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State Power to Define Jurisdiction

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STATE POWER TO DEFINE JURISDICTION

Sam Jordan
Christopher Bader

States should have much broader authority to decline jurisdiction over federal claims. The normative considerations supporting this doctrine of “reverse abstention” have been developed in previous work. But what of the Constitution? The traditional reading, reflected in existing precedent, asserts that the Supremacy Clause, Article III, and perhaps Article I operate together to create an inflexible obligation for state courts to hear federal claims. This reading is misguided. The Supremacy Clause contains no jurisdictional obligation of its own force, but only gives supreme effect to other validly enacted federal laws. And no other clause provides the authority to impose such an obligation on the states. Suggestions to the contrary are based on an overly cramped version of originalism that fails to account for the exigencies of constitutional compromise and ratification.

STATE POWER TO DEFINE JURISDICTION

Sam Jordan*

Christopher Bader†

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INTRODUCTION

Suppose that the federal government decides to pass new health and safety standards for the processing of meat. May it enforce these newly created federal rights by requiring states to send their inspectors to processing facilities periodically to monitor compliance? It may not. States of course may not enact regulations that contradict the federal standards,¹ and depending on the scope of the regulatory scheme and the intent of Congress they may not be able to enact regulations at all.² Moreover, a state may voluntarily agree to send inspectors in exchange for federal funds.³ But a state may not be subject to a unilateral command to fulfill federal objectives.⁴

Now suppose that the federal government also decides to enforce these new safety standards by creating a private cause of action available to individuals who consume tainted meat. May it enforce these newly created federal rights by requiring states to hear and enforce claims brought under the law? Now the answer is almost certainly that it may. With limited exceptions, the creation of a federal cause of action that may be brought by a plaintiff in a federal court simultaneously creates a right for the plaintiff to choose to bring that cause of action in state court instead.⁵ Of course, a plaintiff may decline to proceed in state court, and the power of removal means that the defendant may

¹ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142–143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

² *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 115 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³ Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 858 (1998).

⁴ *See, e.g., N.Y. v. United States*, 505 U.S. 144, 168–69 (1992).

⁵ Indeed, the federal government need not even create this obligation explicitly. *See Tafflin v. Levitt*, 493 U.S. 455, 458–58 (1990) (discussing the presumption of concurrent jurisdiction between federal and state courts for claims arising under federal statutes). There are some limited exceptions to the concurrency presumption. These include express Congressional directive or by “unmistakable implication” found in the legislative history that create exclusive federal jurisdiction. *Id.* at 460–62. A court may also find “clear incompatibility” between state-court jurisdiction and federal interests. *Id.* at 464. Finally, the “valid excuse” doctrine, discussed further below, provides a tiny escape hatch for state courts to avoid hearing federal claims of their own volition. *See infra* note 10 and accompany text.

decline even where the plaintiff does not.⁶ But the state itself will usually have no power to decline, and instead must expend its resources to fulfill federal objectives.

Why is this so? Why is it acceptable for the federal government to commandeer state judges but not state inspectors? The traditional answer has been that the scope of federal power with respect to jurisdiction is different and greater than other federal powers described in Article I.⁷ The Supreme Court has read the Supremacy Clause to extend to federal jurisdictional rules, meaning that a state may not create competing rules that would deny jurisdiction over a federal claim in cases where the federal rule would permit it.⁸ Scholars uncomfortable with such a robust vision of federal supremacy have argued that the Court has reached the right conclusion for the wrong reason, and have suggested Article III or Article I as a substitute source for federal power to impose a jurisdictional obligation on the states.⁹ But the basic premise that state courts have an obligation to entertain federal claims has largely gone unquestioned.

Largely, but not entirely. One of us has argued elsewhere that this obligation is overly rigid and undesirable as a matter of policy.¹⁰ And in *Haywood v. Drown*, Justice Clarence Thomas penned a dissent that questioned its consistency with the original

⁶ 28 U.S.C. § 1441 (2006).

⁷ Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2012–13 (1993) (combining the Supremacy Clause with the State Judges Clause to support such power); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 89–91 (1998) (situating this power in the State Judges Clause combined with the Necessary and Proper Clause). The Court has concurred in this understanding, particularly in *Printz*, where Justice Scalia noted, “[t]he Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” *Printz v. United States*, 521 U.S. 898, 908 (1997) (emphasis in original).

⁸ *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009).

⁹ See, e.g., Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 848 (2012); James Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 212 (2007).

¹⁰ Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. __ (forthcoming 2012).

meaning of the Constitution.¹¹ Taking a cue from *Haywood*, this Article takes a close look at the original understanding of state court jurisdictional obligations. Part I begins by setting out the existing precedent that imposes substantial obligations on state courts to hear federal claims, subject to a very narrow exception. Part II considers the various sources of federal power that might support that precedent – the Supremacy Clause, Article III and Article I. While we certainly do not agree with all of Justice Thomas’s assertions, our basic conclusion is that he was more right than wrong. Understood in its proper context, the original design of the constitution was not intended to infringe on the power of states to define the jurisdiction of their courts. Finally, in Part III we use the narrow question of state court jurisdictional obligation to press the broader point that considerations of intent and of shared expectations should play a role in any meaningful originalist methodology.

I. FRAMING THE ISSUE

States are often willing—and perhaps even eager—to open their courts to federal business. Indeed, a federal claim being decided in a state court is unremarkable. That said, the Constitution imposes requirements for how a federal claim must be treated once a state court chooses to exert jurisdiction. First and foremost, the state court must decide the claim according to federal law, and may not substitute some other law in its place. This applies clearly to the substantive rules of decision surrounding the federal claim, and in certain circumstances it may apply equally to the procedural rules attendant to the claim.¹² A decision by a state court to hear a federal claim but to ignore these obligations is a straightforward violation of the Supremacy Clause.¹³

But what if a state decides that it does not want to hear the federal claim at all? Based primarily on pragmatic considerations, one of us recently argued that a state should have the authority to turn away federal business, at least when it does

¹¹ *Haywood v. Drown*, 129 S.Ct. 2108, 2118 (2009) (Thomas, J., dissenting).

¹² For a discussion of the precise contours of those circumstances, see Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 26–27 (2006).

¹³ U.S. CONST. Art. VI cl. 2.

so in a way that does not prejudice federally created rights.¹⁴ That suggestion is a departure from established cases, which have consistently held that a state's power to control its jurisdiction with respect to federal claims is constrained not by the principle of prejudice, but by those of discrimination and interference.

Testa v. Katt provides an early and instructive example of these principles.¹⁵ At issue in *Testa* was a claim brought in a Rhode Island state court against a seller who sold an automobile at a price exceeding the ceiling set by the federal Emergency Price Control Act.¹⁶ Under the terms of the act, the plaintiff was entitled to receive treble damages, and the state district court awarded just that.¹⁷ On appeal, the Rhode Island Superior Court struck the treble damages and instead entered a judgment using the state measure of damages, which was limited to the overcharge plus costs.¹⁸ On appeal yet again, the Rhode Island Supreme Court declined to award damages at all, and instead concluded that a federal action for treble damages could not be sustained in the state courts.¹⁹ The first two of these dispositions are constitutionally straightforward. The district court heard the federal claim and applied federal law to measure damages, a result that is unproblematic. The superior court, on the other hand, heard the federal claim but then applied state law to measure damages. That result disregards the supremacy of federal law, and is unacceptable.

The Rhode Island Supreme Court's treatment of the case is not nearly so straightforward. The court obviously did not award the treble damages called for by the federal law, but neither did it award damages measured by state law. Rather, its disposition was in the nature of a jurisdictional dismissal, and presumably left the plaintiff free to pursue his federal remedy elsewhere. That was not enough for Justice Black, who—speaking for a unanimous Court—concluded that Rhode Island's unwillingness to enforce the federal law “disregards the purpose and effect of

¹⁴ See generally *Jordan*, *supra* note 10.

¹⁵ 330 U.S. 386 (1947).

¹⁶ *Id.* at 387–88.

¹⁷ *Id.* at 388.

¹⁸ *Id.*

¹⁹ *Id.*

the [Supremacy Clause].”²⁰ At least since *Testa*, then, the Supremacy Clause has been interpreted to require not just that states treat federal claims in a certain way, but also that they hear federal claims in the first place. Or put differently, the Constitution affects a state’s power to define its own jurisdiction.

That said, *Testa* did not hold that a state court is always compelled to hear federal claims presented to it. Instead, the Supreme Court has consistently declared that a state may refuse federal business if it has a valid excuse for doing so.²¹ Precisely what constitutes a valid excuse has been the subject of some dispute. The baseline requirement has consistently been that the state must apply a “neutral rule of judicial administration.”²² Neutral in this context means that the rule does not turn on the federal nature of the claim being presented. It is on this basis that the rule at issue in *Testa* failed. The Rhode Island Supreme Court would have permitted the state court to entertain a state cause of action for overcharging (with damages measured by state law), but would not entertain a parallel action rooted in federal law. By contrast, consider a rule that says that a state district court may only hear claims arising from actions that occurred within the territorial borders of the district. That rule provides a valid excuse for refusing a federal claim because it would apply equally to a state claim.²³

So what then of a rule that suits against corrections officers may not be maintained in the state courts? Applying the notion of neutrality just developed, such a rule would appear to be acceptable because it is triggered by the identity of a party rather than the source of law, and would therefore apply equally to federal and state claims. In *Haywood v. Drown*, however, the Supreme Court struck the rule down even so.²⁴ To explain that result, Justice Stevens concluded that the neutrality emphasized in earlier cases was a necessary but not sufficient condition for compliance with the Supremacy Clause.²⁵ The problem he then

²⁰ *Testa*, 330 U.S. at 389.

²¹ *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009).

²² *Id.*

²³ See *Douglas v. New York, N.H. & R.H. Co.*, 279 U.S. 377, 387 (1912); *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4–5 (1950).

²⁴ *Haywood*, 129 S. Ct. at 2115.

²⁵ *Id.* at 2116.

identified with New York's rule was that it was jurisdictional in effect but not intent. As for intent, Stevens concluded that New York was motivated by hostility to the concept of official liability (at least in the prison context).²⁶ But of course official liability is precisely the policy embedded in federal statutes, most notably in § 1983, and therefore the New York rule really constituted a substantive disagreement with a federal law. Viewed this way, the rule is constitutionally problematic because a state is not entitled to disagree with federal law. And that is true even if the form of the disagreement is the introduction of a jurisdictional rule that preserves federal rights but forces them to be vindicated somewhere other than the state's courts. After *Haywood*, then, the Constitution acts as a significant constraint on the power of states to define the jurisdiction of their own courts. States may not create jurisdictional rules that apply exclusively to federal claims, and they also may not create jurisdictional rules that apply to both federal and state claims if the rule is motivated by a disagreement with federal law.

Writing for himself, Justice Thomas argued in dissent in *Haywood* that the entire line of cases just discussed is inconsistent with the original meaning of the Constitution.²⁷ In its place, he presented a competing vision of state power of jurisdiction that is robust and not subject to federal control. This competing vision stems from a very basic premise: the Supremacy Clause has nothing to do with and nothing to say about jurisdiction.²⁸ Instead, it merely defines the priority to be given to competing substantive laws once a court (whether federal or state) exerts jurisdiction in an action.²⁹ Moreover, although Congress may have authority to remove cases that fall within the federal judicial power described in Article III from the state courts, nothing in that article supplies the converse power to compel states to take jurisdiction over federal cases. Therefore, so long as the state invokes a jurisdictional rule to close its courthouse doors to a federal claim, the constitution is not

²⁶ *Id.* at 2115.

²⁷ *See id.* at 2118–26 (Thomas, J., dissenting). Three other justices joined the final part of his dissent in which he accepted the precedent set by these cases but disputed their application in the instant proceeding. *See id.* at 2133.

²⁸ *Id.* at 2126.

²⁹ *Haywood*, 129 S. Ct. at 2126 (Thomas, J., dissenting).

offended, regardless of the rule's neutrality or intent.³⁰

This reading of state jurisdictional control stands in stark contrast to the prevailing view. That may explain why the three justices who signed other parts of the dissent declined to join in Thomas's attempt at an originalist revision of established precedent.³¹ But a broader power to define and control state court jurisdiction might be desirable for other reasons, and may ultimately enhance rather than undermine federal-state relations.³² To the extent that the resistance to embrace such a broader power is rooted in a concern about its constitutionality, Thomas's revisionism is worth a close examination. It is to that examination that the next Part turns.

