary and hierarchical judicial system that has been missing from debates over federal jurisdiction, and evidence of the origins of the Exceptions and Regulations Clause that can explain its meaning and context. Second, we offer a partial solution to the puzzle of how Scottish legal thought left its mark on the law of the early American republic. Historians have long recognized that Scottish thinking profoundly influenced the American lawyers of the early republic,<sup>49</sup> but have been struck by the relatively modest Scottish influence on the developing common law of the early nineteenth century.<sup>50</sup> We think that Scottish thought had a greater impact on structural

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17 (1859). It did so despite the fact that the British Parliament had adopted legislation conferring final decision-making authority on the lower court. *Id.* at 115, 117–18.

<sup>46</sup> On the prerogative writ system in England, see generally S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951).

<sup>47</sup> See *infra* Part III.

<sup>48</sup> We acknowledge the many contributions of contemporary scholars, on whose work we have drawn in attempting to understand the influence of Scots thinking on the framing. This Article differs from other work in focusing on the practice in the Scottish Court of Session, on the specific language of the Acts of Union, on the way that language operated to constitutionalize the hierarchical structure of the Scottish legal system, and on the implications of the Scots system for the meaning of Article III.

<sup>49</sup> See, e.g., GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978) [hereinafter WILLS, *INVENTING*]; GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981) [hereinafter WILLS, *EXPLAINING*]; Douglass Adair, "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIB. Q. 343 (1957); Arnauld B. Leavelle, James Wilson and the Relation of the Scottish Metaphysics to American Political Thought, 57 POL. SCI. Q. 394 (1942).

<sup>50</sup> See R.H. Helmholz, *Scots Law in the New World: Its Place in the Formative Era of American Law*, 52 STAIR SOC'Y 169 (2006); C. Paul Rogers III, *Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence*, 8 LAW & HIST. REV. 205 (1990); David M. Walker, *The Lawyers of the Scottish Enlightenment and Their Influence on the American Constitution*, 1988 JURID. REV. 4.

matters than on the common law (as to which Blackstone's account of English law reigned supreme). Finally, our study of Scottish legal structure may shed some light on the controversial debate over the place of comparative constitutional law in the interpretation of the Constitution. We think Scotland, under the Acts of Union, may provide as useful a source of comparative insight as the English precedents to which today's historically minded scholars so frequently turn.<sup>51</sup>

Our attempt to uncover the Scottish roots of Article III proceeds in five parts. Part II explores the influence of Scottish thinking on the founding generation. Although earlier scholars have demonstrated various connections to Scottish legal thought, we document a wider Scottish influence than has been previously recognized. The writings of the Scottish jurist and philosopher Lord Kames, in particular, were as widely studied and accepted by the founding generation as the writings of the English commentators. Both James Madison and James Wilson were familiar with Scottish legal ideas and with the writings of Kames; both Madison and Wilson played essential roles in developing early drafts of Article III and its provision for one supreme Court. Wilson also set forth the founding era's most complete early explication of the structure of the federal judiciary, drawing freely on Scottish legal thinkers as he did so. The widespread influence of the legal writers of the Scottish Enlightenment suggests that one cannot look exclusively to Blackstone for insight into the legal culture and political ideology of the founding generation.<sup>52</sup>

Part III begins our analysis of the Scottish legal system by comparing it to the system in England, circa 1770. One immediately notices three differences. First, in England, a number of superior courts of law, equity, and admiralty competed for business

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<sup>51</sup> Although many originalists condemn the use of foreign law and constitutions to interpret the U.S. Constitution, they tend to make an exception for foreign materials that were available in 1787 and familiar to the framers, such as writings on the common law of England. See, e.g., Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 306 (2004); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 307 (2006) ("For originalists, using foreign or international law from the time a provision was framed can advance our understanding of the original meaning of the Constitution if it bears on the understanding of those who framed the provision. In fact, the framers may themselves have used international and foreign law as policy arguments when they debated the ratification of the Constitution.").

<sup>52</sup> We should say a word about methodology. We have collected a good deal of evidence of Scottish influence on the generation that framed the Constitution. We think it appropriate, then, in attempting to recapture the ideas that animated the framers, to concentrate on sources of Scottish law that were widely available in America and were known to have influenced members of the Philadelphia convention. Professor Ritz has warned us not to assume that everything we know today was also known to the framers. As Ritz put it, careful scholarship must demonstrate a nexus between "an eighteenth-century information source . . . and accessibility to the same information in the United States." RITZ, *supra* note 3, at 32. We hope to meet this standard of demonstrable accessibility by confining ourselves to the materials that were both familiar to the framers and actively used by them. Our emphasis on Lord Kames' *Historical Law-Tracts* and *Principles of Equity* and the Acts of Union satisfies both of these criteria; as we shall explain, Wilson and Madison were both well versed in Kames and Scottish institutions more generally, and Kames' works circulated widely throughout North America well before and well after the arrival of Blackstone's *Commentaries*. We have not yet found evidence that these men actively consulted Scottish precedents as they set quill to parchment in the summer of 1787, although they certainly had the opportunity to do so. But we invite attention to two facts: the important role that the Scottish born James Wilson played in drafting the judiciary article and the striking similarity between Article III and the Acts of Union, with their use of supremacy, inferiority and qualified legislative power to secure a hierarchical judicial system. If it does not quite prove a Scottish connection conclusively, the evidence certainly points to northern Britain.

and encroached on one another's jurisdiction.<sup>53</sup> England thus lacked any institutional analogue to the Court of Session, which acted as the only supreme civil court of Scotland and exercised supervisory review over all inferior courts of any jurisdiction.<sup>54</sup> The best-known works of Scottish legal theorists prominently featured the hierarchical position of the Court of Session and consistently defined supremacy and inferiority as a function of one court's power to supervise and review the judgments of another court. Second, England treated equity as a separate body of remedies to be administered in a separate court, the Court of Chancery, whereas Scotland united law and equity in the Court of Session.<sup>55</sup> Third, and most strikingly, English courts owed their existence to royal prerogative and were subject to the sovereign power of Parliament.<sup>56</sup> The Court of Session, in contrast, enjoyed a measure of constitutional protection from parliamentary control in the provisions of the Acts of Union that secured its place atop the Scottish judicial hierarchy.

Parts III and IV then explain the significance of the framers' knowledge of the Scottish legal system for the ongoing debate over the meaning of the spare and oft-mooted words of Article III. Viewing Article III through an English prism, scholars have struggled to give meaning to such constructs as unity, supremacy, and inferiority, none of which fit comfortably with the English model of multiple superior courts of coordinate jurisdiction. Contrary to those who view the hierarchical structure of Article III as unprecedented, we think the Scottish court system's hierarchical judiciary and single supreme civil court provided a concrete model for the framing of Article III. We present evidence demonstrating that the framers' experience with Scottish legal structure directly or indirectly influenced a number of the central provisions of Article III, including the Exceptions and Regulations Clause, as well as Article I's guarantee that any courts created by Congress must be inferior to the Supreme Court. In addition, we explore ways in which the Court of Session invoked its supervisory powers to ensure oversight in a range of cases that appeared to have been, at least nominally, placed beyond the Court's purview by legislative action. We think that the Session's willingness to exercise its supervisory powers in the face of jurisdictional restrictions provides a notable illustration of the importance of assured supremacy as a check on the legislative control of a supreme court's jurisdiction.

Part V briefly concludes with reflections on the place of English and Scottish precedents in debates over constitutional meaning. English ideas certainly shaped the framers' conception of law and legal institutions. But to an extent not previously understood in the literature, the Scottish legal system made its own distinctive contributions to American innovations. Rather than a source that shaped common law norms, Scottish legal thought appears to have had its most profound impact on the

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<sup>53</sup> Jurisdictional competition may have been fueled to some extent by the English tradition of fee-paid judges, whose compensation was dependent on the amount of business they attracted. For accounts, see James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 8–11 (2008) [hereinafter Pfander, *Judicial Compensation*]; Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007).

<sup>54</sup> The closest analogy was King's Bench, which exercised broad supervisory authority over inferior tribunals through the prerogative writs of mandamus and habeas corpus, among others. We evaluate the hierarchical aspirations of some English jurists and the somewhat mixed reality below. See *infra* part III.A.

<sup>55</sup> See 3 BLACKSTONE, *supra* note 7, at 429, 441; KAMES, *supra* note 9, at 50.

<sup>56</sup> See *supra* note 219 and accompanying text.

hierarchical structure of the American federal judicial system and Article III's provisions for the protection of the Supreme Court from legislative interference. The Acts of Union that joined England and Scotland into Great Britain may have played an important role in the creation of that later, "more perfect union" to which the Constitution's preamble aspires.

## II. UNDERSTANDING SCOTTISH INFLUENCE DURING THE FOUNDING ERA

Many scholars and jurists today consider it axiomatic that the framers derived their expectations for the practical operation of the federal judicial department primarily from the model of the English courts.<sup>57</sup> Justice Felix Frankfurter provided a well-known articulation of this view:

[T]he framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster.<sup>58</sup>

Raoul Berger echoed Frankfurter's view thirty years later, capturing the overriding sentiments of contemporary scholars: "Given a document which employed familiar English terms—*e.g.*, 'admiralty,' 'bankruptcy,' 'trial by jury,'" Berger argued, "it is hardly to be doubted that the framers contemplated resort to English practice for elucidation" of Article III.<sup>59</sup>

Like Frankfurter and Berger, generations of American scholars and jurists have turned to Blackstone's *Commentaries* for insights into the framers' understanding of the English legal heritage.<sup>60</sup> Blackstone's importance is understandable. In contrast to the

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<sup>57</sup> See, *e.g.*, Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 466 (1994) (highlighting "contemporary English legal dictionaries and abridgements, treatises, and judicial opinions" as informing the framers' understanding of "legal words and concepts of adjudication"); Amanda Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 614 (2009) (describing Blackstone and Coke as the two most influential authors to whom "the framers turned in shaping American law"). See generally George Jarvis Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 9, [##] (1932) (tracing the development of the English legal system and describing the English House of Lords as the precursor to the US Supreme Court).

<sup>58</sup> *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

<sup>59</sup> Berger, *supra* note 2, at 816. As support, Berger quoted a strongly worded statement from Chief Justice Taft that bears mention here:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

*Id.* (quoting *Ex Parte Grossman*, 267 U.S. 87, 108–09 (1925)). Notably, Taft's reference to British institutions sweeps broadly enough to encompass the Scottish courts of Great Britain.

<sup>60</sup> See, *e.g.*, Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 631 & n.15, 632–34 (1933); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV.

antiquated and abstruse *Coke on Littleton*,<sup>61</sup> Blackstone offered early Americans a straightforward and easily digestible summary of English law.<sup>62</sup> Moreover, the *Commentaries* influenced a period of rapid Anglicization of American common law in the late eighteenth and early nineteenth centuries.<sup>63</sup> Its timely appearance in the United States in 1770, on the eve of the American Revolution, makes the *Commentaries* a natural touchstone for modern efforts to understand English legal institutions at the time of the framing. Supreme Court opinions, particularly those by originalist-minded Justices, often treat the *Commentaries* as a primary source for understanding the framers' legal milieu.<sup>64</sup>

Yet the emphasis on English law as depicted in the *Commentaries* fails to capture the breadth of ideas and institutions that influenced the framers' legal thought. The legal system in British North America during the colonial period did not simply reproduce in miniature the judicial institutions in England. Colonial legal institutions developed in a more or less haphazard way over the span of almost two centuries, and often differed in material respects from the courts at Westminster and from each other.<sup>65</sup> Historians have shown that colonial lawyers had relatively few law books and only the most rudimentary

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551, 561 (2006); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 731–32 (1976). For an account of the colonial appearance of English editions of the *Commentaries* in 1770, see HOEFLICH, *supra* note 1, at 26, 131–34. Blackstone published the four volumes of the *Commentaries* between 1765 and 1769, and over one thousand copies had sold in the colonies by the printing of the first American edition in 1771. Nolan, *supra* note 60, at 735, 737.

<sup>61</sup> Though he later held Coke in great esteem, when Thomas Jefferson was a law student he found Coke severely frustrating. “I do wish the Devil had old Cooke,” Jefferson wrote, “for I am sure I never was so tired of an old dull scoundrel in my life.” EDWARD DUMBAULD, *THOMAS JEFFERSON AND THE LAW* 11 (1978). Justice Joseph Story described his own encounter with *Coke on Littleton* thusly: “[A]fter trying it day after day with very little success, I sat myself down and wept bitterly. My tears dropped upon the book, and stained its pages.” GEORGE DARGO, *LAW IN THE NEW REPUBLIC: PRIVATE LAW AND THE PUBLIC ESTATE* 51 (1983) (quoting ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 20 (1953)) (internal quotation marks omitted).

<sup>62</sup> See Waterman, *supra* note 60, at 632 n.18; Nolan, *supra* note 60, at 764.

<sup>63</sup> See Nolan, *supra* note 60, at 759–67; G. Edward White, *Law in American History: The Colonial Years*, Univ. of Va. Sch. of Law Public Law and Legal Theory Research Paper Series No. 2009-18, Oct. 2009, at 63–64, available at <http://ssrn.com/abstract=1480731>; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at 5–6 (1977).

<sup>64</sup> For assessments of the influence of Blackstone, see Nolan, *supra* note 60; Meyler, *supra* note 60, at 561 (discussing the central importance of Blackstone to Justice Scalia's method of originalism).

<sup>65</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 35 (2d ed. 1985); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 237 (2005); Rogers III, *supra* note 50, at 234 n.163 (citing G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 6 (1960)); Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in *POLITICAL SEPARATION AND LEGAL CONTINUITY* 91, 95 (Harry W. Jones, ed., 1976) (“When the people of a particular colony set up simple legal institutions along the general lines of what they remembered from ‘back home,’ their model was not necessarily the Court of Common Pleas; it might have been some local tribunal in the English country or neighborhood from which that group of settlers had come. So law and legal institutions were very different from colony to colony in the seventeenth century, reflecting differences in historical experience, in soil and climate and in the religious and social views of the people.”). See also Ross, *supra* note 5, at 123 (noting that the English system of administrative oversight tended to respect the internal integrity of each body of colonial law, instead of attempting to impose a continent-wide uniformity).

system of legal education.<sup>66</sup> Under such conditions, early colonial Americans took the law where they could find it, often looking to whatever sources were available,<sup>67</sup> and often explicitly rejecting or altering the English legal system where it was found unsuitable to American conditions or unnecessarily complex and forbidding.<sup>68</sup> Even lawyers of the later colonial period, including such American patriots as Thomas Jefferson, John Adams, James Wilson, and George Wythe, did not study the law through Blackstone,<sup>69</sup> and had indeed completed their legal studies before the *Commentaries* arrived in America.<sup>70</sup> Instead, they drew upon a wide and diverse group of writers, which ranged from Coke and Bacon to Hale and Kames,<sup>71</sup> from civil and Roman law writers to history and political theory.<sup>72</sup>

Central to legal study in the eighteenth-century were such Roman law authorities as Cicero and Justinian, and such natural and civil lawyers as Pufendorf, Grotius, Thomas Wood, and Vattel. When the young lawyer John Adams, for example, presented himself as a candidate for the bar, one of his interlocutors asked him what he had “lately read” in Latin.<sup>73</sup> The civil law—which formed the basis of admiralty law and the law of nations

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<sup>66</sup> See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 157–187 (1911); Charles R. McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124, 130–31 (1976); Waterman, *supra* note 60, at 631 n.14; HOEFLICH, *supra* note 1, at 33–35 (describing the scarcity of law books and legal booksellers in colonial America).

<sup>67</sup> Roscoe Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676, 684–85 (1914) (describing the heavy use of civil law authorities in early American case reports); McKirdy, *supra* note 66, at 130 (“A shortage of law books stemming from the high price of importation from England plagued Massachusetts for most of the Eighteenth Century. For every Jeremy Gridley whose will reveals a library of almost 700 titles studded with the best English, ancient and continental authorities, there was a Nathan Tyler who could stuff his entire legal library in his saddlebags.”).

<sup>68</sup> See Goebel, Jr., *supra* note 65, at 417, 420; HERBERT ALAN JOHNSON, JOHN JAY: COLONIAL LAWYER 121 (unpublished dissertation, 1965); ROBERT B. KIRTLAND, GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE 54 (1986); L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250, 253 (1962) (describing the “selective adaptations of English practices” practiced in colonial New England); Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY* 257, 262–63 (Donald Fleming & Bernard Bailyn eds., 1971).

<sup>69</sup> See Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy, Jr.’s Law Commonplace (1763)*, 39 ARIZ. ST. L.J. 317, 319 (2007).

<sup>70</sup> See, e.g., DUMBAULD, *supra* note 61, at 10. While studying law, Wilson and Adams had read Blackstone’s *Analysis of the Laws of England* (1754), a short work that preceded the work of the Vinerian lectures and the *Commentaries*, but they seemed to draw far more on other sources. See James Wilson, *Commonplace Book* (unpublished James Wilson Papers, located at the Historical Society of Pennsylvania) (copies on file with the authors); J.H. Powell, John Adams & Richard Rush, *Some Unpublished Correspondence of John Adams and Richard Rush, Part II*, 61 PA. MAG. HIST. & BIOG. 26, 39–40 (1937). Cf. Coquillette, *supra* note 69, at 334 n.76 (“The first volume of Blackstone’s *Commentaries* did not appear until 1765, and there is no mention of it in Quincy’s *Law Commonplace*. . . . There is a reference to Blackstone’s more rudimentary *Analysis of the Laws of England* . . . , but Quincy made little use of it, apparently preferring Wood’s ‘divisions’ and Hale’s system.” (internal citations omitted)).

<sup>71</sup> See Meyler, *supra* note 60, at 582–84.

<sup>72</sup> See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 5–8 (1985); DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* (2008).

<sup>73</sup> Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775*, in *LAW IN COLONIAL MASSACHUSETTS 1630–1800*, at 359, 363 (Daniel R. Coquillette et al. eds., 1984). See also *id.* (recounting Gridley’s emphasis of the civil law, Grotius, and Pufendorf in conversation with Adams); 2 *THE WORKS OF JOHN ADAMS* 146 (Charles Francis Adams ed., 1850) (diary entry, Jan. 24,

in England and the colonies<sup>74</sup>—had an enormous impact upon the framers,<sup>75</sup> as did accounts of the Saxon law.<sup>76</sup> Despite the focus of today’s scholars on the common law, one cannot fully understand the framers’ legal studies without examining their interaction with non-common law sources. In many ways, the framers saw these alternative legal models as complementary to English common law, rather than as competing, and incorporated their doctrines into American law whenever the occasion to do so arose.

Scotland provided the framers with a particularly influential collection of ideas and institutions. For starters, the great thinkers of the Scottish Enlightenment were closely read and studied in North America. In addition, Scots tutors and professors were central to the education of many of the most important members of the founding generation. Finally, the patriots who theorized America’s separation from England were intimately familiar with the way the Acts of Union framed Scotland’s ties with England and drew freely on earlier forms of governmental structure in thinking through alternatives to parliamentary supremacy. This part explores the nature and extent of Scottish influence in some detail and then reassesses Blackstone’s role in the early republic.

#### A. *Scottish Influences on the Founding Generation*

Numerous scholars have explored the role played by the Scottish Enlightenment in the thinking of the Founding Fathers. Garry Wills, for example, traces both the Declaration of Independence and Madison’s writings in *The Federalist* to Scottish

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1765) (describing the study of civil law in Adams’ legal circle). For an account of the extensive influence of the civil law upon Adams, see generally Coquillette, *supra*.

<sup>74</sup> See Coquillette, *supra* note 69, at 326; Joanne Mathiasen, *Some Problems of Admiralty Jurisdiction in the 17th Century*, 2 AM. J. LEGAL HIST. 215, 216 (1958) (describing the continental and civil law origins of admiralty law). On the origins of English admiralty law, see generally Lionel H. Laing, *Historic Origins of Admiralty Jurisdiction in England*, 45 MICH. L. REV. 163 (1946). On the development of admiralty jurisdictions in the colonies and the early United States, see generally Wroth, *supra* note 68; William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993). On the practice of the early federal courts applying civil law in admiralty cases, see STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* [##] (1991).

<sup>75</sup> See, e.g., M. H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* 51 (1997) (describing the connection between American scholars and lawyers and civil and continental law); Coquillette, *supra* note 69, at 322 (explaining that the eighteenth century legal apprenticeship study often included study of Roman law), 326 (describing use of the civil law in the education of Josiah Quincy, Jr.); McKirdy, *supra* note 66, at 129 (describing William Smith’s suggested legal study program, which began with Wood’s *Civil Law*, Pufendorf, Grotius, and Domat’s *Civil Law*); FORREST McDONALD, *ALEXANDER HAMILTON: A BIOGRAPHY* 52 (1979) (describing Vattel’s influence on Hamilton); GEORGE C. GROCE, JR., *WILLIAM SAMUEL JOHNSON: A MAKER OF THE CONSTITUTION* 27 (1937) (cataloging the extensive collection of civil law books in the library of federal convention delegate W.S. Johnson).

