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FEDERAL JUDICIAL POWER: THE CONSTITUTIONALITY OF LEGISLATIVE ENCROACHMENT

*Wilfred R. Caron**

We are a nation rooted in a tradition of respect for the orderly processes of government. In that tradition, when we cannot agree with decisions of the federal judiciary, we are nevertheless inclined to accept those decisions with relative equanimity until the legislative branch acts to correct a perceived erroneous result. If that branch allows the judicial decisions to stand, or if it lacks constitutional authority to do otherwise, we go on as a nation with respect, if not love, for the law, notwithstanding a measure of popular discontent.

This democratic rhythm demands a high degree of discipline and integrity, particularly with respect to issues that involve our fundamental rights and beliefs. Yet, there are times when many are convinced that the judicial branch has so clearly exceeded its authority in matters involving fundamental rights that they are moved to a consideration of measures to curtail that branch's jurisdiction. In some ways this is understandable. As a result of dissatisfaction with federal precedents in such controversial areas as school prayer, abortion, and busing, efforts to curtail the federal courts' jurisdiction have become part of the agenda in recent sessions of Congress. Some have sought to enact legislation that would remove or limit federal jurisdiction over such controversial cases, hoping thereby to return the adjudication of those cases to the state courts.¹ These proposed bills are referred to as "court-stripping bills" because, if enacted, their effect would be to strip the court of its jurisdiction in specific cases.

A most recent example of such legislation is the Voluntary School Prayer Act of 1985.² Bills of this type involve the most far-reaching incursions upon

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1. See, e.g., S. 1743, 97th Cong., 1st Sess., 127 CONG. REC. S11514 (daily ed. Oct. 15, 1981) (busing); S. 583, 97th Cong., 1st Sess., 127 CONG. REC. S1606 (daily ed. Feb. 26, 1981) (abortion); S. 481, 97th Cong., 1st Sess., 127 CONG. REC. S1281-84 (daily ed. Feb. 16, 1981) (school prayer).

2. S. 47, 99th Cong., 1st Sess., 131 CONG. REC. S389 (daily ed. Jan. 21, 1985). The relevant provisions of the bill are:

federal judicial power. They are designed to abrogate both the district courts' original jurisdiction over specified constitutional questions arising under state laws and the Supreme Court's appellate jurisdiction. Advocates of such legislation contend that the "exceptions and regulations" clause³ of article III of the Constitution gives Congress the power to exclude classes of cases from the Supreme Court's appellate jurisdiction. As to the district courts, advocates of this legislation argue that Congress has plenary power under article III to create or not create inferior federal courts as it sees fit,⁴ and that this broad discretion necessarily includes the lesser power of limiting the jurisdiction of the inferior courts it chooses to establish.⁵

SEC. 2(a). Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1260. Appellate jurisdiction; limitations

"(a) Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any State statute, ordinance, rule, regulation, or practice, which relates to voluntary prayer, Bible reading, or religious meetings in public schools or public buildings.

"(b) As used herein, 'voluntary' means an activity in which a student is not required to participate by school authorities."

(b) The section analysis of chapter 81 of title 28 is amended by adding at the end thereof the following new item:

"1260. Appellate jurisdiction; limitations."

SEC. 3. (a) Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1365. Limitations on jurisdiction."

"Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1260 of this title."

(b) The section analysis at the beginning of chapter 85 of title 28 is amended by adding at the end thereof the following new item:

"1365. Limitations on jurisdiction."

SEC. 4. The amendments made by this Act shall take effect on the date of the enactment, except that such amendments shall not apply to any case which, on such date of enactment, was pending in any court of the United States.

3. "In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

4. Congressional control over inferior federal courts allegedly derives from article III, section 1. This section provides in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

5. See, e.g., Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982). Professor Bator stated that the argument in favor of legislative control of judicial power goes further than the "mechanical argument that the greater power (not to create [inferior federal courts] at all) must include the lesser (to create them but limit their jurisdiction)." *Id.* at 1031. According to Bator, it is also based on an understanding of the framer's intent. *Id.*

The asserted justifications for such legislation appear to result, at least in part, from an incomplete analysis of the meaning of article III and its interrelationship with other parts of the Constitution. Adequate analysis must accept certain fundamental, historical realities, including the framers' conviction that they were creating a fully coordinate judicial branch that would ensure the supremacy of federal law.⁶ A close examination of the relevant historical materials and the language of article III demonstrates that court-stripping bills are unconstitutional encroachments upon the power of the federal judiciary.

I. THE FRAMERS' INTENT: A STRONG FEDERAL JUDICIARY

Before analyzing the specific constitutional language at issue, it is instructive to recall the circumstances in which that language arose. A complete understanding of the provisions promulgated at the Constitutional Convention (Convention) requires attention to the reasons behind convocation of the Convention.⁷ The men who assembled in Philadelphia in the spring of 1787 were alarmed at the state of affairs in the United States under the Articles of Confederation. They were painfully aware of the disastrous economic conditions in the Union and they feared the effect of unwise and unjust state legislation.⁸ Their primary motivation in desiring a new Constitution was a realization that its guarantees were necessary to prevent dissolution of the Union and the extinction of republican government.⁹

One of the most dangerous deficiencies under the Articles of Confederation was the lack of effective national judicial power. Alexander Hamilton described this shortcoming as "[a] circumstance which crowns the defects of the Confederation."¹⁰ Hamilton recognized that "[l]aws are a dead letter without courts to expound and define their true meaning and operation."¹¹ The existence of state courts could not rectify the dilemma, for "[i]f there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless

6. See *infra* text accompanying notes 44-54.

7. See 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 45.05 (C. Dallas Sands 4th ed. 1984).

8. C. WARREN, THE MAKING OF THE CONSTITUTION 54 (1937).

9. *Id.*

10. THE FEDERALIST No. 22, at 138 (A. Hamilton) (Modern Library ed. 1937); see also J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 28-30 (New York 1860). According to Story, one reason for the failure of the Articles of Confederation was that the states "nourished a spirit of resistance to all external authority" and refused to delegate power sufficient to maintain a national union. *Id.* at 29. Story also remarked that while the Continental Congress had exclusive powers in various matters it was without any power to execute them. *Id.* "Congress had little more than the power of recommending their measures to the good will of the States." *Id.* at 30.

11. THE FEDERALIST No. 22, at 138 (A. Hamilton) (Modern Library ed. 1937)

diversities in the opinions of men."¹² Such diversity would undermine the great end that the framers proposed to accomplish:

[T]o frame, for the consideration of their constituents, one federal and national constitution—a constitution that would produce the advantages of good, and prevent the inconveniences of bad government—a constitution whose beneficence and energy would pervade the whole Union, and bind and embrace the interests of every part—a constitution that would insure peace, freedom, and happiness, to the states and people of America.¹³

Conscious of the Articles of Confederation's failure, the drafters of the Constitution were determined to vest sufficient power in the judiciary of their new government. The framers knew that even though they could draft provisions outlining the role of the states in matters of national concern, these provisions would be meaningless without a way of enforcing them. According to Hamilton, it was naive to believe "that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them."¹⁴ Reliance on the states to act selflessly would be foolish and even dangerous, for "[n]o government can be stable which hangs on human inclination alone, unbiased by coercion."¹⁵ While the framers did not wish to deprive the states of judicial power over their internal affairs, they recognized the need for a national judicial authority to decide matters of import beyond the boundaries of a particular state.¹⁶

Proponents of a strong federal judiciary were not only reluctant to rely on state courts to uphold federal interests in individual cases, but they also feared the threat that disparate interpretations of federal law would pose to the entire system they meant to establish. "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."¹⁷ This contradiction would be particularly

12. *Id.* at 138-39.

13. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 431 (J. Elliot 2d ed. 1836) (emphasis added) (statement by James Wilson at the Pennsylvania convention) [hereinafter cited as DEBATES].

14. THE FEDERALIST No. 80, at 516 (A. Hamilton) (Modern Library ed. 1937); see also J. STORY, *supra* note 10, at 29-30 (one problem under the Articles of Confederation was that Congress, in effect, only had the power to recommend measures to the states and could not force the states to accept the recommendations).

15. 1 DEBATES, *supra* note 13, at 483 (letter from Edmund Randolph to the Speaker of the Virginia House of Delegates).

16. See, e.g., PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 343 (P. Ford ed. 1888) (James Iredell's answers to Mr. Mason's objections to the new Constitution: only "where the Union is in some measure concerned, are the federal courts to have any jurisdiction").

17. THE FEDERALIST No. 80, at 516 (A. Hamilton) (Modern Library ed. 1937).

intolerable in adjudication of constitutional controversies, where uniformity was thought essential:

The people of the United States have one common interest; they are all members of the same community, and ought to have justice administered to them equally in every part of the continent, in the same manner, with the same dispatch, and on the same principles. It is therefore absolutely necessary that the judiciary of the Union should have jurisdiction in all cases arising in law and equity under the Constitution.¹⁸

Given this strongly perceived need for a federal judiciary, it is only logical that the framers intended to protect this judicial power from encroachments by other branches of the federal government. Indeed, the desire to protect the independence of all three branches of the federal government—executive, legislative, and judicial—is evident in the framers' adherence to the doctrine of separation of powers.¹⁹ Division of the governing power into three distinct spheres—each with its own area of competence—was to ensure the unhampered operation of each. To do otherwise, Madison explained, would be to invite disaster: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."²⁰ Applying this principle specifically to the judiciary, Hamilton drew on the view of Montesquieu that "there is not liberty, if the power of judging be not separated from the legislative and executive powers."²¹

This need for complete independence of the courts—advocated by Madison and Hamilton in *The Federalist*—influenced the Convention as a whole in

18. 4 DEBATES, *supra* note 13, at 157-58 (statement by William R. Davie at the North Carolina convention). John Marshall made a similar statement at the Virginia convention:

Is it not necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?

3 DEBATES, *supra* note 13, at 554.

19. Separation of powers has been described as a political theory rather than a technical rule of law. Its purpose is to prevent a consolidation of power in any one branch of the government. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 135 (2d ed. 1983). According to Tribe, the Madisonian framework would "enable forces and counterforces of government to mesh as needed to execute the purposes of the nation . . . and to check one another as needed to shield the individual and the community from governmental oppression and discrimination." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 15 (1978).

20. THE FEDERALIST NO. 47, at 313 (J. Madison) (Modern Library ed. 1937)

21. THE FEDERALIST NO. 78, at 504 (A. Hamilton) (Modern Library ed. 1937) (citing 1 C. MONTESQUIEU, *SPIRIT OF LAWS* 181). Hamilton also stated that "liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . ." *Id.* Thus, in order to maintain liberty, the judiciary must maintain its independence.

drafting the Constitution. Fifteen years after the creation of the Constitution, one of the members of the Convention remarked that "[t]here is nothing, I think, more demonstrable than that the Convention meant the judiciary to be a coordinate, and not a subordinate branch of the government."²² He continued: "This was not only the intention of the General Convention, but of the state conventions when they adopted this Constitution. Nay, sir, had they not considered the judicial power to be coordinate with the other two great departments of government, they never would have adopted the Constitution."²³

In light of their firm belief in the independence of the judiciary, it is unreasonable to conclude that the framers would impliedly insert into the Constitution the means to undercut that independence. Yet, this is precisely what the advocates of court-stripping bills contend. As argued below, the justifications offered to support the court stripping bills fail to take into account the broader goals of the Convention. The establishment of judicial power in article III becomes a mockery if Congress can circumvent its provisions. Further, attempts to justify court stripping bills under article III also ignore their impact on article VI which mandates that there be but one supreme federal law.²⁴ Among other things, correct analysis requires adherence to fundamental rules of interpretation, including the obligation to construe each part of a document harmoniously with other parts of that document.²⁵

II. THE SUPREME COURT'S APPELLATE JURISDICTION

One component of federal judicial power under attack in court-stripping legislation is the Supreme Court's appellate jurisdiction. The Voluntary School Prayer Act of 1981, for example, sought to withhold the Supreme Court's appellate jurisdiction to review *any* case arising out of any state statute relating to voluntary prayers in public schools and public buildings.²⁶ Legislation of this type violates the intent of the Constitution's framers that the Supreme Court be the final arbiter to ensure uniformity of decisions and the supremacy of federal law, and that exceptions to the Court's appellate jurisdiction be narrowly confined.

A. *The Language of Article III*

Section one of article III begins: "The judicial Power of the United States,

22. 4 DEBATES, *supra* note 13, at 445 (statement by John Rutledge in the United States Senate, Jan. 13, 1802).

23. *Id.* at 447.

24. The supremacy of federal law is mandated by the Constitution. *See* U.S. CONST. art. VI.

25. *See* 2A J. SUTHERLAND, *supra* note 7, at § 46.05.

26. S. 481, 97th Cong., 1st Sess., 127 CONG. REC. S1284 (daily ed. Feb. 16, 1981). The relevant portions of the bill are set out *supra* note 2.

shall be vested in one supreme Court, and in such inferior Courts"²⁷ Section two first sets forth the specific areas to which the federal judicial cognizance, vested under section one, shall extend.²⁸ It then states the role of the Supreme Court in the federal scheme by enumerating the cases in which the Court possesses original jurisdiction. Section two goes on to provide that "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction"²⁹

The significance of these provisions is heightened by the rule of construction that directives in a constitutional context demand a more literal compliance than similar provisions found in general legislation.³⁰ In other words, their mandate must be given effect. Applying this principle to the article III's language, it is clear that the framers ordered the judicial power to be vested in the Supreme Court and mandated that this Court exercise appellate jurisdiction in *all* cases of federal concern not assigned to its original jurisdiction.