II. ORIGINAL UNDERSTANDINGS

The Court and many scholars ground state-court jurisdictional compulsion in the constitutional text.³³ Originalist assessments of the plain language of the enacted text, they argue, support the notion that state courts are obligated to hear federal

³⁰ In his dissent, Thomas explains at length the precedent supporting the anti-discrimination principle. *See id.* at 2126–31. There, he discusses why *Testa* was a proper decision—the Rhode Island court's refusal to hear the federal claim wasn't founded on a jurisdictional “rule” that was being invoked, but a *sua sponte* decision based on disagreement with federal law. *Id.* at 2129.

³¹ Justice Thomas's jurisprudence highlights the significant theoretical tension between originalism and stare decisis. *See, e.g.,* *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (calling for the abrogation of *Tinker* as inconsistent with Framers expectations); *Kelo v. City of New London*, 545 U.S. 469, 523 (2005) (“When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning.”). Other originalists share his views, though his dissents are probably the most tenacious statements of the position. *See, e.g.,* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (“Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place.”).

³² *See* Jordan, *supra* note 3, at 55.

³³ *See, e.g.,* *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009); Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 848 (2012).

claims absent a valid excuse. In *Haywood*, Stevens based this compulsion in the “anti-discrimination” principle of the Supremacy Clause.³⁴ This understanding of the Clause includes supremacy commands not only for the substantive law applied in a case, but also in the jurisdictional laws which determine whether a state court must hear a case at all.

Our conclusion, detailed below, is that the Supremacy Clause contains no such jurisdictional component. We echo and expand on this point that Thomas made in his *Haywood* dissent. If this argument is true, then state-court jurisdictional compulsion cannot be situated in the Supremacy Clause alone. Instead, this power must flow from the natural operation of the Clause, i.e., the supremacy of a law enacted pursuant to a validly exercised Congressional power. The obvious next question is: Where else in the Constitution could a federal power to compel state court jurisdiction come from? The potential answers are Article III and Article I. After deconstructing the *Haywood* Court’s Supremacy Clause anti-discrimination principle as a matter of original understanding, we will turn to these other clauses and show that, again as a matter of original understanding, neither can support state-court jurisdictional compulsion.

A. Article VI and Federal Supremacy

The Supremacy Clause embodies a counter-textual compromise. Akin to the Madisonian Compromise, discussed more fully below, the Framers and ratifiers crafted a “clear” text for the Clause that embodied a compromise far more nuanced. The Supremacy Clause’s text is “clear” in that it does not distinguish between the kinds of laws states must recognize as supreme and binding.³⁵ The reality of constitution-making requires us to dig deeper than the supposedly clear surface and into the murkier waters below. It is those depths that the real outlines of federal supremacy lay. In the end, the Supremacy Clause commanded obedience to substantive laws, but the debates and writings, coupled with a consideration of rejected alternatives, suggests that jurisdictional laws are not within its

³⁴ *Haywood*, 129 S. Ct. at 2114–15.

³⁵ *Id.* at 2117.

ambit.

Thomas's *Haywood* dissent devotes significant space to this argument. After attempting to establish state authority to control the subject-matter jurisdiction of their own courts in the face of federal claims, Thomas attacks the majority's contention that there is an "anti-discrimination" principle inherent in the Supremacy Clause, arguing that the Clause's power reaches only substantive, not jurisdictional, state laws.³⁶ He sums this point up nicely when he states, "[T]he Supremacy Clause does not address whether a state court must entertain a federal cause of action; it provides only a rule of decision that the state court must follow if it adjudicates the claim."³⁷ Thus the Supremacy Clause confers no jurisdiction of its own accord but is merely a choice-of-law rule. In this view of the Supremacy clause, federal laws that purport to control the jurisdiction of state courts are unconstitutional and therefore not entitled to Supremacy. Thomas relies on the debates in the Philadelphia Convention to show that the Framers rejected the notion that the Supremacy Clause compels state courts to hear federal claims.³⁸

1. *The Convention*

Context is critical in assessing the underdetermined language of the Supremacy Clause. The Convention debates and other Founding-era writings provide helpful illumination. In the Convention, the New Jersey Plan was a rejected alternative to the Virginia Plan (and ultimately the Madisonian Compromise). The New Jersey Plan required state-court adjudication of federal claims "in the first instance."³⁹ The other major alternative was Madison's proposed the Congressional negative on any state law, discussed in the Article III context below, which was struck down

³⁶ *Id.* at 2123 (Thomas, J., dissenting).

³⁷ *Haywood*, 129 S. Ct. at 2123.

³⁸ *See id.* at 2123–25.

³⁹ *Id.* at 2123; *see* 1 FARRAND'S RECORDS, *supra* note 47, at 242–45. The precise language from the third volume of Farrand is that it was Luther Martin's "wish and hope" that state courts, and not lower federal courts, would hear federal claims. 3 *id.* at 287. This is not immediately denotative of compulsion, but the language of the proposed plan is sufficient to show that such "wish and hope" would have been carried into action if it had been adopted.

as violative of state autonomy and sovereignty.⁴⁰

The Supremacy Clause was drawn out from the defeated New Jersey Plan and adopted in the final Constitution, but the portion of the Plan compelling state-court jurisdiction was not.⁴¹ Two arguments can flow from this result. First, the jurisdictional compulsion provision was rejected and the Supremacy Clause does not intend such a compulsion.⁴² Alternatively, the Framers felt that the two measures were duplicative and chose to adopt the Supremacy Clause because it could serve to compel state-court submission to both jurisdictional and substantive laws standing alone. While the former argument is undoubtedly stronger, honest reliance on Framers' intent requires us to be open-minded about the universe of possible outcomes. Thus we acknowledge that the rejection of the New Jersey Plan's jurisdictional mandate can cut either way: either it can show that the final version abandoned that requirement, or that the Supremacy Clause was intended to contain that requirement on its own terms.

Nevertheless, Thomas argues strongly in *Haywood* that such context trumps the otherwise clear language of the Clause. First, he points out that the Supremacy Clause was revived from the New Jersey Plan and incorporated into the Constitution in the context of addressing which federal branch, the courts or Congress, would best vindicate the superiority of federal law.⁴³ This argument has some merit in light of the discussion of Article III and state jurisdictional freedom below. It is possible that Article III “end[ed] the fight over state-court jurisdiction,”⁴⁴ giving state courts freedom to refuse jurisdiction of federal claims.

⁴⁰ *Haywood*, 129 S. Ct. at 2124 (Thomas, J., dissenting); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, *supra* note 72, at 207–15 (outlining and advocating his failed plan for a Congressional power to negative any state laws).

⁴¹ James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 725, 730 (1998) (reporting that the New Jersey Plan explicitly assigned original jurisdiction of federal matters to state courts, and that Luther Martin’s language for a Supremacy Clause was salvaged from the otherwise defeated Plan).

⁴² See *Solum*, *supra* note 42, at 34 (originalism allows negative implications to inform interpretation where positive text is ambiguous or vague).

⁴³ *Id.*

⁴⁴ *Haywood*, 129 S. Ct. at 2124 (Thomas, J., dissenting).

With that understanding in mind, jurisdictional disputes were resolved not in the Supremacy Clause but in Article III. From this would follow the assumption that the Supremacy Clause did not address jurisdiction. This rightly applies the “surplusage” lesson from *Marbury*.⁴⁵

Thomas next argues that since (a) Madison’s proposed Congressional negative was directed to substantive laws and (b) the Supremacy Clause was an alternative to that proposal, the Supremacy Clause must be limited to the supremacy of substantive federal laws, not procedural or jurisdictional ones.⁴⁶ In the spirit of fair analysis, this argument must be laid out as less persuasive.

Thomas provides no support for his first premise that Madison’s negative would not reach jurisdictional laws except for the footnote comment that Madison thought little of state court competency over federal matters.⁴⁷ He brashly claims that “there can be no question” that Madison’s proposal was concerned solely with substantive laws and not state-court jurisdiction.⁴⁸ But, what is it about jurisdictional laws that place them outside the “laws” of the states as mentioned in Madison’s proposal?⁴⁹ Even if Madison thought ill of state court judges, that is not enough to show that he would sacrifice federal supremacy in order to avoid conflict with their parochialism. On the contrary, Madison’s letter to Jefferson, cited by Justice Thomas, is ardent in its

⁴⁵ See *supra* note 105 and accompanying text.

⁴⁶ *Haywood*, 129 S. Ct. at 2124–25 (Thomas, J., dissenting).

⁴⁷ *Id.* at 2124.

⁴⁸ *Id.* at 2125.

⁴⁹ Scholars have devoted countless pages to the differences between procedural and substantive laws. See, e.g., Walter Wheeler Cook, “*Substance*” and “*Procedure*” in the Conflict of Laws, 42 YALE L. J. 333 (1933); Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392 (1941); D. Michael Risinger, *Substance and Procedure Revisited With Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,”* 30 UCLA L. REV. 189 (1982). More recent work has sought to elucidate the more nuanced distinctions between procedural and jurisdictional laws. See, e.g., Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55 (2008); Howard M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547 (2008); Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (2008). Though the different types of laws serve different functions, nowhere do any of these authors intimate that jurisdictional laws are simply not laws.

support for the federal government and the vital necessity of federal supremacy.⁵⁰ It is far more in line with the plain language of the proposal to interpret “laws” as granting Congress full power over any state law, substantive, procedural, or jurisdictional. Thomas claims that the negative “merely provided that state laws could be directly nullified if Congress found them to be inconsistent with the Constitution or laws of the United States.”⁵¹ This misses the critical question entirely: are state jurisdictional laws like the one at issue in *Haywood* inconsistent with the Supremacy Clause’s mandate? The ratification debates and other Founding-era writings hint at the answer that state sovereignty was too important to incorporate jurisdictional compulsion.

2. *The Ratification Debates*

Nearly every ratification convention expressed similar concerns over the broad language of the Supremacy Clause. Some conventioners conveyed this sentiment in vague terms as a threat to their “Rights and Privileges.”⁵² More sensational advocates claimed that such a provision would “destroy all the laws of the states”⁵³ and “produce an abolition of the state governments.”⁵⁴ The Clause, in their view, would create a federal government prone to become “despotic.”⁵⁵

The most influential of these attacks on the Clause was a circular letter issued by the Albany Anti-Federalist Committee.⁵⁶ The letter contained numerous objections to the Constitution as proposed, but for our purposes, one of its strongest objections was that the laws of the national government

⁵⁰ See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 THE WRITINGS OF JAMES MADISON 23–32 (Gaillard Hunt ed., 1904) (enumerating reasons why federal supremacy was critical, including managing factioning among the states, protecting individuals by allowing control over state-created injustices, and the general inadequacy of morality or religion to restrain the oppressive tendencies of the majority will).

⁵¹ *Haywood*, 129 S. Ct. at 2125 (Thomas, J., dissenting).

⁵² MAIER, *supra* note 109, at 149.

⁵³ *Id.* at 191.

⁵⁴ *Id.* at 419.

⁵⁵ *Id.* at 152.

⁵⁶ *Id.* at 333.

are to be the supreme law of the land, and the judges in every state are to be bound thereby, notwithstanding the constitution or laws, of any state to the contrary – A sweeping clause, which subjects every thing to the controul of the new government.⁵⁷

This letter went so far as to call for wholesale rejection of the Constitution, because compromise with the later hope of concession was a foolish and unachievable ideal.⁵⁸

Of course, compromise was in fact reached, and the viable concerns over state sovereignty were thereby assuaged (if only in part). The Federalist response encapsulates the counter-textual understanding of the Clause that answered the Albany circular's objection:

The words “made in pursuance of the Constitution,” which are fully expressed in the form of government submitted to us, are willfully omitted by the objectors to deceive the people into a belief that the New System of Government will have power to make laws in all cases whatsoever[.]⁵⁹

The Antifederalists' calls for a “limited and defined” federal supremacy⁶⁰ were thus not answered in-text, but in mutual understanding.