<sup>76</sup> Dating from the period before the Conquest in 1066, Saxon law was thought to offer an authentic source of common law ideas and exerted a powerful influence on such patriots as Thomas Jefferson, John Adams, and James Wilson. See, e.g., David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common Law Adjudication*, in *THE MANY LEGALITIES OF EARLY AMERICA* 97, 114 (Christopher L. Tomlins & Bruce H. Mann eds., 2001); Gilbert Chinard, *Introduction to THE COMMONPLACE BOOK OF THOMAS JEFFERSON: A REPERTORY OF HIS IDEAS ON GOVERNMENT* 57 (Gilbert Chinard ed., 1926); 1 *THE WORKS OF JAMES WILSON*, *supra* note 29, at 337–38, 347–52, 408.



intellectual origins.<sup>77</sup> Douglass Adair similarly attributes Madison's *Federalist No. 10* to the influence of the Scot David Hume.<sup>78</sup> Several writers have noted James Wilson's use of Scottish "Common Sense" philosophy in developing his theories of natural law, popular sovereignty, and political institutions.<sup>79</sup> Although Gordon Wood has rightly cautioned against attempting to isolate a single influence from the array of ideas in play at the time,<sup>80</sup> no one doubts that Scottish Enlightenment philosophers and social scientists had earned a prominent place in the thinking of framing-era Americans.<sup>81</sup>

Part of that influence stems from an influx of Scottish immigrants and royal officials during the eighteenth century and the proliferation of Scottish teachers in colonial American universities, primary schools, and private homes. According to Professor Adair, the works of the major figures of the Scottish Enlightenment, such as David Hume, Adam Smith, Francis Hutcheson, Thomas Reid, Lord Kames, and Adam Ferguson, "had become the standard textbooks of the colleges of the late colonial period."<sup>82</sup> At Princeton, the Scottish parson John Witherspoon, university President and later a delegate to the federal Constitutional Convention, steeped his students, including James Madison, in both Scottish social science and Whig politics.<sup>83</sup> At William and Mary another Scottish immigrant, Dr. William Small, exerted a similar influence upon the education of Thomas Jefferson.<sup>84</sup> As noted, James Wilson was born in Scotland and educated at St. Andrew's University before emigrating to America.<sup>85</sup> Although Wilson's biographers have provided conflicting accounts of Wilson's education in Scotland,<sup>86</sup> new

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<sup>77</sup> WILLS, INVENTING, *supra* note 49; WILLS, EXPLAINING, *supra* note 49.

<sup>78</sup> Adair, *supra* note 49.

<sup>79</sup> See, e.g., Leavelle, *supra* note 49; Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 117 (2003); Stephen A. Conrad, *James Wilson's "Assimilation of the Common-Law Mind,"* 84 NW. U. L. REV. 186, 206 (1989).

<sup>80</sup> See Gordon S. Wood, *Heroics*, 28 N.Y. REV. BOOKS, Apr. 2, 1981.

<sup>81</sup> A previous study has concluded that the development of—and kinship between—the Enlightenment in Scotland and America owed something to the fact that both places were essentially outlying provinces of England, the political, economic, and cultural hub of the British empire. On this view, folks in the province must attempt to make sense of both their provincial selves and their image of the world, leading perhaps to new views and new approaches that helped to foster creativity and originality. See John Clive & Bernard Bailyn, *England's Cultural Provinces: Scotland and America*, 11 WM. & MARY Q. 200 (1954).

<sup>82</sup> Adair, *supra* note 49, at 345. See *id.*; Rogers III, *supra* note 50, at 221 n.5.

<sup>83</sup> RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 45 (1971) (describing the large number of Scottish books Witherspoon brought to Princeton); WILLS, EXPLAINING, *supra* note 49, at 18.

<sup>84</sup> See DUMBAULD, *supra* note 61, at 3–4.

<sup>85</sup> Farrand describes Wilson's role at the convention as "[s]econd only to Madison and almost on a par with him." MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* 197 (1913). For a critique of Farrand's view and an argument that Wilson's contribution should be considered as distinct from and in many respects stronger than Madison's, see generally William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008) Ewald, *Drafting*, *supra* note 30.

<sup>86</sup> In the past, Wilson's biographers have disputed whether he also studied at Glasgow and Edinburgh. See GEOFFREY SEED, *JAMES WILSON* 3–4 (1978). Had he done so, he would have numbered some major Enlightenment figures his teachers. See Walker, *supra* note 50, at 12–13 (speculating that Wilson may have been taught by John Millar or attended Adam Smith's lectures on jurisprudence, and may have even encountered Kames and Hume). Cf. The Hon. Lord Mackenzie-Stuart, *Benjamin Franklin in Scotland*, 6 DENNING L.J. 119, 124 (1991) (conjecturing that Wilson may have met Benjamin Franklin at St. Andrew's in 1759). Despite their disagreement, it has always been acknowledged that Wilson became acquainted with the philosophy of his countrymen. See Ewald, *Drafting*, *supra* note 30, at 902–03. After finishing his law apprenticeship to John Dickinson in Philadelphia, Wilson moved to Carlisle, Pennsylvania, a

research from Professor Martin Clagett seems to establish that Wilson also attended the University of Glasgow, where he likely attended lectures given by Thomas Reid, Adam Smith and John Millar, and where he apprenticed at law for three years.<sup>87</sup> Andrew Hamilton, attorney to John Peter Zenger in the famous Zenger Trial of 1735, was also a Scottish-educated immigrant.<sup>88</sup> Hamilton and Wilson were in fact but two among many Scotsmen occupying important positions in the political life of the colonies.<sup>89</sup> And Jefferson, Madison, John Marshall, and Alexander Hamilton all were tutored largely at the hands of Scots from their earliest years.<sup>90</sup>

In addition, during the colonial era many wealthy colonial families sent their children abroad to study law and medicine.<sup>91</sup> Some students went to England—to study law as John Dickinson did at the Middle Temple, for example—but a surprising number went to Scotland to study at the universities at Edinburgh and Glasgow.<sup>92</sup> In particular, many young men from the area of Virginia that was home to Jefferson, Madison, Marshall, George Washington, George Mason, and Patrick Henry were educated at Scottish universities.<sup>93</sup> The Virginian Cyrus Griffin, for example, a judge on the Federal Court of Appeals in Cases of Capture, President of the final Continental Congress from 1788–89, and a United States District Judge, studied law at the University of Edinburgh.<sup>94</sup> Benjamin Rush, who signed the Declaration of Independence and was a member of the Pennsylvania constitutional ratifying convention, studied medicine there.<sup>95</sup>

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community flush with Scottish immigrants, to begin his law practice. SEED, *supra*, at 5; *id.* at 192 n.13. See also CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798, at 205 (1956) (describing Wilson’s involvement in the Scottish St. Andrew’s Society in Philadelphia).

<sup>87</sup> Ewald, *Scottish Enlightenment*, *supra* note 30, at 62. We are in Professor Clagett’s debt for sharing with us his discoveries, which he will publish in a forthcoming book.

<sup>88</sup> See BURTON ALVA KONKLE, THE LIFE OF ANDREW HAMILTON, 1676–1741, at 5–8; Richard B. Morris, *The Legal Profession in America*, in POLITICAL SEPARATION AND LEGAL CONTINUITY, *supra* note 65, at [##].

<sup>89</sup> See LACROIX, *supra* note 38, at 122 (“[T]hroughout the eighteenth century a corps of Scots and Scots-Irish officials had been involved in imperial administration, both at home and in Great Britain and in North America. . . . This class of imperial middlemen brought with them a special appreciation for the many varieties of union, as well as a confederal vocabulary that was crucial for American federal thought.”).

<sup>90</sup> See Rogers III, *supra* note 50, at 221 n.7; WILLS, EXPLAINING, *supra* note 49, at 63; *id.* at 66 (noting that King’s College relied heavily upon Scottish social science and philosophy, and that Hamilton’s tutor there had attended the University of Glasgow); DUMBAULD, *supra* note 61, at 3–4 (describing Jefferson’s early education under William Douglas and James Maury); 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 53, 57 (1916). The son of Marshall’s Scottish tutor Archibald Campbell was “among the most distinguished lawyers of Virginia.” *Id.* at 57.

<sup>91</sup> See FRIEDMAN, *supra* note 65, at 97.

<sup>92</sup> See Walker, *supra* note 50, at 11 (describing Benjamin Franklin’s role in sending American students to study in Scotland); 1 BEVERIDGE, *supra* note 90, at 24. With their growing commitment to free inquiry, Scottish universities were thought to offer a better education than the more hidebound and scholastic universities at Oxford and Cambridge. See Ewald, *Scottish Enlightenment*, *supra* note 30, at 1080–81.

<sup>93</sup> See 1 BEVERIDGE, *supra* note 90, at 32.

<sup>94</sup> See HENRY BOURGUIGNON, THE FIRST FEDERAL COURT: THE HISTORY OF THE CONTINENTAL CONGRESS’ COMMITTEES ON APPEAL AND ITS COURT OF APPEALS IN CASES OF CAPTURE, 1775–1787, at 84 (1977); 7 DICTIONARY OF AMERICAN BIOGRAPHY 618–19. Griffin was forced to leave Scotland after eloping with the daughter of a Scottish earl, and completed his legal education in England. Cyrus Griffin, <http://cyrusgriffin.com/> (last visited Feb. 28, 2010).

<sup>95</sup> Rogers III, *supra* note 50, at 221 n.5.

Despite its acknowledged influence upon the framers' philosophical and political thinking, Scotland's contributions to the legal systems of early America have attracted little scholarly attention.<sup>96</sup> Yet Scottish Enlightenment figures—many of whom were lawyers and jurists—were concerned to a large degree with public law, private law, and government.<sup>97</sup> Adam Smith and David Hume, for example, both wrote on the law: Smith delivered an important series of lectures on jurisprudence,<sup>98</sup> and Hume's *A Treatise on Human Nature* and *An Enquiry Concerning the Principles of Nature* treated natural law and theories of justice extensively.<sup>99</sup> To be sure, Scottish private law never took hold in the United States during the nineteenth century in the way that Blackstone and the English common law did.<sup>100</sup> Nevertheless, Scottish legal writers had a significant impact upon the generation of men that wrote and ratified the Constitution.

To begin with, the large influx of Scottish immigrants, commerce with the mother isle, and a linguistic kinship nurtured connections between American and Scottish law throughout the colonial period. When James Alexander immigrated to New York from Scotland in 1715, for instance, he brought with him the largest law library in the colony.<sup>101</sup> Alexander, who went on to become a prominent attorney and teacher to a number of New York's lawyers, made the library available to lawyers throughout the colony. Many of the important lawyers, judges, and government officials in the colony were frequent borrowers from Alexander's library, which included several books on Scottish law and government.<sup>102</sup>

The Scotsman Sir John Dalrymple's *An Essay Towards a General History of Feudal Property* ("Feudal Property"),<sup>103</sup> a history of the development of the feudal

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<sup>96</sup> See Rogers III, *supra* note 50, at 205; *but see* Walker, *supra* note 50, at 25 ("[I]t is a reasonable inference from the evidence that the thinking and teachings and writings of some of the jurists and philosophers of the Scottish Enlightenment were among the influences on the minds of the draftsmen of the Constitution and of those who by their comments helped to settle that document.").

<sup>97</sup> See, e.g., Hon. Madame Justice Bertha Wilson, *The Scottish Enlightenment: The Third Shumiatcher Lecture in "The Law as Literature,"* 51 SASKATCHEWAN L. REV. 251, 253 (1987); Adair, *supra* note 49, at 345; Walker, *supra* note 50, at 4; Mackenzie-Stuart, *supra* note 85, at 119.

<sup>98</sup> Walker, *supra* note 50, at 14.

<sup>99</sup> See KNUD HAAKONSSON, *THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH* (1981).

<sup>100</sup> See Rogers III, *supra* note 50. A variety of factors may have contributed to the comparative absence of Scottish influence on American common law. For one thing, in keeping with its civil law origins, the Court of Session tended to issue simple rulings as opposed to reasoned explications of law of the kind that formed the backbone of the common law system of precedent. Law was more a matter of reasoning from first principles than applying a body of prior judicial opinions. See John W. Cairns, *Scottish Law, Scottish Lawyers, and the Status of the Union*, in *A UNION FOR EMPIRE: POLITICAL THOUGHT AND THE BRITISH UNION OF 1707*, at 261–62 (John Robertson ed., 1995). For another, Scots law itself tended to borrow English precedents in the wake of the Acts of Union, influenced both by the review of Session decisions in the House of Lords and by the ready availability of English decisional law. *Id.* at 248–50. English common law thus tended to capture both Scottish and American private law.

<sup>101</sup> PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 76 (1939).

<sup>102</sup> *Id.* at 77. In 1730, for example, Alexander purchased from Governor Montgomerie's estate *Acts of Parliament in Scotland*, *Stair's Institutes*, Sir Thomas Craig's *De Feudis*, *Scots Acts of Parliament*, "Craig of Homage," and *Old Laws and Constitutions of Scotland*. At the same sale, John Miln purchased "Acts Generall Assembly of Scotland," "Acts &c. Meeting of the Estates in Scotland," and "Minutes of Parliament in Scotland." *Id.* at 194, app. VII. A Scottish bookseller sold the first subscribed edition of Blackstone in 1770. See HOEFLICH, *supra* note 1, at 131–34.

<sup>103</sup> DALRYMPLE, *supra* note 10.

system in Great Britain and the legal systems of Scotland and England, was on the bookshelves of many prominent lawyers and libraries in America.<sup>104</sup> Thomas Jefferson, for example, made extensive excerpts from *Feudal Property* in his commonplace book,<sup>105</sup> and later included it in his recommended course of law studies for his cousin.<sup>106</sup> John Adams and his friends in the Sodality Club, a society formed by Adams, James Otis, and Jeremy Gridley to study the law, also read and discussed the work, and James Wilson began his Legal Commonplace Book (compiled under the tutelage of John Dickinson, a Philadelphia lawyer and federal convention member) with an excerpt from a chapter in *Feudal Property* entitled “Jurisdiction,”<sup>107</sup> which provides a sketch of the development of the Court of Session.<sup>108</sup>

<sup>104</sup> See, e.g., 2 E. MILLICENT SOWERBY, CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 317 (1953); CATALOGUE OF BOOKS SOLD BY GARRAT NOEL, & Co. 9 (1759); A CATALOGUE OF BOOKS SOLD BY NOEL AND HAZARD 12 (Noel & Hazard, 1771); A CATALOGUE OF A VERY LARGE ASSORTMENT OF THE MOST ESTEEMED BOOKS 30 (Cox & Berry 1772) (two copies and Dalrymple’s *Military Essays*); THE CHARTER, AND BYE-LAWS, OF THE NEW YORK SOCIETY LIBRARY, WITH A CATALOGUE OF BOOKS 20 (1773); STEPHEN CLARK, A CATALOGUE OF THE ANNAPOLIS CIRCULATING LIBRARY 22 (1783); CATALOGUS BIBLIOTHECAE HARVARDIANAE 83 (Harvard University Library, 1790). Dalrymple’s *Memoirs of Great Britain and Ireland*, a history of the relationship between England, Scotland, and Ireland in the seventeenth century, was also available. See, e.g., *Books in Williamsburg*, 15 Wm. & Mary Q. 100, 101 (1906) (listing Dalrymple’s *Memoirs* among books for sale in Virginia in 1775).

<sup>105</sup> Walker, *supra* note 50, at 23; THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 76, §§ 569–584, at 135–162. A commonplace book was a journal kept by law students that kept a record of excerpts from, and comments upon, the books that the student read. See Coquillette, *supra* note 69. Jefferson made excerpts from Dalrymple’s account of the Scottish court system in *Feudal Property*. See THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 76, § 584, at 160–62.

<sup>106</sup> WILLIAM HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA, 1779–1979: A BIOGRAPHICAL APPROACH 25–26 (1982) [hereinafter BRYSON, LEGAL EDUCATION] (citing Letter of Thomas Jefferson to John Garland Jefferson, June 11, 1790, *reprinted in* 16 PAPERS OF THOMAS JEFFERSON 480–82 (J.P. Boyd ed., 1961)). See also Chinard, *Introduction*, *supra* note 76, at 19 (“In [Dalrymple], Jefferson was able to find historically established the same principles as in Kames, with a much more precise and emphatic condemnation of the system of entails and primogeniture.”). Indeed, Jefferson’s library contained an impressive number of books related to Scottish law and government, including Sir Robert Spottiswood’s *Practicks of the Laws of Scotland* (1706), William Forbes’s *Journal of the Sessions* (circa 1714), Thomas Craig’s *Jus Feudale* (1732 ed.), and *Judgments of the Lords of Session* (1768). See 2 SOWERBY, *supra* note 104, at 210, 394–96. These and other works on Scottish law were also more widely available in America. See EDWIN WOLF 2ND & KEVIN J. HAYES, THE LIBRARY OF BENJAMIN FRANKLIN # 3024, at 708 (2006) (*Scotland, Laws and Statutes* (1704)); Library of John Adams, <http://www.johnadamslibrary.org/> (*The Laws and Acts of Parliament Made by King James the First, Second, Third, Fourth Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second who now presently reigns, kings and queens of Scotland* (1681)); The Library of George Wythe, <http://www.monticello.org/library/tjlibraries/transcripts/wythelibrary/1.html> (*Jus Feudale*); CATALOGUS BIBLIOTHECAE LOGANIANAE 20 (Loganian Library 1760) (*Burgh Laws of Scotland*); DAVID HALL, IMPORTED IN THE LAST VESSELS FROM EUROPE (1763) (Robertson’s and Buchanan’s *History of Scotland*); *Books in Williamsburg*, *supra* note 104, at 102, 106 (Robertson’s and Buchanan’s *History of Scotland*); SAMUEL CAMPBELL, SALE CATALOGUE FOR 1787, #542, at 20 (1787) (Maclaurin’s *Arguments and Decisions, in Remarkable Cases, Before the High Court of Justiciary in Scotland*); CATALOGUS BIBLIOTHECAE HARVARDIANAE, *supra* note 104, at 83 (*Jus Feudale* and Adam Ferguson’s *Essay on the History of Civil Society*); WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA # 176, at 26 (1978) [hereinafter BRYSON, CENSUS] (*Laws of Scotland*, probably one of the institutional works, see *infra* notes 99–103 and accompanying text).

<sup>107</sup> James Wilson Papers, *supra* note 70 (quoting DALRYMPLE, *supra* note 10, at 308).

<sup>108</sup> See DALRYMPLE, *supra* note 10, at 295–300.

Later, in his law lectures, Wilson made extensive use of Scottish works, such as those by Thomas Reid and Adam Smith,<sup>109</sup> and the writings on civil government and public law by John Millar.<sup>110</sup> Wilson's lectures also refer to Lord Bankton's *Institutes of the Law of Scotland*.<sup>111</sup> *Institutes* was one among a long series of "institutional" works on the Scottish law. These are general treatises, ranging from Viscount Stair's byzantine seventeenth-century tome, which was available and read in the colonies,<sup>112</sup> to the later, more streamlined works by Bankton, William Forbes, and John Erskine. The institutional works resemble (and generally precede) Blackstone's *Commentaries*,<sup>113</sup> but were not prominent in America in the eighteenth century.<sup>114</sup> Erskine's work, however, gained more influence in the nineteenth century; Story and Kent both cite him extensively, which led to modest use of his work as authority in American courts.<sup>115</sup>

Foremost among the Scottish legal writers read in America was Lord Kames, a leading figure in the Enlightenment and one of the most famous judges ever to sit on the Court of Session.<sup>116</sup> Kames' interests ranged widely, from agriculture to philosophy to zoology, but one of his chief areas of study was the law. Through a series of works on Scottish and English law, primarily *Historical Law-Tracts*,<sup>117</sup> *Principles of Equity*,<sup>118</sup> and *Essays upon . . . British Antiquities* ("British Antiquities"),<sup>119</sup> Kames melded legal doctrine with history, political science, and metaphysics in an attempt to provide a scientific explication of the law as it was and as he conceived it should be.<sup>120</sup>

Kames was well regarded in England, and his works were familiar to and admired by England's major legal figures.<sup>121</sup> Blackstone's *Commentaries*, for example, cite to

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<sup>109</sup> See 1 THE WORKS OF JAMES WILSON, *supra* note 29, at 15–16; 2 *id.* at 835–37.

<sup>110</sup> See 1 *id.* at 50; Walker, *supra* note 50, at 18. Millar's writings were widely available in America. See Walker, *supra* note 50, at 23–24.

<sup>111</sup> Bankton, *supra* note 9; see 2 THE WORKS OF JAMES WILSON, *supra* note 29, at 505, 853. Wilson cites the work as M'Douall, referring to Bankton's given name Andrew McDouall.