B. *The Need for Uniformity and Control over State Courts*

A look behind the actual wording of article III to its underlying purposes reveals that the framers were striving for uniformity of decision under the new federal judicial system. The thirteen state courts under the Articles of Confederation had taken varying courses in adjudicating congressional measures and there was no effective way of harmonizing their decisions.³¹ Whereas the Convention delegates heavily debated the role of the inferior federal courts, they were in unanimous agreement that there should be one supreme tribunal of the national judiciary.³² They considered a supreme tribunal to be the only means of securing the uniform administration of justice in the several states.³³ Without such a supreme decisionmaker, the divergence of opinion would produce intolerable results:

27. U.S. CONST. art. III, § 1.

28. See U.S. CONST. art. III, § 2, cl. 1.

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

30. See 2A J. SUTHERLAND, *supra* note 7, at § 57.13 (citing *Mason v. Fearson*, 52 U.S. (9 How.) 248 (1850)).

31. See, e.g., 2 DEBATES, *supra* note 13, at 231. (Hamilton's comments at the New York convention: "Hence there have ever been thirteen different bodies to judge of the measures of Congress, and the operations of government have been distracted by their taking different courses.")

32. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 37 (M. Farrand ed. 1937) (the phrases "That a national Judiciary be established" and "To consist of One Supreme Tribunal" both passed unanimously) [hereinafter cited as RECORDS OF CONVENTION].

33. See 4 DEBATES, *supra* note 13, at 147. (remarks of James Iredell at the North Carolina convention: "The propriety of having a Supreme Court in every government must be obvious to every man of reflection. There can be no other way of securing the administration of justice uniformly in the several states. There might be, otherwise, as many different adjudications on the same subject as there are states").

If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.³⁴

Although some delegates speculated that exclusive federal court jurisdiction over questions arising under the laws, treaties, and Constitution of the United States might be a proper way to assure uniformity of judgment and protection against state bias, even they conceded that there might be instances in which state courts would take cognizance of cases arising under federal law.³⁵ In situations of concurrent state court jurisdiction, they urged that the avenue of appeal to the federal judiciary be correspondingly broad.³⁶ Their position reflected a general assumption pervading the Convention itself, namely, that the Supreme Court would have appellate jurisdiction over state court decisions regarding matters of federal interest:

The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals.³⁷

This appellate jurisdiction over decisions by state courts was considered to be not only desirable, but absolutely essential. Otherwise, the federal courts would be as defective as they were under the Articles of Confederation, and the law of the whole would be in danger of being contravened by the law of the parts.³⁸ In addition, if state court adjudications of article III cases

34. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

35. See THE FEDERALIST NO. 81, at 528 (A. Hamilton) (Modern Library ed. 1937).

36. See *id.*

37. See THE FEDERALIST NO. 82, at 536-37 (A. Hamilton) (Modern Library ed. 1937).

38. THE FEDERALIST NO. 22, at 139 (A. Hamilton) (Modern Library ed. 1937); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 48 (1981). One of the reasons for the failure of the Articles of Confederation was that the new federal government had no way of enforcing its powers. Without Supreme Court appellate jurisdiction to review state court decisions, the new federal government established by the Constitution would have been just as powerless as the federal government under the Articles of Confederation. In order for the government established by the Constitution to succeed, it was necessary that the Supreme Court have power to review decisions of state courts.

were free of Supreme Court review, the result would defeat the constitutional mandate that the Court exercise appellate jurisdiction over all article III cases in which it does not have original jurisdiction.³⁹ The logic of this argument was recognized by Justice Story in *Martin v. Hunter's Lessee*:⁴⁰

If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, *but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution.*⁴¹

Other events at the Convention also suggest that the framers intended the federal judiciary—primarily the Supreme Court—to provide a check on state proceedings that were inconsistent with the Constitution. The original Randolph plan called for congressional power to veto state legislation which contravened federal law.⁴² This resolution was ultimately rejected, at least in part because the federal judicial power to declare state laws unconstitutional would provide sufficient review.⁴³ If court-stripping bills are enacted, this means of enforcing state adherence to the federal Constitution would be lost.

C. *The Judiciary Article and the Supremacy Clause*

A full understanding of the role that the framers' intended for the Supreme Court requires simultaneous examination of the supremacy clause in article VI. That clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁴⁴

By this clause, the framers intended to assure that there would be only one federal law in the land and that in the case of a conflict between state

39. See *supra* text accompanying notes 55-83.

40. 14 U.S. (1 Wheat.) 304 (1816).

41. *Id.* at 339 (emphasis added).

42. See 1 RECORDS OF CONVENTION, *supra* note 32, at 21.

43. See 2 RECORDS OF CONVENTION, *supra* note 32, at 27-28; see also Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 162 (1960) ("Supreme Court review of cases involving the constitutionality of either state or federal statutes would constitute a sufficient check upon the legislative power.") (footnotes omitted).

44. U.S. CONST. art. VI.

and federal laws the former would yield to the latter.⁴⁵ The force of the supremacy clause, however, is dependent upon the good faith of the officers called to uphold it. Indeed, although the Articles of Confederation contained a supremacy clause, the provision was ineffective because there was no adequate means of enforcement.⁴⁶ Aware of this defect in the Articles of Confederation, the framers made certain that the new Constitution contained a means of assuring adherence to the supremacy clause. The mode chosen to achieve this end was a federal supreme tribunal empowered to sit as the final arbiter of the law of the land.

The close relationship between the judiciary article and the supremacy clause can best be seen by the parallel evolution of these provisions at the Convention.⁴⁷ As reported by the Committee of Detail on August 6, 1787, the supremacy clause read in part as follows: "The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants."⁴⁸ In the full Convention on August 23, Rutledge moved to amend the provision to begin: "This Constitution and the Laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States"⁴⁹ Four days later, on August 27, the Convention discussed the provisions of the judiciary article. The version presented by the Committee of Detail provided, in part: "The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States."⁵⁰ The delegates to the Convention made a number of amendments⁵¹ to the clause so that it read: "The Judicial Power shall extend to all cases arising under this Constitution and the laws of the United States and treaties made or which shall be made under their authority."⁵²

45. Ratner, *supra* note 43, at 160.

46. Sager, *supra* note 38, at 48 n.90. The fatal flaw of the Articles of Confederation's supremacy clause was an "absence of a means of holding the states to their agreement to abide by the Articles." *Id.*

47. See Ratner, *supra* note 43, at 160-65.

48. 2 RECORDS OF CONVENTION, *supra* note 32, at 183.

49. *Id.* at 381-82, 389.

50. *Id.* at 186.

51. Johnson moved to insert before the word "laws" the words "this Constitution and the," and the motion passed. 2 RECORDS OF CONVENTION, *supra* note 32, at 423-30. Then Rutledge moved that the words "passed by the Legislature" be struck out and the words "and the treaties made or which shall be made under their authority" be inserted after the words "United States." *Id.* at 423-24, 432. This motion also passed. Subsequently, the Convention substituted the words "[t]he judicial Power" for "[t]he jurisdiction of the Supreme Court." *Id.* at 425. The substitution of "[t]he judicial Power" for "[t]he jurisdiction of the Supreme Court" does not alter the conclusion that the Supreme Court is the body responsible for assuring the supremacy of federal law. That change was made merely to broaden the base of the judicial power to include inferior federal courts, and does not in any way derogate from the duties of the Supreme Court.