This excerpt in particular refutes the *Haywood* Court's inclusion of an anti-discrimination principle in the Supremacy Clause, because it underscores the vital textual limitation that only acts made “in pursuance of the Constitution” are to be given supremacy. Thus, the Court cannot locate any element of state-court jurisdictional compulsion in the Clause itself; they must instead site it in another validly exercised Congressional power. The Clause has no force of its own, but only gives supreme effect

⁵⁷ Address of the Albany Antifederal Committee, April 10, 1788.

⁵⁸ MAIER, *supra* note 109, at 333–34.

⁵⁹ The 35 Anti-Federal Objections Refuted, by the Federal Committee of the City of Albany, April 1788.

⁶⁰ MAIER, *supra* note 109, at 420.

to other powers granted to Congress and validly exercised. Bradford Clark has made similar a point from a textual and structural perspective.⁶¹

3. *Early Congress*

The records of early Congressional debates bolster this interpretation of the Supremacy Clause in light of the implications of the Madisonian negative. There, Congressmen fiercely debated the need for lower federal courts. While we will show that the Framers and ratifiers did not imbue them with the authority to continue this debate, their records nevertheless show that they concluded that they were bound to create lower federal courts.

Representative Fisher Ames explained during the debate over the Judiciary Act of 1789 that “[t]he law of the United States is a rule to [state-court judges], but no authority for them. It controlled their decisions, but could not enlarge their powers.”⁶² Ame’s comment concerning the dichotomy of “rules of decision” and “authority” is not fully clear without more context, however. When examined in context, Ames does not defend the ability of the state courts to refuse jurisdiction, but instead argues that state courts cannot hear claims under new federal statutes at all because “offenses against statutes of the United States, and actions, the cognizance whereof is created *de novo*, are exclusively of Federal jurisdiction.”⁶³ Despite not advocating for state-court jurisdictional freedom, Ames’s argument reaches the same ends, albeit through a broad federal-court exclusive-jurisdiction regime.

Representative Sedgwick felt that state courts ‘might refuse or neglect to attend to the national business,’ and so lower federal courts were necessary to deal with this eventuality.⁶⁴ Sedgwick’s primary aim was to show “how dangerous it would be” to make the state governments “sole guardians of the national faith and honor.”⁶⁵ Even though his comments did not reflect

⁶¹ Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 103–04 (2003).

⁶² 1 ANNALS OF CONG., *supra* note 63, at 808.

⁶³ *Id.*

⁶⁴ *Id.* at 806.

⁶⁵ *Id.*

support for state autonomy, they recanted the common refrain lower federal courts were necessary because state-court parochialism would undermine enforcement of federal policy.⁶⁶ This goal evidences so much distrust of state courts that a jurisdictional obligation, which would give a greater share of federal business to state courts, would likely be far from the Framers' minds. Akin to Ames's argument described above, Sedgwick's conclusions support state-court jurisdictional freedom but come to that conclusion from a different angle, one concerned more with the danger of state-court undermining of federal supremacy.

William Patterson's notes on a speech on the Judiciary Act in the early Senate debates record that the Constitution requires only an oath of "Allegiance and not an Oath of Office," and therefore the federal government "[c]annot compel them to act or to become our Officers."⁶⁷ Patterson's notes are not taken in prose form, nor transcribed into such form. Instead, they exist simply as a series of broken phrases which do not give a great deal of definite insight into Patterson's thoughts or the contents of the speech itself. While Patterson's conclusions are attractive to our theory, we must note that this context leaves little satisfaction as to interpretive certainty. One might be loath to resort to such piecemeal reflection as indicative of legislative intent.⁶⁸ To place it at a distance of over two hundred years does nothing to assuage the reader's unease.

Not all speakers supported either jurisdictional freedom or exclusive-jurisdiction regimes. Mr. Stone rested compelled state-court jurisdiction on federalism concerns. He argued that even if federal courts may one day be necessary, state courts were currently sufficient as arbiters of federal law.⁶⁹ He also noted that using state courts for federal claims "would be...one of the strongest chains by which the Union is bound; one of the strongest cements for making this Constitution firm and

⁶⁶ See *supra* notes 87–90 and accompanying text.

⁶⁷ Notes of William Patterson from Speech on Judiciary Act (June 23, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1791, at 477 (Kenneth R. Bowling & Helen E. Veit eds., 1988).

⁶⁸ This is precisely a case of "unavoidably vague" Framer language that leaves "substantial uncertainties" in its wake. Whittington, *supra* note 14, at 611–12.

⁶⁹ *Id.* at 810–11.

compact.”⁷⁰

Mr. Harper argued that Congress “cannot enforce on the State courts, as a matter of duty, a performance of the acts we confide to them.”⁷¹ Harper asserted that there was “no cause to complain’ ‘until [state courts] refuse to exercise’ the jurisdiction granted over federal claims.”⁷² Here, Mr. Harper pointed out that, at the time of the debate, there was no necessity for federal courts.⁷³ This is because the state courts were, at this time, accepting adjudication of federal rights.⁷⁴ He saw no need to engage in such a demanding enterprise as creating lower federal courts until the state courts refused to exercise Congressionally-given jurisdiction.⁷⁵ Until such time, Congress had “no cause to complain.”⁷⁶

This does not undermine state-court autonomy and each state’s ability to amend the subject-matter jurisdiction of its own courts. Some later speakers in the same debate forcefully argue in favor of lower federal courts, noting that the plain meaning of Article III did not leave the creation of lower federal courts to expediency but rather mandated their creation.⁷⁷ Thus, even if the judicial balance at the time of ratification was not tested by the existence of lower federal courts, when and if it was, state courts should maintain jurisdictional freedom.

Furthermore, the political context as a whole shows that federal supremacy did not demand jurisdictional supremacy. In light of the Articles of Confederation, the very failure of which was the major motivation for the Constitutional Convention,⁷⁸ the Framers were especially concerned with ensuring an effective national government. A more assertive federal presence was required to guide the Union in matters beyond the jurisdiction of

⁷⁰ *Id.* at 811.

⁷¹ *Haywood*, 129 S. Ct. at 2125 (Thomas, J., dissenting) (quoting 10 ANNALS OF CONG., *supra* note 122, at 892).

⁷² *Id.*

⁷³ 10 ANNALS OF CONG., *supra* note 122, at 892.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 893.

⁷⁸ John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1365 (1997).

any one state.⁷⁹ Thus the Supremacy Clause ensured that the new federal scheme under the Constitution empowered the national government to make, enforce, and interpret its own body of laws. This did not include a duty for state courts to adjudicate federal claims, but merely an oath to not contravene such laws when properly brought before them.⁸⁰ Madison argued this point eloquently, pointing out that state courts, unlike the federal courts, were bound to uphold the laws of the other sovereign.⁸¹ Contrary to the majority's reasoning in *Haywood*, Framers feared a "clashing of jurisdiction" would result in too much power being confided in the states.⁸² To do oblige untrustworthy states to adjudicate federal matters would undermine federal authority to pronounce and effectively enforce national policy.

4. *The State Judges Clause*

The fact that Article VI contains language specifically directed at state judges does not undermine the conclusion reached above.⁸³ Rather, the clause merely reinforces the idea

⁷⁹ Indeed, while some worked to ensure that the federal judiciary would not intrude into matters of local, state-level concern, M.E. BRADFORD, FOUNDING FATHERS: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION 180–81, 191 (2d ed. 1994), this concern is inapposite to the question of state adjudication of federal law. In that area, one is not concerned with federal overreaching but instead with a lack of necessary participation from the states.

⁸⁰ See THE FEDERALIST No. 27 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("It merits particular attention in this place, that the laws of the confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which, all officers legislative, executive and judicial in each State, will be bound by the sanctity of an oath.") (emphasis in original).

⁸¹ THE FEDERALIST No. 44, at 307 (James Madison) (Jacob E. Cooke ed., 1961).

⁸² 1 ANNALS OF CONG., *supra* note 63, at 829. Mr. Gerry noted that Congress is empowered "to suppress any system injurious to the administration of this constitution" through its necessary and proper powers. *Id.*; see also *Essay of A Democratic Federalist*, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 91, at 59 (conceding that "in case of a *conflict of jurisdiction* between the courts of the United States, and those of the several Commonwealths, is it not easy to foresee which of the two will obtain the advantage").

⁸³ U.S. CONST. art. VI, cl. 2 ("... and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.")

that state judges were bound to respect duly enacted federal laws, and did not reach the question of whether they were obligated to adjudicate federal matters in the first instance. The debates at the Federal Convention evidence this intent, particularly Mr. Randolph's assertion that, in order to prevent competition between the national and state laws in state courts and "[t]o preserve a due impartiality" respecting those laws, "they ought to be equally bound to the Natl. Govt. The Natl. authority needs every support we can give it."⁸⁴ Joseph Story echoed Madison's reasoning when he pointed out:

The judges of the state courts will frequently be called upon to decide upon the constitution, and laws, and treaties of the United States; and upon rights and claims growing out of them. Decisions ought to be, as far as possible, uniform; and uniformity of obligation will greatly tend to such a result.⁸⁵

Story's concern with uniformity of decision underscores the Clause's substantive focus. The obligation to enforce federal law by taking jurisdiction of cases arising under it is not equivalent to the obligation to uphold federal law in cases properly before a court. Decisions will not be more uniform because state courts must hear federal claims, but only because state courts must sustain federal law in federal claims adjudicated.

A significant body of other Founding-era writings expresses strong misgivings about the unduly broad power of the federal government. For example, many Framer voices cautioned that the Necessary and Proper Clause would lead to oppressive expansion of Congress's power.⁸⁶ Likewise, they feared that the

⁸⁴ 1 FARRAND'S RECORDS, *supra* note 47, at 203. Thomas attempted to counter the oath-obligation, as noted above. *See supra* note 128 and accompanying text. However, as was shown above, his primary source was so weak as to be wholly unreliable for a conscientious reader. *See supra* note 129–130 and accompanying text.

⁸⁵ STORY, *supra* note 89, §1839.

⁸⁶ *New York Ratifying Convention*, in 2 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 398 (Jonathon Elliot ed., 2nd ed. 1888); *Virginia Ratifying Convention*, in 3 THE PAPERS OF GEORGE MASON, 1725-1792, 1084–85 (Robert A Rutland ed., 1970); BRADFORD, *supra* note 145, at 186 (danger of "implied

Supremacy Clause would effect a practical dissolution of the states as coequal sovereigns in the overall federal scheme. In fact, Mr. Gerry, while advocating for lower federal courts, expressed a view strikingly similar to the “valid excuse” doctrine at issue in *Haywood*: “[y]ou cannot make Federal courts of the State courts, because the constitution is an insuperable bar; besides, the laws and constitutions of some States expressly prohibit the State Judges from administering, or taking cognizance of foreign matters.”⁸⁷ Likewise, St. George Tucker contended that the reach of federal jurisdiction would “wholly superced[e]” the states’ judicial powers by compelling their aid in attending to that jurisdiction.⁸⁸ These reactionary concerns were well-taken and were embodied in one of the most fundamental principles of constitutional interpretation: what is not enumerated in the Constitution as a federal power is excluded.⁸⁹ This notion is strongly at odds with a desire to grant power to the federal government.

powers”); *but see* Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 241–43 (Paul Leicester Ford ed., 1968) (discussing how the Necessary and Proper Clause will only expand Congress’s powers by *necessary* implication). Despite Hanson’s rebuttal, history has shown the expansive nature of the Necessary and Proper Clause. John Marshall himself supported this view of the Clause as the appropriate one in *McCulloch v. Maryland*, 17 U.S. 316, 354–55 (1819) (concluding that the reach of the Necessary and Proper Clause is not limited to cases of “indispensabl[e]” necessity, which is an interpretation that is “so gross an absurdity [that it] cannot be imputed to the framers of the constitution”).

⁸⁷ 1 ANNALS OF CONG., *supra* note 63, at 828.

⁸⁸ St. George Tucker, 1 BLACKSTONE’S COMMENTARIES 350–51 (1803). Writing on the implications of *New York* and *Printz* and their anti-commandeering principle, Roderick Hills argued that the Founders feared that preemption, not commandeering, would emasculate state governments by depriving them of meaningful subject-matter jurisdiction. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 833 (1998).

⁸⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). The “default rule,” proffered by Thomas himself in *U.S. Term Limits v. Thornton*, is similar to Marshall’s principle in that it reserves all powers not enumerated in the Constitution to the states. 514 U.S. 779, 848–50 (1995) (Thomas, J., dissenting). He discussed in detail how this rule stands even in the face of the broad necessary-and-proper power conveyed in *McCulloch*. *Id.* at 853–55.