<sup>112</sup> See, e.g., WARREN, *supra* note 66, at 181 (Judge Parker's reading list). A catalog of the books in the library of Judge William Smith from 1770 includes Dalrymple's *Laws of Scotland*, which is probably Viscount Stair's *Institute* (Stair's given name was James Dalrymple). See HAMLIN, *supra* note 101, at 185.

<sup>113</sup> On the formal roots of the *Commentaries* and the Scottish institutional works, see John W. Cairns, *Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318 (1984).

<sup>114</sup> Professor Walker asserts that the institutional works were largely unavailable in America in the eighteenth century, though he appears to have missed Wilson's use of Bankton. See Walker, *supra* note 50, at 9. In fact, as Wilson's lectures suggest, the institutional works were known in America, albeit less widely or influentially than the works of Kames and Dalrymple. See ROBERT BELL, A CATALOGUE OF A LARGE COLLECTION OF NEW AND OLD BOOKS #505, at 54 (1783) (advertising Mackenzie's *Institutions of the Law of Scotland*); CAMPBELL, *supra* note 106, # 448, at 20 (Erskine's *Institute of the Law of Scotland*).

<sup>115</sup> Helmholz, *supra* note 50, at 178–80; Rogers III, *supra* note 50, at 207–208 & nn. 40–43. See also HOEFLICH, *supra* note 75, at 30 (noting that Story cited Erskine and Viscount Stair).

<sup>116</sup> For descriptions of Kames' life and works, see generally WALKER, *supra* note 7, at 220–247, and IAN SIMPSON ROSS, LORD KAMES AND THE SCOTLAND OF HIS DAY (1972).

<sup>117</sup> KAMES, *supra* note 8.

<sup>118</sup> KAMES, *supra* note 9.

<sup>119</sup> HENRY HOME, LORD KAMES, ESSAYS UPON SEVERAL SUBJECTS CONCERNING BRITISH ANTIQUITIES (1747) (2d ed., London, M. Cooper 1749).

<sup>120</sup> See Walker, *supra* note 50, at 227–232; Ross, *supra* note 116, at 202–246.

<sup>121</sup> See, e.g., MICHAEL C. MESTON ET. AL., THE SCOTTISH LEGAL TRADITION 52 (new enlarged ed., Scott Crichton Styles ed., 1991); Walker, *supra* note 50, at 229, 232.

*Historical Law-Tracts* and discuss *Principles of Equity*.<sup>122</sup> Lord Mansfield, the Scottish-born Chief Justice of King’s Bench, read widely in Kames and other Scottish legal writers, and attempted to emulate Scotland’s merger of law and equity by importing equitable principles into his common law decisions.<sup>123</sup> And Jeremy Bentham, echoing the sentiments of many of the Founding Fathers, “viewed Kames’s writings as a ‘vital corrective to Blackstone.’”<sup>124</sup>

Although Kames has been largely forgotten by American legal scholars today, his works were prevalent in revolutionary America<sup>125</sup> and exerted a profound influence during the period surrounding the formation of the American republic.<sup>126</sup> In the era before Blackstone’s *Commentaries* and Story’s *Commentaries on Equity Jurisprudence*,

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<sup>122</sup> See 3 BLACKSTONE, *supra* note 7, at \*49 (citing KAMES, *supra* note 8, at 325, 330); *id.* at \*\*49, 430, 433, 441 (contesting Kames’ arguments in *Principles of Equity*). See also Julian S. Waterman, *Mansfield and Blackstone’s Commentaries*, 1 U. CHI. L. REV. 549, 561 (1934) (“[Blackstone] did not believe, as did Lord Kames whose statements he was refuting, that it was the business of a court of equity to abate the rigor and harshness of the common law nor did he believe that the common law courts were characterized by harsh and illiberal principles.”). Cf. W.S. Holdsworth, *Blackstone’s Treatment of Equity*, 43 HARV. L. REV. 1 (1929) (critiquing Blackstone’s understanding of equity).

<sup>123</sup> Waterman, *supra* note 122, at 559; *id.* at 562–63, 566–67; ROSS, *supra* note 116, at 237–42.

<sup>124</sup> Peter Charles Hoffer, Book Review, 11 LAW & HIST. REV. 183, 185 (1993) (quoting DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY ENGLAND* 145 (1989)).

<sup>125</sup> *Historical Law-Tracts*, *Principles of Equity*, and *British Antiquities* were widely available in America, through booksellers and libraries and in private collections, from the early 1760s through the time of the framing. See, e.g., 2 THE WORKS OF JOHN ADAMS, *supra* note 73, at 146–47 (noting discussions in the private legal club Sodalitas of *Historical Law-Tracts* and *British Antiquities* in 1765); HERBERT A. JOHNSON, *IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES: 1700–1799*, at 34–35 (1978) (listing *Historical Law-Tracts* and *British Antiquities* in the libraries of Adams, Jefferson, and St. George Tucker, and *Principles of Equity* in the libraries of Jefferson and Jasper Yeates); BRYSON, *CENSUS*, *supra* note 106, #59, at 8 (Kames’ *Remarkable Decisions of the Court of Session*); *id.* #430, 431, at 59 (*Historical Law-Tracts* and *Principles of Equity*); Massachusetts Historical Society, *Inventory of Books Received by Thomas Jefferson from the Estate of George Wythe, circa 1806*, [http://www.masshist.org/database/img-viewer.php?item\\_id=1768&img\\_step=1&nmask=24&tpc=&mode=large&tpc=#page1](http://www.masshist.org/database/img-viewer.php?item_id=1768&img_step=1&nmask=24&tpc=&mode=large&tpc=#page1) (last visited Feb. 23, 2010) (listing *Principles of Equity* among George Wythe’s legal books); A CATALOGUE OF BOOKS 21 (Garrat Noel, 1762) (*Historical Law-Tracts*); A CATALOGUE OF BOOKS SOLD BY RIVINGTON AND BROWN #732, at 64 (James Rivington, 1762) (*Historical Law-Tracts*); DAVID HALL, *IMPORTED IN THE LAST VESSELS FROM EUROPE*, *supra* note 106 (*Historical Law-Tracts*); THE CHARTER OF LAWS, AND CATALOGUE OF BOOKS, OF THE LIBRARY COMPANY OF PHILADELPHIA (Library Company of Philadelphia, 1764) (*Principles of Equity*); A CATALOGUE OF BOOKS SOLD BY NOEL AND HAZARD, *supra* note 104, at 12 (*Historical Law-Tracts*); ROBERT BELL, *SALE CATALOGUE OF A COLLECTION OF NEW AND OLD BOOKS* #272, at 14 (1773) (*Historical Law-Tracts*); SAMUEL CAMPBELL, *SALE CATALOGUE FOR 1787*, *supra* note 106, #458, at 21 (1787) (*Principles of Equity*); A CATALOGUE OF THE BOOKS, BELONGING TO THE LIBRARY COMPANY OF PHILADELPHIA #225, at 223 (Library Company of Philadelphia, (1789) (*Principles of Equity*); *id.* #615, at 231 (*Historical Law-Tracts*); CATALOGUS BIBLIOTHECAE HARVARDIANAE, *supra* note 104, at 80 (*Historical Law-Tracts*); *id.* at 85 (*Principles of Equity*). The library that Jefferson sold to Congress in 1815 included *Historical Law-Tracts* and *British Antiquities*, as well as Kames’ *Remarkable Decisions of the Court of Session*, *Scotch Acts*, *Dictionary of Decisions*, and three editions of *Principles of Equity*. SOWERBY, *supra* note 104, at 192–93, 200, 318–19, 394, 395–96. The extant catalogs of private and public collections are but a portion of the books actually in America at the time, as many records were lost or destroyed. See BRYSON, *CENSUS*, *supra* note 106, at x–xi.

<sup>126</sup> WALKER, *supra* note 7, at 241; Rogers III, *supra* note 50, at 209 (citing ROSS, *supra* note 116, at 218–19; W.C. LEHMAN, *HENRY HOME, LORD KAMES, AND THE SCOTTISH ENLIGHTENMENT* 217–18 (1971)).

many American lawyers and students turned to Kames' works, and seemed to view them not as an interesting specimen of foreign law, but as a part of the law as received from the mother country.

During his trips to Scotland in 1759 and 1771, Benjamin Franklin became acquainted with most of the major figures of the Scottish Enlightenment, and forged a personal friendship with Lord Kames. Indeed, Franklin stayed at Kames' estate, and the two maintained a long correspondence.<sup>127</sup> As a result of this friendship, Franklin, a delegate to the Federal Convention, brought *Historical Law-Tracts* and *Principles of Equity* with him when he returned to America in 1760.<sup>128</sup> In a letter to Kames, Franklin wrote:

I am now reading with great pleasure and improvement your excellent work, *The Principles of Equity*. It will be of the greatest advantage to the judges in our colonies, not only in those which have Courts of Chancery, but also in those which, having no such courts, are obliged to mix equity with the common law. It will be of more service to the colony judges, as few of them have been bred to the law. I have sent a book to a particular friend, one of the Judges of the Supreme Court in Pennsylvania.<sup>129</sup>

Kames' influence in America widened throughout the 1760s. Wilson, Madison, Jefferson, and Adams all referred to Kames in their writings on law and government, and all engaged deeply with the Scottish jurist during their legal studies. In a diary entry from 1765, for example, John Adams referred to Kames in a manner suggesting that he and his colleagues in the Sodality Club had studied his writings extensively. Of particular note is Adams' recollection of his statement to the group that "Kames has given us the introduction of the feudal law into Scotland." In the course of that discussion, Adams recalled, "I quoted to my brothers the preface to the *Historical Law Tracts*," and later, that he "might have quoted Lord Kames's *British Antiquities*" on the oppressiveness of the theory underlying the British feudal system.<sup>130</sup> Adams' *A Dissertation on the Canon and Feudal Law* also quotes *British Antiquities* approvingly.<sup>131</sup>

As a law student under George Wythe (judge on the Chancery Court of Virginia and a member of the Federal Convention), Jefferson devoted a considerable portion of his *Legal Commonplace Book* to Kames' discussion in *Historical Law Tracts* of criminal law, property, promises and covenants, securities, inheritance, and courts, and almost half of his *Equity Commonplace* to gleanings from *Principles of Equity*.<sup>132</sup>

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<sup>127</sup> Mackenzie-Stuart, *supra* note 85, at 123–28. In fact, Franklin's appellation "Dr. Franklin" came from the honorary degree of Doctor of Laws bestowed upon him by the Scottish University of St. Andrew's—James Wilson's alma mater—upon Franklin's visit in 1759. *Id.* at 121.

<sup>128</sup> Mackenzie-Stuart, *supra* note 85, at 125.

<sup>129</sup> WALKER, *supra* note 7, at 233 (quoting Letter from Benjamin Franklin to Henry Home, Lord Kames, May 3, 1760, reprinted in 1 A. FRASER TYTLER (LORD WOODHOUSELEE), MEMOIRS OF THE LIFE AND WRITINGS OF THE HONOURABLE HENRY HOME OF KAMES 268 (1807)).

<sup>130</sup> 2 THE WORKS OF JOHN ADAMS, *supra* note 73, at 147–49. Adams also refers to Robertson's *History of Scotland* and to Dalrymple. *Id.* at 147, 148. See also 3 *id.* at 454 (referring to Kames). WARREN, *supra* note 66, at 203.

<sup>131</sup> John Adams, *A Dissertation on the Canon and Feudal Law*, reprinted in 3 THE WORKS OF JOHN ADAMS, *supra* note 73, at 454.

<sup>132</sup> THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 76, §§ 557–568, at 95–135; Douglas L. Wilson, *Thomas Jefferson's Early Notebooks*, 42 WM. & MARY Q. 434, 446 (1985) (*Historical Law-*

Kames' influence persisted even after the arrival of Blackstone's *Commentaries*, the first American edition of which was published in 1771.<sup>133</sup> In a series of letters and papers, Jefferson advised young lawyers to study Kames in their preparation for the law, recommending both his philosophical works and *Principles of Equity*, *Historical Law-Tracts*, and *British Antiquities*.<sup>134</sup> Another reading list, prescribed by Judge Parker of New Hampshire for Ezra Stiles, Jr. in 1778, included "Kames' *History of Law*" (*Historical Law-Tracts*) and Stair's *Institutions of the Law of Scotland*.<sup>135</sup> As a practicing attorney in 1784, Alexander Hamilton wrote a brief in the case of *Rutgers v. Waddington* that cited almost exclusively to *Principles of Equity*.<sup>136</sup> And when John Marshall, who briefly attended George Wythe's law lectures before completing his legal studies alone,<sup>137</sup> was establishing his law practice, the first three law books that he purchased were Blackstone's *Commentaries*, Montesquieu's *The Spirit of Laws*, and *Principles of Equity*.<sup>138</sup> Still later, Justice Joseph Story made extensive use of *Principles* in a number of his commentaries.<sup>139</sup>

Most importantly, Kames' legal writings were well known to and used by Madison and Wilson, the two central architects of the Constitution. Following his education at Princeton under Witherspoon, James Madison referred to the works of Kames in his correspondence "with that easy familiarity that assumes writer and reader have a thorough knowledge of the author[] mentioned."<sup>140</sup> Two years after he began studying the law, Madison cited Kames' *Principles of Equity* alongside Francis Bacon as

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*Tracts*); *id.* at 449–50 (stating that Jefferson "copied over 30,000 words, or nearly half the entire manuscript" of his commonplace book from *Principles of Equity*). See also WILLS, INVENTING, *supra* note 49, at 173 ("Most of [Jefferson's] later ideas on private property (107–20), entail (137–49), and inheritance (149–68) are traceable to the passages quoted here from Lord Kames and Sir John Dalrymple."); Wilson, *supra*, at 446 ("[Kames and Dalrymple] no doubt influenced Jefferson's hostility to feudalism and to the law of entails, and Dalrymple was surely a prime source for the version of the 'Saxon myth' to which Jefferson wholeheartedly subscribed."); Chinard, *supra* note 76, at 19 ("[I]t cannot be doubted that the Scottish Lord was for him a Master and a guide."); *id.* at 16–20, 57; GILBERT CHINARD, THOMAS JEFFERSON: THE APOSTLE OF AMERICANISM 28–32, 50 (1929) ("[Jefferson] carefully went through Lord Kames' 'Historical Law Tracts' and studied from him the history of criminal law, promises and covenant, property, securities upon land, courts, briefs. It is in Kames that he found a definition of society which he could have written himself and which expresses his political individualism and subordination to law."). As professor of law at the College of William and Mary, Wythe instructed a large number of luminaries in the new republic, including John Marshall, St. George Tucker, John Breckenridge, John J. Crittenden, Henry Clay, and Spencer Roane. Morris, *supra* note 88, at 18. According to Chinard and Dumbauld, Jefferson's course of law study was guided (if not entirely dictated) by Wythe. See CHINARD, *supra*, at 27–28 (1929); DUMBAULD, *supra* note 61, at 5.

<sup>133</sup> See *supra* note 60.

<sup>134</sup> Walker, *supra* note 50, at 23; see Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. Pa. L. Rev. 823, 840–43 (1971).

<sup>135</sup> WARREN, *supra* note 66, at 181; Simeon E. Baldwin, *The Study of Elementary Law, The Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 3 n.\* (1903). On Stair, see *supra* note 112 and accompanying text.

<sup>136</sup> 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 338–39 (Julius Goebel, Jr. ed., 1964).

<sup>137</sup> 1 BEVERIDGE, *supra* note 90, at 154–61.

<sup>138</sup> 1 BEVERIDGE, *supra* note 90, at 184–85.

<sup>139</sup> Rogers III, *supra* note 50, at 225 n.51.

<sup>140</sup> KETCHAM, *supra* note 83, at 48.



guiding authority in a discussion of how to structure the judicial system of Kentucky.<sup>141</sup> Similarly, Wilson read Kames as a legal apprentice and returned to his works throughout his life.<sup>142</sup> In his law lectures, Wilson cites extensively to Kames, including to *Historical Law-Tracts* and *Principles of Equity*,<sup>143</sup> and seems to have modeled the plan of his lessons—which blended law, history, and philosophy—after the former work in both inspiration and subject matter.<sup>144</sup> At the end of his opening lecture, in fact, Wilson stated that his instruction was intended to follow in large part the principles of law laid down by three men: Bacon, Bolingbroke, and Kames.<sup>145</sup>

## B. Reassessing Blackstone's Influence

Blackstone's omission from Wilson's triad deserves special attention. Even though Americans of the founding generation eagerly purchased and read Blackstone, they registered their suspicion of his writings on public law and his effusive praise of the English government and legal system. In part this was a manifestation of the newly independent American nation's complex attitude towards England and English-derived common law.<sup>146</sup> Wilson's suspicion reflected a commonly held view that Blackstone's vision of sovereignty and parliamentary supremacy was unsuited in many material respects to the creation of a republican system of government.<sup>147</sup>

This suspicion is clearly visible in Wilson's lectures. According to Wilson, "the principles of our constitutions and governments and laws are materially *better* than the principles of the constitution and government and laws of England."<sup>148</sup> To prove his point, Wilson launched into an extensive refutation of Blackstone's ideas on popular sovereignty, concluding, "I cannot consider him as a zealous friend of republicanism."<sup>149</sup> Although Blackstone provided a fine survey of the common law,<sup>150</sup> his writings on public law and government were built upon "unsound and dangerous principles,"<sup>151</sup> and were

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<sup>141</sup> See Letter from James Madison to Caleb Wallace, Aug. 23, 1785, reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 26, 29 (Marvin Meyers ed., rev. ed. 1981).

<sup>142</sup> SMITH, *supra* note 85, at 28 (1956). See *id.* at 206–07 (stating that "of first importance to [Wilson] were the philosophers of the Scottish Renaissance," including Kames, Archibald Campbell, Hutcheson, Hume, Stewart, Millar, and Thomas Reid); *id.* at 224 (describing Wilson's use of Reid during the convention debate on the method of choosing the President).

<sup>143</sup> E.g., 2 *THE WORKS OF JAMES WILSON*, *supra* note 29, at 613 (*Historical Law-Tracts*); *id.* at 485, 1 *id.* at 139 (*Principles of Equity*).

<sup>144</sup> Cf. Walker, *supra* note 50, at 18 (observing that "the general tenor of [Wilson's] lectures suggests that he relied . . . on *Historical Law Tracts*).

<sup>145</sup> 1 *THE WORKS OF JAMES WILSON*, *supra* note 29, at 91.

<sup>146</sup> See Pound, *supra* note 67, at 681; *id.* at 691; Waterman, *supra* note 60, at 630 & n.12.

<sup>147</sup> HULSEBOSCH, *supra* note 65, at 215 (noting that the Federalists' drew upon a wider range of sources than English tradition). To be sure, many prominent Americans, including the author of the definitive founding-era account of the new federal judiciary—Alexander Hamilton—regarded the English constitution as well-balanced and deserving of emulation. Even as dedicated an anglophile as Hamilton, however, desired to refashion the relationship between the legislature and the judiciary. See MCDONALD, *supra* note 72, at 62.

<sup>148</sup> *Id.* at 77.

<sup>149</sup> *Id.* at 79.

<sup>150</sup> *Id.* at 80.

<sup>151</sup> *Id.* at 193.

primarily valuable only as “materials of contrast.”<sup>152</sup> Blackstone, Wilson wrote, “deserves to be much admired; but he ought not to be implicitly followed.”<sup>153</sup> Wilson therefore criticized both Blackstone’s writings and the English constitution’s judicial system, and defended the institution of judicial review from Blackstone’s notions of parliamentary supremacy.<sup>154</sup> John Adams also preferred other legal writers to Blackstone and—echoing Wilson—stated, “We should be grateful to Blackstone, without adoring him.”<sup>155</sup>

Blackstone’s most implacable enemy on this side of the Atlantic, however, was Thomas Jefferson, who distrusted Blackstone throughout his life and later came to despise him with an almost devotional furor.<sup>156</sup> In a series of letters, Jefferson lamented the influence of Blackstone, whose “honied Mansfieldism” Jefferson thought had made Tories of the members of the American legal profession. To limit Blackstone’s reach, Jefferson frequently attempted to exclude the *Commentaries* (with the exception of St. George Tucker’s republicanized version) from schools and courts.<sup>157</sup> In part, Jefferson’s animosity was motivated by a feeling that the *Commentaries* were “nothing more than an elegant digest of . . . the real fountains of the law,” such as Coke.<sup>158</sup> But in greater part, as he expressed in an 1826 letter to James Madison, Jefferson feared that republican principles had been supplanted in legal education by Blackstone’s more conservative views, a development that endangered the liberty of the new republic.<sup>159</sup>

With their shared distrust of Blackstone’s prescriptions on questions of judicial review, legislative supremacy, and constitutionalism, Wilson, Adams, and Jefferson gave voice to a fundamental revolutionary American mindset that arose from a long-running colonial struggle to articulate limits on the power of Parliament.<sup>160</sup> Indeed, just as Blackstone was describing a view of parliamentary supremacy that was rapidly gaining

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<sup>152</sup> *Id.* at 80.