52. *Id.* at 432.

Madison's notes for the August 27 session observed that the changes in the judiciary article were made "conformably to a preceding amendment in another place."⁵³ This "preceding amendment" was the August 23 revision of the supremacy clause.⁵⁴ By conforming the provisions of the judiciary article to those of the supremacy clause, the delegates indicated their intent that the articles be considered together. The framers wanted one *supreme* law—the Constitution, laws, and treaties of the United States—secured by the judicial power of the United States. Within this judicial system they mandated but one *supreme* tribunal and assigned to it appellate jurisdiction in all federal cases over which it did not exercise original jurisdiction.

D. *The Intended Scope of the "Exceptions" Clause*

The avowed purpose of the framers of the Constitution was to create a federal judiciary—in particular a supreme tribunal—which would implement the supremacy clause. Appropriate congressional control of the judicial system therefore must not be allowed to frustrate that role. Varying interpretations of the article III language have, however, led to especially lively debates regarding the scope of the Court's appellate jurisdiction.

Section two of article III delineates the reach of the federal judicial power and the Supreme Court's original jurisdiction, and in regard to the Court's appellate jurisdiction states: "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."⁵⁵ Sponsors of court-stripping bills assert that this provision authorizes the withholding or "excepting" of appellate jurisdiction over particular classes of cases, including some involving constitutional questions. Such a broad reading of the exceptions clause, however, lacks fidelity to the framers' intent and carefully chosen language.

To appreciate the framers' understanding of the reach of the exceptions clause, it is again necessary to capture the thrust of the work of the Convention. The Convention records indicate that the clause itself was hardly discussed. It first appears in papers prepared by the Committee of Detail and in the Committee's final presentation. As delivered to the Convention on August 6, 1787, the Committee of Detail's statement on the Supreme Court's jurisdiction read: "In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make."⁵⁶ At the full Convention on August 27, Governor Morris apparently initiated the only discussion of the exceptions clause when he asked whether the jurisdiction of the Supreme Court was to extend to matters

53. 2 RECORDS OF CONVENTION, *supra* note 32, at 431.

54. Ratner, *supra* note 43, at 165.

55. U.S. CONST. art. III, § 2, cl. 2.

56. 2 RECORDS OF CONVENTION, *supra* note 32, at 186.

of fact as well as law.⁵⁷ Wilson responded that he believed the Committee of Detail did mean facts as well as law.⁵⁸ Dickinson then moved to add the words "both as to law and fact" after the word "appellate," and the motion was passed.⁵⁹ After a change on August 28 deleting the words "it shall be appellate"⁶⁰ the clause read: "In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."⁶¹ The Committee of Style took this version and produced the wording which appears in the Constitution today.

The paucity of discussion alone suggests that the framers would never have acquiesced in the inclusion of the exceptions clause had they believed it could undermine the role of the Supreme Court that they unanimously desired. Other factors also support this proposition. First, contemporaneous state practice indicated that regulations of, and exceptions to, jurisdiction were not understood as broad incursions into judicial authority. Rather, regulations were primarily restricted to details such as establishing minima for appeals or periods of limitations. "Exceptions" of certain proceedings were allowed where neither error nor certiorari had been traditionally available.⁶²

Second, contemporary sentiments on the question pointed to a narrow reading of the exceptions clause. Madison felt that by the power to make regulations, Congress would be able to "provide against the inconveniences."⁶³ Hamilton likewise interpreted the power to make exceptions as a means "[t]o avoid all inconveniences."⁶⁴ Pinckney also presumed that the congressional power would be of limited effect: "[I]t can hardly be supposed that they will exercise it in a manner injurious to their constituents."⁶⁵ In

57. *See id.* at 431.

58. *Id.*

59. *Id.* at 424, 431.

60. *Id.* at 434.

61. *Id.* at 600-01.

62. 1 J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 240 (1971). This type of "regulation" was the practice of the individual states at the time of the convention. *Id.* For a discussion of permissible "exceptions" under article III, see *infra* text accompanying notes 54-82.

63. 3 *DEBATES*, *supra* note 13, at 535 (remark of James Madison at the Virginia convention).

64. *THE FEDERALIST* NO. 81, at 532 (A. Hamilton) (Modern Library ed. 1937).

65. 4 *DEBATES*, *supra* note 13, at 307 (remark of Charles Cotesworth Pinckney at the South Carolina convention). Even those who give a broader reading to the exceptions clause, extending it to matters of law as well as matters of fact, concede that the power is limited. For example, John Marshall stated at the Virginia Convention: "These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people." 3 *DEBATES*, *supra* note 13, at 560. Given the framers' ardent desire for the supremacy of federal law and their unanimous insistence on a functioning supreme tribunal, it is unlikely that even Marshall would find court-stripping legislation consistent with the framers' vision of the "interest and liberty of the people."

fact, the more common apprehension was that there was too *little* control over the reach of the federal judiciary in the new Constitution. Mason complained of the judiciary article stating: "Read the 2d section, and contemplate attentively the extent of the jurisdiction of these courts, and consider if there be any limits to it."⁶⁶ Thus, it seems that even those who *wished* to find potential limits to the scope of federal jurisdiction within article III were unable to do so.

A persuasive theory of the exceptions clause's intended scope has been put forward by scholars such as Irving Brant, Raoul Berger, and Henry Merry.⁶⁷ From their analysis of the relevant historical materials, they conclude that the exceptions clause was designed to allow Congress to make exceptions only to the Supreme Court's ability to review facts, and not to its appellate jurisdiction in matters of law.⁶⁸ This is a sound position because it is rooted in an examination of the Convention's proceedings in their entirety.

As discussed above, on August 27 the Convention amended the judiciary article to provide that the Supreme Court's appellate jurisdiction exist "both as to law and fact with such exceptions and under such regulations as the Legislature shall make."⁶⁹ Yet that same day the Convention rejected the following motion which would have given the Congress broad discretion over the Supreme Court's appellate jurisdiction: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct."⁷⁰ It has been suggested that a motion like this would never have been offered if the delegates believed that they had previously conferred the same power.⁷¹ It is unreasonable to contend, as do some proponents of court-stripping bills, that such legislation accords with

66. 3 DEBATES, *supra* note 13, at 521 (remark of George Mason at the Virginia convention).

67. The intention of the founders, further evidenced by the seventh amendment, was not to design the exceptions clause in such a way as to withdraw the Supreme Court's jurisdiction to declare an act of Congress void. Rather, debate on the exceptions clause centered exclusively around the retrial of facts found by a jury. The founders fashioned the exceptions clause to meet the principal criticism of the Court's appellate jurisdiction, its inclusion of the power to review facts. Constitutional issues, being matters of law, fall outside the remedial purposes of the exceptions clause. See R. BERGER, CONGRESS V. THE SUPREME COURT 285-97 (1969); see also Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3, 8-11 (1973) (stating that Hamilton's explanation in *The Federalist*, James Wilson's repeated explications, George Mason's proposed revision, and Joseph Story's analysis all conclude that Congress was only given the authority to make exceptions to the Supreme Court's power to review matters of fact); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 68 (1962) (substantial evidence shows that the authority of Congress to make exceptions to the Supreme Court's appellate jurisdiction is limited to the treatment of fact issues).