B. Article III and Constitutional Necessity

In arriving at Article III's final formulation, the Framers primarily considered the Virginia and New Jersey Plans.⁹⁰ They arrived at the Madisonian Compromise, which allowed, but did not require, Congress to create lower federal courts.⁹¹ Many scholars in the business of constitutional interpretation readily submit to the notion that Article III, section one's language that "[t]he 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" conclusively established the result of the Madisonian Compromise.⁹² The Madisonian Compromise has often been cited for this principle.

History, however, accommodates a very different reading, one that emphasizes the practicality of the Framers' compromise and the real force of their intentions. Michael Collins has also challenged this traditional view of the Compromise on a number of grounds.⁹³ We argue here that, including his contribution of the prospect of enclaves of federal exclusivity,⁹⁴ a wide review of original sources shows that the Compromise was more settled than a mere "may/shall" distinction implied. Many Framers viewed the "power" of Congress to create lower federal courts in Art. III as non-discretionary.⁹⁵ Indeed, they viewed their grant of discretion as pertaining only to the "number and quality" of the lower federal courts, not to their very existence.⁹⁶ Herbert Wechsler similarly argued in his foundational work on federalism that the Madisonian Compromise did not result in an understanding that federal courts were capable of not existing, but merely that their creation was more expediently left to the

⁹⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20–22 (Max Farrand ed., 1937) [hereinafter FARRAND'S RECORDS]; *id.* at 242–45.

⁹¹ *Haywood*, 129 S. Ct. at 2120 (Thomas, J., dissenting).

⁹² *See supra* note 1.

⁹³ *See Collins, supra* note 54, at 59–78 (arguing that since the Framers and other Founding-era writers recognized "enclaves" of exclusive federal jurisdiction, lower federal courts were accepted as necessity); *but see Pfander, supra* note 1, at 593 ("The Madisonian compromise left the decision whether to establish lower federal courts in the hands of Congress, thus leaving open the possibility there might be no inferior courts.").

⁹⁴ *See supra* note 158.

⁹⁵ Hamilton, *supra* note 71, at 488; *infra* Part III.A.2.

⁹⁶ 1 ANNALS OF CONG. 818 (1789) (Joseph Gales ed., 1834).

first Congress.⁹⁷ Though the language of the Constitution gave Congress discretion in the matter, there are powerful reasons to assume that this was merely a linguistic, and not practical, exercise.⁹⁸

1. *The Convention*

In the Convention debates themselves, much controversy ensued from the proposed Virginia Plan, which created both a single supreme court and inferior federal tribunals.⁹⁹ John Rutledge argued that lower federal courts would impermissibly encroach on state jurisdiction.¹⁰⁰ By giving state courts original jurisdiction over all federal claims in the first instance, Anti-federalists could allay their fears of federal domination of the states.¹⁰¹ National uniformity, he argued, would be preserved by the Supreme Court's broad appellate jurisdiction.¹⁰²

Nevertheless, Madison and others effectively argued that inferior federal tribunals were important in ensuring effectual national government. Without them, parties would suffer the oppression of "biassed [sic]" and "dependent" state judges and the "local prejudices" of a local jury.¹⁰³ One cannot rely, as Rutledge would, on appeals from state courts to the Supreme Court. Considering the state of transportation technology in the late eighteenth century, Madison rightly noted that such appeals would carry litigants far away from their homes, at great expense.¹⁰⁴ Furthermore, appeals from state courts would inundate and overwhelm a single Supreme Court.¹⁰⁵

Wilson offered in support of lower federal courts the prospect of cases involving foreigners and peculiarly federal

⁹⁷ See Herbert Wechsler, *The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544, 548 (1954).

⁹⁸ See *supra* notes 73–77 and accompanying text.

⁹⁹ James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 715 (1998).

¹⁰⁰ 1 FARRAND'S RECORDS, *supra* note 154, at 124.

¹⁰¹ Liebman & Ryan, *supra* note 164, at 716.

¹⁰² *Id.*

¹⁰³ 1 FARRAND'S RECORDS, *supra* note 154, at 124.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 716.

matters—namely, admiralty.¹⁰⁶ Mr. Sherman proceeded to argue that lower federal courts would incur great expense.¹⁰⁷ In a sharp rebuttal, Mr. King pointed out that lower federal courts “would cost infinitely less than the appeals prevented by them.”¹⁰⁸ Additionally, Nathaniel Ghorum advocated for lower federal courts on the ground that they would give Congress some meaningful efficacy.¹⁰⁹ Ghorum went on to observe that federal admiralty courts were not only already in existence in some states, but that there were “no complaints...by the States.”¹¹⁰ The lack of objection from the states themselves seems to render the debate moot, at least in some respects. One need not argue that the federal courts impinge on state autonomy if such a system existed without producing the chaos that Rutledge or Luther Martin foretold.

This compromise is also important in the context of its alternative proposals. The primary alternative was Madison’s brainchild, a Congressional negative applicable to any state law.¹¹¹ Anti-Federalists sharply opposed this proposal as impermissibly broad federal encroachment on state autonomy.¹¹² The compromise that resulted, then, was a sort of “lesser evil” in their eyes. Nevertheless, while Liebman and Ryan have argued that these debates produced a text that was “unusually authoritative” in its final form, they also admit that “[t]he Compromise...did not resolve the deep disagreement that prompted it.”¹¹³ Neither side was totally satisfied with the result. And, even if the Compromise was authoritative of the result of these debates, we argue that the result itself contained clear connotations for Congressional action post-ratification.

The argument that lower federal courts were

¹⁰⁶ *Id.*; see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 59–62 (1995) (arguing that many at the Convention believed certain “enclaves” of exclusive federal jurisdiction existed).

¹⁰⁷ 1 FARRAND’S RECORDS, *supra* note 47, at 125.

¹⁰⁸ *Id.*

¹⁰⁹ *Haywood v. Drown*, 129 S. Ct. 2108, 2120 (2009) (Thomas, J., dissenting).

¹¹⁰ 2 FARRAND’S RECORDS, *supra* note 47, at 46.

¹¹¹ Liebman & Ryan, *supra* note 164, at 710.

¹¹² *Id.* at 718.

¹¹³ *Id.* at 707, 718.

constitutionally required at the Founding has substantial relevance to our primary question of whether state-court jurisdictional compulsion is supported by originalist analysis. If lower federal courts were not constitutionally mandated, it is theoretically possible that Congress could have chosen not to create them at all. If this was the case, *some* courts would have to have been available to hear many federal claims in the first instance. The original jurisdiction of the Supreme Court did not extend to every case or controversy cognizable under Article III. Thus, state-court jurisdictional compulsion would comport with the original understanding that Congress could enlist state courts as an alternative to creating a lower federal court system.

This is the classic argument we attempt to refute. Instead of vesting Congress with discretion to create or not create lower federal courts, we argue that the “choice” embodied in Article III, Section I’s language was illusory, a linguistic relic that did not properly reflect the compromise reached in the Framers’ and ratifiers’ minds. Lower federal courts were, in their minds, necessary to an effectual federal government. If lower federal courts were constitutionally required, then there can be no argument that Congress had the implicit to commandeer state courts out of necessity. With lower federal courts in place, there were sufficient fora in place to hear federal claims of all types. Accepting this view, state-court jurisdictional compulsion is not supported by Article III.

2. *The Ratification Debates*

Ratification debates were both diverse and predictable: predictable because many of the same arguments and counter-arguments arose at each, but diverse in the nuanced concerns each set of debaters proposed and the uniquely powerful arguments some were able to muster. The debates in the ratification conventions over state- and federal-court jurisdiction and the creation of lower federal courts fit into this mold. Nevertheless, the conclusions that lower federal courts were required and that state jurisdiction should be preserved are strongly supported by these debates.

First, most state ratifying conventions were preeminently concerned with protecting state autonomy and sovereignty. State

courts, they argued, should retain their pre-existing jurisdiction.¹¹⁴ They already had plenty of business to keep them busy,¹¹⁵ but overbroad federal jurisdiction might leave them with little left to do.¹¹⁶ In another bout of compromise that focused on post-ratification resolution, Congress enacted the Judiciary Act of 1789 and assuaged state fears by instituting the complete diversity and amount-in-controversy requirements for federal diversity jurisdiction.¹¹⁷

The focus on jurisdiction is important here. Whereas most debates focused on the extent of federal jurisdiction, few debated the need for federal courts themselves.¹¹⁸ Such courts were favored because, as echoed in other original sources, a strong national judiciary was necessary to remedy the defects of a state-dominated confederation.¹¹⁹ These courts would also give teeth to a much-desired bill of rights, protecting individuals from state oppression.¹²⁰ In this way, lower federal courts were vital to instituting the “double security” for individual rights that Hamilton envisioned.¹²¹

Such courts would also save litigants the time and expense of travel to the Supreme Court for appeals.¹²² This point may be less relevant for today’s litigants, but the compromise struck at the Founding accommodated the glacially slow travel technology of the time. Further, while some argued that federal courts would eviscerate state court power,¹²³ others acknowledged that instituting state courts as federal courts would serve the very same oppressive function. By constituting state courts as federal tribunals, the state courts would forgo their state loyalties and uphold federal power at the expense of state sovereignty.¹²⁴

A final and vital piece of this compromise was trust.

¹¹⁴ MAIER, *supra* note 109, at 290.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 417.

¹¹⁷ *Id.* at 464–65.

¹¹⁸ Compare *id.* at 151–52, 197, 200, with *id.* at 190, 339, 308.

¹¹⁹ *Id.* at 18, 287.

¹²⁰ *Id.* at 445.

¹²¹ *Id.* at 449.

¹²² *Id.* at 418.

¹²³ *Id.* at 65–66, 83 (but noting that the document gained little circulation), 87, 235, 262, 281.

¹²⁴ *Id.* at 287–89.

Ratifiers needed to trust the first Congresses to “do their duty” and create lower federal courts.¹²⁵ Just as the conventions proposed amendments for Congress’s post-ratification consideration, here they relied on Congress to create lower federal courts despite their textual authority not to.

3. *Other Founding Sources*

Other arguments proposed in various Founding-era writings and early Congressional debates echo the sentiments of the Framers and ratifiers that lower federal courts were required in all but name. One such argument is that the independence of the federal judiciary was essential to its proper function as a check on Congress and the President.¹²⁶ A separate and distinct judicial branch, divorced from “jarring interests” and dependence on political constituency, was needed to render the federal plan stable.¹²⁷ The state judiciaries were subject to the tides of public opinion and thus lacked the requisite independence.¹²⁸ Since the state judges were burdened with political allegiance, they could not be used as effective arbiters of federal law.¹²⁹ Their dependence on political support undermined the neutral,

¹²⁵ *Id.* at 289, 446.

¹²⁶ Alexander Hamilton, *Remarks in the New York Ratifying Convention* (June 27, 1788), in *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* at 229 (Morton J. Frisch ed., 1985); *THE FEDERALIST* No. 78 (Alexander Hamilton). Despite the need for judicial independence, some Framers expressed concern over the underestimated power the federal judiciary might wield. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in *THOMAS JEFFERSON ON CONSTITUTIONAL ISSUES: SELECTED WRITINGS, 1787-1825*, at 31–32 (1962); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 199–200* (2nd ed. 1829).

¹²⁷ John Adams, *Thoughts on Government*, in *THE POLITICAL WRITINGS OF JOHN ADAMS* at 90 (George A. Peek, Jr. ed., 1954). The editor, Professor George Peek, notes in his introduction to the essay that “Adams’ views well represented the climate of opinion” at the time, which is exactly the sort of consensus view which Thomas should, as an originalist, have sought. George A. Peek, *Introduction to John Adams, Thoughts on Government*, in *THE POLITICAL WRITINGS OF JOHN ADAMS, supra*, at 84.

¹²⁸ Some went so far as to claim not only political allegiance, but also personal corruption or prejudice, was a strong reason not to trust state judges. 1 *ANNALS OF CONG.*, *supra* note 63, at 822.