<sup>153</sup> *Id.* at 80.

<sup>154</sup> *See id.* at 168–194; 324–331. For a discussion of Wilson’s views on Blackstone, see Conrad, *supra* note 79, at 197–203.

<sup>155</sup> Powell, Adams & Rush, *supra* note 70, at 40.

<sup>156</sup> Konig, *supra* note 76, at 106 (“[Jefferson] came to regard the two giants of eighteenth-century common law, Mansfield and Blackstone, as twin demons whose judicial alterations violated the deepest principles of popular sovereignty and the legitimacy of the rule of law. Frustrated by resistance to more radical law reform in the 1780s, Jefferson blamed the ‘sly poison’ of Mansfield, which had been ‘admirably seconded by the celebrated Dr. Blackstone.’ But his misgivings had begun much earlier, with his law studies, and had intensified when his legal expertise drew him into the imperial debate.”). On the other side of the ocean, Jeremy Bentham was not particularly fond of Blackstone either. *See* Cairns, *supra* note 113, at 318–19.

<sup>157</sup> *See* Waterman, *supra* note 60, at 634–638.

<sup>158</sup> *Id.* at 637.

<sup>159</sup> *Id.* at 634. *See also* DUMBAULD, *supra* note 61, at 9 (“[Jefferson] deprecated the prevalent view ‘that everything which is necessary is in [Blackstone], and what is not in him is not necessary.’” (quoting Letter to John Tyler)).

<sup>160</sup> *See* HULSEBOSCH, *supra* note 65, at 236 (“[W]hile parliamentary supremacy was becoming orthodox in Great Britain, it was never so throughout the British Empire. Most people in the new states remained devoted to the idea that there were fundamental restraints on all government, including legislatures.” (footnote omitted)); MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* [##] (2004); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* [##] (2008). This mindset surfaced more prominently in Hamilton’s statements in *The Federalist* No. 78 and John Marshall’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

orthodox status in the imperially-minded England of the 1760s,<sup>161</sup> Americans were turning to a different model more suited to their notions of autonomy: that of the Scottish government between the union of the crowns in 1603 and the union of the Parliaments in 1707. In 1603, James VI of Scotland inherited the English throne from Elizabeth I and became King James I of England. But although Scotland and England then shared a common monarch, their governments and national identities remained separate, for “each nation retained its own parliament and thus its legislative supremacy.”<sup>162</sup> With the exception of enforced conquest during Oliver Cromwell’s protectorate,<sup>163</sup> full incorporation between England and Scotland did not occur until the Parliaments of the two nations negotiated and implemented the Treaty of Union—through legislation known as the Acts of Union—in 1707, which reformed the separate legislative institutions as one Parliament of the new nation of Great Britain.<sup>164</sup>

In an important recent book, Professor Alison LaCroix has argued that the Scottish model formed one of the conceptual foundations of both early notions of colonial independence and the federal system of divided sovereignty and authority across different levels and branches of government.<sup>165</sup> A vision of the “halcyon century” of Scottish legislative independence loomed large in revolutionary America, and indeed Wilson, Jefferson, and Adams made that precedent central to their insistence that, notwithstanding the allegiance owed to the Crown, their colonial legislative bodies were independent and not subject to parliamentary control.<sup>166</sup> For Wilson, Adams, Jefferson, and others, the question of Parliament’s power over the colonies was fundamentally about the possibility of divided sovereignty in a state, and two centuries of discussion over the relationship between Scotland and England before and after the Acts of Union formed the predicate for an alternative model to Blackstone’s assertions of legislative supremacy. The Scottish model helped the framers to see that supremacy and sovereignty, far from being monolithic, might be divided between the federal and state governments and between legislative, executive, and judicial branches of government.<sup>167</sup>

With this more complete background, we can better appreciate the influence of Blackstone and the Westminster model on the Constitution. The misgivings of Adams, Jefferson and Wilson confirm that Blackstone was not met with universal acceptance among the Founding generation, particularly on such subjects as sovereignty and parliamentary supremacy. Indeed, Dennis Nolan concludes that Blackstone had little direct impact upon the formation of the Constitution. According to Nolan’s careful study of Blackstone’s influence, the members of the federal convention used the *Commentaries*

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<sup>161</sup> For Blackstone and many others in England, the British constitution reached its zenith in the Glorious Revolution of 1688, which displaced forever the absolutist ambitions of the Stuart kings and erected in its place a model of parliamentary supremacy that achieved an ideal balance between the competing interests of the crown, the aristocrats, and commons. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 10–18 (1998 ed.); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 20 n.115 (1996) (citing 1 BLACKSTONE, *supra* note 7, at \*\*50–52, 154–55).

<sup>162</sup> LACROIX, *supra* note 38, at 25.

<sup>163</sup> See 4 WALKER, *supra* note 8, at 153–63.

<sup>164</sup> See *supra* notes 14–15 and accompanying text.

<sup>165</sup> LACROIX, *supra* note 38, at 24–29, 87–88, 120–124.

<sup>166</sup> *Id.* at 120. See *id.* at 24–29, 87–88, 120–124.

<sup>167</sup> *Id.* at 29.

less as a structural model or template, and more as a law dictionary.<sup>168</sup> Nolan observes, however, that because Blackstone was so widely read in the early republic and in the nineteenth century, his work had an “indirect and delayed” influence upon the lawyers and judges who were to interpret the Constitution.<sup>169</sup> “If we read the Constitution today as if it were written by Blackstone,” Nolan explains, “it is only because the Constitution has been interpreted by generations of judges trained on the *Commentaries*.”<sup>170</sup>

In fact, it was not until well after the adoption of the Constitution, in part through the efforts of Joseph Story and James Kent to create a uniform American private law jurisprudence modeled after the English common law,<sup>171</sup> that Blackstone attained his mythical status as expounder of the law as the framers understood it.<sup>172</sup> Because of the need for a stable and well-developed body of legal principles, American private law in the nineteenth century ultimately embraced and followed—with some modifications—the path laid down by the English common law.<sup>173</sup> Thus, when it came to the basic principles of property or contract law, Blackstone’s codification of the English common law claimed a dominant position in Americans’ understandings, which in turn fueled the assumption that Blackstone was equally important at the time of the Framing. But as we have seen, the framers felt free to depart from English structures; they not only distrusted the English, but they also shared the heady notion that they were crafting a government that would assimilate and improve upon the wisdom of the ages.

In other words, although *private* law continued down the common law path, the framers crafted a *public* law system that diverged materially from the model of the English constitution.<sup>174</sup> The American Revolution and the ensuing developments that led to the adoption of the Constitution caused a significant break with the home country’s conception of public law and government institutions. Daniel Hulsebosch has captured the spirit of careful and judicious selection that animated the Framing:

All participants alternated between embracing and recoiling from conventional wisdom, defining precedents and proposing innovations. . . . Noah Webster, the Federalist lawyer who later compiled the first American dictionary, warned that Americans should not receive indiscriminately the maxims of government, the manners and the literary taste of Europe and make them the ground on which to build our systems in America. Yet just as he did not abandon the English language, he did not jettison English law. There was a mixture of profound wisdom and

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<sup>168</sup> Nolan, *supra* note 60, at 745 (describing the framers’ consultation of Blackstone in a debate over whether the prohibition on ex post facto laws applied to civil or only criminal cases).

<sup>169</sup> *Id.* at 747.

<sup>170</sup> *Id.* at 747.

<sup>171</sup> See, e.g., Pound, *supra* note 67, at 682; *id.* at 692; HULSEBOSCH, *supra* note 65, at 277–94.

<sup>172</sup> See Nolan, *supra* note 60, at 744–47; Coquillette, *supra* note 69, at 323.

<sup>173</sup> DARGO, *supra* note 61, at 7–8 (“The American Revolution had a deep, abiding, and immediate impact on American public law. In terms of private law, however, its effects were less dramatic and direct.”); *id.* at 57; Jones, *supra* note 65, at 108 (“The American Revolution was receding into the past, and Blackstone, the Dr. Spock of early American law, had exerted his incomparable influence on American legal thought. To a lawyer brought up on Blackstone’s *Commentaries*, as practically all lawyers were in the frontier states, English law was almost the immutable law of nature, certainly nothing for a self-taught country lawyer to quarrel with.”).

<sup>174</sup> Waterman, *supra* note 60, at 652 (stating that Wilson “approved [Blackstone] outside the field of public law”).

consummate folly in the British constitution; a ridiculous compound of freedom and tyranny in their laws.<sup>175</sup>

While drafting the Constitution, the framers thus attempted to create a uniquely American system of government, one that borrowed from the English model but also improved upon it in important respects by looking to reason, experience, history, and legal and political theory.<sup>176</sup> One can see this selective borrowing, refinement, and rejection nicely illustrated in the many ways in which the constitution of the federal courts in Article III departed from the English model.<sup>177</sup>

At the time of the ratification, many commentators recognized the extent to which the Constitution's provision for federal courts differed from their English predecessors. The Anti-Federalist Brutus argued that in many respects, including the fusion of law and equity in the Supreme Court and provisions for judicial independence that dispensed with legislative review of judgments, the proposed federal courts "departed from almost every . . . principle of [English] jurisprudence."<sup>178</sup> In England, Brutus wrote, the courts were "on a very different footing."<sup>179</sup> Similarly, in attacking the proposal to lodge the power to decide cases in both law and equity in the Supreme Court, the Federal Farmer objected that "in the constitution of this supreme court, as left by the constitution, I do not see . . . a shadow of our own or the British common law."<sup>180</sup>

An illustration from St. George Tucker's influential republican edition of *Commentaries* nicely captures the gap between Blackstone and the conception of judicial power that found its way into the Constitution. Writing in response to Blackstone's assertion that the sovereign power lies in Parliament, the body that makes the laws, and that all other parts of the government "must conform to and be directed by it, whatever appearance the outward form and administration of justice may put on," Tucker argued that the Constitution stood as the expressed will of the sovereign people. Because the legislature was but one branch of that will, it could not alter the design of the judiciary outside the bounds created by the document.<sup>181</sup> According to Blackstone, it was "at any

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<sup>175</sup> HULSEBOSCH, *supra* note 65, at 215 (quotation marks omitted).

<sup>176</sup> *Id.* at 215 ("Hamilton declared that it was the 'glory of the people of America' that they had studied the 'opinions of former times and other nations' but had not allowed 'a blind veneration for antiquity, for custom, or for names, to overcome suggestions of their good sense, their knowledge of their own situation, and the lessons of their own experience.'"); *id.* at 215–216 ("The key was selectivity. Webster, like many Federalists, assumed that Europe's political culture was a museum, the old world an estate auction, and postrevolutionary Americans privileged curators. 'It is the business of *Americans* to select the wisdom of all nations,' he wrote, 'as the basis of her constitutions,—to avoid their errors, —to prevent the introduction of foreign vices and corruptions and check the career of her own . . .'). The presidency created by Article II, for example, rejects much of the English constitution and its embodiment in King George III. See Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 312–13 (2003).

<sup>177</sup> See McDONALD, *supra* note 72, at 228–235, 233, 240–249, 248, 253.

<sup>178</sup> Essays of Brutus, No. XV (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTIFEDERALIST [##, ##] (Herbert J. Storing ed., 1981)). See also *id.* No. XIV, Mar. 6, 1788, at [##] ("This [Supreme] Court is to have power to determine in law and in equity, on the law and the fact, and this court is exalted above all other power in the government, subject to no controul . . .").

<sup>179</sup> *Id.* No. XV, Mar. 20, 1788, at [##].

<sup>180</sup> Letters from the Federal Farmer, Letter III (Oct. 10, 1787), *reprinted in* 2 THE COMPLETE ANTIFEDERALIST, *supra* note 178, at [##, ##].

<sup>181</sup> 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. note A at 3–4 (1803) (quoting 1 BLACKSTONE, at \*49).

time in the option of the legislature to alter [the] form and administration [of justice] by a new edict or rule, and to put the execution of the laws into whatever hands it pleases.”<sup>182</sup>

According to Tucker, however, in the Constitution:

[T]he sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.<sup>183</sup>

Tucker’s argument suggests that the notion that a Supreme Court such as the one created by the Constitution could be understood only by reference to Blackstone is deeply flawed: for Blackstone, no court was truly supreme because every court was simply the outward manifestation of the supreme will of a sovereign Parliament. But for Tucker, the federal courts were an independent department of government with an institutional share of the sovereignty vested by the people. Blackstone cannot provide the sole reference for those seeking to interpret the constitutional relationship between Congress and the federal courts because his account of public law was rejected in large part by the framers.

We do not mean to disparage Blackstone’s importance or to downplay the influence of English institutions upon the American Constitution. Rather, we simply observe that forming a complete picture of the framers’ legal universe requires consideration of a wide variety of materials. Many voices contributed to the framers’ understanding of the law, and to focus exclusively on one may undercut our ability to understand the origins of the American judicial system. Perhaps, then, next to Justice Frankfurter’s statement one should place Thomas Jefferson’s statement that the *Commentaries*,

although the most elegant and best digested of our law catalogue, has been perverted more than all others, to the degeneracy of legal science. A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book, he is master of the whole body of law.<sup>184</sup>

The framers, unlike many of the young lawyers Jefferson meant to criticize, were not the legal offspring of Blackstone: many of them learned the law before his work came to America and, though they found his *Commentaries* edifying, they often ventured to disagree with him.

### III. ENGLAND, SCOTLAND, AND ARTICLE III

If Blackstone and Westminster did not stand alone as sources of the framers’ knowledge of law and legal institutions, and if Scottish institutions also brooked large in their thinking, then there may be some profit in exploring how the Scottish model informed the framing of the federal judiciary. In this part, we first sketch the institutional features of the English court system as a baseline for comparison. We next describe the

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<sup>182</sup> *Id.* at 3.

<sup>183</sup> *Id.* at 4.

<sup>184</sup> Nolan, *supra* note 60, at 749 (quoting Letter from Thomas Jefferson to Judge John Tyler, June 17, 1812, in 6 THE WRITINGS OF THOMAS JEFFERSON 66 (H. Washington ed. 1854)).

Scottish legal system as depicted in the widely read Kames treatise, *Historical Law-Tracts*. Then, we consider several ways in which prominent features of Scotland's judicial system, as secured by the Acts of Union, were duplicated in the framing of Article III.

A. *The English Legal System: A Brief Overview*

Although some English jurists of the eighteenth century aspired to hierarchy, and frequently spoke of King's Bench as the supreme court of the common law, England did not establish a hierarchical court system until much later.<sup>185</sup> In eighteenth-century England, the judicial power was divided among multiple superior courts of overlapping and coordinate jurisdiction.<sup>186</sup> There were three superior courts of common law, King's Bench, Common Pleas, and Exchequer, each with jurisdiction over claims throughout the realm. Meanwhile, the Court of Chancery handled cases in equity, the ecclesiastical courts managed family and probate law, and the High Court of Admiralty addressed matters that arose on salty water.<sup>187</sup> These coordinate courts exercised overlapping authority and competed with one another to expand their jurisdiction at the expense of the other courts.<sup>188</sup> Thus, King's Bench expanded its common law authority through the writ of trespass to poach on Common Pleas and Exchequer adopted the fiction that all debts are debts to the Crown to expand its authority over private litigation.<sup>189</sup>

King's Bench exercised a measure of supervisory oversight, but did not act as the supreme court of England with final authority over all judicial disputes. King's Bench clearly did have the power to oversee inferior tribunals; parties could seek the removal of criminal proceedings into King's Bench through a writ of certiorari.<sup>190</sup> Writs of mandamus and habeas corpus would oblige inferior jurisdictions to explain their

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<sup>185</sup> See 3 BLACKSTONE, *supra* note , at \*41 (labeling King's Bench "the supreme court of common law in the kingdom"); PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 2010 75–80, 140–41 (describing the view offered by Chief Justice Hale of the exalted role of King's Bench); PFANDER, *supra* note 7, at 26–27, 178–81 nn.1–21 (collecting accounts of King's Bench and its supervisory role); RITZ, *supra* note 3, at 33 (accepting the view that a modern, "hierarchical arrangement of appellate-review courts was established in England" in 1830, when the Court of Exchequer Chamber was made a mandatory intermediate court of appeal from the superior courts of common law). [describe the reforms of the 1830s, the judicialization of the House of Lords, and the ultimate creation of the English supreme court in 2005]

<sup>186</sup> See sources cited *supra* note 7.

<sup>187</sup> 3 BLACKSTONE, *supra* note 7, at \*\*37–56, 68–70. See also Thompson, *supra* note 57, at 411–21 (describing the jurisdiction in admiralty and maritime affairs). Although the jurisdiction of the High Court of Admiralty in England reached only matters at sea, on salty water, and in the "main stream of the great rivers" where the tide ebbed and flowed, Americans extended the jurisdiction to matters of waterborne commerce on fresh water streams and rivers, so long as they met a test of navigability. See STEVEN L. SNELL, *COURTS OF ADMIRALTY AND THE COMMON LAW* 400–13 (2007) (describing the difference in the scope of admiralty jurisdiction in England and in the United States). The jurisdiction of the admiralty courts was a source of frequent contention throughout English history, and expanded and contracted as various competing factions restricted or enlarged it on often questionable grounds. See Mathiasen, *supra* note 74. In the United States, [expand]

<sup>188</sup> 5 HOLDSWORTH, *supra* note 1, at 423 (3d ed. 1945); 1 HOLDSWORTH, *supra* note 1, at 227–228.

<sup>189</sup> See Konig, *supra* note 76, at 99–102; [See JOHN HAMILTON BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY*]; Thompson, *supra* note 57, at 35–42 (describing the origins of the three superior courts of common law and their jurisdictional competition).

<sup>190</sup> See de Smith, *supra* note 46, at 45–48.

inaction or their decision to imprison and writs of prohibition would compel lower courts to refrain from hearing matters outside their bailiwicks.<sup>191</sup> Nevertheless, the power of King's Bench to hear appeals and to supervise was somewhat haphazardly distributed: King's Bench could hear appeals from Common Pleas but not from Chancery or Exchequer. It could issue writs of prohibition to the ecclesiastical courts and to Admiralty (along with habeas corpus to test a petitioner's entitlement to personal liberty), but it could not issue writs of prohibition to Chancery.<sup>192</sup> The judicial separation that flowed from the absence of any oversight produced a conceptual separation as well; Blackstone and the English viewed common law and equity as distinct bodies of law<sup>193</sup> and Chancery as the only forum in which any equitable defenses or points of law might be raised.<sup>194</sup>

Two other institutions played judicial roles in England and helped to further complicate the picture. First, the Court of Exchequer Chamber, which began not as a fixed court but simply as a college made up of all the judges of the superior courts at Westminster, exercised some degree of oversight.<sup>195</sup> Occasionally, divisive legal questions in Chancery or in one of the other superior courts would be adjourned into Exchequer Chamber for collective deliberation and solemn resolution. English jurists viewed such decisions as the highest source of legal authority in the realm, and as providing a rule to govern the judicial disposition of the dispute by the court in question.<sup>196</sup> Such dispositions, however, were subject to the possibility of appeal to a second quasi-appellate judicial institution, the House of Lords. Exercising a portion of judicial power that remained as a vestige of the days when the High Court of Parliament would sit *curia regis* to hear petitions on a range of issues, in the eighteenth century the House of Lords would review matters by writ of error, but its forms were legislative and it was not constituted as a judicial tribunal until the 1830s.<sup>197</sup> In addition, the House of Lords enjoyed no general supervisory authority such as that wielded by King's Bench and the other superior courts.<sup>198</sup> Finally, although the decisions of the House of Lords controlled the resolution of the dispute on appeal, they were based on a vote of all the Lords (legally trained and otherwise) and thus enjoyed little precedential weight among the superior courts.<sup>199</sup>

Colonial Americans came into contact with English judicial forms in one more way: by prosecuting appeals from their own courts to the Privy Council in London. With the demise of Star Chamber in the seventeenth century, the Privy Council lost its judicial

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<sup>191</sup> 1 HOLDSWORTH, *supra* note 1, at 226–231. For a description of the various writs, see generally de Smith, *supra* note 46.

<sup>192</sup> [cite].

<sup>193</sup> 3 BLACKSTONE, *supra* note 7, at \*\*429, 441.

<sup>194</sup> KAMES, *supra* note 9, at 50.

<sup>195</sup> PFANDER, *supra* note 7, at 40–41. The Court of Exchequer Chamber began life as a common law college of jurists and was later formalized in a series of statutes enacted in the fourteenth, sixteenth, and nineteenth centuries. The 1830 reforms created a single court as an intermediate appellate body between King's Bench and the House of Lords. See Thompson, *supra* note 57, at 428–29.

<sup>196</sup> *Id.* at 41, 191 n.97 (citing TFT PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 162–63, 347–48 (5th ed. 1956)).

<sup>197</sup> 1 HOLDSWORTH, *supra* note 1, at 376–77; Thompson, *supra* note 57, at 432–45.

<sup>198</sup> See Pfander, *Jurisdiction Stripping*, *supra* note 42.