68. See *supra* note 67.

69. 2 RECORDS OF CONVENTION, *supra* note 32, at 424.

70. *Id.* at 425.

71. Brant, *supra* note 67, at 7. If the motion had passed, the proposed clause would have given Congress the power to create exceptions to the Supreme Court's appellate jurisdiction. This authority is the same as that claimed by Congress under the exceptions clause. *Id.*

the framers' intended reach of the exceptions clause when the framers themselves explicitly rejected such broad legislative authority.

In support of the view that the Convention intended congressional power to make exceptions only to matters of fact, Merry and his colleagues point out the intimate relationship in the framers' minds between the concept of appellate jurisdiction and trial by jury.⁷² While there was little controversy about the importance of appellate jurisdiction as to matters of law, there was strong public sentiment against an appellate tribunal's power to review findings of fact made by juries:

The propriety of the appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury⁷³

Comments by certain of the drafters show that the purpose of the exceptions clause was to placate those who feared that appellate jurisdiction over questions of fact would destroy the right to trial by jury. The framers realized that it would have been impossible to guarantee any particular mode of trial by jury under the Constitution itself, because the states varied to a great extent with respect to the manner of summoning jurors, juror qualifications, and particulars of the proceedings.⁷⁴ Thus, rather than provide one general regulation in the Constitution, the drafters left it to Congress to make exceptions and regulations that would harmonize with the right to trial by jury:

The several states differ so widely in their modes of trial, some states using a jury in causes wherein other states employ only their judges, that the Convention have very wisely left it to the federal legislature to make such regulations as shall, as far as possible, accommodate the whole.⁷⁵

Although the view limiting congressional exception-making power to matters of fact rests on firm historical evidence, a recognition of the unconstitutionality of court-stripping bills does not hinge upon the adoption of this theory.⁷⁶ Even if one takes the position that Congress can except questions

72. See, e.g., Merry, *supra* note 67, at 59. For example, both the guarantee of a jury trial in criminal cases only, and the idea of granting Congress the power to make exceptions to appellate jurisdiction were created by the Committee. *Id.* Both of these issues were criticized by the delegates to the Convention. Moreover, the arguments for and against these issues were very similar. *Id.* Both were criticized for not recognizing the traditional common law right to have facts decided by the jury. Both were defended because the states' various procedures made a specific agreement impossible. *Id.*

73. THE FEDERALIST No. 81, at 530 (A. Hamilton) (Modern Library ed. 1937).

74. See 2 DEBATES, *supra* note 13, at 488 (James Wilson at the Pennsylvania convention).

75. *Id.* at 114 (Thomas Dawes, Jr. at the Massachusetts convention).

76. Questions of constitutionality are matters of law. See R. BERGER, *supra* note 67, at 289.

of law, court-stripping bills must still be considered constitutionally infirm. The drafters, unanimous in their desire for a supreme federal tribunal and concerned with the Court's ability to implement the supremacy clause, could not have intended the exceptions clause to destroy this "essential role" of the Court in the constitutional plan.⁷⁷ To allow Congress to divest the Supreme Court of its appellate jurisdiction over article III cases, when that article states that the Court shall have appellate jurisdiction in *all* cases where it does not exercise original jurisdiction, would enable the legislature to override the Constitution and crush a coordinate branch of government.⁷⁸

The wording of the exceptions clause itself supports the proposition that the phrase may not be read so as to undermine the Supreme Court's role as the final arbiter of questions of law in article III cases. At the time of the Convention, the use of the term "exception" did not allow an exception to "nullify the rule or description that it limits."⁷⁹ In addition, a "regulation" was considered a "rule imposed to establish good order," and authority to prescribe such regulations did not "include the power to prohibit the entire sphere of activities subject to regulation."⁸⁰ Thus, the most reasonable interpretation of the exceptions clause is one put forth by Professor Ratner: "With such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution."⁸¹

However, acknowledging that Congress may not interfere with the "essential role" of the Supreme Court does not mean that every litigant in an article III case must be guaranteed Supreme Court review.⁸² It does mean

77. See Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953). Professor Hart incredulously notes that, read literally, the exceptions clause of the Constitution grants to Congress the power to make exceptions "to the point of eliminating the [Supreme Court's] appellate jurisdiction altogether." *Id.* If the term "exception" requires that the Supreme Court have some "residuum of jurisdiction," the essential role of the Court could still be destroyed if, for example, Congress denies to the Supreme Court all appellate jurisdiction except patent cases. *Id.*

78. See B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES* 378 (1963). The Supreme Court's appellate jurisdiction is essential to maintain uniformity between the Constitution and the laws of the United States, and also to assure that these will be the same in every state. *Id.* (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821)). More importantly, if Congress could completely remove the Court's appellate jurisdiction, the "judicial check upon unconstitutional governmental action" would no longer be available. *Id.*

79. Ratner, *supra* note 43, at 169.

80. *Id.* at 170-71. See, e.g., *Lottery Case*, 188 U.S. 321, 329 (1903) (Congress cannot prohibit transfer of notes, deeds, or contracts for personal service under interstate commerce regulation); *United States v. Marigold*, 50 U.S. (9 How.) 560, 566, 569 (1850) (Congress within the "legitimate sphere" of commercial regulation when it enacted law relating to punishment of counterfeiting).

81. Ratner, *supra* note 43, at 172 (quoting H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 312 (1953)).

82. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 936 (1982).

that Congress may not take entire classes of article III cases away from the Court's jurisdiction. Some avenue must remain open to permit resolution by the Court of questions within the federal judicial power. Otherwise, the constitutional mandate that the Supreme Court exercise either original or appellate jurisdiction in such instances is violated.⁸³ Thus, discretionary review through certiorari is as effective a guarantee of the "essential role" of the Supreme Court as mandatory review by writ of error or appeal.