¹²⁹ JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §1583 (1833).

principled manner of adjudication that was vital to the balanced functioning of the federal government.¹³⁰ Mr. Jackson countered this argument by stating that Supreme Court could on its own resolve “partial adjudications” by biased state judges.¹³¹ However, even he impliedly conceded that such partiality existed and would harm the administration of federal law.¹³² Thus, they could not, and indeed should not, bear a duty to hear federal business.

A further argument toward mandatory lower federal courts is that of preserving federal authority and supremacy. Though some feared encroachments on state autonomy by the federal government,¹³³ Hamilton expressed the opposite view: “As to the destruction of State Governments, the *great* and *real* anxiety is to be able to preserve the National from the too potent and counteracting influence of those Governments.”¹³⁴ This fear of state influence, firmly grounded in the experience of federal inefficacy under the Articles of Confederation,¹³⁵ would be

¹³⁰ STORY, *supra* note 89, §1604-1605; See Alexander Hamilton, *The Examination No. 14*, in SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON, *supra* note 86, at 489 (arguing that a federal judiciary without independence would scarcely have the power even to “annoy” the other federal departments); THE FEDERALIST No. 78 (Alexander Hamilton), in SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON, *supra* note 86, at 181 (noting that an independent federal judiciary is an “indispensable ingredient” in the constitutional plan and that it acts as “the citadel of the public justice and the public security”). In the House debate on the judiciary during the first Congress, Mr. Vining argued not only that the lower federal tribunals were “essential” to fair administration of federal law, but that such power was “in its nature inseparable and indivisible” from the federal power to make and enforce law. 1 ANNALS OF CONG., *supra* note 63, at 821 (1789). Addressing the counterargument of the lower federal courts’ great expense, he noted that, while some expense was concededly necessary, “[t]hey are the price that is paid for the fair and equal administration of your laws.” *Id.*

¹³¹ 1 Annals of Cong., *supra* note 63, at 830.

¹³² See *id.* at 829–30.

¹³³ DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 187 (1994); *Brutus No. 15*, in 2 THE COMPLETE ANTI-FEDERALIST 194 (Herbert J. Storing ed., 1981); see also *supra* note 51 and accompanying text.

¹³⁴ Letter from Alexander Hamilton to Edward Carrington (May 26, 1792), in SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON, *supra* note 86, at 330.

¹³⁵ Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 66, at 402 (“The idea of an uncontrollable sovereignty in each state, over its internal police, will defeat the

counteracted by a strong federal judiciary, not limited to merely one Supreme Court. An expanded federal judiciary would be able to thereby protect federal interests more effectively, and act as a barrier to state injustices against individual rights.¹³⁶ Samuel Osgood made the intriguing argument that a stronger federal government was necessary not only to protect against state encroachments on federal power or individual rights, but simply to protect the states themselves from either injustices perpetrated by sister states or foreign powers, which any state alone might lack the power to resist.¹³⁷

The necessity of uniformity in adjudicating federal matters was also an important reason to establish a large federal judiciary. In the House debates on the judiciary in the first Congress, Mr. Smith proposed initially that uniformity in interpretation of national law could be achieved by adjudication in state courts and appeals to the Supreme Court directly.¹³⁸ However, he quickly retreated from that position, noting that the constant control by the federal Supreme Court would “dissatisfy the people, and weaken the importance and authority of the State judges.”¹³⁹ Others similarly argued that state judges could not afford the necessary uniformity of decision and interpretation that consistent, effective federal government required.¹⁴⁰

other powers given to Congress, and make our union feeble and precarious.”); *Impartial Examiner No. 5*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 91, at 199 (“It seems to be agreed on all sides that in the present system of union the Congress are not invested with sufficient powers for *regulating commerce*, and procuring the *requisite contributions* for all expences, that may be incurred for the *common defence* or *general welfare*.”).

¹³⁶ STORY, *supra* note 89, § 1568; See MAYER, *supra* note 91, at 261 (noting that, in the context of judicial review, Jefferson favored judicial independence as a safeguard of citizens’ rights); James Wilson, *Government, Lectures on Law*, in 1 THE WORKS OF JAMES WILSON 296–97 (1791) (Robert Green McCloskey ed., 1967) (extolling the necessity and virtues of an independent federal judiciary in effecting the “distribution of justice”).

¹³⁷ Letter from Samuel Osgood to John Adams (Nov. 14, 1786), in 8 The Works of John Adams 419–21 (Charles Francis Adams ed., 1853).

¹³⁸ 1 ANNALS OF CONG., *supra* note 63, at 798.

¹³⁹ *Id.* He went on to argue that the district courts would be ineffectual without greater jurisdictional reach. *Id.* (“[I]t appears that the district court is not clothed with any authority of which the State courts are stripped, but is barely provided with that authority which arises out of the establishment of a National Government, and which is indispensably necessary for its support.”).

¹⁴⁰ *Id.* (“The necessity of uniformity in the decision of the Federal courts is

Samuel Livermore of New Hampshire was a particularly vocal opponent of the Judiciary Act of 1789 in which Congress proposed to create lower federal courts distinct from current state courts.¹⁴¹ As discussed at the Convention, Livermore again posited that instituting state courts as federal courts would save considerable expense for the new federal government.¹⁴² He also propounded the common Anti-Federalist refrain that “lower federal courts, once established, would eventually ‘absorb’ the state judiciaries, in part because of feared expansive readings of the federal courts’ jurisdictional grants.”¹⁴³ Other debaters shared Livermore’s view, although they were a distinct minority.¹⁴⁴ Analyzing Federalist opposition to Livermore, Michael Collins has noted that “[c]onstitutional insistence on the creation of lower federal courts is ‘obviously an incorrect understanding of article III’ from a modern perspective.”¹⁴⁵ As we will explain in more detail later, however, the modern perspective fails to account for a more nuanced view of compromise, one in which Framers and ratifiers intended, and not otherwise plain constitutional language, controlled. For now, it suffices to say that the constitutional necessity of lower federal courts was subject to some debate, but was in general widely accepted for meta-textual political and practical reasons. Here, then, we take Collins’s thesis a step further: we argue that lower federal courts were constitutionally mandated, not only because of the inadequacy of state courts but also the institutional, political, and structural benefits they needed to provide to the new federal system.

Other debaters at the First Congress rejoined Livermore’s motion to eliminate the lower-federal-courts provision from the Judiciary Act. Madison argued that transforming state courts into federal ones would improperly imbue state judges with life tenure and bypass the nomination process vested in the executive.¹⁴⁶ This counterargument may be less persuasive in

obvious.”).

¹⁴¹ Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1523 (2005).

¹⁴² *Id.* at 1527.

¹⁴³ *Id.* at 1531.

¹⁴⁴ *Id.* at 1563–64.

¹⁴⁵ *Id.* at 1544.

¹⁴⁶ *Id.* at 1556.

light of recent work by Brian Fitzpatrick showing that state courts at the Founding generally employed life tenures during good behavior.¹⁴⁷ Nevertheless, Madison's point describes the general intuition of the Framers and ratifiers that protecting federal interests required a peculiarly federal judiciary.¹⁴⁸ Collins provides another, incredibly clear, example of the feeling of constitutional imperative to create lower federal courts:

Gouverneur Morris, who would claim credit for the final draft of Article III at the Constitutional Convention, once said of Article III: "This, therefore, amounts to a declaration, that the inferior courts shall exist.... 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."¹⁴⁹

Collins further identifies that the true debate over the Judiciary Act was not whether Congress could refuse to create lower federal courts, but merely whether state courts would be appointed to do the job in lieu of separate federal courts.¹⁵⁰ We have further clarified this understanding: not only did Congress lack discretion over whether to create lower federal courts, the significant advantages of institutionally distinct lower federal courts and the disadvantages of constituting state courts as federal tribunals shows that the argument for using state courts was marginal and unpersuasive.

In *Haywood*, Justice Thomas attempts not only to support state-court jurisdictional freedom but also align this view with the long-standing notion of state-federal concurrent jurisdiction. Concurrence and obligation are, of course, not equivalent, but some highly probative original understandings of state-federal concurrent jurisdiction can support state-court jurisdictional freedom. To support his idea of concurrency, Thomas cites

¹⁴⁷ See Fitzpatrick, *supra* note 1, 854–55.

¹⁴⁸ Collins, *supra* note 204, at 1556.

¹⁴⁹ *Id.* at 1561 n.175 (internal citations omitted).

¹⁵⁰ *Id.* at 1562.

Hamilton's well-known *The Federalist No. 82*.¹⁵¹ This writing clearly supports Thomas's reasoning that state courts held a presumptive competency to adjudicate federal matters, since jurisdiction over similar matters was vested in them prior to the creation of the Union.¹⁵² As such it was not infringed upon absent constitutional mandate otherwise.¹⁵³

Yet, a close reading of the *Examination No. 6* points out a surprising contradiction in Hamilton's philosophy. In *The Federalist No. 82*, Hamilton is an outspoken advocate of the states' right to maintain concurrent jurisdiction over federal claims.¹⁵⁴ Conversely, in the *Examination No. 6* Hamilton has a less glowing opinion of the states. Rather than supporting state autonomy, he argues instead that lower federal courts are necessary because of the likely jealousies and prejudices of state judges and the inexpediency of delegating to the state courts "the care of interests which are specially and properly confided to the Government of the United States."¹⁵⁵ Hamilton, then, was of the opinion that the states could only tenuously be trusted with important matters. In some of the more foundational arguments supporting republican government, many of the Framers viewed the people at large as prone to vice and passion.¹⁵⁶ Here, similarly, the Framers were loath to entrust federal matters to state provincialism. The federal government, by contrast, was composed of carefully selected and virtuous men. They would steer the vessel of the nation through the tumultuous storms of state prejudice and infighting. This view, the view that

¹⁵¹ *Haywood*, 129 S. Ct. at 2120 (Thomas, J., dissenting).

¹⁵² *Id.* at 2120–21.

¹⁵³ This power, apparently, did not fall prey to the "big bang" rule that struck down other state powers at the adoption of the Constitution. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 803 (1995) (concluding that some original state powers were sacrificed in the creation of the Union). At least, the matter is not discussed by Justice Thomas.

¹⁵⁴ See *THE FEDERALIST No. 82*, at 553 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁵⁵ Alexander Hamilton, *Examination No. 6*, in 25 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 66, at 487.

¹⁵⁶ See generally James Madison, *Vices of the Political System of the United States*, in 9 *THE PAPERS OF JAMES MADISON* 348 (Robert J. Brugger ed., Univ. Press of Virginia 1987) (arguing that the States violate federal authority, treaties, and interstate agreements, as well as commit injustices, and the people themselves are susceptible to sweeping passions resulting in mob rule).

concurrency might not be as clearly inherent in our judicial system as Thomas believes, underscores the idea of jurisdictional freedom. It merely comes to that destination by a different road. Instead of giving such freedom out of respect for state autonomy, some Framers sought to restrict state-court adjudication of federal rights to protect federal rights from the state bias and vice.

Although the Madisonian Compromise did in fact win the day at the Convention, the implications drawn from this occurrence are not as clear as the literature portrays them.¹⁵⁷ For Thomas specifically, arguments in favor of mandatory lower federal courts would have aided his ultimate goal of eliminating state-court burdens to hear federal matters. If lower federal courts were mandatory, one could argue that states should be allowed to refuse federal business, since there would always be a federal forum ready to hear the claims.¹⁵⁸ Further, a view that lower federal courts were required could be used to show that the Founders may not have *wanted* the states to hear federal claims, but instead sought to divest them of such power by creating a forum for federal business. Perhaps Thomas thought it was more desirable to establish *both* state competency toward federal claims and a lack of power to compel to such jurisdiction. Thomas, then, wanted to have it both ways: state courts can hear federal claims, but don't have to if they don't want to. Trying to preserve both claims led him to proffer less persuasive arguments for each.

A strong federal judiciary equipped with lower courts was a generally popular view.¹⁵⁹ Whether to protect individuals or the

¹⁵⁷ See Collins, *supra* note 54, at 61–62 (noting that some among the Framers believed that lower federal courts were constitutionally required). Collins later discusses the debates in the first Congresses over the possibility that lower federal courts were constitutionally mandated. *Id.* at 69.

¹⁵⁸ This is indeed one of the normative arguments that can be used to combat compelled state jurisdiction over federal claims today. Since federal courts have long been a fixture of the federal government, and are not likely to be abolished any time soon, states should have greater freedom to refuse federal claims that have their own tailor-made forum. See Jordan, *supra* note 23.