<sup>199</sup> [cite].



role in matters domestic to England.<sup>200</sup> Nevertheless, it retained judicial authority in cases coming from the colonies, assessing local decisions and colonial legislation to determine if they were repugnant to British law.<sup>201</sup> Privy Council review entailed an element of hierarchy; it proceeded on the assumption that the Council had the final word on the matter under review and that the colonial courts were duty-bound to carry its decrees into effect. Professor Mary Sarah Bilder has described repugnancy review by the Privy Council as an important precursor to the eventual development of the institution of judicial review in the United States.<sup>202</sup>

From an American vantage point, then, perhaps as many as three different institutions could claim to act as the supreme court of England. King's Bench played that role with respect to many features of domestic litigation, exercising a supervisory power over lower courts that Blackstone described as high and transcendent.<sup>203</sup> Yet the decisions of King's Bench, at least outside the supervisory context, were subject to further review in the Court of Exchequer Chamber or in the House of Lords, an institution that was sometimes characterized as the highest court in the realm.<sup>204</sup> As for matters that originated in the colonies themselves, Privy Council served as the court of final jurisdiction (though it proposed to apply the law of the colonies themselves, rather than some uniform body of continental or imperial law)<sup>205</sup>. No court, however, sat alone at the top of the heap.

### B. *The Scottish Legal System Through the Eyes of the Framers*

A very different model existed to the north of Newcastle. In *Historical Law-Tracts*, a work that has gone unremarked by latter-day students of the federal judiciary in the United States, Lord Kames provided a comprehensive view of the Scottish court system and of the jurisdiction of the Court of Session, Scotland's one supreme civil court. The Court of Session stood at the zenith of the judicial system as the only supreme court of civil jurisdiction (a closely related High Court of the Justiciary served as the supreme court in criminal matters).<sup>206</sup> In addition to a robust original jurisdiction over suits for

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<sup>200</sup> 1 HOLDSWORTH, *supra* note 1, at 479; Thompson, *supra* note 57, at 445–51.

<sup>201</sup> *Id.* at 516, 520–22; BILDER, *supra* note 160, at 1–4; *see also* Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 464–72 (2010) (describing Privy Council's dual function as a court of appeals reviewing decision of colonial courts and as a "council of revision" reviewing colonial legislation for repugnancy).

<sup>202</sup> BILDER, *supra* note 160, at 1–4.

<sup>203</sup> 3 BLACKSTONE, *supra* note 7, at \*42; *see also* 1 HOLDSWORTH, *supra* note 1, at 212 (relaying Coke's statement that the judges of King's Bench "are called *capitals* in respect of their supreme jurisdiction, and *generales* in respect of their general jurisdiction throughout England" (quoting Coke, Fourth Instit. 75)).

<sup>204</sup> Chief Justice Hale's statements on Parliament reflect the contradictions and tensions inherent in the English judicial system. According to Hale, "[t]he Parliament [was] the high and supreme court of this kingdom." Yet it possessed a double jurisdiction, "supreme, consisting in the whole Parliament, and a subordinate, ordinarily exercised in the House of Peers." To the latter belonged a "peculiar jurisdiction, though not the supreme, yet superior to any other courts." Halliday, at 218.

<sup>205</sup> [cite].

<sup>206</sup> KAMES, *supra* note 8, at 329. The Court of Session consisted of fifteen judges, the Lord President and fourteen Ordinary Lords, and an inner and outer chamber. One of the Lords Ordinary sat on a rotating basis in the Outer House, taking evidence and deciding preliminary points and less important cases, while all of the judges sat together in the Inner House (called a gathering of the "haill fifteen") to hear important cases and questions referred from the Outer House. *See* ROSS, *supra* note 116, at 121–28; WHITE &

damages, the Court of Session reviewed decisions from inferior courts. Significantly, all inferior courts of civil jurisdiction were subject to its review, including both the common law sheriff and baronial courts and the admiralty and ecclesiastical courts.

As for the mode of review, the Court of Session initially relied on the appeal,<sup>207</sup> a proceeding familiar to civil law countries, which Scotland to an extent was.<sup>208</sup> By Kames' time, however, the court had come to conduct review primarily through the home-grown supervisory processes of advocacy, suspension, and reduction.<sup>209</sup> As Kames described them, these three extraordinary processes served a function similar to that of the prerogative writ system in England. Kames equated advocacy with the writ of certiorari: when the Court of Session issued an advocacy, it called up to itself a case from an inferior court and then proceeded to try the case or review the decision of the lower court.<sup>210</sup> Suspension and reduction worked somewhat like the writ of prohibition: a reduction set aside the decree of a lower court, while an accompanying suspension prohibited the lower court from executing a judgment during the period of review.<sup>211</sup>

Another feature of the Court of Session provides an important distinction with the English model. Unlike the system in England, which viewed law and equity as separate remedies to be administered in separate courts, the Court of Session had the power to administer both remedies in a single case.<sup>212</sup> Scotland thus had no Court of Chancery to jostle with the common law courts for jurisdiction. According to Kames, the Session inherited the power to decide cases in equity by virtue of its supremacy: upon assuming the position of the Scottish Privy Council, the Court of Session used its extraordinary powers—called its *nobile officium*—to fashion new remedies where necessary to achieve justice.<sup>213</sup> Because all roads led to the Court of Session as the supreme civil court, that court necessarily required the ability to administer justice in whatever outward form a case took on.

Two courts acted outside the supervisory purview of the Court of Session. First, the High Court of Justiciary served as the supreme and final court in criminal cases.<sup>214</sup> Second, the Court of Exchequer, which was established after the union with England in 1707, used English law and was reviewable only by the English Court of Chancery and the House of Lords of Great Britain in order to facilitate uniform decisions on revenue cases throughout the kingdom.<sup>215</sup> An exchequer court of the English variety was unknown to Scotland before the Acts of Union, and was viewed with suspicion in

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WILLOCK, *supra* note 14, at 31. On the origins of the Court of Session, which was created by an act of (the Scottish) Parliament in 1532, see John W. Cairns, *Revisiting the Foundations of the College of Justice*, 52 STAIR SOC'Y 27 (2006). Although some historians have contended that the Session was created primarily as part of a complex stratagem to tax the Catholic Church, Professor Cairns has concluded that the evidence favors the view that its creation actually represented a conscious policy choice on the part of Scottish leaders. *Id.* at 37.

<sup>207</sup> See KAMES, *supra* note 8, at 383–95.

<sup>208</sup> See Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997).

<sup>209</sup> KAMES, *supra* note 8, at 385.

<sup>210</sup> *Id.* at 395.

<sup>211</sup> For a description of these processes, see 4 D.M. WALKER, PRINCIPLES OF SCOTTISH PRIVATE LAW 271–274 (1988); ROSS, *supra* note 116, at 123–24.

<sup>212</sup> KAMES, *supra* note 9, at 50; ROSS, *supra* note 116, at 223.

<sup>213</sup> KAMES, *supra* note 8, at 325; ROSS, *supra* note 116.

<sup>214</sup> ROSS, *supra* note 116, at 18.

<sup>215</sup> 5 WALKER, *supra* note 8, at 470.

Scotland as a foreign institution.<sup>216</sup> The House of Lords also heard appeals from the Court of Session from 1708, another English imposition after the Acts of Union. Prior to the union, litigants possessed only a limited ability to protest to the Scottish King and Parliament for a remedy of a decision of the Session, an avenue of review which had only been instituted in 1689, and which many maintained was confined to inquiring into excess of jurisdiction or judicial corruption.<sup>217</sup> In addition, many observers questioned the extent to which the Acts contemplated appellate review by the British House of Lords, and even after such review was assumed, the decisions of the House of Lords remained unpublished and without binding precedential value in Scottish courts.<sup>218</sup>

The Scottish court system thus provides an eighteenth-century model of a hierarchical judiciary that closely resembled the perfect judicial pyramid described by James Wilson in his lectures. Multiple inferior courts spread throughout the kingdom conducted much of the judicial business in civil cases in the first instance. These courts were in turn regulated by either the Court of Session or, in admiralty actions, the intermediate High Court of Admiralty and then the Court of Session. In addition, even where separate remedies or types of action were administered in separate inferior courts, supervisory review of all such civil causes merged in the Court of Session. As we shall explain, many of the important features of the Court of Session and the Scottish judicial system were replicated in the United States Constitution. The next section of this part explores in more detail the way the structure of the federal judiciary in Article III came to resemble the Scottish model.

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<sup>216</sup> ROSS, *supra* note 116, at 17.

<sup>217</sup> See 5 WALKER, *supra* note 8, at 445 ; Ford, *supra* note 14, at 123.

<sup>218</sup> See Cairns, *supra* note 23, at 29; Ford, *supra* note 14, at 124–28; 5 WALKER, *supra* note 8, at 446. In a careful analysis of the origins of the process of “remeid of law,” J.D. Ford has shown that litigants often relied on protests to the Scottish Parliament as a way to challenge decisions of the Court of Session during the run-up to the union with England. See Ford, *supra* note 20, at 84–99 (2009) (describing some fifty cases in which litigants sought review in the Scottish Parliament between 1690 and 1707). Ford traces the growth of the practice to the Claim of Right (1689), which proclaimed it to be the right and privilege of the nation’s subjects to protest for “remeid of law” against sentences pronounced by the Court of Session. *Id.* at 57. During previous, failed negotiations on a potential union between England and Scotland in 1604 and 1670, Scottish commissioners had insisted that parliamentary review of court judgments be foreclosed because it was unknown in Scotland. By the time of the 1707 union, however, protests for remeid of law to the unicameral Scottish Parliament had become a recognized feature of their legal system, likely making the prospect of House of Lords review more palatable. See Ford, *supra* note 14, at 122–23. Although the Acts of Union did not expressly provide for a shift of this practice from the Scottish Parliament to the British Parliament, it did not foreclose such a shift in terms. Litigants dissatisfied with the Court of Session’s rulings naturally filed appeals with the House of Lords, the only parliamentary game in town following the post-union abrogation of the Scottish Parliament. *Id.* at 99–103. One can argue that this development violated the spirit of the Acts of Union, which foreclosed appellate review of Scottish decisions by English courts sitting in Westminster Hall. But one can also argue that the Acts of Union implicitly invited such review by saying nothing to foreclose appeals to the House of Lords (which did not meet in Westminster Hall). See Ford, *supra* note 20, at 98–99. Ford reports that although decisions of the House of Lords on appeal from the Session were conclusive on the parties, they were not regarded as good law in Scotland on the legal points in issue until much later. See *id.* at 105–07 (noting that Scottish lawyers in the post-union years of the eighteenth century viewed appellate decisions as having “no bearing on the development of [Scots] law”). Elsewhere, Ford has conjectured that this outlook grew from the fact that the prior remeid of law was meant to check individual judicial corruption rather than to alter substantive law. As such, after the union the House of Lords was meant to apply, not change, the preexisting law of Scotland. See Ford, *supra* note 14, at 140.

### C. *Constitutional Status for the Federal Courts*

The framers readily agreed that the Constitution should include provisions for an independent judiciary. That familiar decision, now enshrined in Article III's declaration that the judicial power was to be vested in one supreme and perhaps several inferior federal courts, represented an important departure from the English model. In England, the courts enjoyed no special constitutional status. They had arisen through the exercise of royal prerogative, growing up over time and enjoying a customary jurisdiction that ebbed and flowed with the jurisdictional pretensions of their various judges and the oversight of the Crown.<sup>219</sup> In the early seventeenth century, the Courts of King's Bench and Chancery conducted their well-known feud over the boundaries between law and equity; eventually, King James I intervened to umpire the relative authority of the two tribunals.<sup>220</sup> Although the English courts rose in stature and gained a measure of independence from the Crown during the course of that eventful century, they remained subject to broad parliamentary oversight and control, including review by the House of Lords. Perhaps not surprisingly, then, when Montesquieu wrote his famous discourse on the separation of powers, he treated the judiciary as an agency of the executive power, rather than as an independent branch or power of government.<sup>221</sup> More immediately for the framers, prior to the Revolution the colonial courts had been merely functionaries of the royal will: the Crown used the prerogative to create the colonial courts, appointed and removed colonial judges at will and subjected their decisions to review in the Privy Council.<sup>222</sup>

In Scotland, by contrast, the judicial system enjoyed a measure of constitutional protection, dating from the Acts of Union in 1707, that guaranteed the courts a degree of departmental independence both from the Crown and from Parliament. As we have explained, England and Scotland had been united through allegiance to a common monarch since 1603, but had remained separate nations with independent Parliaments and governments. After the English Civil War and the Glorious Revolution of 1688, England and Scotland appointed commissioners to negotiate terms for a merger of the two nations.<sup>223</sup> These terms evolved into a Treaty of Union and were memorialized by the

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<sup>219</sup> [cite]. As an example, see the description of the incessant creation, abolition, and remodeling of the English admiralty courts by the Tudor kings and their predecessors in R.G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 24 ENG. HIST. REV. 675 (1909).

<sup>220</sup> For an account of the face-off between Coke and Bacon, see John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on Chancery in 1616*, 36 ILL. L. REV. 127 (1941).

<sup>221</sup> See M. DE SECONDAT, BARON DE MONTESQUIEU, 1 SPIRIT OF LAWS, book 11, ch. 6 (treating the judicial power as one of the two elements of the executive power); see generally M.C.J. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 28–30 (1967) (describing Montesquieu's treatment of the judicial and executive powers). Montesquieu primarily understood the judicial power as being exercised by the jury. Cf. Jack Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1063–64 (2007) (describing Montesquieu as longer on theory than on descriptive accuracy).

<sup>222</sup> Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 282–84 (2009); LaCroix, *supra* note 201, at 451, 467–70 (2010). On the nature of colonial courts and the demand for independent judiciaries following statehood, see [cite].

<sup>223</sup> For an account of the "management" of the Scots Parliament by representatives of the Crown urging ratification of the Union, see Karin Bowie, *Publicity, Parties, and Patronage: Parliamentary Management and the Ratification of the Anglo-Scottish Union*, in THE UNION OF 1707: NEW DIMENSIONS 78, 91–92

English and Scottish Parliaments in what scholars know today as the Acts (or Act) of Union of 1707. Most of the articles of the Acts of Union, which dissolved the two previous parliaments and created a new Parliament of Great Britain,<sup>224</sup> addressed such matters as commerce, trade, and guarantees for the Scottish aristocracy.<sup>225</sup> But in addition to these provisions, the Acts of Union included an article devoted entirely to the preservation of the hierarchical structure of the Scottish court system. Article XIX—which has, like many of the other materials considered in this Article, yet to enter the canon of federal jurisdiction scholarship in the United States—secured the position of the Scottish courts, particularly the Court of Session, from English interference. (The Scots understood that they were to be a minority in the newly formed Parliament of Great Britain.)

The terms of Article XIX aimed to confer constitutional status on the Court of Session, making it in some measure immune from the otherwise unchecked power of Parliament.<sup>226</sup> Remarkably, as we explore in more detail below, many of the article’s specific provisions and concepts appear to have informed the drafting of Article III. But perhaps the most important idea expressed in the Acts of Union was that of using structural guarantees to secure the judicial system from Parliament’s oversight and control. The judicial article of the Acts of Union begins by declaring that the Court of Session will “remain in all time coming within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Privileges as before the Union, subject nevertheless to such Regulations for the better Administration of Justice, as shall

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(Stewart Brown & Christopher A. Whatley eds., 2008) (describing the use of public arguments and such private incentives as secret payments and promises of post-union offices to secure majority support in the Scottish Parliament for implementation of the union). As Professor Whatley has noted, however, many Scots saw the union as providing political and financial benefits to Scotland, and the portrayal of the negotiations as the outcome of an “uneven contest between an all-conquering England on the one side and a defenceless Scotland, united in opposition, on the other is less persuasive now than it may have been [previously].” Christopher A. Whatley, *The Issues Facing Scotland*, *in id.* at 18.

<sup>224</sup> Acts of Union (1707), *supra* note 15.

<sup>225</sup> Cairns, *supra* note 23, at 26.

<sup>226</sup> The precise legal status of the provisions of the Acts of Union, and the ability of courts to invalidate acts of Parliament in violation of it, have been the subject of much debate continuing to the present day, but the Acts of Union at the very least possesses something approaching constitutional status. *See* sources cited *supra* notes 16–17. Professor Mitchell’s detailed examination of the subject leads to no firm conclusions, though he does note that the notion of unchecked parliamentary supremacy had by no means solidified by 1707, and is more likely the product of trends in the later-eighteenth and the nineteenth centuries:

[I]t is not clear that in 1707 either that the English Parliament was accepted as “sovereign” in the sense in which the word is now used or that, alternatively, the Scottish Parliament could not, in legal theory, be said to be as “sovereign” then as was the English one. It is more probable that, in the modern acceptance of that term, the doctrine, if it exists, is a post-Union development closely linked with the ideas underlying the reforms of 1832. It is certainly possible that as constituent documents the Acts of Union could have imposed limitations, and it is equally clear that some of those responsible for them hoped so to do.

MITCHELL, *supra* note 17, at 70. Pronouncements of the Court of Session in the twentieth century have treated some of the provisions of the Acts, such as limits on changes to Scottish private law unless for the “evident utility” of the people of Scotland, as essentially non-justiciable. *See id.* at 86; Edwards, *supra* note 17, at 35. That said, some members of the court, in their separate opinions, expressly reserved the question of whether an alteration of the Court of Session itself that violated the Acts could be struck down. *See* MITCHELL, *supra* note 17, at 86–87; Edwards, *supra* note 17, at 35.

be made by the Parliament of Great Britain.”<sup>227</sup> The phrasing is significant: the assurance that the Court of Session was to remain as presently “constituted” in “all time coming” was evidently meant to ensure against parliamentary remodeling.<sup>228</sup> In other words, the Acts of Union attempted to insulate the Scottish court system from the threat that ordinary legislation could pose to its independence, structure, or jurisdiction.

In a second important feature, the Acts of Union specify and qualify legislative power over the Scottish court system. The Acts reject the tradition of royal control that characterized the English court system and colonial courts; it deposits the power to make regulations and alterations for the better administration of justice in the “Parliament of Great Britain,” subject however to a number of qualifications. In the Constitution, Article III (and Article I) followed this approach, depositing the power to ordain and establish lower federal courts (and the power to constitute inferior tribunals) in the Congress of the United States and thus implicitly disavowing any role for the President in the creation or reshaping of the judicial system beyond the appointment power.<sup>229</sup> Significantly, although the framers looked to some of the reforms introduced by Parliament in England to secure the independence of judges (such as life tenure), they ultimately chose to reject both the despised colonial system and the English model of complete parliamentary control. Instead, they adopted the system prefigured by the Acts of Union of legislative organization subject to constitutional safeguards, a system designed to ensure the independence of the judicial department.<sup>230</sup>

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<sup>227</sup> Acts of Union (1707), art. XIX.

<sup>228</sup> Mitchell has cautioned against reading too much into the phrase “in all time coming,” given that such terminology was used with some frequency by the Scottish Parliament. MITCHELL, *supra* note 17, at 70. The standard position among most English scholars today adopts Dicey’s view of “the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body.” DICEY, *supra* note 12, at 62. All the same, Mitchell observes that the importance Scots have ascribed to the phrase and its specific use in the Acts to protect central institutions and Scottish equality are of no mean significance. MITCHELL, *supra* note 17, at 70 & n.34; *see also* Ford, *supra* note 14, at 128–39 (providing an extended discussion of the degree to which the Scots viewed the Acts of Union as immutable by future acts of the British Parliament).

<sup>229</sup> See Pfander, *Article I Tribunals*, *supra* note 37, at 649 n.16 (quoting St. George Tucker, who celebrated the framers’ decision to assign the court-making power to Congress and decried prerogative courts as “engines of oppression and tyranny”); Reinstein, *supra* note 222, at 282.

<sup>230</sup> The framers were deeply familiar with the provisions of and circumstances surrounding the Acts of Union; John Jay, for example, made a discussion of the Acts one of the central features of *The Federalist* No. 5. *See* Akhil Amar, *Abraham Lincoln and the American Union*, 2001 U. Ill. L. Rev. 1109, 1124. Indeed, Scotland’s political experience played a central role in the ideology underlying the Revolution and the Framing. *See* LACROIX, *supra* note 38, at 24–29, 87–88, 120–24; Konig *supra* note 38. Significantly for our purposes, the entirety of the Acts was reproduced in *Statutes at Large*, a collection of English and British statutes from the Magna Charta onwards. *Statutes at Large* was part of the library made available to the delegates to the Federal Convention, and thus would have been at the fingertips of Wilson and others. *See* A CATALOGUE OF THE BOOKS, BELONGING TO THE LIBRARY COMPANY OF PHILADELPHIA, *supra* note 125. According to Edwin Wolf:

The offer of the use of the collections [to the 1st Cont. Congr.] was renewed when the Second Continental Congress met the following spring, and again when the delegates to the Constitutional Convention met in 1787. In fact, for a quarter century, from 1774 until the national capital was established in Washington, D.C., in 1800, the Library Company, long the most important book resource for colonial Philadelphians, served as the de facto Library of Congress before there was one de jure. Unfortunately, no circulation records for the period exist, so we can never know which delegate or congressman borrowed or consulted what work. But virtually every significant work on political theory, history,

Third, the Acts of Union anticipate Article III in conferring only a qualified power on Parliament to reshape the Court of Session. Although Parliament could “regulat[e]” the Court of Session to improve its administration, it was given no power to make any “alterations” in its power and authority. That omission appears quite significant in view of the fact that Article XIX elsewhere recognizes the power of Parliament to make “regulations” of and “alterations” to the jurisdiction of other Scottish courts, including the High Court of Admiralty. In addition, Article XIX explicitly required that all inferior courts in Scotland “remain subordinate as they are now to the supream courts [of Session and Justiciary] for all time coming,” thus ensuring that Parliament’s regulations would not disturb the Session’s supremacy over subordinate inferior courts.