E. *Judicial Precedents*

Although the Supreme Court has on occasion noted Congress' authority under the exceptions clause,⁸⁴ only three cases, decided in the stormy Reconstruction era, are truly germane. The first is *Ex Parte McCardle*.⁸⁵ McCardle, a newspaper editor imprisoned by the army for anti-Reconstruction activities, contended that the Reconstruction Acts were unconstitutional insofar as civil authority was displaced by the military.⁸⁶ McCardle unsuccessfully sought review of his conviction in the circuit court pursuant to the Habeas Corpus Act of 1867. McCardle appealed under the provision of that Act that permitted direct appeals to the Supreme Court. The government's motion to dismiss McCardle's appeal as not within the terms of the statute was denied on February 17, 1868.⁸⁷ The Supreme Court rapidly moved to consider the appeal on the merits; oral argument was heard in early March 1868.⁸⁸ On March 27, 1868, Congress overrode President Johnson's veto and repealed the provision of the 1867 Act under which McCardle had appealed.⁸⁹ The Supreme Court continued the case for a term, and then heard arguments on the effect of the repeal. The Court finally dismissed the appeal stating:

The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.⁹⁰

83. *Id.*

84. *See, e.g.,* Colorado Central Mining Co. v. Truck, 150 U.S. 138, 141 (1893) (court exercises appellate jurisdiction only in accordance with acts of Congress); American Const. Co. v. Jacksonville, T. & K.W. Ry. Co., 148 U.S. 372, 378 (1893) (Court has appellate jurisdiction as directed and prescribed by Congress).

85. 74 U.S. (7 Wall.) 506 (1869).

86. *Id.* at 508.

87. *McCardle*, 73 U.S. (6 Wall.) 318, 327 (1868).

88. 74 U.S. at 508.

89. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, *repealed by* Act of March 27, 1868, ch. 34, 15 Stat. 44.

90. 74 U.S. at 514.

The Court made plain, however, that the decision was limited to the effect of the very pointed repeal of this one particular aspect of the Court's appellate jurisdiction.⁹¹ Further, a realistic assessment of so limited a decision cannot overlook the fact that the Court was confronted by the extraordinary political unrest of the times that brought federal troops to the streets of the Capital.⁹²

The precedential effect of the decision in *McCardle* was virtually eclipsed the same year in *Ex parte Yerger*.⁹³ Like *McCardle*, *Yerger* was imprisoned for anti-Reconstruction activities and sought review of his conviction by writ of habeas corpus. *Yerger* sought Supreme Court review under the Judiciary Act of 1789. The government had urged that Congress' repeal of the direct appeals provision of the 1867 Habeas Corpus Act had effectively removed all appellate authority to review Reconstruction Act convictions.⁹⁴ Over the objection of the government, the Supreme Court held:

The effect of the [repealer] was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.⁹⁵

Significantly, the Court indicated that Congress lacked authority to take away the Court's power to hear a case that was provided for by the Constitution.⁹⁶

The third case that bears directly upon the necessary analysis is *United States v. Klein*.⁹⁷ Decided three years after *McCardle*, *Klein* disposed of any lingering doubts with respect to Congress's authority under the exceptions clause to strip the Court of its constitutional authority. *Klein* was the administrator of the estate of Wilson who was formerly an officer in the Confederate Army. He sought to recover the proceeds of the sale of Wilson's

91. *Id.* at 515 (citing *McCardle*, 73 U.S. at 324). For example, the Court still derived authority under the Judiciary Act of 1789.

92. *Id.* One commentator noted that, "with troops in the streets of the capital and the President of the United States on trial before the Senate, a less ideal setting for dispassionate judicial inquiry could hardly be imagined." Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542, 1555 (1972).

93. 75 U.S. (8 Wall.) 85 (1869).

94. *Id.* at 90.

95. *Id.* at 104.

96. *Id.* at 102.

97. 80 U.S. (13 Wall.) 128 (1872).

cotton, which had been seized by the Union Army. In 1864, Wilson took a loyalty oath and availed himself of a pardon offered by President Lincoln.⁹⁸ The Act under which the property was seized provided that if the owner could prove loyalty to the Union, he could recover the proceeds. The court of claims held that the pardon extinguished the crime of disloyalty and allowed recovery. The government appealed. While the appeal was pending, Congress enacted legislation that provided that in all claims litigation presidential pardons would conclusively establish the underlying *disloyalty*, but would be inadmissible to prove subsequent *loyalty*.⁹⁹ Congress therefore directed that all claims suits on behalf of pardoned Confederate officers be dismissed. The Supreme Court held that by dictating the outcome in particular cases, Congress unconstitutionally infringed upon the judicial power.¹⁰⁰

The Supreme Court has never approved the literal implication of the language in *McCordle*. In fact, not only did the Court qualify those expressions in *Yerger*, but the relevant cases after *McCordle* bear out the essential principle espoused by Chief Justice Marshall almost two centuries ago in *Marbury v. Madison*,¹⁰¹ namely, that the judicial power of the United States cannot be subverted by a law of Congress.¹⁰² Indeed, the Supreme Court has refused to honor legislative restrictions on federal jurisdiction when that jurisdiction was necessary to safeguard constitutional rights.¹⁰³

In sum, the authority of Congress to make exceptions to the Supreme Court's appellate jurisdiction is limited. On the one hand, it is reasonable to conclude that the Convention gave Congress the authority to prescribe orderly procedures for the exercise of appellate jurisdiction and to modify

98. *Id.* at 132.

99. *Id.* at 142-44.

100. *Id.* at 146-47. The Court stated:

In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

Id. at 147. The Court also noted that the law was an invalid transgression on the President's power to pardon. *Id.*

101. 5 U.S. (1 Cranch) 137 (1803).

102. *Id.* Various cases have indicated that legislation purporting to deny the appellate jurisdiction of the Court over constitutional issues would be invalid. *See, e.g.*, *Territory of Guam v. Olsen*, 431 U.S. 195, 204 (1977); *Feinberg v. Federal Deposit Ins. Corp.*, 522 F.2d 1335, 1342 (D.C. Cir. 1975).

103. *See* *Lipke v. Lederer*, 259 U.S. 557, 559-61 (1922) (construction of tax code by IRS as administrative and not as a criminal procedure erroneous); *Ng Fung Ho v. White*, 259 U.S. 276, 283-84 (1922) (decision to deport a claimed citizen is a judicial, rather than legislative, action); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Congress may not attach penalties to wrongful entry by aliens without a judicial hearing).

those procedures in response to prevailing social conditions.¹⁰⁴ On the other hand, proposals that would annul the Supreme Court's jurisdiction over any case falling within the federal judicial power would *pro tanto* destroy the Supreme Court's essential role in the constitutional plan, and thus, must be considered unconstitutional.

III. INFERIOR FEDERAL COURTS UNDER ARTICLE III

A. *Constitutional Interpretation*

An analysis of the intended role of inferior federal courts in the judicial system centers primarily on two sections of the judiciary article. The first section of article III provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹⁰⁵

Although the foregoing contains the only explicit references to inferior federal courts in article III, it is essential to read section one in conjunction with section two, which details the reach of the judicial power referred to in section one:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹⁰⁶

Again, it is important to stress that these words appear in a constitutional setting; thus, they invoke the principle of interpretation that requires that

104. Hamilton stated that the exceptions and regulations clause "will enable the government to modify [the Supreme Court's appellate jurisdiction] in such a manner as will best answer the ends of public justice and security." *THE FEDERALIST* No. 81, at 532-33 (A. Hamilton) (Modern Library ed. 1937).