¹⁵⁹ 1 ANNALS OF CONG., *supra* note 63, at 822 (“It is conceded on all hands, that the establishment of [lower federal courts] is immutable.”). *Id.* at 798 (“With respect to the first point, it seems generally conceded that there ought to be a district court of some sort. The constitution, indeed, recognises such a

federal government from the states, the ideals of federalism practically demanded a federal judiciary that could counterbalance both its coordinate departments and its sister courts in the states. This finding destabilizes Thomas's conclusions regarding state-court concurrency. It undermines his assertion that state-court concurrency was "essential" to the Madisonian Compromise's formulation that allowed, but did not require, lower federal courts.¹⁶⁰ Since lower federal courts were essentially guaranteed in the minds of the Framers and ratifiers, the states may not have been indispensable arbiters of federal law. Indeed, the Framers' evident distaste for state-court adjudication of federal matters suggests that they meant to reduce, if not totally divest, the state courts of concurrent jurisdiction through the lower federal courts.¹⁶¹

We should make it clear here that the existence of dissenting views identified in the discussion above does not in itself destabilize our thesis. We are not attempting to make the arguments in favor of lower federal courts for the Framers. Rather, we have tried to catalogue the various arguments both for and against and have determined that the most popular view, and the one embodied in the true Compromise, included mandatory, distinct lower federal courts.

C. Article I and Congressional Prerogative

James Pfander has argued that, notwithstanding jurisdictional freedom that may be read into Article III or the Supremacy Clause, Article I empowers Congress to require state courts to entertain federal claims.¹⁶² Under his interpretation,

court, because it speaks of 'such inferior courts as the Congress shall establish,' and because it gives to the Supreme Court only appellate jurisdiction in most cases of a federal nature."). Mr. Morris claimed that the apportionment of jurisdiction gave Congress a "duty" to create lower federal courts to adjudicate those matters outside the Supreme Court's appellate jurisdiction. 11 ANNALS OF CONG. 86 (1802).

¹⁶⁰ *Haywood v. Drown*, 129 S. Ct. 2108, 2120 (2009) (Thomas, J., dissenting).

¹⁶¹ See *supra* notes 71–72 and accompanying text.

¹⁶² James Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. Rev. 191, 212 (2007).

the “ordain and establish” language of Article III cannot easily accommodate the incorporation of existing state courts as federal tribunals.¹⁶³ Instead, Pfander relies on Article I, section 8, which gives Congress the power “to constitute Tribunals inferior to the supreme Court.”¹⁶⁴ This power, coupled with the Necessary and Proper Clause, gives Congress the authority to forgo creating lower federal courts outright.¹⁶⁵ They could alternatively choose to “constitute” state courts as federal tribunals.¹⁶⁶ Indeed, analysis of the Madisonian Compromise may support this view, because Madison’s reworked proposal for lower federal courts allowed the legislature to “appoint inferior Tribunals,” which in context appeared to suggest “formally enlisting state courts for national purposes.”¹⁶⁷

While this reading solves the apparent redundancy problem between Article I and Article III,¹⁶⁸ it ignores three powerful counter-arguments. First, as explored above, the Madisonian Compromise left Congress discretion to create or not create federal courts in name only. Their true duty was to create such necessary courts to uphold federal supremacy, secure individual rights from state intrusions, and accommodate state sovereignty and state-court competency concerns. He relies heavily on Hamilton’s account of the role of the Inferior Tribunal Clause as laid out in *The Federalist No. 82*.¹⁶⁹ There, Hamilton argued that state courts might be adopted as lower federal courts.¹⁷⁰ But even Hamilton recognized that Congress had at least a “two-fold power”: either institute state courts as federal courts or “create new [federal] courts with a like power.”¹⁷¹ Further, he thought it “absurd” that new federal courts would displace existing state courts.¹⁷² In the end, Hamilton did more in *The Federalist No. 82* to assuage critics of the plan for the national judiciary than to actually advocate for utilizing state

¹⁶³ *Id.* at 203.

¹⁶⁴ U.S. CONST. art. I, § 8, cl. 9.

¹⁶⁵ Pfander, *supra* note 244, at 205.

¹⁶⁶ *Id.*

¹⁶⁷ Liebman & Ryan, 717.

¹⁶⁸ Pfander, *supra* note 244, at 205.

¹⁶⁹ *Id.* at 216–19.

¹⁷⁰ *The Federalist No. 82* (Alexander Hamilton).

¹⁷¹ Pfander, *supra* note 244, at 217.

¹⁷² *Id.* at 218.

courts as federal tribunals. An ardent supporter of the federal government,¹⁷³ Hamilton's move was consistent with the pragmatic approach the Constitution's supporters had to take to avoid derailing ratification.

Second, and far more concerning, is Pfander's failure to account for the function of Article I. It goes without saying that Congress exercises limited powers.¹⁷⁴ To act within its constitutional authority, Congress take express, positive action. As Pfander acknowledges, the current concurrency presumption is only an implicit action under Congress's Article I power. Why is implicit power so clear and strong in this instance? There are no satisfactory answers. For example, as a matter of policy, a concurrency presumption does not protect federal regulatory sovereignty but undermines it by giving states a voice in the exposition of federal law.

The third reason to doubt Congress's Article I power to oblige state courts to hear federal business relates to Pfander's own formulation of that power. To constitute state tribunals as federal ones, Congress should "simply take state courts as it finds them, constitute them as tribunals for certain federal purposes, and avoid structural problems."¹⁷⁵ Congress might also "pay the states directly to defray the cost of its relying on such tribunals rather than being constrained to pay the judges directly, as it must under Article III."¹⁷⁶ Congress has done neither of these things. As cases like *Brown*, *Dice*, and others show, federal rights are accompanied by federal procedures that states must apply.¹⁷⁷ And, while a funded-mandate approach to state-court obligation seems consistent with Congress's Supremacy Clause powers, our reading of the jurisdictional-substantive compromise embodied in the constitutional debates provides solid ground on which states may refuse such a mandate. Even though funding would make the obligation less burdensome, states have the constitutional space to refuse such obligations outright.

¹⁷³ David McGowan, *Ethos in Law and History: Alexander Hamilton, the Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 879 n.579 (2001).

¹⁷⁴ See *United States v. Lopez*, 514 U.S. 549, 566 (1995).

¹⁷⁵ Pfander, *supra* note 244, at 222.

¹⁷⁶ *Id.* at 204.

¹⁷⁷ *Brown v. W. Ry. of Alabama*, 338 U.S. 294, 298 (1949); *Dice v. Akron, Canton, & Youngstown R. Co.*, 342 U.S. 359, 363 (1952); *Felder v. Casey*, 487 U.S. 131, 138 (1988); *but see Johnson v. Fankell*, 520 U.S. 911, 918 (1997).

III. INDETERMINACY AND COMPROMISE

There is no controversy in claiming that compromise was a part of the Founders' constitution-making process. The context in which the Framers and ratifiers lived was one of intense debate and bitter rivalry between those who believed in the necessity of strong national government and those who feared the subjugation or dissolution of the states under a domineering federal sovereign. The classic view holds that hallmark compromises such as the Madisonian Compromise did not resolve the issues raised in debate. Rather, the compromise was that entrusted Congress with the discretion to resolve the debate later. While this view accounts for the exigencies of ratification, another theory is supported by the historical account and modern theories of intentionalists originalism. Leveraging those theories, we argue that constitutional compromises were not always geared toward pushing off resolution of a debate, but rather that the language of certain clauses were left in the form proposed by the Convention in order to avoid delaying ratification further. Thus, while their plain language invites the superficial reading that the debate was preserved for post-ratification actors, Framer and ratifier intent shows that many such controversies were resolved pre-ratification, vesting Congress with the mere duty to implement the result reached. This is precisely the view we have advocated above with respect to the constitutional provisions underlying state-court jurisdictional compulsion. Before describing this theory of counter-textual intentionalism, we will first explore the limitations in current originalist doctrine. We will then describe why compromise was a critical element in constitution-making. Finally, we will connect up the need compromise with the notion that some compromises resulted in counter-textual yet firm commands from the Framers and ratifiers.

A. Originalism's Indeterminacy

The significant limitations of originalist methodology must be recognized if the spirit of honest, rigorous scholarship may be attributed to its adherents.¹⁷⁸ Perhaps the most fundamental

¹⁷⁸ See *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 651 (6th Cir. 2004)

assumption underlying originalism is that there is a cohesive, discoverable “original meaning” that inheres in the Constitution. The Framers were so numerous and expressed such diversity of opinion that a majority, let alone a consensus, on any particular issue is hard, if not impossible, to determine.¹⁷⁹ Even original-understanding originalism suffers from a crippling reliance on normative assumptions about the competency and beliefs of their supposed late-eighteenth-century “reasonable person.”¹⁸⁰ This lack of cohesion casts a long shadow over the achievements of originalism as a source of constitutional interpretation. Without a reasonable majority or a principled objectivity in selecting the “interpreter” of constitutional language, the cohesive original meaning that transcends from the Founding to our day loses much of its luster.

This evident lack of cohesion spawns another, more troubling problem. Selective citation of Founding-era sources can support almost any constitutional interpretation.¹⁸¹ A spirit of

(pointing out that “neither constitutional ‘textualism,’ ‘originalism,’ or any other interpretive ‘ism’ requires [the interpreter] to abandon all common sense and reasonableness”).

¹⁷⁹ Whittington, *supra* note 14, at 605 (noting that one major criticism of originalism is that there is not a definite, coherent intent that can be gleaned from the “varying intentions” of the many Framers); Lawrence B. Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin*, ILL. PUB. L. RES. PAPER No. 08-12 at 4 (2008) (“[T]he multiplicity of framers creates problems of conflicting intentions.”).

¹⁸⁰ Robert W. Bennett, *Originalism and the Living American Constitution*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 107 (2011). Lawrence Solum counters that conventional semantic meanings exist independently of “psychological states of particular persons on particular occasions.” Lawrence B. Solum, *Living with Originalism*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 147 (2011). In this argument, he may be referring to a specific level of generality at which we assess “conventional” meaning. We respond to this contention in Part III and argue that particular psychological states are important to understanding compromise: we must understand the particular intentions of the Framers and ratifiers as they crafted the Constitution to understand the intended application of its provisions.

¹⁸¹ See generally *D.C. v. Heller*, 554 U.S. 570 (2008) (primary opposing sides leverage Founding-era sources, particularly dictionaries and other sources illuminating Founding-era linguistic norms). This sort of back-and-forth originalist snow-ball fight clouds the issue at hand: we seemingly cannot, for particularly contentious issues, elucidate a clear message from the Framers as to which interpretation is correct. This is because, in general, if an issue is

scholastic honesty mandates that originalists acknowledge and respect the ambiguities, uncertainties, and unresolved conflicts at the Founding.¹⁸² Professor Kramer suggests that originalists take account of all sources from the Founding, including sensational rhetoric from the ratification debates, instead of blindly relying on the more venerable sources like Madison, Hamilton, and Jefferson.¹⁸³ After all, they were merely a part (albeit an important one) of the process of formulating the late-eighteenth-century-American context that created the original public meaning that originalists seek.¹⁸⁴

Relying on a broad review of Founding-era sources, rather than a selective analysis, helps solve further problems with originalist methodology. Arguments similar to the one we have made here have also been made in relation to the textualist slant of “new originalism.”¹⁸⁵ Both types of originalism suffer the same ultimate dilemma: where multiple sources are legitimate and support opposite or inconsistent conclusions, which should we choose?¹⁸⁶ Alicea and Drakeman posit that

In this kind of case, where the text, read in light of all the tools in the New Originalists’ kit, leads to a semantic “tie,” it is at least conceivable that a sufficiently clear understanding of the provision’s meaning to the Framers can be found in the records

particularly contentious today, as with the 2nd Amendment in *Heller*, the issue was likely contentious at the Founding, admitting huge diversity of opinion and reasoned arguments on all sides. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1008 (1995) (“The proper scope of federal authority has been in dispute since the Framing—and so, too, has been the proper role of states within that realm of federal authority.”).

¹⁸² Kramer, *supra* note 1, at 1651–52.