Seemingly, then, Article XIX anticipates the Exceptions and Regulations Clause of Article III and its provision for qualified legislative control of the Supreme Court’s appellate jurisdiction. Just as Article XIX allows housekeeping rules for the better administration of justice, and omits any authority to make more far-reaching alterations to the Court of Session, so too does Article III confer a qualified power on Congress to fashion exceptions to and regulations of the Supreme Court’s appellate jurisdiction. All of the evidence suggests that this exception and regulations power was meant to authorize Congress to make federal justice more convenient by allowing lower courts to exercise final authority in many cases of modest significance.<sup>231</sup> The Necessary and Proper Clause confirms this conclusion, limiting Congress to legislation aimed at carrying the judicial power into execution and thus obliging Congress to act for the better administration of justice.<sup>232</sup> Notably, as the next section emphasizes, nothing in Article III authorizes Congress to countermand the requirement that the Court remain supreme in relation to inferior tribunals.

#### IV. HIERARCHY, INFERIORITY, AND THE SUPERVISORY POWER

##### A. *Unity, Hierarchy, and Article III*

##### 1. One Supreme Court

In addition to building a constitutional foundation for an independent judicial system, the framers chose to create a hierarchical judiciary with “one supreme court” at

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law, and statecraft (and much else besides) could be found on the Library Company’s shelves, as well as numerous tracts and polemical writings by American as well as European authors. And virtually all of those works that were influential in framing the minds of the framers of the nation are still on the Library Company’s shelves.

EDWIN WOLF, *AT THE INSTANCE OF BENJAMIN FRANKLIN: A BRIEF HISTORY OF THE LIBRARY COMPANY OF PHILADELPHIA* (1976). See also John Adams Library, Search the Collection, <http://www.johnadamslibrary.org/book/?book=2221577Adams%2093.1%20v.9%20Folio> (listing *Statutes at Large* in John Adams’ library).

<sup>231</sup> See FEDERALIST NO. 81 (Hamilton) (describing the power to institute inferior courts and tribunals as obviating the necessity for recourse to the Supreme Court in every case involving federal law). For a good account of the role of geographic convenience in the framers’ decision to authorize Congress to fashion exceptions and regulations, see Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989).

<sup>232</sup> See Engdahl, *supra* note 31, at 103–04; Calabresi & Lawson, *supra* note 42, at 1041.

the top of the heap. The decision was taken in the course of early deliberations on the terms of the Virginia plan, which had provided that a “National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals.”<sup>233</sup> This resolution teed up the question whether to adopt the English model of multiple superior courts of overlapping and duplicative jurisdiction or to adopt the Scottish-style model of a pyramidal system. On June 4, 1787, the convention answered that question in favor of the unitary model, opting for the vesting of judicial power in a single supreme court and such inferior courts and tribunals as Congress might establish or constitute.<sup>234</sup>

In the past, one of us has argued that the framers of Article III made a deliberate decision to create a hierarchical judicial system, with one Supreme Court at the top of that system and such inferior courts and tribunals as Congress might choose to constitute, ordain, and establish down below. In particular:

The inferiority requirement of Article[s] I [and III] operates as a limit on the power of Congress and of the tribunals to which Congress assigns federal jurisdiction: such tribunals must remain subordinate to the Supreme Court as the head of the judicial department of the federal government. This requirement of subordination to the Supreme Court may oblige inferior tribunals to give effect to the Court's precedents and submit to some form of supervisory oversight and control. While Congress may regulate the Court's appellate jurisdiction [under the Exceptions and Regulations Clause], it may not place inferior tribunals beyond the Court's supervisory authority as the Supreme Court of the United States. . . . Article I specifically states that any tribunals must remain inferior “to” the Supreme Court--a formulation that suggests subordination as the likely meaning of the provision.<sup>235</sup>

On such a view, which is sometimes called the supervisory account, inferior federal courts have wide authority to decide cases finally without being subject to as-of-right review, but must remain subject to the supervisory jurisdiction of the Supreme Court, which maintains its supremacy not through direct review in every case, but through discretionary intervention when necessary. Other scholars have expressed sympathy for this conception of the significance of a unitary and pyramidal judicial system.<sup>236</sup>

The English model of overlapping and coordinate superior courts was well known to the framers, and led to familiar problems. Two consequences flowed from the absence of a single judicial head. First, courts of overlapping jurisdiction competed for business with one another, indulging fictions to expand their jurisdiction.<sup>237</sup> King’s Bench, for example, adopted the fiction that all claims amounted to a trespass, whereas the Court of Exchequer treated all debts as owing to the Crown.<sup>238</sup> Second, judges would contend over which tribunal’s judgment was decisive of a dispute that touched the jurisdiction of

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<sup>233</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95, 104–05 (Max Farrand ed., rev. ed. 1996) [hereinafter FARRAND’S RECORDS].

<sup>234</sup> 1 FARRAND’S RECORDS, *supra* note 233, at 95, 104–05.

<sup>235</sup> Pfander, *State Court Inferiority*, *supra* note 42, at 199–200; *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817, 828–34, 867–69 (1994) (interpreting inferiority as a duty to follow precedents).

<sup>236</sup> *See, e.g.*, Calabresi & Lawson, *supra* note 42; Claus, *supra* note 42.

<sup>237</sup> *See* Pfander, *Judicial Compensation*, *supra* note 53, at 10–11.

<sup>238</sup> On the use of legal fictions in the English courts, *see* Konig, *supra* note 76, at 99–102.



two or more courts. As a result, King’s Bench and Chancery often heard the same dispute and often disagreed as to which court’s judgment should take precedence.<sup>239</sup> The dispute between Lord Coke and his adversaries Lords Bacon and Ellesmere illustrated the unfortunate consequences of festering jurisdictional conflicts.<sup>240</sup> We believe that, in choosing to avoid the nettlesome problems arising from the English-style dispersal of jurisdictions, the framers made a significant decision to emphasize uniformity through final review in a single court of last resort, a decision that creates a framework within which to interpret Article III.

Despite the well-known difficulties with the English system, however, some scholars have argued that Article III contemplates the creation of a national judiciary that, as under the Westminster model, could have included multiple superior courts with final review over a large amount of federal judicial business. Professor David Engdahl, relying upon the system of coordinate superior courts used in England and many of the states, has contended that inferior courts were simply those whose geographic or subject matter jurisdiction was more limited than that of supreme or superior courts.<sup>241</sup> According to Professor Engdahl, when James Wilson stated in his law lectures that a proper judiciary should resemble a pyramid, he was not describing judicial systems of the day, but was instead advocating for fundamental change.<sup>242</sup> Consequently, for Engdahl the hierarchical federal judicial department we know today emerged by historical accident rather than from the plan of the Convention.<sup>243</sup> Congress would have been free, on this view, to implement Article III with a system of multiple supreme courts. Professor Ritz provides important support for Engdahl’s position, contending that none of the court systems with which the framers were familiar featured a hierarchical judicial structure with a single supreme court that exercised predominantly appellate jurisdiction.<sup>244</sup> At the center of these arguments lies the notion that the framers simply had no hierarchical model upon which to draw in fashioning the judiciary, and therefore had little—if any—expectation for a hierarchical federal judicial system. As such, the arguments go, the choice of a single supreme court was a relatively trivial one with few implications for our understanding of Article III.

In contrast to the English model emphasized by Engdahl and Ritz, however, the Scottish judiciary featured all of the elements of hierarchy that one finds in Article III. The Scottish Court of Session was known as the “supream” (as an adjective rather than as a title) civil court of Scotland,<sup>245</sup> and was so described in *Historical Law-Tracts, Principles of Equity*, and in the Acts of Union. As we shall explore below, the supremacy of the Court of Session consisted of three features: its power to supervise the work of inferior courts, its own freedom from oversight or supervision, and its power to decide all civil causes regardless of whether the cause arose in law, equity, or admiralty.

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<sup>239</sup> [cite]

<sup>240</sup> For background on this dispute, see generally 5 HOLDSWORTH, *supra* note , at 423–41.

<sup>241</sup> Engdahl, *supra* note 34, at 466–72. On the influence of Engdahl and Ritz, see DANIEL J. MEADOR, ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 14-21 (2d ed. 2006) (quoting Ritz and Engdahl at length in describing the origins of the federal judiciary).

<sup>242</sup> Engdahl, *supra* note 34, at 463.

<sup>243</sup> Engdahl, *supra* note 34, at 503–04.

<sup>244</sup> See RITZ, *supra* note 3, at 33–41.

<sup>245</sup> Acts of Union (1707), *supra* note 15, art. XIX.

Indeed, important structural provisions in Article XIX of the Acts of Union were designed to safeguard the traditional hierarchy of the Scottish judiciary, preserving supervisory review by the Court of Session and protecting the Session itself from supervision. To be sure, the British House of Lords assumed the power to conduct writ of error review of the Court of Session from 1708 onwards. But whatever the bona fides of the practice of appellate oversight by the House of Lords, the treaty had expressly ruled out a much more intrusive form of judicial review. Article XIX expressly prohibits the courts at Westminster from reviewing any judgment of the Court of Session or other Scottish court: “[N]o Causes in Scotland [shall] be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas, or any other Court in Westminster-hall; and that the said Courts, or any other of the like Nature, after the Union, shall have no Power to cognosce, review, or alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same.”

This limitation accomplishes two things: First, it confirms the linkage between the supremacy of the Court of Session and its finality, preventing English courts from subordinating the Session by subjecting it to any form of review. Second, the provision equates supremacy with hierarchy; by prohibiting interference by the Westminster superior courts with any inferior jurisdiction in Scotland, the Acts of Union forestalled parliamentary or judicial circumvention of the Session’s supervisory role and ensured that the Session’s supremacy with respect to the Scottish inferior civil courts would remain intact. Combined with its guarantee that all inferior courts within the realm would remain “subordinate to the supream court[]” of Session, the Acts of Union gave voice to an understanding of the importance of unity, finality, supremacy, and inferiority to the workings of a hierarchical judicial system, concepts that ultimately found expression in Article III.

## 2. The Joinder of Law, Equity and Admiralty

For example, the Scottish background likely informed an important but heretofore inscrutable episode from the Federal Convention: the combination of jurisdiction over cases in law and equity in the Supreme Court, a combination that implemented—at least as a practical matter—unity as a defining feature of the federal judicial system. In contrast to the English model of divided jurisdictions, Article III ultimately extended the judicial power of the United States to “all Cases, in law *and* equity,” and to “all Cases of admiralty and maritime jurisdiction.”<sup>246</sup> The former phrase arose out of a proposal by William Samuel Johnson of Connecticut, regarded by his contemporaries as one of the foremost authorities on law among the framers.<sup>247</sup> Madison’s notes describe the episode as follows: “Doctr. Johnson suggested that the judicial power ought to extend to equity as well as law—and moved to insert the words ‘both in law and equity’ after the words ‘U.S.’ in the 1st line of sect. I.”<sup>248</sup> One delegate, George Read of Delaware, “objected to vesting these powers in the same Court,” but the motion passed with the approval of both

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<sup>246</sup> U.S. CONST. art. III, § 2 (emphasis added).

<sup>247</sup> GROCE, JR., *supra* note 75, at 148–49.

<sup>248</sup> 2 FARRAND’S RECORDS, *supra* note 233, at 428 (Aug. 27).

the Virginia (Madison) and Pennsylvania (Wilson) delegations.<sup>249</sup> The Convention records provide no further information about why the phrase was proposed or why the delegates voted in favor of it. Moreover, the structural choice has received little scholarly attention, perhaps in part because, like the switch to a unitary supreme court, it seemed to have no analogue in the Westminster model.<sup>250</sup>

Yet our evidence demonstrates that the framers were deeply familiar with a Scottish court that blended law and equity, as well as with a lengthy debate across the Atlantic regarding the merits of a unitary court system. This debate centered to a large degree on the reasoning of Lord Kames. In the Introduction to his widely read *Principles of Equity*, Kames made an extensive case for the unitary model of his own court.<sup>251</sup> Kames recognized that courts should be careful to remember in which mode they were proceeding and not to let the rules of equity and law become too intertwined. But he argued that the Scottish system was superior because it avoided both the complexity of multiple proceedings and the unjust results often dictated in English courts by their inability to administer certain forms of relief and to entertain certain claims and defenses.<sup>252</sup>

Although Kames's argument met with mixed praise in England,<sup>253</sup> it found a more receptive audience in an America that saw no reason to duplicate the complexity (or expense) of the courts of Westminster.<sup>254</sup> In 1785, while giving his advice on how to structure the constitution of the aborning state of Kentucky, James Madison expressly referred to *Principles of Equity*:

With regard to a Court of Chancery as distinct from a Court of Law, the reasons of Lord Bacon on the affirmative side outweigh in my Judgment those of Lord Kaims on the other side. Yet I should think it best to leave this important question to be decided by future lights without tying the hands of the Legislature one way or the other. I consider our country

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<sup>249</sup> 2 FARRAND'S RECORDS, *supra* note 233, at 428 (Aug. 27). On the political controversies provoked by courts of equity in colonial America, see Katz, *supra* note 68.

<sup>250</sup> At the time, many Anti-Federalists decried the vesting of law and equity in a single court as both unprecedented and as a failure to adhere to the English model. See, e.g., HULSEBOSCH, *supra* note 65, at 215; Essays of Brutus, *supra* note 178, No. XV (Mar. 20, 1788), at [##]; *id.* No. XIV (Mar. 6, 1788), at [##]; *id.* No. XIII (Feb. 21, 1788), at [##]; Letters from the Federal Farmer, *supra* note 180, Letter III (Oct. 10, 1787), at [##]; Journal Notes of the Virginia Ratifying Convention Proceedings, June 21, 1788, <http://www.consource.org/index.asp?bid=582&documentid=5141>. As we shall explain, the Constitution indeed extended Scottish notions of unity and finality beyond their expression in the existent Scottish court system. That said, the failure of the Anti-Federalists to refer to the Court of Session and of the Federalists to mention it in response raises some concern about the soundness of our thesis that the Scottish system was well known in America. In some quarters, however, there existed a popular hostility to Scotland and the Scots, who often served as mercenaries during the Revolution and whom many viewed as opposed to American independence. This hostility may explain the paucity of references to Scottish law during ratification and the readiness of Anti-Federalists to cast Article III as unprecedented. [cite]. In any event, in our view the solid evidence demonstrating that the framers and others with legal knowledge, such as Jefferson and Adams, were familiar with the Scottish model stands up quite nicely to the unanswerable question of the motivations behind statements made during the heavily politicized ratification debate.

<sup>251</sup> KAMES, *supra* note 9, at 44.

<sup>252</sup> KAMES, *supra* note 9, at 50.

<sup>253</sup> See Walker, *supra* note 7 at 232. Blackstone acknowledged Kames' learning but disputed his conclusions. See *id.*; 3 BLACKSTONE, *supra* note 7, at 49, 430, 433, 441.

<sup>254</sup> JOHNSON, *supra* note 68, at 121.

courts as on a bad footing and would never myself consent to copy them into another constitution.<sup>255</sup>

Although Madison himself came down on the side of separate courts, he recognized that others might disagree and proposed to leave the choice between Bacon and Kames to the legislature.

In his *Law Lectures*, James Wilson also joined the debate between Bacon and Kames:

Should the jurisdiction according to equity, and the jurisdiction according to law, be committed to the same court? or should they be divided between different courts?

My Lord Bacon thinks that they should be divided: my Lord Kaims thinks that they should be united. All this is very natural. My Lord Bacon presided in a divided, my Lord Kaims was a judge in a united jurisdiction. Let us attend to their arguments: the arguments of such consummate masters will suggest abundant matter of instruction, even if we cannot subscribe to them implicitly.<sup>256</sup>

In the end, Wilson sided with Kames. After paraphrasing the two positions, and analyzing their respective merits, Wilson concluded that, because the distinction between law and equity in England arose out of obscure historical circumstances unsuited to convenience, “every court of law ought also to be a court of equity.”<sup>257</sup>

The evidence thus suggests that well-informed participants in the framing of Article III were quite familiar with the debate between Bacon and Kames and may have interpreted Dr. Johnson’s motion as adopting the Scottish model—just as Wilson discussed the debate in explaining and defending the decision subsequently.<sup>258</sup> (Read’s objection to vesting the powers of law and equity in the same court certainly calls to mind the Bacon position.) Johnson’s motion carried by a vote of six states to two, which included Madison and Wilson in the affirmative,<sup>259</sup> and accomplished two things. First, it extended the judicial power of the Supreme Court to cases in law and equity, thereby assuring that Court of a supervisory role with respect to any lower federal court. Second, it created the possibility (doubtless agreeable to Madison) that Congress could create

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<sup>255</sup> Letter from James Madison to Caleb Wallace, *supra* note 141, at 29.

<sup>256</sup> 2 THE WORKS OF JAMES WILSON, *supra* note 29, at 484–85.

<sup>257</sup> 2 THE WORKS OF JAMES WILSON, *supra* note 29, 486. Wilson then argued that a separate court of chancery should be established to handle mercantile cases in the first instance in order to govern commerce. *Id.* at 486–93.

<sup>258</sup> Another, less serious proposal at the convention to follow the model of the Scottish judiciary came from Ben Franklin. During the debate on the selection of federal judges, Franklin suggested the method “he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice <among themselves>. It was here he said the interest of the electors to make the best choice, which should always be made the case if possible.” 1 FARRAND’S RECORDS, *supra* note 233, at 120. Scottish law also made a curious appearance in the treason trial of Aaron Burr in 1807, when the jury returned a verdict of “not proven guilty.” Although “not proven” was not a recognized verdict in England, it was the jury’s third choice in criminal trials in Scotland. Almost two hundred years later, Senator Arlen Specter resurrected that third choice when he attempted to offer a verdict of not proven in the impeachment trial of President Clinton. See Samuel Fray, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1299 (2005).

<sup>259</sup> 2 FARRAND’S RECORDS, *supra* note 233, at 428. Both of the states in opposition to the joinder of law and equity (Delaware and Maryland) had separated the two jurisdictions along English lines.

separate lower courts of law and equity if it chose to do so. As proposed by Johnson, the judicial power in law and equity was to be vested in the Supreme Court and in “such” inferior courts as Congress might establish, thereby conferring a measure of discretion on the legislative branch as to give the lower federal courts a more specialized jurisdiction.<sup>260</sup>

The entire episode nicely illustrates the idea that (somewhat in contrast to Justice Frankfurter’s implication) the framers were not simply copying the judicial system of England and the colonial state courts. Despite the fact that they dated from the colonial times and tracked in many respects, as Engdahl notes,<sup>261</sup> the Westminster system, Madison made quite clear that he did not regard the Virginia courts as worthy of emulation. Wilson considered both the English and the Scottish systems as potential guides but refused to “subscribe to them implicitly.” Both men attempted, as they had done with the executive and legislative branches, to use all of the models and materials at hand to craft a judicial branch that improved upon the system they inherited from England.<sup>262</sup>

Indeed, in two important respects Article III departs from Scottish ideas by extending unity and finality to their logical conclusions. First, despite the Acts of Union’s insulation of Scottish courts from supervisory review at Westminster, Parliament interposed itself as an appellate body to overturn decisions of the Court of Session. Article III, by contrast, vests the entire judicial power in the federal courts, dispensing with any form of legislative appellate review.<sup>263</sup> In doing so, the framers established a judicial power that was truly independent of the executive and legislative powers and also created a court that was truly supreme because it was entirely immune from political supervision or correction. Second, although Scotland lacked overlapping superior courts, it did divide its judicial power into two separate hierarchies under the supreme Court of Session in civil causes and the supreme High Court of Justiciary in criminal ones. The

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<sup>260</sup> Apparently for stylistic purposes, the framers later shifted the reference to law and equity from section 1 (where Johnson had placed it) to section 2, thereby clarifying that the judicial power was to extend to federal question cases of law and equity, as well as to admiralty cases. *Compare* 2 FARRAND’S RECORDS, *supra* note 233, at 600 (committee of style report refers to law and equity in both sections 1 and 2), *with* 2 *id.* at 660–61 (engrossed constitution contains but a single reference to law and equity in section 2). Many described the district courts under the Judiciary Acts of 1789 as primarily courts of admiralty, although they also exercised jurisdiction over less serious criminal proceedings. [cite] Congress has, from time to time, created specialty courts, such as the Temporary Emergency Court of Appeals and the Foreign Intelligence Surveillance Court, innovations that pose little threat to the Court’s supremacy. [cite]

<sup>261</sup> Engdahl, *supra* note 34, at 469.