105. U.S. CONST. art. III, § 1.

106. U.S. CONST. art. III, § 2, cl. 1.

constitutional directives be given mandatory effect.¹⁰⁷ When the framers provided that the judicial power “*shall* be vested,” they intended that this power in fact be vested. Further, read together in light of their evolution at the Convention, sections one and two of article III are viewed most reasonably as vesting the power to adjudicate the enumerated cases in inferior federal courts.

Significant changes made in section one by the Convention’s Committee of Style emphasized that the creation of inferior federal courts by Congress was not meant to be discretionary. As submitted to the Committee of Style on September 10, 1787, the relevant portion of the judiciary article read: “The Judicial Power of the United States both in law and equity shall be vested in one Supreme Court, and in such Inferior Courts as shall, *when necessary*, from time to time, be constituted by the Legislature of the United States.”¹⁰⁸ The Committee of Style, whose mandate was to revise the style of the text and arrange it in accordance with the sentiment of the Convention, rewrote this provision to state: “The judicial power of the United States, both in law and equity, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁰⁹ Eliminating the phrase “as shall, when necessary” had the effect of depriving Congress of the power to decide whether there was a need for inferior federal courts, thereby giving full obligatory effect to the directive that the judicial power “shall be vested in one supreme Court, and in such inferior courts.”¹¹⁰ Historical analysis by Professor Goebel confirms this view. Goebel traces the contemporaneous usage of the words “ordain and establish” and finds that they conveyed the sense of something imperative.¹¹¹ Thus, it appears that the Committee of Style selected the phrase “ordain and establish” in order to show that inferior federal courts were constitutionally required.

Another significant language change concerns the use of the phrase “[t]he judicial Power” at the outset of section two. As reported by the Committee of Detail on August 6, 1787, this section began: “The Jurisdiction of the

107. See *supra* text accompanying note 25.

108. 2 RECORDS OF CONVENTION, *supra* note 32, at 575 (emphasis added).

109. *Id.* at 600.

110. 1 J. GOEBEL, JR., *supra* note 62, at 247. Goebel believes that the members of the Committee rewrote the provision to “assure that federal inferior courts” were created. *Id.* Furthermore, as Goebel notes, the designation of state courts to serve the same purpose was insufficient. *Id.*

111. *Id.* Goebel explains that these were the words used by the state constitutions of Massachusetts, New York, Pennsylvania, and Virginia to call into being their new state governments. He also notes that they are the words of fiat used by the people of the United States in the preamble of the new Constitution. *Id.*

Supreme Court shall extend to all cases arising under"¹¹² During a meeting of the entire house on August 27, the phrase "[t]he Judicial Power" was substituted for "[t]he jurisdiction of the Supreme Court."¹¹³ The selection of this broader term indicates that the framers did not wish adjudication of the enumerated cases to be confined to the Supreme Court. Also, by beginning section two with the phrase "[t]he judicial Power," the framers suggested a parallel to section one, which opens with the same words. Taken together, the two sections mandate creation of the lower federal courts and list the controversies to which the jurisdiction of those courts shall extend.

The drafters' inclusion of the words "from time to time" in the provision regarding inferior courts is also noteworthy. An 1802 congressional debate on the judiciary system recognized the significance of this phrasing. Responding to a contention that Congress had discretion to create or not create inferior courts as it wished, Representative Joseph Hemphill explained the meaning of the words "from time to time."¹¹⁴ He noted that these words were used in three other places in the Constitution, and that on each occasion they did not "convey the idea of what may be done," but rather described "where it is impracticable to undo what shall have been done."¹¹⁵ That is, the phrase appears in these constitutional provisions to not only mandate particular actions, but simultaneously to allow discretion as to their timing. In the case of the judiciary power, Hemphill concluded that the language of article III was not intended to give Congress the power to constitute inferior courts, because that power had been granted in article I, section eight.¹¹⁶ Instead, article III was designed to vest the federal judicial power in the inferior federal courts created under article I, section eight.¹¹⁷

To discern the intended meaning of article III, it is important to take note of the provisions that the framers refused to insert in the judiciary article. In a session of the full Convention, a motion was made that in certain enumerated cases original jurisdiction rest in the courts of the several states with appeal to the United States courts. This motion was immediately withdrawn.¹¹⁸ Another motion was made to amend the judiciary article to

112. 2 RECORDS OF CONVENTION, *supra* note 32, at 186.

113. *Id.* at 425.

114. 4 DEBATES, *supra* note 13, at 444 (statement by Joseph Hemphill in the United States Senate, Jan. 13, 1802).

115. *Id.* The other uses of "from time to time" in the Constitution are: art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same. . . ."); art. I, § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."); art. II, § 3 ("[The President] shall from time to time give to the Congress Information of the State of the Union").

116. 4 DEBATES, *supra* note 13, at 445 (statement by Joseph Hemphill in the United States Senate, Jan. 13, 1802). One of the powers given to Congress under article I, section 8 is "[t]o constitute Tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9.

117. *See* U.S. CONST. art. III, § 2.

118. 2 RECORDS OF CONVENTION, *supra* note 32, at 424.

include a provision that “[i]n all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct.”¹¹⁹ This motion was defeated by a vote of six states to two.¹²⁰ These events show the Convention’s unwillingness both to substitute state tribunals for inferior federal tribunals and to vest Congress with extensive control over the federal judiciary.

Contemporaneous occurrences outside of the Convention also lend support to these conclusions. Maryland delegate Luther Martin, recounting the opposition to the creation of inferior federal tribunals, explained:

But here, again, we were overruled by a majority, who, assuming it as a principle that the general government and the state governments (as long as they should exist) would be at perpetual variance and enmity, and that their interests would constantly be opposed to each other, insisted, for that reason, that the state judges, being citizens of their respective states, and holding their commissions under them, ought not, though acting on oath, to be intrusted with the administration of the laws of the general government.¹²¹

The Maryland convention was so certain that the Constitution required the establishment of lower federal courts that it proposed amendments “[t]o give a concurrent jurisdiction to the state courts, in order that Congress may not be compelled, as they will be under the present form, to establish inferior federal courts”¹²² North Carolina delegate Richard Spaight observed that the failure of Congress to establish inferior federal tribunals would amount to a “betrayal.”¹²³ Pennsylvania delegate Governor Morris made similar observations before the United States Senate in 1802:

[The Constitution] has declared that [the cases enumerated in Article III] shall (in the first instance) be tried by inferior courts, with appeal to the Supreme Court. This, therefore, amounts to a declaration, that the inferior courts shall exist. Since, without them, the citizen is deprived of those rights for which he stipulated, or rather those rights verbally granted would be actually withheld; and that great security of our Union, that necessary guard of our tranquility, be completely paralyzed, if not destroyed. In declaring then that these tribunals shall exist, it equally declares that the Congress shall ordain and establish them. I say they shall; this is the evident intention, if not the express words, of the Constitution. The Convention in framing, the American people in adopt-

119. *Id.* at 425.

120. *Id.*

121. 1 DEBATES, *supra* note 13, at 370 (emphasis added) (statement by Luther Martin to the Maryland Legislature).

122. 2 DEBATES, *supra* note 13, at 551 (address to the people of Maryland).