¹⁸³ *Id.* at 1653; see also Whittington, *supra* note 14, at 609 (observing that “new originalism” is less focused on the “concrete intentions” of the Framers and more on the “public meaning” of the Constitution at its ratification).

¹⁸⁴ Kramer, *supra* note 1, at 1653–54; MARCOSSON, *supra* note 1, at 128 (calling the Framers “grossly unrepresentative of the population for whom the established a government”).

¹⁸⁵ Alicea & Drakeman, *supra* note 39 (“[The] array of inconsistent uses of the key constitutional language creates a methodological conundrum for New Originalists quite similar to the ‘summing’ problem they have linked with Old Originalism.”)

¹⁸⁶ *Id.* at 57.

of the Philadelphia Convention and the state ratifying conventions.¹⁸⁷

If only things were so simple. As we have admitted, it appears we cannot rely on the Framers, ratifiers, or anyone else in the eighteenth century to give us the straight answer on what a particular clause meant.

Acknowledging that originalism has some limited value in illuminating constitutional meaning, it does not follow, as Thomas would have it, that the Framers' intended meaning is the *right* one.¹⁸⁸ Whatever may be said about their intellectual, philosophical, or moral virtues, the Framers did not survive to the present day, nor receive portentous visions of the future which allowed them to craft a timeless document.¹⁸⁹ Many of the Framers themselves cautioned against undue deference to their views in constitutional interpretation.¹⁹⁰ Some even feared that

¹⁸⁷ *Id.* at 64.

¹⁸⁸ Kramer, *supra* note 1, at 1635 (questioning reliance on the Founding by arguing that the Framers themselves recognized “governing as a process shaped by experience” and that the Constitution “must be accommodated to lessons learned in practice”).

¹⁸⁹ Balkin, *supra* note 17, at 435 (“The accumulation of these constructions over time, as one innovation builds on another, produces a sort of institutional evolution; it has a path dependence that drives constitutional development forward in ways that no one in 1787 would have predicted.”).

¹⁹⁰ See Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 119, at 72 (“As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, & as a source perhaps of some lights on the Science of Govt. the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be not in the opinions or intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses.”); THE FEDERALIST No. 38 (James Madison) (Jacob E. Cooke ed., 1961) (reasoning that the errors inherent in the document may have come from lack of experience on the part of the Convention, and that, “on this complicated and difficult subject,” the problems and their answers “will not be ascertained until an actual trial shall have pointed them out?”); THE FEDERALIST No. 82 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“‘Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each

unthinking deference to Framers intent in the future would be dangerous to liberty.¹⁹¹ Originalism's limitations highlight its imperfect relevance in today's world.¹⁹² Thomas himself has admitted as much.¹⁹³

The vital issues of federalism underlying the *Haywood* majority and dissent underscore the effects of changed circumstances. The majority and the line of "valid excuse" cases they cite support the proposition that state courts are competent to hear federal claims alongside federal courts.¹⁹⁴ Some Founders argued for such parity because they foresaw the downfall of the states to the dominance of the federal government.¹⁹⁵ The same principle was leveraged in *Haywood* to not only allow, but indeed

other in a harmonious and consistent WHOLE"); STORY, *supra* note 89, § 407, at 391 n.1 (disparaging the notion of constitutional interpretation by assessing the "'probable meaning' to be gathered by conjectures from scattered documents, from private papers, from the tabletalk of some statesmen, or the jealous exaggerations of others") (emphasis in original); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON, *supra* note 84, at 123–25 (insisting that "periodical repairs" to the Constitution would prevent the United States from "falling into the same dreadful track" as European monarchs, whose inability to "wisely yiel[d] to the gradual change of circumstances" proved disastrous for them and their people); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (arguing that no interpretational method employed by the Framers was analogous to "modern notion of intentionalism," and that instead early courts and scholars "applied standard techniques of statutory construction to the Constitution").

¹⁹¹ James Iredell, *North Carolina Ratifying Convention Debates*, in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 154, at 149.

¹⁹² Whittington, *supra* note 14, at 605–06 (noting the "dead hand" problem of originalist argument).

¹⁹³ *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2759 (2011) (Thomas, J., dissenting) (conceding that "the original public understanding of a constitutional provision does not always comport with modern sensibilities" and "may also be inconsistent with precedent").

¹⁹⁴ *Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009).

¹⁹⁵ See THE FEDERALIST No. 6 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (concluding that a constitution uniting the states would "preven[t] the differences that neighbourhood occasions, [and] extinguish[h] that secret jealousy, which disposes all States to aggrandise themselves at the expence of their neighbours"); THE FEDERALIST No. 10 (James Madison) (Jacob E. Cooke ed., 1961) ("[S]tates must be protected as separate political entities so that they can serve as countervailing sources of power and reservoirs of liberty"); see also *supra* note 91.

require state court adjudication of federal claims.¹⁹⁶

Originalism can accommodate changed circumstances, though not without cost. Instead of looking for the consistency and concurrence that never existed at the Founding, originalists should instead focus on leveraging originalism as just another form of legal reasoning.¹⁹⁷ This may not be the most satisfying answer for those truly dedicated to interpreting the Constitution as the Founders would,¹⁹⁸ but it is the only honest route available.

Accepting the view that originalist reasoning is akin to any other form of legal reasoning implicates two assumptions that originalism should carry with it.¹⁹⁹ First, originalists must accept that there is disagreement among Founding-era sources and acknowledge that they merely argue in favor of one possible interpretation.²⁰⁰ They cannot attempt to solidify their conclusions as representative of unanimous consent among the Founding generation. Second, they must expand their arguments beyond the scope of the Founders. In fact, Thomas does an

¹⁹⁶ *Haywood*, 129 S. Ct. at 2117.

¹⁹⁷ See *infra* notes 212–215 and accompanying text.

¹⁹⁸ Alicea and Drakeman argue that such selectivity is what powers the current policy-driven use of originalism. Alicea & Drakeman, *supra* note 39, at 60.

¹⁹⁹ In this point we fully accept Larry Kramer's words of caution, that the advocacy that underlies legal training must be somewhat curtailed when approached historical analysis. Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 402 (2003). He summarizes his lesson thus:

An injunction on advocacy is really about avoiding distortion. It is about recognizing the difference between making an argument and pushing it too far, between defending one's conclusions reasonably and misleading readers into thinking that support for one's position is stronger than may in fact be the case.

Id.

²⁰⁰ Thomas Jefferson himself supported this view, which is clearly contrary to Thomas's supposedly neutral approach by which he acts merely as a vessel for the opinions of the Framers. Letter from Thomas Jefferson to John Adams (Feb. 25, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON 421 (Andrew A Lipscomb & Albert Ellery Bergh eds., 1905) (“[M]ultiplied testimony, multiplied views will be necessary to give solid establishment to truth. Much is known to one which is not known to another, and no one knows everything. It is the sum of individual knowledge which is to make up the whole truth, and to give its correct current through future time.”).

admirable job of this in *Haywood*. After arguing his positions from an originalist perspective, he “accept[s] the entirety of the Court’s precedent in this area” and sets himself up for arguments alternative to originalism.²⁰¹ To that end, he presents theoretical arguments about the dichotomy between substantive and jurisdictional laws, noting that the New York statute at issue in the case operates jurisdictionally and thus cannot discriminate against federal claims.²⁰² Nevertheless, our disagreement with Thomas is focused on his failure to both recognize the fallibility of his originalist analysis and accept even broader non-originalist notions such as changed circumstances. His overzealous dedication to originalism foreclosed him from leveraging his full potential arsenal against the majority.

Grudging, if implicit, acknowledgement of this reality has already begun in the originalist academy. Lawrence Solum touts the “interpretation/construction” distinction as indicative of a more effective “new” originalism.²⁰³ This theoretical maneuver distinguishes between interpretation, which involves the bare, practically objective process of ascertaining the original public meaning or Framers’ view of a word or clause, and construction, which acts where real facts require an application of constitutional text that is not clearly resolved by interpretation.²⁰⁴ Where the result of this inquiry is clear and unambiguous, that meaning controls.²⁰⁵ Where the result is vague or ambiguous, originalists must ply the “construction zone.”²⁰⁶ Here, they still claim to be bound by the interpretation they’ve discovered, but are more free to develop divergent views of what non-originalist normative or theoretical frameworks will help them determine a final application of constitutional language.²⁰⁷

²⁰¹ *Haywood v. Drown*, 129 S. Ct. 2108, 2133 (2009) (Thomas, J., dissenting).

²⁰² *Id.* at 2133–34. This final point in Thomas’s argument reflects one of the several normative and theoretical reasons why we ultimately support Thomas’s conclusion. See *supra* note 9.

²⁰³ Solum, *supra* note 42, at 22–24.

²⁰⁴ *Id.* at 23.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 69.

²⁰⁷ *Id.* at 25–26, 70.

Such a method “makes a mountain out of a molehill.”²⁰⁸ How many clear, unambiguous answers can the Constitution provide? Even simple requirements like the minimum-age requirement for the Presidency can be subject to ambiguity.²⁰⁹ Inviting pluralism in construction undermines originalism’s objectivity, which for many is its primary appeal.²¹⁰ While this means that originalism must necessarily prove far less than its adherents hope, it is the right move. Our proposed view of originalist analysis accepts the reality that interpretation is illuminative but not necessarily controlling. By incorporating originalist interpretation as one element of constitutional interpretation, we eviscerate originalism’s unwarranted claims to principled finality and preserve only those elements of originalism that forthrightly contribute to the vast, diverse mural of constitutional meaning.

B. The Need for Compromise

Utilizing a methodology that acknowledges both the contributions and limitations of the originalist methodology, we can now show how a broad survey of Founding-era sources shows that constitutional compromise did not end at the ratified text. Instead, it extended beyond the text and into the infant years of the republic.

There are a number of reasons that anyone interested in truthful constitutional interpretations should be attracted to this idea. First, traditional originalism can ignore important possible sources of illumination. By focusing on the enacted text, originalists necessarily overlook the practical aspects of

²⁰⁸ Solum, *supra* note 69, at 156.

²⁰⁹ Bennett, *supra* note 69, at 85–86. We return to this clause later to further illustrate the need for intentionalism and its role in forming counter-textual compromise.

²¹⁰ *Id.* at 97, 103; *see also* Alicea & Drakeman, *supra* note 39, at 5 (describing the primary difference between “Old” and “New” originalism as a shift away from intentionalism and toward “the objective meaning of the text itself”). Justice Thomas often straddles this divide by purporting to be a strict textualist while inviting the “plain meaning” of such text as it was understood by the Framers. Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court’s Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC. POL’Y & L. 351, 362 (2002).

constitution-making, particularly compromise that extended beyond the text. For those exploring the Constitution, every word and source is vital to exploring what was and was not included in the final text and why. Thus, we cannot ignore the nature of political expediency and how it affected the framing and ratification of the document.

The ratification of the Constitution was anything but a sure thing at the time of its framing and ratification.²¹¹ Many were interested not only in amending the document sent to them from the Convention, but even in tossing out the whole project and beginning anew.²¹² The Framers took many months to agree on a final form for the document. The Confederation Congress was in heated disagreement as to whether they could propose amendments to the text or if they were simply charged with approving the document for transmission to the state ratification conventions.²¹³ Even more concerning was the debate over whether the ratification debates themselves could propose or even demand amendments.²¹⁴

This is the heart of the “all-or-nothing” notion that the Federalist supporters of the Constitution put forward.²¹⁵ They argued that a federal government was urgent and vital to protect the United States from foreign interference.²¹⁶ Delay might cost the newly-freed nation everything. The Federalist response to the Albany Antifederalists’ influential circular put the point eloquently:

THE GRAND AMERICAN UNION has already encircled us except on the one side where our haughty enemy still bleeds with the wounds of our conquest; and on the other a defenseless seacoast

²¹¹ PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* 68–69 (2010).

²¹² *Id.* at 76.

²¹³ *Id.* at 52–59.

²¹⁴ *Id.* at 59, 295–96, 61–62, 105; *see also id.* at 118 (noting that some ratifiers insisted on recommending amendments even if they themselves could not amend the proposed text).

²¹⁵ *Id.* at 68–69 (finding that the Constitution’s supporters’ plan was to “go for broke” and work to get the Constitution quickly adopted without delaying amendment proposals).