<sup>262</sup> Further support for this contention can be found in the convention debates. Immediately after Dr. Johnson’s successful motion to extend the judicial power to equity as well as law, John Dickinson moved to provide for removal of judges “by the Executive on the application [by Congress].” 2 FARRAND’S RECORDS, *supra* note 233, at 428. In favoring the motion, Sherman “observed that a like provision was contained in the British statutes,” but Rutledge argued that “[i]f the supreme Court is to judge between the U.S. and particular States, this alone is an insuperable objection to the motion,” and Wilson further contended that the unique circumstances of American government made reliance upon the British model “dangerous.” *Id.* at 428–29. The motion was ultimately defeated.

<sup>263</sup> During the Jeffersonians’ impeachment of Federalist judge Samuel Chase, Chief Justice Marshall (himself a potential target) suggested a constitutional amendment that would allow Congress to review unpopular Supreme Court decisions as an alternative mode of political control. For accounts, see PRESSER, *supra* note 74, at [##]; Pfander, *Judicial Compensation*, *supra* note 53, at [##]. One might view the proposal as aimed at introducing review on the House of Lords model.

framers took the notion of unity one step further, vesting *all* of the judicial power in one Supreme Court in both civil and criminal cases. These two departures lend force to Wilson’s description of the work of the framers in looking to exterior models for inspiration but making independent decisions in order to improve upon those models. At the very least, however, the framers’ familiarity with Scotland’s supreme court and with what Wilson called its “united jurisdiction” suggests that the shift from multiple supreme courts to one was far from meaningless. Instead, it was a fundamental choice between division and coordination as represented by the English model on the one hand and unity and hierarchy as represented by the Scottish model on the other.

*B. Supremacy, Inferiority, and the Exceptions and Regulations Clause*

Most importantly, the Scottish model and the writings of Lord Kames call into question the validity of the orthodox view of the Exceptions and Regulations Clause of Article III. Under the well-known terms of the orthodox view, Congress has broad power over the Court’s appellate jurisdiction and can fashion exceptions and regulations that would eliminate the Court’s power to hear certain categories of cases.<sup>264</sup> Orthodoxy further holds that Congress can effectively zone unpopular constitutional rights out of the federal courts altogether by combining its power to restrict the jurisdiction of the lower federal courts under the Madisonian compromise with its power to fashion exceptions to the Court’s appellate jurisdiction.<sup>265</sup> Although a number of scholars have questioned orthodox claims of plenary congressional power, the challenge for critics of orthodoxy has been to identify a textual limit on what appear to be the unqualified terms of Article III’s exceptions and regulations clause. For example, the so-called essential function test put forward by Professors Hart and Ratner—which argues that Congress must not exercise its power to make exceptions in a way that removes the Court’s essential role in the federal system<sup>266</sup>—has been faulted for its indeterminacy and its lack of textual foundation.<sup>267</sup>

A growing body of literature, however, suggests that Article III’s requirements of unity, supremacy, and inferiority provide an important textual limit on congressional jurisdiction-stripping power. One of us has argued that the Exceptions and Regulations Clause must be read in connection with the constitutional requirements that other tribunals remain inferior to the one supreme Court in the Constitution.<sup>268</sup> To the extent that the Court’s supremacy entails a supervisory role, it ensures ongoing forms of supervisory intervention on a basis independent of any particular grant of appellate jurisdiction. Moreover, because the Constitution impresses the status of inferiority on any tribunal constituted to hear federal cases, it ensures that both state and lower federal court decisions will remain subject to review in the wake of restrictions on the Court’s appellate jurisdiction. On this view, Congress has broad power to fashion exceptions to

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<sup>264</sup> See, e.g., Wechsler, *supra* note 40; Van Alstyne, *supra* note 34..

<sup>265</sup> For a more comprehensive account, see PFANDER, *supra* note 7, at x.

<sup>266</sup> See Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Ratner, *supra* note 41.

<sup>267</sup> See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 903 (1984).

<sup>268</sup> See Pfander, *Jurisdiction Stripping*, *supra* note 42; Pfander, *Article I Tribunals*, *supra* note 42; Pfander, *State Court Inferiority*, *supra* note 42.

the Court's as-of-right appellate jurisdiction, but lacks the power to assign matters to the state courts and free them from supreme judicial oversight and from the obligation to apply the Court's own precedents as to the meaning of federal law.

Yet the inferior-as-subordinate position, which lies at the center of a hierarchical conception of the federal judiciary, has been challenged by a number of scholars who question hierarchy on both definitional and structural grounds. First, as a matter of definition, these scholars argue that inferior courts were understood at the time of the framing as courts of limited geographic jurisdiction.<sup>269</sup> Supreme courts, by contrast, had the power to exercise jurisdiction over disputes throughout the realm. On this view, one cannot draw any firm limits from the terms supreme and inferior because supreme courts had no special role to play with respect to lower or inferior courts, but simply provided a geographically expansive court of original jurisdiction for the trial of substantial civil and criminal matters. Others, such as Professor Amy Coney Barrett, have excavated dictionaries and contemporary usage, concluding that, in general, supreme and inferior often denoted rank or prestige rather than any sort of hierarchical relationship.<sup>270</sup>

Drawing a different lesson from the English model, Professor Edward Hartnett has argued that the common law writs on which the Court of King's Bench relied in exercising supervisory oversight of lower courts outside the ordinary course of appellate jurisdiction were distinctive features of a monarchical legal system.<sup>271</sup> For Hartnett, instead of being linked to supremacy and inferiority, the supervisory powers of the English superior courts derived from their relationship to the royal prerogative and the King's power to administer justice throughout the realm. Hartnett further contends that the republicans who framed Article III rejected the model of prerogative power in favor of a model that emphasized the importance of written law.<sup>272</sup> For Hartnett, then, the English courts provide an example of what the framers rejected when they required federal courts to act within boundaries set both by Article III and by acts of Congress conferring and limiting jurisdiction.<sup>273</sup>

Second, proponents of limits on the Exceptions and Regulations Clause have run up against the clause's relatively obscure origins. Convention holds that, aside from the text itself, interpretive guidance can be drawn only from a remarkably barren drafting history.<sup>274</sup> The clause first appeared rather late in the proceedings of the Committee of Detail in a draft written by James Wilson. A prior draft, penned by committee member John Rutledge, provided that "the legislature shall organize" the Supreme Court's original and appellate jurisdiction. Wilson rewrote Rutledge's provision in a form familiar to us from Article III: "In all the other Cases beforementioned, [the Court's jurisdiction] shall be appellate, with such Exceptions and under such Regulations as the

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<sup>269</sup> See *infra* notes 241–244 and accompanying text.

<sup>270</sup> See Barrett, *supra* note 42, at 349–51; but see Caminker, *supra* note 235, at 828–34 (arguing that the language "inferior to" mandates a subordinate relationship (emphasis added)).

<sup>271</sup> See Hartnett, *supra* note 176, at 309–14.

<sup>272</sup> *Id.* at 310–16.

<sup>273</sup> *Id.* at 308.

<sup>274</sup> See, e.g., Ratner, *supra* note 41, at 172 n.69 (1960); Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1004 (2008).

Legislature shall make.”<sup>275</sup> Until now, no other information about how the clause originated has been discovered.

More fundamentally, as explained above, scholars have argued that there was simply no model for a hierarchical, appellate-style supreme court at the time of the framing. Professor Ritz, for example, points to the colonial and English models in contending that hierarchical judicial systems were unknown in 1787–88.<sup>276</sup> A similar critique, albeit one addressed to the Hart-Ratner essential function thesis, is that advocates for limits on Congress’s jurisdiction-stripping power confuse the familiar with the constitutionally required.<sup>277</sup> In mounting this critique at the essential function thesis, Professor Gunther doubtless had two ideas in mind. First, Article III leaves a fair amount of control over the structure of the federal judiciary in the hands of Congress. On this view, the federal judiciary could have been structured in a variety of different ways. Second, we have only come to rely on the Supreme Court as the final arbiter of the meaning of federal law in comparatively recent times. The Court’s discretionary jurisdiction (via the writ of certiorari) was conferred in the Judges’ Bill of 1925.<sup>278</sup> What Professors Hart and Ratner view as the Court’s essential function of settling the meaning of federal law through discretionary review arrived rather late in its institutional history. To insist that such discretionary oversight must be respected by Congress would transform what has happened more or less by happenstance into a constitutional requirement.<sup>279</sup>

As the following sections explain, however, our findings demonstrate that the Scottish court system, as explained by Lord Kames and as immunized from parliamentary tinkering in Article XIX of the Acts of Union, provides decisive support for the hierarchical/subordinate position in this debate over definitions and precedents.

### 1. Supremacy and Inferiority in the Scottish Courts

First, in addition to introducing the framers to a pyramidal and largely unified court system, Kames’ *Historical Law-Tracts* provided the most complete exposition of the correlative relationship of supreme and inferior courts available at the time of the framing.<sup>280</sup> According to Kames, a “supreme” court possessed several attributes. The Court of Session, for example, enjoyed wide geographic and subject matter

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<sup>275</sup> For a description of the clause’s origins, see Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 BOST. COLL. L. REV. (forthcoming 2010).

<sup>277</sup> Gunther, *supra* note 267, at 906–09.

<sup>278</sup> See Edward A. Harnett, *Questioning Certiorari: Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000).

<sup>279</sup> This critique from anachronism underlies Van Alstyne’s suggestion that Congress could implement Article III with a multi-headed hydra, no matter how inconsistent with current practice such an arrangement would appear. See *supra* note 34.

<sup>280</sup> Many of the Scottish institutional writers confirm that Kames’ understanding of supremacy and inferiority was widely shared, although they differ about particular details. We note such confirmation throughout this section in the footnotes, but refrain from a detailed discussion of the institutional works because they do not seem to have circulated as widely as *Historical Law-Tracts* and *Principles of Equity*.



jurisdiction,<sup>281</sup> which included the power to decide cases on equitable principles, a power not necessarily conferred upon inferior courts. More importantly, however, a supreme court was primarily defined by its ability to review the decrees of inferior courts:

The court of session is sovereign and supreme: sovereign, because it is the King's court, and it is the King who executes the acts and decrees of this court: supreme, with respect to inferior courts having the same or part of the same jurisdiction, but subjected to a review in this court.<sup>282</sup>

As Kames described it, the Session was supreme “with respect to” those courts whose judgments it could review.

Kames extended this idea of oversight and control to his definition of inferior courts; he characterized the decrees of inferior courts as subject to review by another court. For example, Kames explained that, at one time, an aggrieved party could appeal a decision of a baronial court to the sheriff court, making the baronial courts inferior to their supervising sheriff court. But later, the appeal to the sheriff court gave way to review by suspension and reduction in the Court of Session, at which point the sheriff courts lost their supremacy over the baronial courts:

[T]his process of reduction, first practiced in the daily council, and afterwards in the present court of session, put an end to the difference betwixt the sheriff and baron courts in point of superiority. When appeals went into disuse, the sheriff lost his power of reviewing the sentences of the baron court; and these courts came by degrees to be considered as of equal *rank*, when the proceedings of both were equally subjected to the review of the court of session.<sup>283</sup>

Kames' use of rank here also nicely resolves the textual ambiguity noted by Professor Barrett and others by making clear that a court's rank *depended* upon its place in the chain of hierarchical review.

In the same discussion, Kames made clear that supremacy and inferiority were not absolute, but were instead matters of relation.<sup>284</sup> Thus, the High Court of Admiralty in Scotland was a supreme court in relation to the inferior admiralty courts, but was an inferior court in relation to the Court of Session (and to the High Court of Justiciary in criminal causes) because its decrees were subject to review, either by appeal or by suspension, reduction, or advocation:

The admiral court . . . is supreme with respect to inferior admiral courts, whose sentences it can review. But with regard to the courts of session and justiciary, it is an inferior court; because its decrees are subjected to a review in these courts. The commissary [ecclesiastical] court of

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<sup>281</sup> KAMES, *supra* note 8, at 317 (“Courts superior and inferior which judge the same causes, admit not of any local distinction; because a court superior or supreme has a jurisdiction that extends over the several territories of many inferior courts.”); KAMES, *supra* note 8, at 329.

<sup>282</sup> KAMES, *supra* note 8, at 429.

<sup>283</sup> KAMES, *supra* note 8, at 394 (emphasis added). See also 1 ERSKINE, *supra* note 10, at 28 (“Inferior judges are those whose sentences are subject to the review of one or other of our supreme courts . . .”).

<sup>284</sup> Cf. 2 BANKTON, *supra* note 10, at 475 (arguing that only the House of Lords could be considered supreme, because its judgments were the dernier resort, and designating the Court of Session a “superior” court because although it reviewed the judgments of inferior courts, its own judgments were subject to parliamentary review); 1 Erskine 28 (“Mixed jurisdiction participates of the nature both of the supreme and inferior.”).

Edinburgh is properly the bishop's court, and not sovereign. With respect to its supremacy, it stands upon the same footing with the admiral court.<sup>285</sup>

A number of features of *Historical Law-Tracts* shed light on the contemporary debate over the structural qualities of the federal courts. First, although the terms “supreme” and “inferior” generally did denote—as some modern scholars have contended—the breadth of a court's geographic and subject matter jurisdiction, Scots jurists viewed them primarily as indicative of a hierarchical relationship. Second, in contrast with the views of scholars steeped in English precedents, Scottish authorities viewed the power to supervise inferior courts as derived not from a supreme court's status as an arm of the king, but from its supremacy. Several Scottish courts were sovereign, in the sense that they enjoyed broad territorial and subject matter jurisdiction, but sovereignty did not confer powers of review. Indeed, as Kames explained, the Court of Exchequer was a sovereign court, conducting the King's business and hearing causes from across Scotland,<sup>286</sup> but it nevertheless was not a supreme court because it did not review the judgments of any other courts.<sup>287</sup> Third, a supreme court enjoyed wide powers to administer justice that transcended the formal strictures ordinarily regulating the exercise of judicial power at common law, namely, what Kames termed the *nobile officium*, or equitable powers, of the Court of Session.

Scholars have attempted to reconstruct the meaning of the Constitution's reference to “one supreme Court” and “inferior” courts and tribunals from the Westminster model, but Kames' account reveals that they have been missing a key piece of the framers' understanding.<sup>288</sup> Kames, supported by other Scottish legal writers, took the position that a court was inferior only to those courts with the power to review its decrees and stop its proceedings. Although Kames also embraced the geographic account of inferiority, he did not regard geographical limits as the distinctive or defining feature of an inferior court. The Acts of Union confirm the understanding that, at least in Scotland, inferior courts were subordinate to the supreme court. Article XIX, as we have seen, ensures the supremacy of the Courts of Session and Justiciary by declaring that “all inferior Courts” within Scotland must “remain subordinate, as they are now,” to the

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<sup>285</sup> KAMES, *supra* note 8, at 429–30. See also 1 ERSKINE, *supra* note 10, at 28 (“That jurisdiction is supreme from which there lies no appeal to a[] higher court.”). Chief Justice John Marshall expressed a similar understanding in *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810), in the course of assessing the Supreme Court's power to review decisions of the federal district court for the territory of Orleans without explicit statutory authority. The Court held that by giving the district court the same original and appellate jurisdiction as that exercised by the United States District Court for the District of Kentucky, Supreme Court review of whose decisions was provided for by the Judiciary Acts of 1789, Congress had meant for decisions of the Orleans court to be equally subject to review. *Id.* at 318. According to Marshall, to construe the statute as providing for no review by appeal, writ of error, or otherwise would have meant that “the court of Orleans would be . . . a *supreme* court,” and “would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an *inferior* court.” *Id.* (emphasis added). On *Durousseau*, see Pfander, *Jurisdiction Stripping*, *supra* note 42, at 1502–03; Ratner, *supra* note 41, at 176–77.

<sup>286</sup> KAMES, *supra* note 8, at 383.

<sup>287</sup> KAMES, *supra* note 8, at 429. But see 1 ERSKINE, *supra* note 10, at 28.

<sup>288</sup> In his commonplace book, for example, Thomas Jefferson copied out or paraphrased many of the excerpts from *Historical Law-Tracts* quoted above and below, including Kames' discussion of review for excess of jurisdiction even where a judgment of a lower court was considered final. THE COMMONPLACE BOOK OF THOMAS JEFFERSON, *supra* note 76, § 562, at 122–27.

“supream Courts of Justice within the same, *in all time coming.*” This requirement provides striking support for Kames’ equation of supremacy with hierarchy and inferiority with subordination. In addition, it placed an important and avowedly permanent limitation upon the ability of Parliament to remove inferior jurisdictions from the supervision and oversight of the Court of Session, the subject to which we now turn.

## 2. Supervision in the Wake of Jurisdictional Exceptions and Regulations

Second, the practice of the Court of Session under Article XIX of the Acts of Union provides strikingly strong support for the supervisory account of Article III, allays concerns with anachronism that now inform the jurisdiction-stripping debate, and helps to explain the origins of the Exceptions and Regulations Clause. Recall that the Acts of Union provided that the Court of Session would retain its current position and privileges within the Scottish judicial system, but “subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great Britain.” This clause has not been previously considered in the literature on the Constitution’s Exceptions and Regulations Clause. But it bears an obvious resemblance to the declaration in Article III that the Supreme Court shall have appellate jurisdiction subject only to “such exceptions, and under such regulations, as Congress shall make.” Given the similarity of the operative language and Wilson’s Scottish roots, one can reasonably infer that he drew the Clause, not out of thin air, but on the model of the judicial article of the Acts of Union.

Indeed, at the same time that he was drafting the Exceptions and Regulations Clause, Wilson inserted into what was to become Article I the provision granting Congress the power to “constitute tribunals *inferior to* the supreme Court,”<sup>289</sup> a phrasing conspicuously similar to the requirement in the Acts of Union that all inferior courts in Scotland remain “*subordinate . . . to* the supream Courts of Justice.” The coincidence of the two provisions in Wilson’s draft suggests a conscious attempt to institute a pyramidal judicial framework, based on the Scottish design. While the similarity suggests conscious borrowing, we do not think that an argument for the significance of the Scottish model depends on proof that Wilson deliberately copied from the Acts of Union. Plainly, the Scottish model provided the framers with a vocabulary and set of concepts with which to implement the constitutional protections they sought to confer on the federal judiciary. In addition, the Court of Session’s eighty years of experience with regulations enacted pursuant to Article XIX would have shaped their understanding of how the combined requirements of unity, supremacy, and inferiority in Article III limit the exercise of the Exceptions and Regulations power.

As David Walker has noted, the seemingly innocuous regulations power in the Acts of Union could allow Parliament to “fundamentally modify the powers and functioning of a court.”<sup>290</sup> But Parliament’s regulations power was subject to a crucial limitation: the provision that inferior Scottish courts remain subordinate to the Court of Session for all time coming. In *Historical Law-Tracts*, Lord Kames explained how the Court of Session reconciled its supremacy with jurisdictional “regulations” imposed by

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<sup>289</sup> 2 FARRAND’S RECORDS, *supra* note 233, at 168.

<sup>290</sup> 5 WALKER, *supra* note 8, at 455.

Parliament. As with King's Bench in England, the Court of Session reviewed the judgments of inferior courts in a variety of ways, ranging from appeals to the issuance of the extraordinary processes, in order to rectify error: "[J]udges subjected to no review soon become arbitrary. Hence the necessity of superior courts, to review the proceedings of those that are inferior."<sup>291</sup> Uniquely to Scotland, though, the practice of appeal as of right had mostly given way by Kames' time to the regular issuance of reduction, suspension, and advocacy, whose flexibility was preferable to the complexities of appeals.<sup>292</sup> In this function, the Court of Session used its supervisory powers to act as "a compleat legal police,"<sup>293</sup> one constituted in order to ensure the orderly administration of justice.

Nevertheless, direct review on the merits in the Court of Session did not lie in every case. The function of a supreme court, according to Kames, was not necessarily to scrutinize every decision of an inferior court in every case for any sign of legal or factual error, but rather to supervise those inferior courts in order to prevent them from exceeding their powers or administering justice arbitrarily. As such, parliamentary regulations often significantly curtailed the ability of litigants to secure review in the Court of Session in the ordinary course. For a variety of reasons, Parliament used the authority conferred upon it by the Acts of Union to provide for other tribunals to serve as the exclusive and final jurisdictions in certain matters. But despite these declarations of lower court finality, the Court of Session possessed the power by virtue of its supremacy to interpose extraordinary supervisory remedies where necessary to keep inferior courts within their proper bounds.