123. 4 DEBATES, *supra* note 13, at 139 (remark of Richard Spaight at the North Carolina convention).

ing, that compact, did not, could not presume, that the Congress would omit to do what they were thus bound to do. They could not presume, that the Legislature would hesitate one moment, in establishing the organs necessary to carry into effect those wholesome, those important provisions.¹²⁴

Perhaps the most famous statement of article III's intended force came from Justice Story in *Martin v. Hunter's Lessee*.¹²⁵ "The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation."¹²⁶ Recognizing that the Constitution must be read as a whole, so that its components fit together in a consistent way, Justice Story continued:

The judicial power must, therefore, be vested in some court, by congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the constitution, they might defeat the constitution itself; a construction which would lead to such a result cannot be sound.¹²⁷

Justice Story further noted that because Congress has the duty to vest the judicial power, it must vest the *whole* of the judicial power.¹²⁸ From this it follows that Congress is bound to create inferior courts invested with jurisdiction to hear those cases falling within the judicial power of the United States, but not assigned to the Supreme Court's original jurisdiction.¹²⁹

B. The "Madisonian Compromise"

Despite the force of the foregoing, some deny that Congress is obligated to create inferior federal courts because the final wording of article III represents a "compromise" position.¹³⁰ They, too, base their position on developments at the Convention. The original constitutional plan put before the Convention by Governor Edmund Randolph of Virginia on May 29 included a resolution "that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."¹³¹ The resolution also listed the cases to which

124. 3 RECORDS OF CONVENTION, *supra* note 32, at 391.

125. 14 U.S. (1 Wheat.) 304 (1816).

126. *Id.* at 328.

127. *Id.* at 329.

128. *Id.* at 330.

129. *Id.* at 331.

130. See, e.g., M. REDISH, FEDERAL JURISDICTION: TENSION IN THE ALLOCATION OF JUDICIAL POWER 8 (1980) (framers entered compromise giving Congress power to create lower federal courts as it chose); Sager, *supra* note 38, at 33-34 (clear intent of framers to compromise divergent views of lower federal courts by "passing the buck" to Congress).

131. 1 RECORDS OF CONVENTION, *supra* note 32, at 21.

the judicial power should extend, and stated that with respect to them "the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort."¹³² On June 5th, however, before the Committee of the Whole, John Rutledge of South Carolina moved that the words "and of inferior tribunals" be struck from Randolph's resolution.¹³³ The motion passed by a vote of five states to four, with two divided. Immediately thereafter, James Madison and James Wilson moved to add the provision "[t]hat the national legislature be empowered to appoint inferior tribunals."¹³⁴ This motion passed by a vote of seven states to three, with one divided.

Some supporters of court-stripping bills view this sequence of events as a shift in position from providing an absolute congressional duty to create inferior courts to a discretionary power to do so. They align themselves with those who give a very broad reading to the scope of that discretion.¹³⁵ It is true that Rutledge supported his motion by arguing that the state tribunals should be left in all cases to decide in the first instance, with recourse to the supreme tribunal on appeal being sufficient to secure national rights and uniformity of judgment.¹³⁶ If this was what the framers intended, however, the judiciary article would not provide for inferior courts at all. It is also true that Madison explained his "compromise" motion by saying that there was a distinction between establishing such inferior tribunals in the Constitution and leaving them to the discretion of the legislature.¹³⁷ But this last statement by Madison must not be taken out of context.¹³⁸ In opposing Rutledge's motion, Madison had just spoken ardently of the *necessity* of inferior tribunals. He reiterated their absolute importance when he put forth his compromise motion.¹³⁹ Madison's discussion of congressional discretion, on the other hand, was carefully designed to elicit support from the Convention members who were fearful that state autonomy would be destroyed by the federal judicial power. As discussed above, the overall understanding of the Convention was that the creation of lower courts was mandatory, an understanding reflected in the report of the Committee of Style and in the final wording of the Constitution.

C. *The Scope of Congressional Discretion*

The fact that the Constitution delegates to Congress the duty of creating lower courts, rather than establish them directly, does imply that the framers intended the legislature to exercise some discretion. The question is the *extent* of that discretion. Because Congress does not have plenary power over the

132. *Id.* at 22.

133. *Id.* at 118, 125.

134. *Id.*

135. See, e.g., M. REDISH, *supra* note 130, at 32-36.

136. 1 RECORDS OF CONVENTION, *supra* note 32, at 124.

137. *Id.* at 125.

138. 1 J. GOEBEL, JR., *supra* note 62, at 212.

139. See 1 RECORDS OF CONVENTION, *supra* note 32, at 125.

existence of inferior courts, it is incorrect to assert, as some commentators do, that it necessarily possesses the "lesser power" of removing lower court jurisdiction over some or all classes of article III cases.

A more reasonable interpretation of the framers' intent allows congressional discretion over such matters as the location and number of inferior federal courts, and other administrative details. Congressional control over the number of inferior federal courts was acknowledged by Hamilton in *The Federalist*: "[T]he organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint."¹⁴⁰ In the Virginia convention debates, Pendleton similarly remarked that while the judicial system required inferior federal courts, it would have been "exceedingly inconvenient, to fix the arrangement in the Constitution itself"¹⁴¹ Thus, from the framers perspective, legislative authority over lower federal tribunals extended not to questions of their necessity, but only to questions of public convenience.¹⁴² While Congress was to have discretion as to the structure of the court system, it was not to have control over whether inferior courts should exist at all or whether inferior courts were to be vested with the full range of article III judicial power.¹⁴³

IV. CONCLUSION

Careful consideration of the language and historical context of article III reveals the strength of the framers' conviction that the new Constitution provide for an effective federal judiciary invested with the judicial power of the United States. Acutely aware of the inadequacies of the judiciary under the Articles of Confederation, the framers intended that the new system guarantee uniformity of decision and the supremacy of federal law. They implemented these ideals by mandating that the judicial power of the United States be vested in a Supreme Court and an indeterminate number of inferior courts, and that this power extend to cases falling within the categories enumerated in article III, section two.

Congressional efforts to pass court-stripping bills such as the Voluntary School Prayer Act of 1981 are clearly inconsistent with the framers' desire for an effective and independent federal judiciary. Court-stripping bills are premised on fundamental misunderstandings of the provisions of article III. These misunderstandings must lead inevitably to the conclusion that such bills are unconstitutional. Legislative power to make exceptions to the Supreme Court's appellate jurisdiction does not include the power to annul its appellate jurisdiction over entire classes of article III cases. Similarly, congressional discretion over the structure and operation of the inferior federal courts cannot interfere with the ability of those courts to adjudicate cases falling within the federal judicial power.

140. THE FEDERALIST NO. 82, at 535 (A. Hamilton) (Modern Library ed. 1937).

141. 3 DEBATES, *supra* note 13, at 517 (remark of Edmund Pendleton at the Virginia convention).

142. 1 J. GOEBEL, JR., *supra* note 62, at 247.

143. *Id.*