²¹⁶ *Id.* at 261.

invites the avarice of an adventitious invader. Our neighbors and friends extend their arms to embrace us – UNITE then, ye lovers of our common county.²¹⁷

Furthermore, continued debate on the content of the Constitution would only lead to further confusion, disagreement, and possibly endless delay in forming a new government.²¹⁸ If some states required pre-ratification amendments while others did not, Edmund Randolph feared it could mean “inevitable ruin to the Union.”²¹⁹ Even Charles Pinckney, who “disliked parts of the Constitution,” recognized that “only ‘confusion and contrariety’ could result from letting the state recommend amendments to the Constitution.”²²⁰

Nevertheless, many Anti-federalists and state convention speakers dismissed the urgency of the Federalist’s plea.²²¹ Instead, they proposed many changes to the text which they expected Congress to consider carefully.²²² Some gave only conditional ratification that was dependent on certain amendments being adopted.²²³ They asserted that, as the true and ultimate sovereigns of the United States, they could not be forced to accept a Constitution that was not of their design.²²⁴ Others still called for a second convention, either to review the states’ various proposed amendments or start the project over from scratch.²²⁵

C. The Intentionalist Thesis Revisited

This volatile environment demanded a pragmatic approach from those who wanted to see the current Constitution ratified

²¹⁷ The 35 Anti-Federal Objections Refuted, by the Federal Committee of the City of Albany, April 1788.

²¹⁸ MAIER, *supra* note 109, at 446, 302, 117.

²¹⁹ *Id.* at 261. John Jay similarly opposed conditional ratification, arguing that because some states were “content with [the Constitution] as is,” pre-ratification amendments by other states would lead to a divisive second convention. *Id.* at 337.

²²⁰ *Id.* at 45.

²²¹ *Id.* at 231.

²²² *Id.* 48–49, 398, 302, 421, 45, 261, 117.

²²³ *Id.* 379–80.

²²⁴ *Id.* at 48, 89.

²²⁵ *Id.* at 391, 397.

and not mired in further amendment proposals or a second convention. In the interest of ratification, supporters on both sides made difficult but important compromises in the constitutional text that affected not only the meaning of otherwise plain language, but also shunted responsibility for important elements of government off to later actors, including Congress. Such an idea undermines the constitutional finality that originalists so desire, because compromises that pushed compromise realization to later generations are just as critical to constitutional interpretation as issues that were clearly resolved in the final text.²²⁶ Any full account of original constitutional meaning must acknowledge that post-ratification realities helped enunciate the constitutional vision of the Framers and ratifiers that could not, for practical purposes, be included in the Constitution's ratified text.²²⁷

Moreover, the idea of proposed amendments was typically closely aligned with compromise that extended post-ratification. The Bill of Rights is the clearest example of this practice. Many ratifiers acknowledged the necessity of ratifying the document as it stood.²²⁸ Their assent to ratification was thus vitally dependent on Article V and its amendment processes.²²⁹ Their understanding of the Constitution at the time of ratification, then, was one that included a clear need for post-ratification dialogue, development, and Congressional action. Congress did its duty by quickly proposing the first ten amendments to the Constitution.²³⁰ We would argue that such a compromise is equally important to any compromise struck in the text itself.

This view at first blush appears quite similar to the orthodox interpretation of such grand compromises as the Madisonian Compromise. We propose a different view of the nature of that and other compromises, as discussed in greater detail below. Instead of the traditional view which vested discretion in later actors to act consistently with the broad themes of the Constitution, here we argue that the clauses

²²⁶ EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 5, 25 (2007).

²²⁷ See Solum, *supra* note 42, at 53.

²²⁸ See *supra* notes 113–116 and accompanying text.

²²⁹ See MAIER, *supra* note 109, at 48–49, 397.

²³⁰ Maeva Marcus, Speech, *The Adoption of the Bill of Rights*, 1 WM. & MARY BILL RTS. J. 115, 118 (1992).

operative on state-court jurisdictional obligations were in fact mostly settled by the Framing and ratifying conventions. Their debates acknowledged opposing views of the extent of effectual federal power and the need to preserve state sovereignty. In the end, lower federal courts were deemed necessary to strike a proper balance between national and state governments, but the Supremacy Clause and other clauses were construed in a very limited fashion in order to protect states from consolidation or domination under the new federal government. Particularly in the context of Article III, these compromises did not, as many uncritically conclude, mean that Congress had unlimited discretion to refuse to create lower federal courts. Counter to the otherwise plain meaning of Article III, the Framers and ratifiers accepted the text of that clause for prudential and practical reasons, all the while understanding that the real compromise was concluded and only its implementation was left to Congress.

At this point we should address an issue that will be clear to many readers after reading the previous Part: why the focus on Framers and ratifier intent? “New” originalism touts the objectivity of original public meaning as a more principled way to approach constitutional interpretation.²³¹ Nevertheless, modern intentionalists roundly pan the alleged “objectivity” of this new approach, and it is this supposed objectivity that stands in the way of our counter-textual readings of Article III and the Supremacy Clause.

In a recent work defending and criticizing contemporary iterations of originalist methodology, Larry Alexander and Stanley Fish offer convincing arguments based in linguistic theory that Framers and ratifier intent is the only legitimate source for originalist interpretation.²³² First, Fish notes that there cannot logically be meaning without intention.²³³ Any author intends the signs and symbols he uses to embody a particular meaning based on his circumstances, his audience, and a number of other factors.²³⁴ Such signs carry no meaning

²³¹ Solum, *supra* note 42, at 13–14.

²³² THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft & Bradley W. Miller eds., 2011).

²³³ Stanley Fish, *The Intentionalist Thesis Once More*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 102 (Grant Huscroft & Bradley W. Miller eds., 2011).

²³⁴ *Id.* at 101.

whatsoever prior to their deployment in a purposive act of communication.²³⁵ In other words, an author's meaning is the true meaning of the text, notwithstanding what message is communicated or miscommunicated to the reader.²³⁶

Fish acknowledges that an author's intention to deploy the original public meaning of the words he uses may be a default assumption.²³⁷ However, he counters that such an assumption must be argued for.²³⁸ The author's intention to either use or flout conventional meanings is never apparent from the text itself.²³⁹ Thus original public meaning is just one possibility within a world of possible authorial intent.

One example Fish provides is the distinction between commonplace and poetic language. Whereas an author's intent to deploy commonplace meanings is consistent with original public meaning, the author's choice to use a poetic style of language, one in which meaning is not apparent from the text itself but instead hidden for the reader to discover, is not.²⁴⁰ This example highlights a part of Fish's intentionalists thesis that is critical to our argument: "[s]traightforwardness and ambiguity are the properties not of language, but of intentions."²⁴¹ The only way to resolve the question of whether a text is ambiguous or straightforward is to approach it with assumptions about the author's intention to use language in a straightforward or ambiguous manner.²⁴²

An example here will help illuminate the importance of this principle. Consider the Presidential age requirement: "neither shall any Person be eligible to [the office of President] who shall not have attained to the Age of thirty five Years."²⁴³ Enumerating a numerical value would appear to be immutable.²⁴⁴

²³⁵ *Id.*

²³⁶ *Id.* at 101–02.

²³⁷ *Id.* at 107.

²³⁸ *Id.*

²³⁹ *Id.* at 103, 107.

²⁴⁰ *Id.* at 112.

²⁴¹ *Id.*

²⁴² *Id.* at 113.

²⁴³ U.S. CONST. art. II, § 1, cl. 4.

²⁴⁴ Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 312 (2010) ("[T]he age requirement for presidents is one of countless points of constitutional law on which a practical consensus holds across competing interpretive methods.").

However, the clarity of such a phrase is absolutely dependent on the intentions of the author to choose this meaning. It is at least conceivable, with admittedly some creativity, that the Framers and ratifiers intended the numerical requirement to represent an age of maturity commensurate with the requirements of the presidential office.²⁴⁵ One need not even accept that the authors intended such a counter-textual meaning in order to recognize the heart of the matter, that even conventional meanings originate only in intention.

Solum would argue that original public meaning is still a legitimate source for interpretation because the Framers and ratifiers must have intended to use the conventional meanings of their day.²⁴⁶ This would promote clearer understanding of the text at the time of ratification and aid later readers in interpretation because such meaning is supposedly readily ascertainable. But our account of the exigencies of compromise counters this view: despite any supposed concern for clarity, the Constitution's supporters' overriding concern was with ratification. Clarity would certainly have been the ideal. It would have provided later interpreters with clear textual commands. Nevertheless, the desire for successful adoption of the Constitution required that the Framers and ratifiers set desires for clarity aside in the interest of pushing the document through the state ratifying conventions. Because of this dominant concern, we cannot assume, as Solum would, that the Framers and ratifiers unequivocally supported interpretation consistent with the conventional meanings of their words at the Founding. We argue instead that they employed a non-standard set of meanings for the words they used that preserved ambiguity in name only, based on the intent to promote ratification at the cost of clarity.²⁴⁷ For example, we have shown that the supposed authority vested in Congress to create or not create lower federal courts was vacuous. Such language was left in place merely to prevent further delays in ratification.

Furthermore, Larry Alexander provides substantial evidence that reliance on original public meaning does not

²⁴⁵ Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 169 (1997).

²⁴⁶ Solum, *supra* note 42, at 15–16.

²⁴⁷ Fish, *supra* note 129, at 117.

provide the objectivity that originalists like Solum strive for in the “interpretation” zone. He echoes Fish’s intentionalists approach when he argues that there can be no communication without the author intending a particular message.²⁴⁸ Original public meaning fails not because it is an untenable intention an author might deploy, but rather because the pursuit of original public meaning substitutes the actual authors’ and ratifiers’ intents with the intent of a hypothetical Framer or ratifier.²⁴⁹ This method also requires manufacturing a hypothetical reader for the document at the time of its ratification.²⁵⁰ The normative assumptions inherent in such constructs—their fluency in contemporary English, their social status, their knowledge of political affairs of the day—undermine the supposed objectivity original public meaning proponents offer.²⁵¹ Moreover, Alexander posits that hypothesizing authors invites goal-specific subjectivity, where the scholar deploying original public meaning accepts or rejects available normative assumptions based on argumentative need.²⁵²

This approach does not solve all of originalism’s problems. As Fish readily concedes, there are no formulas for determining authorial intent in a given situation.²⁵³ As he notes, to make an intentionalists argument, “[y]ou just have to sit down and do it, every time.”²⁵⁴ This admission complements our view of originalism’s contributions to constitutional interpretation outlined above. Because there is no objective, consistent way to determine authorial intent for any given clause in the Constitution, originalism provides results that are far less useful than its proponents would admit. In the end, “[t]he only thing going for [the intentionalists thesis] is that it is true.”²⁵⁵ Thus,

²⁴⁸ Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 88 (Grant Huscroft & Bradley W. Miller eds., 2011).

²⁴⁹ *Id.* at 89, 93 (“[I]f we are to attend to the normative propositions in the Constitution, we should seek the intended meanings of its actual authors...not the intended meanings of any of an indefinite number of possible hypothetical authors.”)

²⁵⁰ *Id.* at 89.

²⁵¹ *Id.*

²⁵² *Id.* at 92.

²⁵³ Fish, *supra* note 129, at 115.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 116.

originalism's limited, non-dispositive nature makes it only one among many methods for illuminating the Constitution. Further, the focus on authorial intention opens the door for counter-textual readings of the Constitution that respect compromises not readily apparent on the document's face.

CONCLUSION

The Supremacy Clause, Article III, Article I, and the State Judges Clause all have been relied upon to support an obligation for state courts to hear federal claims. We have developed another view here that contravenes the prevailing orthodoxy. First, the historical record does not support an anti-discrimination principle inherent in the Supremacy Clause. Founding era debates were primarily directed at controlling overwhelming federal power and the need to preserve state sovereignty, and the Supremacy Clause is thus best understood as a choice-of-law rule that gives preemptive effect to validly enacted, substantive federal laws. Second, neither Article III nor Article I provides Congress with the power to oblige state courts to hear federal claims. Critically, the Madisonian Compromise vested discretion in Congress to control the creation of lower federal courts, but this discretion did not realistically include the option not to create lower federal courts at all. Rather, lower federal courts of some kind were essentially guaranteed in the minds of the Framers so as to properly balance the national and state governments. In short, the Constitution does not restrict the power of states to define the jurisdiction of their courts, even when that power is used to close the state's courts to federal business.