In some instances, the Court of Session exercised a confined appellate jurisdiction, leaving closer supervision to an intermediate court. Although the Session reviewed judgments in admiralty cases, for example, Parliament conferred on the High Court of Admiralty "an exclusive jurisdiction in the first instance" in maritime cases. Thus, the Court of Session refrained from direct supervision of the inferior admiralty courts, and acted only in an appellate function:

[W]ith relation to the [admiral court], the session at present cannot be considered in any other light, than as a court of appeal; precisely as the house of Lords is with relation to the session. Hence it seems to follow, that the court of session cannot regularly suspend the decree of an inferior admiral; which would be the same, as if a cause should be appealed from the sheriff to the house of Lords.<sup>294</sup>

But when the admiralty court heard mercantile cases not occurring directly on the high seas (but related to merchant shipping<sup>295</sup>), its jurisdiction was an inferior one, supervised like any inferior court by the Court of Session:

The court pretends not to an exclusive jurisdiction in mercantile affairs; and in these it is precisely like the sheriff court, considered as an inferior jurisdiction, subjected to the orders and review of the supreme court of

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<sup>291</sup> KAMES, *supra* note 8, at 316.

<sup>292</sup> See KAMES, *supra* note 8, at 385–94.

<sup>293</sup> KAMES, *supra* note 8, at 395.

<sup>294</sup> KAMES, *supra* note 8, at 327–28.

<sup>295</sup> See 5 WALKER, *supra* note 8, at 468–70.

session, by advocacy, suspension, and reduction, in the ordinary course.<sup>296</sup>

Note here that Kames distinguished between a court of appeal and a supreme court. Although the Session heard appeals from the admiral court in maritime cases because the admiral court possessed an exclusive jurisdiction, it was only in those mercantile cases in which the Session exercised direct supervisory power that the admiral court was considered “an inferior jurisdiction.” Indeed, Kames inserted the adjective “supreme” when transitioning from the Session’s appellate to its supervisory function.

Conversely, the Court of Session also issued supervisory decrees in many situations in which it lacked appellate jurisdiction. That practice emerged from the complicated and vexatious nature of interlocutory appeals in Scotland in the fifteenth century, which had to run through numerous courts and could multiply proceedings indefinitely before eventually reaching the supreme court. According to Kames, the daily council—the predecessor of the Session as the supreme civil court<sup>297</sup>—began reviewing judgments of lower courts for error after aggrieved parties filed a direct complaint for relief, though it did so without explicit statutory authority:

[C]omplaints were received against the proceedings and decrees of inferior judges, and, upon iniquity found, . . . the proceedings were rectified or annulled. The *very nature and constitution of this court*, behoved to give birth to some such remedy . . . . This court could not receive an appeal, because no such privilege was bestowed upon it; and the whole forms of a process of appeal, were accurately adjusted by parliament immediately after the institution of this court. Now, no man who had once experienced an earlier remedy, would ever patiently submit to the hardship and expence, of multiplying appeals through different courts, before he could get his cause determined in the last resort. We may therefore readily believe, that a direct application to the daily council for redress, would be the choice of every man who conceived injustice to be done him by an inferior judge. He could not bring his cause before this court by appeal; which justified his bringing it by summons or complaint. And in this form he had not any difficulty to struggle with, more than in an appeal; for the former requires no antecedent authority from the court, more than the latter. This assumed power of reviewing the decrees of inferior judges, was soon improved into a more regular form. Decrees of registration were from the beginning suspended and reduced in this court; and *by its very institution* it was the proper court for such matters. The same method came to be followed, in redressing iniquity committed by inferior judges. In place of a complaint, a regular process of reduction was brought; and because this process did not stay execution, the defect was supplied by a suspension.<sup>298</sup>

As the supreme court, the daily council—and its later successor the Court of Session—was “by its very nature and constitution” empowered to exercise supervisory authority in

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<sup>296</sup> KAMES, *supra* note 8, at 328.

<sup>297</sup> See KAMES, *supra* note 8, at 386–89.

<sup>298</sup> KAMES, *supra* note 8, at 391–93 (emphasis added).

order to prevent inferior courts from exceeding their authority even in the absence of statutorily vested as-of-right appellate jurisdiction.

More intriguingly, although the Session lacked a specific criminal jurisdiction, during the development of the Scottish judicial system, the Session for a time interposed itself where necessary to issue an advocation to inferior criminal courts, a power to which the Justiciary had not yet succeeded:

The privilege of advocation, according to the established notion, was confined to the court of session. The justiciary court did not pretend to this privilege, and the court of session could not properly interpose in matters which belonged to another supreme court. . . . The court of session received complaints of wrong done by inferior criminal judges, and upon finding a complaint well founded, took upon them to remove the cause by advocation to the justiciary. They also ventured to remove the criminal causes from one court, to another that was more competent and unsuspected.<sup>299</sup>

In this example, the Session's actions were even more notable than in the previous one, for the court lacked eventual appellate jurisdiction over criminal cases. Thus, the court assumed power only through its role as a supervisory court, but this time, instead of removing the cause for its own determination, it transferred it for impartial adjudication in the Justiciary.<sup>300</sup>

The Court of Session also entertained applications for extraordinary remedies to supervise inferior courts even where another court possessed final power to determine a case. Ecclesiastical courts, for example, were given the authority to pass an "ultimate" sentence settling a minister in a parish, a decision with which the Session could not interfere regardless of the lack of a minister's legal entitlement to the position.<sup>301</sup> "One would imagine," Kames explained, "that this should entitle him to the benefice or stipend" of the office. Nevertheless, "the court of session, without pretending to deprive a minister of his office, will bar him from the stipend, if the ecclesiastical court have proceeded illegally in the settlement."<sup>302</sup> According to Kames, "it would be a great defect in the constitution of a government, that ecclesiastical courts should have an arbitrary power in providing parishes with ministers."<sup>303</sup> Thus, the Session interposed a limited remedy to prevent such illegal proceedings without embroiling itself in the merits of every dispute over the settlement of ministers: "The check is extremely mild, and yet is fully effectual to prevent the abuse."

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<sup>299</sup> KAMES, *supra* note 8, at 400. *See also* KAMES, *supra* note 8, at 401 ("And through the same influence they interposed in ecclesiastical matters also. They advocated a cause for church censure, from the Dean of the chappel-royal, and remitted the same to the Bishop and clergy. And a minister who was pursued before a sheriff as an intruder into a church, having presented a bill of advocation to the court of session, the cause was advocated to the privy council.").

<sup>300</sup> *See id.* at 400. In addition, despite not possessing appellate jurisdiction over criminal cases, the Court of Session used reduction as an equivalent of the writ of habeas corpus. *See* 1 PATRICK GRANT, LORD ELCHIES, DECISIONS OF THE COURT OF SESSION FROM THE YEAR 1733 TO THE YEAR 1754, COLLECTED AND DIGESTED INTO THE FORM OF A DICTIONARY 495–96 (William Maxwell Morrison ed., 1813).

<sup>301</sup> *Id.* at 337–38.

<sup>302</sup> *Id.* at 338.

<sup>303</sup> *Id.* at 339.

Most strikingly, the Court of Session actually addressed the consequences of an act of Parliament restricting its appellate jurisdiction. In a decision with important, but thus far unremarked implications for the jurisdiction stripping debate under Article III, the Court of Session nonetheless upheld its supervisory authority. The case began with Parliament's adoption in 1749 of a statute authorizing certain trustees of a shire to determine charges for tolls on a turnpike.<sup>304</sup> This Turnpike Act also declared that the justices of the peace would review the actions of the trustees, and could "rectify" any abuses "ultimately and without appeal."<sup>305</sup> In the case of any pre-existing jurisdiction, the established canon of construction was that the Session (as with King's Bench in England) would possess a power of review unless expressly excluded by the statute.<sup>306</sup> As the Scottish jurist Erskine explained, "[t]he law is understood to confer a *supreme* and sole jurisdiction only when the expression is so explicit to exclude all doubt, *ex. gr.* that the court shall have power to determine without appeal, or that the judgment shall not be subject to the review of any other court."<sup>307</sup>

Even where Parliament provided for finality with respect to the Session's appellate jurisdiction, however, that finality extended only to the merits of the case, not to review for excess of jurisdiction. Although the Court of Session lacked the power to disturb the lower court's judgment on the merits, it could still interpose to determine whether the lower court had incorrectly determined the extent of its statutory jurisdiction, perhaps by applying its power to a party or a situation outside the contemplation of the statute: "A judgment however of a court upon its own powers, ought never, in good policy, to be declared final; for this, in effect, would be to bestow upon the court, however limited in its constitution, a power to arrogate to itself an unbounded jurisdiction, which would be absurd."<sup>308</sup> Thus, despite the statutory vesting of finality in the justices of the peace under the Turnpike Act, the Court of Session separated finality as to the merits from finality as to the jurisdiction and maintained its supervisory role.<sup>309</sup>

Another manifestation of the idea that supervision survives a parliamentary restriction on appellate jurisdiction appears in *Countess of Loudon v. Trustees*. In this 1792 case involving a different turnpike statute, a similar question arose as to meaning of a provision that deemed the decisions of the quarter-sessions "final and conclusive."<sup>310</sup> The statute gave the local trustees the authority "to suppress any *by-roads* that do not appear to be *of importance* to the public," and vested final and conclusive appellate jurisdiction in the court of quarter-sessions.<sup>311</sup> After the trustees decided to close a certain road, the Countess of Loudon petitioned the Court of Session for an advocacy. In determining that it possessed jurisdiction to review the judgment of the lower court, the Court of Session distinguished between discretionary determinations committed to the trustees, which were final, and determinations about the scope of the trustees' power,

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<sup>304</sup> *Id.* at 427. See Turnpike Acts for the Shire of Haddington, 23d Geo. II.

<sup>305</sup> KAMES, *supra* note 8, at 427.

<sup>306</sup> *Id.* at 423–25 (quoting 1 BACON, *supra* note 11, at 592).

<sup>307</sup> 1 ERSKINE, *supra* note 10, at 30 (emphasis added).

<sup>308</sup> KAMES, *supra* note 8, at 426–27.

<sup>309</sup> *Id.* at 428–29.

<sup>310</sup> May 28, 1793, M. 7398, in DECISIONS OF THE COURT OF SESSION, *supra* note 27, at 115. Obviously, Countess of Loudon came too late to have influenced the framing of Article III, although it represented the continuation of an established trend in Scottish jurisprudence.

<sup>311</sup> *Id.*

which were not.<sup>312</sup> And because the “Supreme Court” of Session had determined in a previous decision that the road in question was in fact of importance to the public, the trustees had exceeded their statutory authority by ignoring the Court of Session’s prior decision.<sup>313</sup> “In this way,” the Court explained, “the question of competency came to be blended with the question of merits.”<sup>314</sup>

*Countess of Loudon* sheds important light on the flexible quality of supervisory power and the importance of subordination as a defining feature of inferiority, both considerations at the center of modern debates over jurisdiction stripping under Article III. One centerpiece of the debate concerns the question whether Congress might free inferior courts from any duty to apply the precedents of the Supreme Court by declaring those precedents inapplicable and immunizing the lower courts from Supreme Court review in the exercise of the Exceptions Clause.<sup>315</sup> In *Countess of Loudon*, the Court of Session indicated that the inferior court was bound to apply the decisions of its hierarchical superior, and had no discretion to second-guess the Court’s prior judgment about the importance of the road. Viewing itself as duty-bound to interpose to correct that error, the Court of Session treated the parliamentary limit on its appellate jurisdiction as inapplicable to its supervisory role. Even though the error did not implicate the lower court’s jurisdiction, it threatened to upend the hierarchical relationship specified in the Acts of Union and thus required correction. Indeed, the Court of Session intimated that the vesting of final and conclusive jurisdiction on all points in an inferior court “might even be held to be in some measure unconstitutional.”<sup>316</sup>

An incident that occurred shortly after *Countess of Loudon* confirms that the Scottish courts viewed the protections of the Acts of Union as an affirmative check upon parliamentary regulations. In their 1807 Memorial to the House of Lords, the Senators of the College of Justice (which consisted of the Lords of Session and other high-ranking members of the Scottish judiciary) argued that some contemplated reforms of the Court of Session might contravene the protections of Article XIX:

We are of opinion that on fair bona fide construction, as between two independent nations, it cannot be held to have been in the contemplation of either, that any law should, in future times, be considered as merely a regulation for the better administration of justice which goes to subvert the supreme jurisdiction of the Court of Session, and to render it subordinate to a new court, unknown to our ancestors.<sup>317</sup>

It appears, moreover, that Parliament took this admonition to heart in crafting subsequent legislation.

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<sup>312</sup> *Id.* at 117–118.

<sup>313</sup> *Id.* at 118.

<sup>314</sup> *Id.* See also 1 ERSKINE, *supra* note 10, at 30 n.15 (“[I]f the statutory trustees do not follow the terms of the act, or exceed the powers thereby given, the party aggrieved is not limited to the statutory or local jurisdiction, but may at once apply for his redress in the Court of Session . . .”). According to the editor of a later edition of Erskine’s *Institute*, in the early nineteenth century the House of Lords agreed with this principle in a number of cases on appeal. See *id.*

<sup>315</sup> For examples of proposed jurisdiction stripping legislation see Pfander, *State Court Inferiority*, *supra* note 42, at 192–94.

<sup>316</sup> *Countess of Loudon*, May 28, 1793, M. 7398, in DECISIONS OF THE COURT OF SESSION, *supra* note 27, at 118.

<sup>317</sup> MITCHELL, *supra* note 17, at 73.



*Historical Law-Tracts* and *Countess of Loudon* suggest that the supervisory account of Article III, far from being an anachronism, actually gives voice to a model of supremacy and inferiority that was widely understood in the eighteenth century and employed in the Constitution. The Court of Session saw no threat to its supremacy in routine exceptions to its power of review, or to the vesting of final jurisdiction over factual decisions in inferior courts. In addition, it was content to let intermediate courts—such as the High Court of Admiralty—handle the supervision of much judicial business in the first instance. Notwithstanding Parliament’s regulations, however, the Court of Session ensured the uniformity of the law, the status of its precedents, and the orderly administration of justice through limited interventions on jurisdictional grounds, thereby preventing inferior courts from escaping their subordinate status and using legislative exceptions to accumulate an unbounded jurisdiction.

## V. CONCLUSION

Scholarship on the origins of Article III of the Constitution and the meaning of the judicial power of the United States has often drawn on what Justice Frankfurter called the “traditional” work of the courts of Westminster. In an effort to understand English legal traditions, scholars have invariably turned to Blackstone’s *Commentaries* as the best digested summary of English law. But just as Thomas Jefferson feared Blackstone’s influence on the sons and daughters of the nation’s founders, so too has Blackstone captivated the scholarly gaze of subsequent generations. England’s jurists aspired to a hierarchy that their judicial system did not achieve; it featured multiple superior courts with overlapping jurisdiction, without one supreme court to oversee the work of all subordinate inferior tribunals. Relying on the English model, critics argue that our supervisory account of Article III simply lacks historical precedent and may suffer from anachronism. For critics steeped in Blackstone, the crucial terms of Article III—unity, supremacy, and inferiority—invite argument about the degree to which Congress must create and respect a judicial hierarchy with ultimate oversight over law, equity, and admiralty vested in the Supreme Court. Supremacy conveys conflicting meanings and the judicial hierarchy that now characterizes the Article III judiciary might appear to have emerged by accident, rather than by design.

We think that quite the contrary is true. Drawing on the Scottish example of a unitary judicial system operating within a constitutional framework that qualified parliamentary control, we think the framers deliberately chose a system of judicial hierarchy and supervision and rejected the vision of plenary congressional control on which orthodox accounts depend. The Scottish model of a unitary judicial system, familiar to the framers and quite different from the English model of multiplicity, provides important support for our supervisory account, and answers both Professor Engdahl’s critique that the framers did not understand supremacy to denote hierarchy, and Professor Hartnett’s critique that supervisory authority is a monarchical vestige that contradicts a republican government predicated upon written law. The evidence of Scottish influence on those who structured Article III plainly demonstrates that the framers had available to them a fully formed model of a unitary judicial system, implemented through a system of supervisory review that clearly defined one supreme court (the Court of Session) and imposed obligations of subordination on all inferior

courts. Rather than one we moderns have imposed on them, we think the hierarchical conception of Article III was one the framers borrowed from Scotland, extended, and projected into the future.

We believe the Scottish model has important lessons to teach, not only about the many influences on the founding generation but also about the way knowledgeable lawyers would have understood the operation of Article III's Exceptions and Regulations clause. Just as the Acts of Union protected the privileges and authority of the Court of Session from parliamentary remodeling, so too did Article III secure the judicial power and jurisdiction of the Supreme Court. Just as the Acts of Union contemplated that Parliament would make routine housekeeping regulations, so too did Article III authorize exceptions and regulations to the Court's appellate jurisdiction to provide for the more convenient administration of justice. Just as the Session's power to supervise inferior courts was understood to survive any parliamentary restrictions on its appellate jurisdiction, so too does the Supreme Court's spot-checking supervisory authority necessarily survive any congressional exceptions to its as-of-right appellate jurisdiction.

Scottish law, so familiar to revolutionary Americans, left very few traces upon the American common law norms that developed in the nineteenth century under the stewardship of Joseph Story and James Kent. Blackstone's emergence and the *Commentaries'* influence on the education of young lawyers helped to fuel the widespread adoption of English law (even in Scotland). Yet the absence of Scottish influence on nineteenth-century American legal education and the rules of contract, tort, and property law should not be read to mean that the Scots example was entirely lost on early Americans. Indeed, we believe the Scottish judiciary had its most profound impact in providing a model for the structure of the federal judiciary, with its one Supreme Court sitting atop a judicial pyramid consisting of a multitude of inferior tribunals. If it contributed little to the common law of the early Republic, the Scottish judicial system as secured through the Acts of Union remains embossed in Article III and in the features of unity, hierarchy, finality, and independence that define the federal judiciary.

## APPENDIX

### Article XIX of the Acts of Union

That the Court of Session or Colledge of Justice, do after the Union and notwithstanding thereof, remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the Union; subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain; And that hereafter none shall be named by Her Majesty or Her Royal Successors to be Ordinary Lords of Session but such who have served in the Colledge of Justice as Advocats or Principal Clerks of Session for the space of five years, or as Writers to the Signet for the space of ten years With this provision That no Writer to the Signet be capable to be admitted a Lord of the Session unless he undergo a private and publick Tryal on the Civil Law before the Faculty of Advocats and be found by them qualified for the said Office two years before he be named to be a Lord of the Session, yet so as the Qualifications made or to be made for capacitating persons to be named Ordinary Lords of Session may be altered by the Parliament of Great Britain.

And that the Court of Justiciary do also after the Union, and notwithstanding thereof remain in all time coming within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Priviledges as before the Union; subject nevertheless to such Regulations as shall be made by the Parliament of Great Britain, and without prejudice of other Rights of Justiciary:

And that all Admiralty Jurisdictions be under the Lord High Admirall or Commissioners for the Admiralty of Great Britain for the time being; And that the Court of Admiralty now Established in Scotland be continued, And that all Reviews, Reductions or Suspensions of the Sentences in Maritime Cases competent to the Jurisdiction of that Court remain the the same manner after the Union as now in Scotland, until the Parliament of Great Britain shall make such Regulations and Alterations, as shall be judged expedient for the whole United Kingdom, so as there be always continued in Scotland a Court of Admiralty such as in England, for determination of all Maritime Cases relating to private Rights in Scotland competent to the Jurisdiction of the Admiralty Court; subject nevertheless to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain; And that the Heritable Rights of Admiralty and Vice-Admiralties in Scotland be reserved to the respective Proprietors as Rights of Property, subject nevertheless, as to the manner of Exercising such Heritable Rights to such Regulations and Alterations as shall be thought proper to be made by the Parliament of Great Britain;

And that all other Courts now in being within the Kingdom of Scotland do remain, but subject to Alterations by the Parliament of Great Britain; And that all Inferior Courts within the said Limits do remain subordinate, as they are now to the Supream Courts of Justice within the same in all time coming;

And that no Causes in Scotland be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas, or any other Court in Westminster-hall; And that the said Courts, or any other of the like nature after the Union, shall have no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same;

And that there be a Court of Exchequer in Scotland after the Union, for deciding Questions concerning the Revenues of Customs and Excises there, having the same power and authority in such cases, as the Court of Exchequer has in England And that the said Court of Exchequer in Scotland have power of passing Signatures, Gifts Tutories, and in other things as the Court of Exchequer in Scotland hath; And that the Court of Exchequer that now is in Scotland do remain, until a New Court of Exchequer be settled by the Parliament of Great Britain in Scotland after the Union;

And that after the Union the Queens Majesty and Her Royal Successors, may Continue a Privy Council in Scotland, for preserving of public Peace and Order, until the Parliament of Great Britain shall think fit to alter it or establish any other effectual method for that end.